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REFLECTIONS ON LAW AND DEVELOPMENT

(Papers presented at the Seminar on
Law and Development, University of Nairobi
26th - 30th July 1976)

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INTRODUCTION BY THE WORKSHOP ORGANISERS

In a letter dated 2 September 1975, Prof. Robert B. Seidman of Boston University asked us to explore the possibility of hosting a seminar on law and development at the University of Nairobi. Our view then, as now, was that seminars of this kind ought to be encouraged, particularly since they provide a much needed opportunity for academics of various disciplines, legislators and administrators to sit together and exchange their views on legal regulations. Beyond this, of course, we were delighted to host such a seminar because the material prepared could be used to build up teaching materials in this fast-growing area of public concern.

The seminar, which was held from 26 to 30 July 1976, drew participants from the following departments of the University of Nairobi and the Kenya Government:

University of Nairobi

<u>Faculty/Department</u>	<u>Invited</u>	<u>Participating</u>
Law	4	3
Institute for Development Studies	3	8
Sociology	2	1
Government	2	1
Economics	-	1
Total	11	14

Kenya Government

<u>Ministry/Department</u>	<u>Invited / Participating</u>	
Office of the President	4	3
Ministry of Lands and Settlement	2	1
National Assembly	1	1
Ministry of Home Affairs - Prisons	2	1
Ministry of Commerce and Industry	1	-
Attorney-General's Office (Kenya School of Law)	1	1
East African Customs and Excise	1	-
Total	12	7

From Boston University there were two participants Professor R.B. Seidman, a lawyer and Professor A.W. Seidman, an economist.

Only about half the total number of participants took part in the seminar continuously throughout its duration. This was because on several occasions a number of participants, especially those in Government, had to leave in order to respond to official duties. Nonetheless, the level of participation was generally high and individual contributions extremely valuable.

The following papers were presented for discussion:

1. The Domain of Study of Law
2. A Vocabulary for Law and Development: A General Model
3. Commercial Law and Development in Kenya
4. Reforms in the Field of Land Adjudication, Consolidation and Registration in Kenya
5. Why People Disobey Law: The Problem of High-Level Bribery
6. Law and Development Administration
7. Law and Underdevelopment in Kenya: A Theoretical Analysis
8. Facilitative Law
9. The Need for Flexibility in Law as an Administrative Tool in Development
10. The Methodology of Law and Development Research
11. The Intellectual Control Over Value Choice in Research and the Definition of Development
12. The Implementation of Law: In General
13. The Components of a Theory of Law and Development
14. Law and Development Administration with Illustrations from Kenya.

These papers have been reorganised and edited in order to make the present volume more readable, integrated and internally coherent. This, we hasten to add, has been done without intentionally altering any of the substance or the theoretical perspectives of the individual authors.

The plea of the seminar organisers is that readers of the present volume will find time not simply to read the papers, but to offer substantive suggestions for future action.

Finally we would like to acknowledge the financial assistance of the Ford Foundation (Eastern Africa Office), the National Science Foundation (U.S.A.) and Boston University, without which the seminar would not have been possible.

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PART I: THEORIES OF LAW AND DEVELOPMENT

ON THE THEORY OF LAW AND DEVELOPMENT

by

A.W. Seidman and
R.B. Seidman

THE DOMAIN OF STUDY

It is the torment of the Third World that triggers the primal scream of our age. Two thirds of the human race suffer in abject poverty. Hunger haunts their days, malignant disease is an overhanging threat, the spectre of early death lurks in their doorways. Trussed in ancient bonds not of their own making, they control neither their own resources nor destinies.

Today all the world plucks at the sleeves of the academy, asking, What do you know? What are you good for? Any answer must include a statement of the discipline's response to the Third World's scream. How lawyers respond ought to define the domain of the study of law and development.

Lawyers, however, march to a discordant beat. They have suggested at least three different definitions of the domain of the study of law and development: conflict amelioration, law and society studies, and problem solving.

Conflict Amelioration: Law and Society Studies

The dominant Western jurisprudential and sociological tradition perceives conflict amelioration as the law's primordial function. Law is an 'integrative' mechanism.

The function of the law is the orderly resolution of disputes. As this implies, 'the law' (the clearest model of which I shall take to be the court system) is brought into operation after there has been a conflict. The court's task is to render a decision that will prevent the conflict -- and all potential conflicts like it -- from disrupting productive cooperation.

This tradition celebrates the law as a great wall against Hobbesian anarchy.

Some modern writers on law in the less developed countries (hereafter, the LDCs) have assumed that the function of law in these countries will be the same as in the developed countries. The role of law is

to create a milieu in which social and cultural diversities are harmonized, values essential to societal and governmental purposes are unified (and others left alone), and tensions resolved...to maintain stability within a climate of desired, necessary and inevitable change.

The Third World's imperative is social transformation, a painful, tension-ridden, conflict-plagued, inescapable Middle Passage. The reduction of tension and conflict in that passage too easily becomes a device for delaying social change, thus bolstering the status quo. Conflict amelioration as a domain of study responds to the uncertainties of power, not the pain of poverty.

Other lawyer-academics have responded not to the cries of the Third World, but the more muted whimpers of the US. academic community. These scholars have defined the domain of study for law and development as 'the general connections between law, culture and development.' 'The basic goal', writes David Trubek, 'is to understand "law" as a social phenomena.' These theorists explicitly warn against trying to understand law in conditions of development as a phenomenon different from law and social change generally. They begin with a variable, derived from their academic discipline--- 'universalistic rules' or 'the legal culture' or 'the autonomous legal system.' The law-ways of the Third World are then studied not in order to ameliorate the torment of the LDCs, but as an exotic laboratory in which to test the chosen variable.

Problem Solving

Another method of selecting the domain of study requires the researcher to consider initially not the difficulties faced by academics, but by real people. 'Good research should scratch where people itch.' In real life, investigations do not begin with a variable. They begin with real-life troubles: poverty, pain, suffering, conflict, power.

The pervasive troubles of the poor countries are poverty and oppression. How are lawyers and the law engaged with these troubles? To answer that question is to define our domain of study. We examine first the function of law in development and second the role of lawyers in that process.

The Function of Law in Development. Modern social science conceives that each society is defined by the repetitive interactions of its members. Nigeria differs from the United State because its members interact with each other in different patterns. They behave differently.

By the same token, to say that a society changes is to say that the kind and intensity of these repetitive interactions change. Social change can therefore be defined as a change in the repetitive patterns of behaviour of the members of a society. Development is a form of social change.

Repetitive patterns of human behaviour are defined by norms, supported by sanctions, expressing how the various roles in society are expected to behave. A few of these norms are promulgated, communicated or sanctioned by state officials. We shall use the phrase 'the legal order' very broadly to mean all or any part of the normative system in which the state has a finger. It includes the processes by which rules are promulgated, communicated or sanctioned by persons acting at least under the colour of official capacity, as well as the rules themselves. D.J. Black defines the law in the same very general way as 'governmental social control.' The legal order enters into the processes of development in two ways. First, the burden of trying purposively to induce social change today usually falls upon the state. No other institution ordinarily has sufficient capacity, resources, or legitimacy to undertake so formidable a task. Typically, the state does this by changing the rules defining repetitive patterns of behaviour, and by directing its officials to bring about desirable new behaviour by various actors.

Demands for development therefore appear in the guise of demands for new law: new rules of land tenure, of marketing boards, of planning machinery, of electoral politics, of educational institutions, of monetary systems, of taxation. The International Congress of Jurists in 1959 recognized these functions in its modified definition of 'The Rule of Law.' That concept, they said, 'should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, political, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.'

This function of the legal order is thrust upon the governors by circumstance. The patterns of behaviour that define society are in constant flux. Society is constantly changing. However little a government changes its law, upheavals inevitably occur: wars, revolutions, famines, education, the introduction of cash crops, industrialization, foreign or domestic investment. The romantic vision of an unchanging tropical society--poor,

to be sure, but in the unhurried idyll of its days blessedly free of future shock --is a lie.

Since societies change even within the constraints imposed by their legal order, a decision to try to induce new patterns of behaviour by changing the legal order is not, as is frequently thought, a decision to introduce change into an otherwise static world. Rather, it is an attempt to deflect existing processes of change into channels thought to be more desirable. To do nothing about the existing legal order is to accept the new configurations which social processes themselves induce. Law-makers cannot avoid that decision.

Besides being an instrument for channelling social change, the legal order enters into development processes in another, perhaps even more fundamental way. It is mainly the nation-state which today has thrust upon it the initiative to determine the course of social change--rather than the church, family or village, and this reflects the great transformation from kin-oriented, village, agricultural subsistence communities into societies with a high degree of specialization and exchange. In such societies, the shoemaker must know not only that others will supply him with leather, but that some will keep a monetary system going, and others will create and maintain markets in which he can purchase food, and in which he can sell his product. 'Modernization requires a whole range of new, specialized roles. This can only succeed if the persons who occupy them mesh their activities with each other. This requires a high degree of co-ordination.' Hence the long-term trend in Western Europe was 'toward the perfection of systems of obligations and their transformation from a network of individual relationships into obligations to the community'. The legal order is the most available instrument to state, create, enforce and coordinate these obligations.

Black makes the same point in general terms: 'Law tends to become implicated in social life to the degree that other forms of social control are weak or unavailable.' In conditions of development, the problem posed for social control is not merely to restrain deviance from the old order and to restore the status quo ante, but to induce change. Existing non-governmental agencies of social control tend to be meliorative, tension-management systems. They are not designed as change-mechanisms. The legal order has significance for development not because law influences behaviour significantly - in many, perhaps most, cases its actual influence on behaviour is peripheral - but because, with all its manifest limitations, the legal order is probably the most important tool available to induce development.

Despite this potential, however, too frequently the legal order fails to induce the prescribed behaviour. Development programmes remain on paper, plans die in parturition, policies remain unimplemented.

Myrdal has described the consequences of 'soft development'. By this he means

...a general lack of social discipline in underdeveloped countries, signified by many weaknesses: deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials at various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general inclination of people in all strata to resist public controls and their implementation. Also within the concept of the soft state is corruption, a phenomenon which seems to be generally on the increase in underdeveloped countries.

To explain the soft state is to discover the limits on the legal order as a tool of social change in conditions of development.

The Roles at the Interface of Means and End. It is sometimes argued that these issues are of no concern to lawyers. The content of law is determined by policy-makers--politicians, cabinet, revolutionary councils. Lawyers, it is maintained, (frequently by lawyers) while of course involved in the drafting of rules relating to development, are mere scribes, technicians who translate programmes developed by others into the obscurantist language of the law. By the same token, it is argued that the policy-makers have nothing to do with the law itself --that is the concern of the lawyers, civil servants, bureaucrats and other technicians concerned with the detailed drafting and implementing of rules.

When asked what we do, we respond with only an idealized part of what we are supposed to do. 'It is as if a policeman were to describe his role by saying that he catches criminals; as if a businessman were to say, he makes soap;...a priest.. /that_/ he celebrates mass;...a congressman /that_/ he passes laws.' So to separate 'technical' from 'policy' roles insulates both technicians and policy-makers from the full moral consequences of their actions, and from responsibility for their effectiveness. On the one hand, 'to limit judgment solely to "autonomous" technical criteria is in effect not only to permit but to require men to be moral cretins in their technical roles'. On the other hand, to formulate 'policy' unanchored to implementation assumes that the ends adopted will justify any means - a proposition no less morally cretinous.

In every government, there are some actors whose roles place them at the interface between ends and means, between policy formulation and implementation. Very frequently, this interface is at the point at which policies are transformed into law, for it is at that point that the generalities of policy are given programmatic content. That interface is a broad one, comprising many actors: those who draft the legislation, structure options, raise queries, and submit or review drafts, as well as those who finally decide yea or nay on particular formulations. Titles vary: permanent secretary, ministerial counsel, consultant, civil servant, parliamentary draftsman, solicitor general, and so on. In every country that we know, some of the roles at the interface are occupied by law-trained professionals. Their positions place them at the very cortex of decision-making. Unless these lawyers, and the other actors at the interface, are explicitly aware of the policy implications of their contributions to the decision-making process, too frequently the ultimate outcome is defensible neither pragmatically nor morally.

The title of the roles at the interface are unimportant. The detailing of specific rules is a complex process in which many participate in varying ways. Until these details are formulated, however, it is impossible to specify the actual content of the 'policy.' Their formulation is part and parcel of the policy-making process. For lawyer or civil servant to insist upon a sharp division between 'policy' and 'law' is to ensure that nobody raises those crucial questions which are indispensable if the end-in-view is to be both effective and consistent with broader perspectives.

Sometimes this task at the interface of broad policy and detailed implementation is called 'problem-solving.' The phrase 'problem-solving' raises uncomfortable visions of mindless pragmatism, whose 'solutions' to problems often create most difficult problems of all. To 'solve' a problem in such a way as to magnify troubles, rather than to alleviate them, is plainly no solution at all. 'Problem-solving' must include some methodology to avoid this sort of confusion.

Lawyers, to some degree, have always played a problem-solving role in society. In more developed communities, it sometimes appears that the lawyer's principal technique in 'solving' emerging social problems is to operate an ongoing relatively stable system of law. In conditions of development, the lawyer frequently is more clearly engaged with the process

of creating a new set of rules.

The contemporary lawyer...in the developing nations must become an active and responsible participant in development plans.

An ever-increasing...part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the scope and formulation of policies, in the exercise of legal powers constructively establishing or altering the relations between private legal parties interested, between public authorities and private parties, between governments and foreign investors, and the like.... In all these questions, the lawyer must play an important, often decisive part. It is he who must draft the necessary legislation, or the complex international agreements; it is he who will usually be the principal or one of the principal representatives of his country in international trade negotiations.... It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to strictly legal issues.

These policy-formulating tasks are not sought out by lawyers or by the civil servants with whom they work. They are thrust upon them by the necessities of developing detailed programmes for action. Their successful accomplishment requires careful analysis of the uses and limits of governmental power to influence the direction and intensity of social change.

This problem has been little studied.

The view that government is an integral part of the social structure, but may have the capacity of altering it significantly, is not in the mainstream of social theory. The opposite view is more common: that the formal government and its actions are epiphenomena, the product of forces arising from the social and economic structure of society.

'Mainstream' social science lags behind. Every government today perceives its function to be in part one of influencing ongoing processes of change into desirable directions. The study of 'soft' development ought to lead to knowledge likely to make that function more effective. At the same time, such a study should also lead a consideration of the uses to which state power ought to be put -- that is, into the nature and meaning of development, and the interests it does and should serve. That is our domain of study.

THE COMPONENTS OF A THEORY OF LAW AND DEVELOPMENT

The initial efforts made everywhere to solve the problems of poverty and oppression were to copy the laws of the developed countries, usually the former imperial powers. This has never worked, in the sense that the laws did not induce in the LDCs the sorts of behavior that it was believed they had induced in the metropolitan countries. The reason is obvious. Role-occupants make choices among the range of constraints and resources with which they are confronted as they perceive them. The behaviour of the role-occupant is the consequence of his choice; it is, therefore, a result of all the constraints and resources in his environment. Behaviour of a role-occupant in an LDC, faced by a rule of law which is identical with a rule of law in the former metropolitan country, will be different from that of a role-occupant in the law's original metropolitan home. The reason is again obvious: the total range of constraints and resources as perceived by the role-occupant in the metropolitan country is inevitably vastly different from that effecting the choices of the role-occupant in the LDC.

A second effort to induce developmental behaviour began from the assumption that behaviour is a function of the sort of person the actor is. The British believed that what they perceived as the successes of colonial rule flowed from the sort of men the colonial civil servants were. The colonial civil servants were all carefully selected from the upper middle classes of England. To be selected one had preferably to be from a 'good' family to have attended one of the great English public schools (which are not 'public' in any conventional sense of the word), to have been a senior prefect (that is, a member of the top governing elite of the student body), to have attended Oxford or Cambridge, and preferably to have received a 'blue' in athletics (that is, been a member of Varsity athletic team).

The colonial service made vigorous efforts to train an African elite in their own image. They created schools modelled more or less on the public school pattern (Achimota in Ghana, King's College in Nigeria, Tabora Boys in Tanganyika). They created universities that aped Oxford's and Cambridge's patterns of residential living and curricula -- even to gowns and high table. Many of the products of these institutions are today leading senior civil servants in the Anglophone African countries.

These African senior civil servants, however, are no more competent than their British predecessors to solve the problems of poverty and oppression in their countries. The range of constraints and resources within which they have to act has been created for them by the institutions within which they live. They were not trained to change these institutions, but to operate them.

Within this limited range of choice, development is unlikely, no matter who are the operating decision-makers.

Given the failure of the theory that development could be brought about by copying the laws of another country and the theory that good men make good government, there is no alternative except for each country to solve for itself its own problems. The function of a theory of law and development is to guide the acquisition of knowledge in order to better accomplish this task.

Underpinning any attempts to control the world must lie knowledge of the world. Long ago, Sir Francis Bacon described the objective of learning as the discovery of the 'secret motion' of things, so that man can control his environment. An airplane designer ignores the law of gravity at peril. Lawmakers are equally at risk who ignore the 'secret motion' of man-in-society. Solutions aimed at symptoms rarely succeed. We must first understand causes, the 'secret motion' of things.

Of what does knowledge of law and development consist? Three positions have been put forward, all basically incompatible, which we shall denote as positivist, ideal-type and problem-solving. The first is exemplified by a proposition put forward by Lawrence Friedman and Stuart Macaulay:

The ideal for the social sciences is the situation of the physical sciences; what is true of falling bodies in New York today is true of them in Brisbane tomorrow and Nairobi yesterday. It is a view which assumes that there are systematic, universal ties between law and society, and that these can be uncovered through the methods of the physical sciences.

Other writers argue that knowledge of law and development consists of the construction of ideal types in the Weberian mode. David Trubek writes:

...Our program should be guided by the following criteria. First, to analyze the relationships between law and other variables, we must separate 'legal' phenomena from key social variables which interact with them. With these key variables in mind, we must construct ideal types...Legal and social variables should be set forth in terms which guarantee that similar things are observed in all societies and that discrete states or quantities of the variables can be observed and measured.... Finally, it must be possible to go beyond the establishment of mere correlations to true causal analysis. That is, it must be possible to posit the independent and dependent variables in our theory of law and development.

The theorist stipulates the definitions of the variables he deems to be salient legal phenomena and key social variables. He then deduces their presumed relationships through logical operations.

A third position, which we adopt, holds that the output of law and development studies should consist of intellectual tools appropriate to the solution of real-life troubles. The difficulty is that every historical situation is unique. How can we learn from one unique situation something useful for solving another problem, in another place, involving different people? Propositions answering this question we subsume under the heading of theory. Theory in this sense consists of three sorts of propositions: methodology, perspectives, and categories.

Methodology

Reliable knowledge is expressed in propositions (or sentences). Facts are not sentences. Propositions are not immanent in facts. Logic is a characteristic of knowledge, not of facts. Causal relationships exist. Trees grow from seeds, not stones. Propositions constitute our mode of understanding these causal relationships. The great task of methodology is not merely the description of techniques of gathering data, but the more inclusive function of moving from the apprehension of data to propositions expressing knowledge about causal relationships in the real world.

The human mind is capable of generating a vast number and variety of propositions about the world. Most of these are erroneous. The long history of well-accepted propositions that were later shown to be invalid demonstrates the obvious: that only a few of the propositions that men formulate about the world are valid. Of these, even fewer are useful to the task of changing the world. A methodology of research must provide criteria by which to identify those propositions which are both valid and useful.

Perspectives

Methodology alone is not sufficient. An adequate theory of law and development must provide a means of dealing with the question of perspectives (or values). In the course of the formulation of propositions expressing reliable knowledge about our domain of study, and in formulating policies to deal with emergent problems of development, discretionary choices are inevitable. Which choices are made determines what propositions are formulated and accepted. How are these choices to be made.

Categories

The final element in an adequate theory of law and development is a set of categories to guide empirical investigations. These are perhaps the most fundamental criterial of relevance. If we have no category within which to classify an item of data, it is meaningless to us. English has only a few words for different sorts of snow: slush, powder snow, corn snow. The Eskimo are said to have 32 words, each for a different sort of snow. The differences that Eskimos perceive between one kind of snow and another are lost to us or want of categories into which to classify the information.

Any choice of categories (or vocabulary) implies an evaluation. To create a category is to express a judgement that the category is important in explaining the phenomenon at issue. A category is important if it is in some sense in a causal relationship with the observed phenomena which in our case is the social construction of reality in a particular setting.

If one is to select categories consciously, one must a) explicate the characteristics of the phenomena to be explained and b) detail their logical connections to the assumed independent variables which are believed to have caused them. That is to say, in the first instance, one creates the categories for investigation by formulating an ideal type. Such constructs are an indispensable first step towards the acquisition of reliable knowledge. By explication the characteristics of the phenomenon they propose to explain, they expose for discussion and analysis the utility of the investigation of these rather than other characteristics. By stating the logical relationships between independent and dependent variables, they raise directly the question of relevance.

The ideal type of capitalism as an analytical construct, for example, united those characteristics which give it its originality as an economic doctrine, although any one of them may be absent in a concrete economic organization. The ideal type of capitalism also comprises its various trends and its final goals, even if they are nowhere fully attained.

To the extent that the ideal type includes the key variables of reality, and excludes that insignificant ones, it serves its function of identifying the categories for investigation.

To be useful, such ideal-type constructs must point to the variables that in fact explain the phenomena at issue. Weber's notion of the ideal type was that it included the characteristic traits of the phenomena.

Methodology, perspectives, categories - these are the three elements of an adequate theory for the study of a particular domain. They cannot, however, be understood as unchanging. Like all propositions expressing knowledge, the sentences stating what methods work best, which perspectives are most desirable, and which categories most useful for organizing data must themselves be taken as no more than problematical. However one investigates an area of interest, the theory used must contain built-in guarantees of self-correction. The processes by which methods are used and tested, perspectives formulated, and categories identified must themselves provide for continual change. Without such built-in self-corrective processes, our knowledge must remain static and hence sterile. The world always changes. Our knowledge of the world must therefore always change, and the processes by which we acquire knowledge must likewise be in constant flux. The unending dialectic between the world and our knowledge of it must be reflected as well in processes of investigation.

A VOCABULARY FOR LAW AND DEVELOPMENT: A GENERAL MODEL

To generate knowledge relevant to the solution of problems in the existential world requires at the outset some categories within which to classify the world. We undertake to specify these by developing a very general model (or explanation) for the domain of study, i.e. by creating an ideal type. To do this, we discuss first the structure of choice, second, the available tools for social engineering through law, third, model that purports to relate law to behaviour, and finally, a few of the implications of the model.

The Structure of Choice

Human history, as contrasted with geology for example, concerns acts, not events. Acts imply choice. The most simple and also the most general statement about human society is that it consists of individuals and collectivities making choices among the constraints and rewards of their environments as they perceive them. A science of law and development must begin with a model which directs attention to the categories that are useful in explaining choice.

There are two questions that one can ask about choice. First, the environment of the actor provides a complex web of rewards and disrewards, resources and constraints. What are the constraints and resources, the rewards and punishments within which the actor must choose his course? Second, why does this actor choose as he does, within these constraints and resources?

This model of behaviour denies any dichotomy between determinism and freedom. Both are always present. The environment imposes constraints. Within those constraints there is always the potential for choice.

Alternative courses of action are defined by all the social and physical forces of the world: technology, geography, the behaviour of others. In a society built upon human interdependence, the expected behaviour of others is the most important and pervasive factor. For example, if a farmer requires credit, and the only source of credit in his village is a money-lender who charges extortionate rates of interest, the choice for the

the farmer is structured by that fact: he can either borrow money at the extortionate rate and continue farming, or he can cease farming.

Within the range of resources and constraints defined by the existential world, people do make choices. Despite this, it is also true that people act in repetitive ways. That fact defines society, as opposed to anarchy. Why do people make repetitive choices?

What has been called 'role perspective' i.e., the perspective of role-theory, suggests an answer:-

Individuals in society occupy positions, and their role performance in these positions is determined by social norms, demands and rules; by the role performances of others in their respective positions; by those who observe and react to the performance; and by the individual's capabilities and personality.

Norms are statements of expected behaviour. The attendant sanctioning statements prescribe the consequences to be expected from a breach of the norms. The individual exercising choice does so because he believes that he knows what behaviour to expect from others, both as they occupy their own positions and as they respond directly to his own behaviour.

It is the concept of norm which bridges the internal world of the actor as he makes choices and the existential world of society. To explain why a person makes the particular choices he does, we must take into account his notion of what he ought to do as well as what he believes he is compelled to do by circumstances. To understand the normative structure which an individual knows about, of whose consequences he is aware, and towards which he may (or may not) hold sentiments of obligation, is in part - but only in part - to understand why with any given range the individual makes the choices he does.

This perspective holds the potential for conscious social change. Social prescriptions are susceptible of statement in words. Rules explicitly stated hold a potential for influencing choice. Both human and animal colonies exhibit a high degree of regularity of behaviour. The human condition, however, is

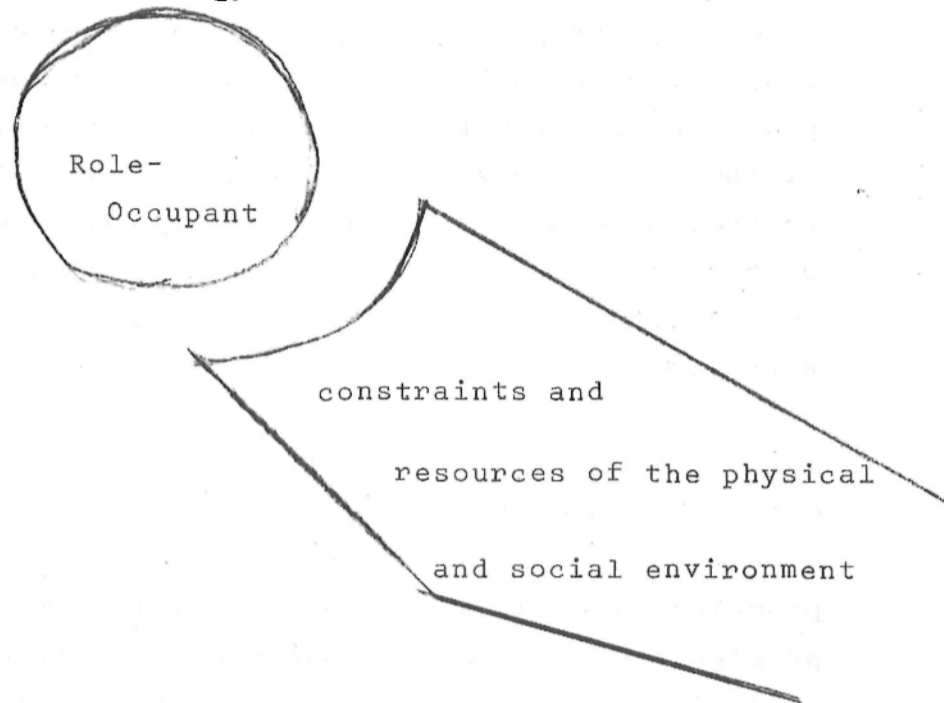
distinguished from that of the lower orders by the normative system.

By contrast, the intricate interactions of an ant colony or a beehive, like those of a prairie dog village, are governed mainly by the instinctive reactions of natural and social stimuli.... Obviously if the structure of human societies is to be understood, if human behaviour is to be adequately explained, the normative aspect must be dealt with.

It is precisely because human beings do possess consciousness, and hence can, to some extent, be induced to respond to a change in the prescriptive rules addressed to them, that there is a possibility of consciously induced social change.

The word 'role' we mean only 'a norm or set of norms defining what the behaviour of a position should be'. The position may be that of an individual or a collectivity (a corporation, a cooperative, a marketing board). The individual who happens to be occupying a particular role at a particular time is the 'role-occupant'. How a particular role-occupant or set of role-occupants behave is called 'role-performance'. The role-performance may or may not correspond to the behaviour prescribed by the norm. By the word 'norm' we mean only 'a rule prescribing the behaviour of a role'. Since it is addressed to a role, it is also addressed to each role-occupant. Finally, the word 'sanction' has usually been defined in jurisprudence as a pain or punishment imposed by the state in consequence of a breach of a law. This definition is insufficient for our purposes. The state has other tools besides punishment to induce behaviour conforming to a rule of law. We shall call these several tools collectively 'conformity-inducing measures'. We recognize the difficulties in these definitions -- e.g., the circularity of the definitions of 'norm' and 'role'. They are, we think, nevertheless sufficient for our purposes here.)

We represent this perception of man-in-society by a simple diagram:-



The behaviour of any role-occupant is a function of his making a choice within a range of constraints and resources thrown up by his physical and social environment. Since the role-occupant is a human being, the actual choice made is dependent upon his perceptions, domain assumptions, internalized norms and so forth -- that is, how he views the environment within which he lives. The model thus directs attention to the two sorts of causal explanations for human behaviour: propositions describing the range of constraints and resources within which the role-occupant must choose, and propositions explaining why the role-occupant chooses the way he does within that range.

The problem is to identify those tools which government has available to change behaviour. We turn now to this question.

The Tools of Legal Engineering

What is law? This is the oldest question in jurisprudence. Physicists do not debate with each other over what is physics. Plumbers do not worry about what is plumbing. Lawyers concern themselves about the 'nature' or 'essence' of law because they are so generalist a profession. To define law is to state what the author believes to be the proper concerns of lawyers. Our definition of law reflects a concern with the use of law as a tool of social engineering.

Every rule of law is a norm. John Austin grasped this proposition when he defined law as a 'command'. It is a rule prescribing the behaviour of the set of role-occupants -- i.e., of the role. One can divide all norms between law and custom. By custom we mean any norm which people come to hold or to follow without its having been promulgated by an agency of the state. By a 'law' or a 'rule of law' we mean any norm so promulgated. A custom becomes a law when it is so promulgated.

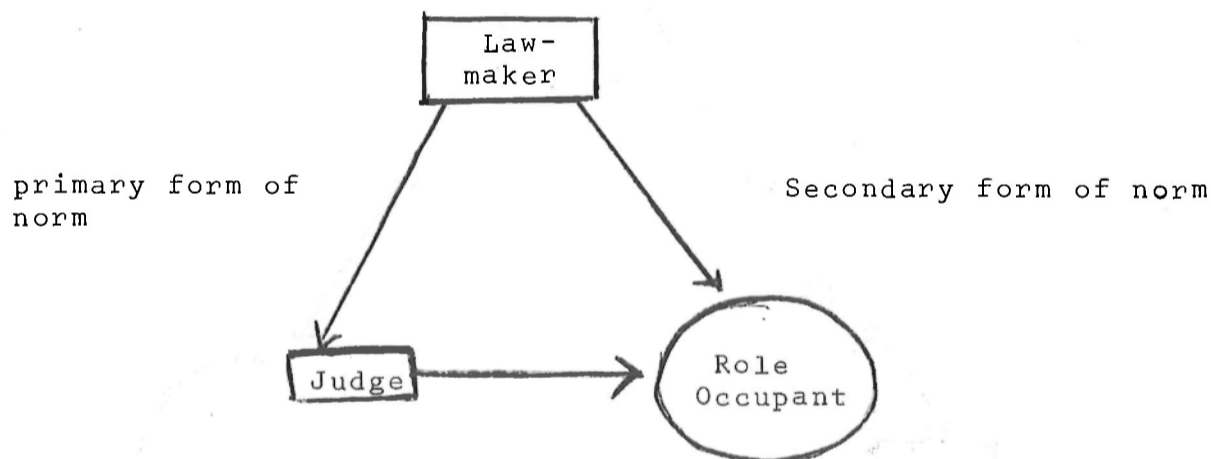
Whether a rule of law has been internalized by a role-occupant is irrelevant to this definition. It is rule of law if it is a norm prescribing the behaviour of a role-occupant, promulgated by an agency of the state. The definition leaves problematic whether role performance will march the behaviour prescribed by the rule. What has been called 'phantom' laws-- i.e., rules promulgated by the state which do not induce the prescribed behaviour--may still appropriately be denoted as 'rules of law'.

Soft development arises, in the main, because the rules of law do not induce the desired behaviour. In the terms used by the legal realities, there is a wide gap between the law-in-the-books and the law-in-action. In the vocabulary of role-theory, soft development exists when role-performance does not match role-expectation. That is the event to be explained by a model for law and development.

To say that role-performance does not match role-expectation is to say that the role-occupant is not making the choices with respect to behaviour that the law-maker desires him to make. Since behaviour is a function of choice within perceived rewards and constraints, to say that role-performance does not match role-expectation is only to say that the structure of choice facing the role-occupant, as he perceives it, leads him to solve his problems by behaviour different from that prescribed by the rule of law. He behaves deviantly.

Role-occupants behave deviantly because the net rewards for deviant behaviour within their social 'field', as they perceive it, are greater than the rewards to be received if they conform. Of this 'field', the behaviour of state officials is the variable over which the governors believe themselves to have the greatest control.

The relationship between rules of law and behaviour-inducing activity by state officials is suggested by Kelsen's idealized model of the legal order. He taught that 'the legal norm does not, like the moral norm, refer to the behaviour of one individual only, but to the behaviour of two individuals, at least: the individual who commits or may commit the delict, the delinquent, and the individual who ought to execute the sanction'. The law that instructs a role-occupant not to commit murder, simultaneously instructs the judge to convict him of the crime if he disobeys, and to sentence him to punishment. Kelsen maintained that the first norm, (which he called the 'secondary' norm) which forbids the substantive delict, was only an epiphenomenon of the primary norm addressed to the judge. He conceded, however, that 'the representation of law is greatly facilitated if we allow ourselves to assume also the existence of the first norm'. We can represent the form of the legal order thus postulated:



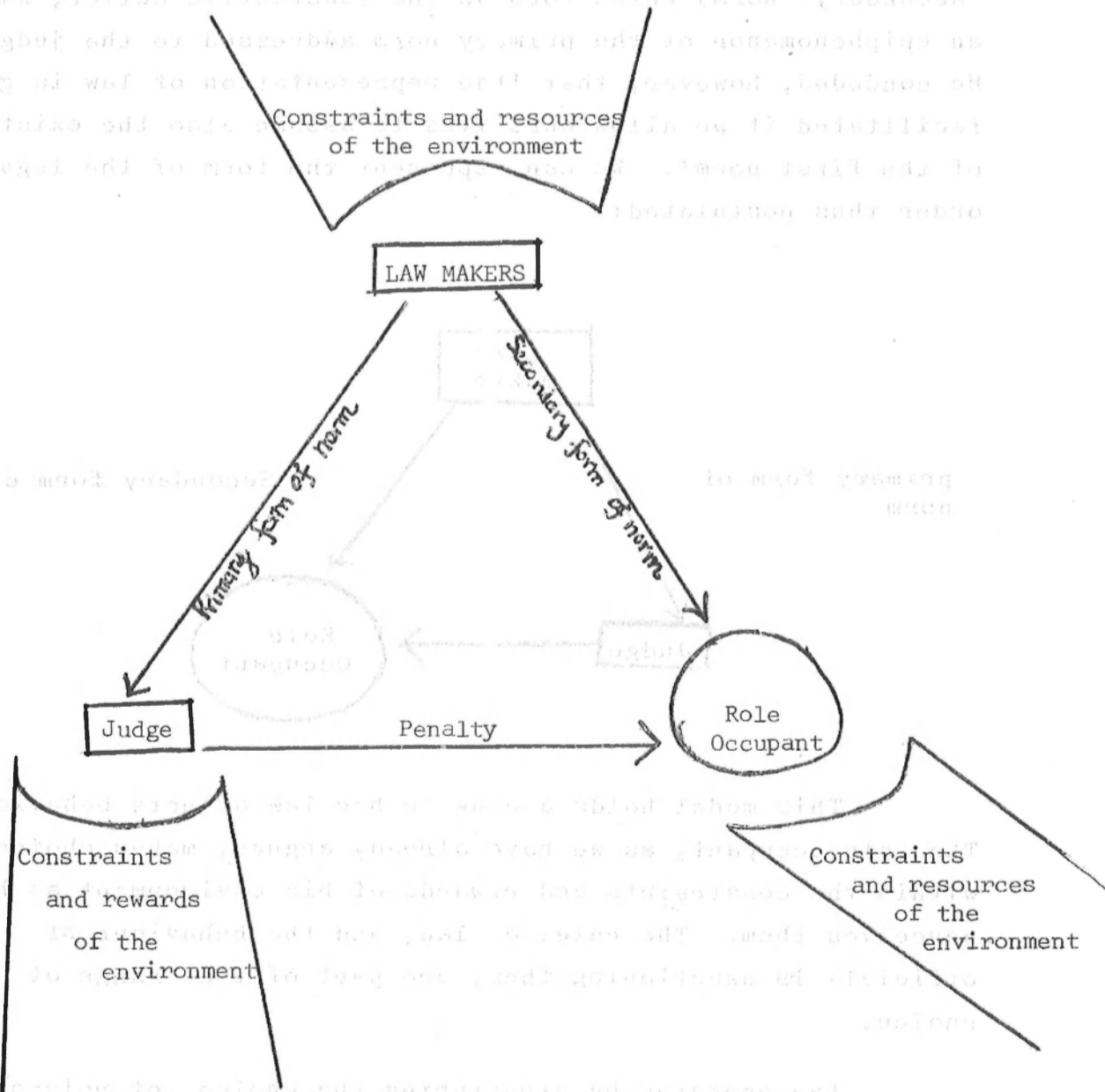
This model holds a clue to how law affects behaviour. The role-occupant, as we have already argued, makes choices within the constraints and rewards of his environment as he perceives them. The rules of law, and the behaviour of officials in sanctioning them, are part of that range of choice.

Law operates by structuring the choice of role-occupants through rules and through sanctioning processes. It does so,

in Kelsen's model, a) by stating a rule which the role-occupant may feel obligated to obey, or b) by instructing the judge to act in such a way that the benefits and rewards offered the role-occupant in consequence of his behaviour will be altered: 'The secondary norm stipulates the behaviour which the legal sanction endeavours to bring about by stipulating the sanction.'

A Model of Law and Development

Kelsen's model only depicts the relationships among the rules of law themselves. The various actors in the model, however, are themselves all role-occupants. Each of them acts within a 'field' of social forces. Thus we can assimilate our two diagrams:-



The demand by the American legal realists to study 'law-in-action' --i.e., behaviour -- as well as the law in books--i.e., the normative structure--led them to much the same sort of model. The model is, however, insufficient for five reasons. First, it assumes that the judge is the principal sanctioning institution. That assumes that the legal order is based on universalistic norms, with an autonomous legal system. As we saw earlier, to focus on these concepts inevitably directs attention to the courts. This is plainly too narrow a focus. The objection is met, however, by broadening the category of 'judge' to include the entire machinery of government concerned with inducing desired behaviour - the bureaucracy, the police, state corporations, and so forth.

Second, the realist model directs attention only to explicit laws addressed by law-makers to role-occupants--i.e., to Austinian 'commands,' for which there is a stipulated sanction if broken. It does not address the question of whether a particular law or set of behaviour-inducing activities is achieving conformity to less formally articulated policy.

An example may help. The government wished to induce citizens to hunt and kill coyotes (a wolf-like predator in the western United States). It offered a reward or bounty for each one killed. The form of that offer was contained in a law directing county agricultural extension agents to pay one dollar for each pair of coyote's ears presented, with a small criminal penalty if a county agent failed to make the payment on demand and production of the pair of ears. The realist model would concern itself with the law directed to the county agent and his behaviour. That question is, however, relatively trivial. The important question about the law is whether it induced the desired behaviour in the citizen. In fact, it was reported that farmers bred coyotes for the bounty. Because the realist model limits itself to rules of law, however, it does not explicitly provide a guide for examining the relationship between the activity of the county agent, to whom a rule of law was directed and the behaviour of the citizen, to whom a policy, but no explicit rule of law, was directed.

In short, the realist model does not accommodate itself to the study of law and government policy. We can adapt it to that study if we broaden the concept of the norm addressed to the role-occupant, defining the role expectation held for him by the government. It may also be articulated in exhortation or other form of persuasion, indicated by a wavy

line. A government may wish to induce farmers to grow cash crops. If it enacts a statute (such as exists in Tanzania) making it a crime to fail to grow a stipulated acreage of cash crops, the rule addressed to the role-occupant can be symbolized by a stright line. If it merely exhorts the role-occupant to grow cash crops, and seeks to induce this behaviour by rules addressed to bureacrats directing them to provide credit, seed, adequate marketing facilities and the like for cash crops, the exhortation directed to the role-occupant can be symbolized by a wavy line. The test of the success of the rules addressed to the bureaucracy is then plainly not merely a question of whether they provide credit, seed, and marketing facilities, but the more important question of whether their behaviour induced the farmers to grow cash crops.

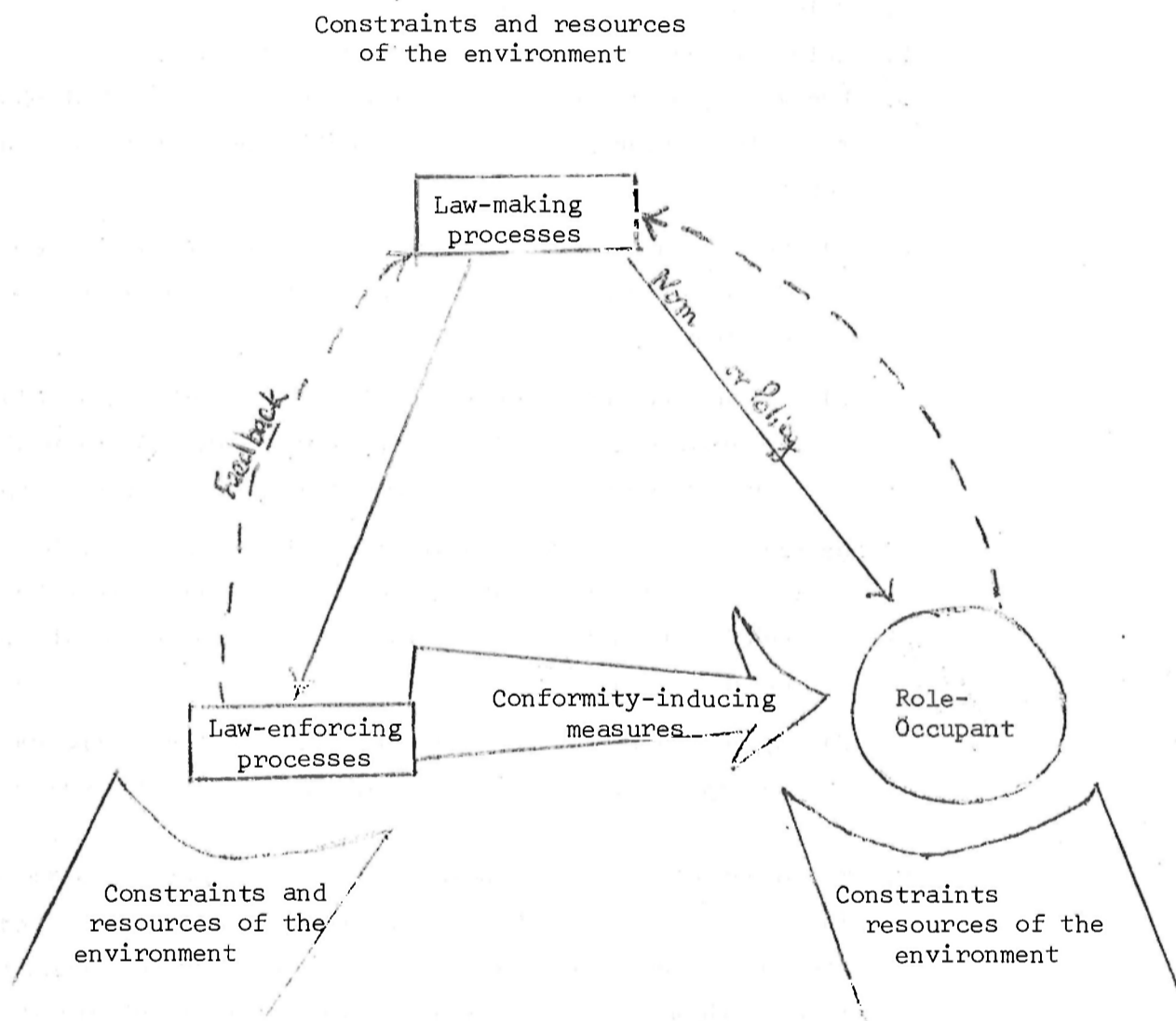
Third, any law, once passed, changes from the day of passage, either by formal amendment or by the way the bureaucracy acts. It changes because the various forces embodied in the social 'field' change. Of these, it is important to identify various messages communicated between the several actors in the model. Citizens express their reactions to a particular law or programme to the lawmakers. They send signals to bureaucrats about the acceptability of sanctioning behaviour, and the bureaucrats communicate to the lawmakers. In addition, there are various sorts of monitoring devices, both formal and informal, by which lawmakers and bureaucrats learn about the relative success or failure of a rule. We include all these various sorts of communication under the very general term 'feedback'.

Fourth, the crude concepts of 'lawmaker' and 'bureaucracy' require explication. Laws are not generated by a single 'lawmaker'; they arise out of a process of lawmaking involving many roles in complex relationships. Sanctions are not applied by individuals; they are the consequence of complex sanctioning processes. These sanctioning processes are composed of a set of roles, each defined by rules of law. Many of these rules of law are not right-duty rules, but power-conferring rules. Each of these roles can be analyzed, however, by substituting it for the role-occupant in our general model.

Finally, as suggested earlier, the concept of 'sanction' is too narrow. As we shall see below, conformity-inducing measures may be aimed directly at the role-occupant as rewards or punishments, at changing the

constraints and resources of the environment, or at changing the perceptions of the role-occupant through education or moral suasion. Our diagram must indicate this broader category.

The proposed model can be completed thus:-



We can now state in very general terms why role-occupants behave as they do in the face of a particular norm addressed to them by law makers.

1. Role-occupants act pursuant to choices they make among the constraints and resources of their environment, according to the way in which they perceive reality, and the rewards and disrewards which they believe are likely to follow upon their behaviour.

2. Among the resources and constraints some are attendant upon behaviour of others:-
 - a) By sanctioning behaviour consequence upon the failure of the role-occupant to match his performance to the expectation of the role, or
 - b) By the performance of others in their roles.
3. Role expectations are defined by norms.
4. Rules of law are norms promulgated by the state.
5. Every rule of law or government programme is aimed at changing the role-occupant's arena of choice in one or more of four ways:-
 - a) By providing psychological rewards for compliance or deviance, depending upon the acculturation of the role-occupant,
 - b) By instructing government officials at various levels to provide different sorts of rewards or punishments in consequence of the role-performance of the role-occupant;
 - c) By instructing government officials to act in such a way as to change the behaviour of third parties whose behaviour in turn alters the arena of choice of the role occupant, and
 - d) By instructing government officials to try to change the perceptions, attitudes, assumptions, etc. of role-occupants.
6. The occupants of roles in the law-making processes will perform in the face of a rule of law for all the same reasons that move any role-occupant to comply or be deviant, by the behaviour towards them of role occupants and of participants in the sanctioning processes, and by the fact that they occupy roles within law-making institutions.

In what sense is this a 'model'? We argued earlier that there is no such thing as a legal system discontinuous with society. There are, however, plainly a vast number of specific systems, involving particular laws, bureaucracies and feedbacks. What is the relationship between the model and its existential referent?

A model is a method of organizing thought. A physical model of an airplane is not the airplane, no matter how detailed the model may be. A diagrammatic representation of the system of law concerning the agricultural sector is not the law of the agricultural sector. The model put forward here is not a diagram of a legal system: It is no more--and no less--than a device directing attention to particular categories of data for investigation, a perspective to guide discretionary choice in social inquiry. It is an agenda for research. It cannot be proven to be valid. It can be diswarranted, however, by the discovery of instances in which significant variables not included in the model do affect behaviour in response to a rule of law.

Finally, this model implies a definition of law. It is an operational definition that addresses law's function in channelling behaviour. Law is a process by which government structures choice. The consideration of law as a device to structure choice expresses at once law's usual marginality in influencing behaviour and its importance as the principal instrument of government to influence behaviour. Since society itself determines the range of choice in most respects, it is society which determines the limits of law. We can understand law only by understanding it as part of society.

Implications of the Model

In the preceding section, a variety of variables discussed in the jurisprudential literature were examined. Some of these, such as the bargaining model, appear to be special cases of a more general theory. Others, such as custom, seem to be significant variables. We next discuss how the model offered here treats these variables.

Autonomous Legal System, Universalistic Rules, Legalistic Law-finding. These categories advanced by Weber, implied by Lon Fuller, and equally implicit in analytical positivism concern the form of rules and the legal order. They operate through sanctioning processes and law-making processes, and they have consequences for the behaviour of role-occupants. The model proposed, therefore, suggests lines of inquiry to discover if, in fact, this triad of concepts induces behaviour appropriate to a free market. In this sense, these concepts are plainly only a special case of the more general hypotheses advanced here.

The Bargaining Model. The bargaining model asserts that all behaviour in the face of law is the consequence of interactions between the various actors. The model advanced here makes this explicit in two ways. In the first place, the relative power of others is an important factor in determining the range of choice open to law-makers and other role-occupants. In the second place, the model expressly includes a feedback mechanism. How the law-making processes operate and how rules are enforced, is a function of the interactions indicated by the feedback mechanism. Unlike the bargaining model, however, the model advanced here does not take these interactions as the sole or even the principal determinants of official behaviour. The model only advises that these interactions must be investigated in order to explain specific behaviour. They must be taken into account with a host of other factors structuring the choices made by the actors in the legal order.

Custom. Custom, both in the sense that it provides a set of norms defining the behaviour of others and in the sense that the role-occupant is likely to feel internally obliged to follow it, forms a part of the social forces operating upon the role-occupant. It is included in the elements which structure his choices. Unlike the explanations which assert that it is the implacable, determining factor in behaviour, however, the model advanced here leaves the question of the force of custom in a particular case problematical.

The Legal Culture. In Lawrence Friedman's model, the legal culture is 'the term we use apply to those values and attitudes which determine what structures are used and why; which rules work and why'. That values and attitudes may be significant variables in explaining behaviour is accepted in the model advanced, for it explains behaviour in part by the ways in which role-occupants perceive reality. It does not, however, take as given that these values and attitudes necessarily determine behaviour. As in the case of custom, it identifies the legal culture as a variable, but leaves problematical its effect in any concrete historical situation.

Conflict vs. Consensus. By leaving for further examination the precise content of the constraints and resources affecting choice, the model leaves their structure problematical. We could argue, that the very existence of law is strong evidence that society lacks a consensus. Nevertheless, this issue is not prejudged by the model advanced.

The Dialectic Between Law and Society. Marxist legal theory focusses attention upon the interaction between law and society, while urging that in the final analysis, the economic base determines the legal superstructure. Our model, too, draws attention to this interaction. The choices open to law-makers and to the other actors in the legal process are all limited by society itself. To this extent, society determines the legal order. Within the socially-defined set of options, human beings can deflect the course of society itself by conscious action through law. The task of developing a true science of law and social change is to generate propositions that express knowledge about this symbiosis.

Governors and Governed. Finally, Kelsen's model assumes that there are law-making and law-enforcing processes, each with their specific roles. It assumes, in short, a state of affairs, in which identifiable governors are distinct from the masses of the people. This model unquestionably matches the situation in practically every modern state.

We argue below that the separation between law-making and law-enforcing processes and the ultimate targets of these processes is perhaps the single most serious barrier against induced social change. The bureaucratic state is designed to tend the machine, not to redesign it. The opposite of bureaucracy is participation. A model of law and development is insufficient unless it directs attention to the processes by which social transition can be accomplished.

The model described here purports to do this by its specific inclusion of feedback channels. To the extent that role-occupants and bureaucrats provide inputs to decision-making by the governors, they participate in the decision-making processes. To the extent that the institutions of feedback are strengthened the separation between governors and governed tends to disappear. When this takes place, the model we have suggested will of course be useless. New perspectives will be required. The model, as it were, contains the seeds of its own destruction.

THE METHODOLOGY OF LAW AND DEVELOPMENT RESEARCH

The domain of study has been defined as 'soft' development. This is clearly a subject appropriate for a policy-oriented, problem-solving approach: How do we go about generating knowledge concerning the domain of study, and proposals for solution of specific, identified difficulties relating to poverty and oppression?

At first glance, the dual functions of generating knowledge and policies seem mutually contradictory. Knowledge necessarily simplifies reality. It is impossible to know the world meaningfully in all its complexity. A map on a one-to-one scale includes all the detail, and tells us nothing. The propositions of reliable knowledge simplify and generalize; that is part of the process of understanding.

Policy, on the other hand, is inevitably singular and particularistic. It is designed to solve specific problems in specific places at specific times. Its outcomes are sentences in the form of normative statements 'So-and-so should be done' - rather than general statements about what is the case. The great paradox posed for a methodology of law and development -- as it is the great paradox of a civilization that boasts of its 'scientific' biases -- is to relate the generalities of knowledge to the specifics of policy, to invoke the learned experiences summed up in the propositions of reliable knowledge in determining what is a good thing to do. In short, how do we use knowledge to create a just society?

There are two principal methodologies for the generation of policy. The first rests upon a supposed dichotomy between means and ends, between 'policy' and 'implementation'. It is a dichotomy deeply reinforced by the institutional structure of Western society. High-level bureaucrats or politicians are supposed to formulate policies; lower-level bureaucrats implement them. Boards of directors and corporate managers determine ends; the rest of the employees carry out the means. The difference in function of various roles in society seemingly is based upon the difference between ends and means. It is inevitable that all of us living in societies structured in this way will come to believe that the institutions of the society are the way they are because of an ineluctable difference between ends and means.

Concomitant with the distinction between ends and means is the notion that ends are not susceptible to control through data, that is, through experience. Some argue that there is an unbridgeable discontinuity between the Is and Ought. Ends represent the Ought. Means constitute the Is. Data and experience are relevant to determining what are appropriate means for accomplishing any given end. But it is impossible to use experience to determine ends. They are, ultimately, fixed by the individual's internal 'values' or 'residues'.

Another explanation for the distinction between means and ends is possible. Rather than the institutions themselves reflecting an inevitable distinction, perhaps our concepts reflect our institution. To say that ends are determined merely by the sort of man one is, and to lodge responsibility for determining them in the power of a few roles in society, is to ensure that the shape of things will be determined by the particular interests of those who occupy those roles. The distinction between means and ends, and the orthodox accompanying notion that they are discontinuous as the Is and Ought are discontinuous, is thus seen to be another of the manifold rationalizations of power, rather than a distinction immanent in the existential world.

There is, we believe, an alternative implicit in the methodological writings of authors seemingly so diverse as Dewey, Popper, Sartre and Marx. This can be conceptualized as consisting of four stages: the selection of a troubled situation; its explanation; the proposal of a solution; and its implementation.

The first task is to determine what real-life troubled situation one will investigate. Empirical research is needed to ensure that what we believe to be a trouble *is* a trouble in fact. A law professor may be quite sure that his students are not studying very hard, but empirical research may reveal that in fact they are working very hard indeed.

It is sometimes urged that the very definition of a trouble is merely a reflection of the researcher's 'values'. I am concerned with oppression and poverty, it is said, because I hold the values or ends of freedom and prosperity. The argument is circular. The evidence that I hold those values or ends is my concern with oppression and poverty. An 'explanation' whose proof is the very event it is supposed to explain, explains nothing. The statement, that one values freedom and prosperity, is only another way of stating, one's aversion to oppression and poverty. Of course, the choice of a trouble for research is discretionary, as are many choices in the research process. How to gain intellectual control over these discretionary choices is itself an appropriate subject for investigation.

Secondly, having defined a specific trouble, one must propose alternative explanations for it. Explanations are syllogistic in form. They require both a major and a minor premise. The task is to generate as many such potential explanations as possible, and then to try systematically to eliminate them. There is a variety of criteria to use in making the choice between potential explanations -- generality, parsimoniousness, logical form,

and so forth. The most important are, we believe, the criteria of falsifiability and empirical falsification. An explanation which is not in principle subject to falsification is either definitional (that is, merely another way to state the trouble), or it rests upon mysticism or intuition (neither of which are falsifiable). One cannot use experience to determine its validity. One can only learn through experience in an organized way if one generates alternative explanations which are in principle falsifiable, and then conscientiously tries to falsify them by empirical research. The most arduous task of research, of course, is the effort to falsify possible explanations systematically.

Third, having eliminated most of the possible explanations and thus indentified the 'causes' of the trouble, one can propose alternative solutions addressed to those causes. The choice between these alternative solutions depends upon the constraints and resources inherent in the situation and a notion of their probable consequences. Again, empirical research will be required to discover what are in fact the constraints and resources and to make an educated guess concerning what the desirable and undesirable outcomes of the proposed solutions are like to be.

Finally, the research is not complete until one has tried to implement the proposed solutions and monitored their success or failure. The success of the action taken warrants or diswarrants all the previous steps. Building a bridge that works validates not only the actual design of the bridge but the rules of physics upon which it is based. Thus, as Dewey says, we learn by doing. Marx and Sartre call it praxis. (Of course, no rule of law ever works precisely as designed. That it does not is a new trouble, calling for new explanations, new solutions, new efforts at implementation, and therefore -- new troubles. Life is indeed one trouble after another.)

In the course of proposing explanations, we must articulate general propositions as major premises. If they work in one case, these propositions have some status as knowledge -- i.e., as useful heuristics for further research. The principal task in the generation of knowledge thereafter is to falsify the general propositions suggested, to amend them or to propose new ones. The general stock of knowledge consists in the main of these 'middle-level' propositions or theories, all of them heuristics, all of them never more than problematical.

It is these propositions that, in our view, together constitute a social theory of law. The methodology proposed, therefore, does not distinguish between the tasks of developing general theory and proposing 'instrumental' solutions. We generate theory in the course of solving problems.

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LAW AND UNDERDEVELOPMENT IN KENYA:
A THEORETICAL ANALYSIS

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INTRODUCTION

Any theoretical analysis of the role of the legal system in economic development which is observation within an agrarian-capitalist, underdeveloped economy is confronted with many problems. The most basic of these problems is that of definition¹ - not so much of a definition of law and its potential role in development, but rather the problem of defining the concept of development. Development is a most elusive concept and is highly contentious, irrespective of the discipline from which it is defined. Is it development to be able to manufacture bottled orange juice half diluted with water, or is the concept measured by the extent to which people of a defined social unit have access to natural, unadulterated orange? But more precisely, there is no consensus on the meaning of development: whether it is mere industrialization or the more meaningful satisfaction of basic human needs, with or without industrialization. The task before us is an unenviable one of attempting to describe what development should mean, and, having done that, to ascertain the extent to which the legal machinery has in the past contributed and is today contributing to the process.

In this chapter development will be considered in its normative socio-economic sense, and in relation to the basic desires and needs of every member of a society. It is conceived as a process whereby human beings become capable of achieving, to use Dudley Seers trilogy (1972, pp. 21-36), a reduction in poverty, unemployment and inequality. The presence and/or growth of any one or all of these inter-related phenomena, in absolute or relative terms, must be conceded to be antithetical to the realization of human personality. Kay, among many other serious development economists,

1. Note, for instance, the extreme difficulty experienced by the Research Advisory Committee on Law and Development which, in our opinion, avoided defining the concept, giving the lame excuse that this was outside the scope of their mandate. See International Legal Centre, 1974, p. 15. Dudley Seers: "What are we trying to Measure?" in, Journal of Development Studies, vol. 8, No. 3, 1972. pp. 21-36.

has in his classic analysis of the concepts of development and underdevelopment stressed the fact that even '... national sovereignty can have no real meaning unless it is joined to the idea of development as progress towards a social and economic equality ...' (1975, p. 1, emphasis added). Here we extend Kay's macro definition to the individual level so that whatever is inimical to the achievement of social and economic justice may be seen as undermining the achievement of human personality growth and national sovereignty.

To guard against misinterpretation, Seers' three indicators of the development process must be qualified and redefined. The concepts of poverty and inequality are seen in their relative and absolute sense. In this way, it is quite in order to contend theoretically that there can exist absolute poverty within a nation without inequality, but relative poverty presupposes inequality. Thus, industrial growth may eradicate absolute poverty, but not relative poverty and inequality. It is at this level that we reject the neo-classical economists' approach that sees development as reflected in the growth of per capita incomes² or rates of national economic growth.³ We are not implying that these indicators are not associated with development - what we mean is that they are false indicators when used, as is usually done, without regard to the elimination of poverty, unemployment and inequality, which should be the target of development, rather than the growth rates per se. Non-growth is also, of course, non-development, unless its effect is to achieve the growth of human personality.

The concept of employment as one of the basic needs of human life, since it is the only way to ensure survival through production of use-values and commodity values, must also be viewed in broader terms of social justice. We are concerned not only with ending unemployment, but also with ending unproductive employment and over-employment. The latter term includes all the exploitative modes of employment that verge on slavery and are considered

2. See the 1970-74 and the 1974-78 Kenya Development Plans which, at p. 1 and p. 17 respectively, stress as a measure of development during the period since independence that the annual per capita income has increased from £43 (1967) through £55 (1974) to £68 (1978 - projected).

3. The 1974-78 Development Plan states that since independence the economy has achieved a steady 6.8% average annual growth (Part I, p. iii); the ILO report gave an average annual increase of 7% since independence (pp. 106, 107, 109).

in theories of the political-economy of underdevelopment.⁴ Overemployment leads to relative poverty and inequality, particularly in a capitalist economy where property and other means of production are in the hands of a small bourgeois class. It is this control of the means of production by a few which generates the exploitative over-employment characterized by the purchase of the workers' labour-power at a price quite below its real value.⁵

Having established what development is and is not, we are also concerned with the role of law in achieving development. The task of defining the appropriate approach to conceptualizing law in its developmental perspective is made much easier by the work of the Committee on Law and Development (see International Legal Centre, 1974). The Committee reviewed the jurisprudential theories of what law is, what it ought to be, and what it is doing in society and concluded that 'the social and policy perspective of law' is the best approach to understanding the role of law in development. I have chosen as the most appropriate approach the notion that law can be an instrument of social change and also that it is an expression of 'values' (International Legal Centre, 1974, p. 16). These two theories are dynamically interrelated and must not be viewed independently, though the Committee did not stress this point. The reason for this is that being an instrument or tool, law must quite naturally be used by those who have the power to enforce it to further their own values. Of necessity there, where society is stratified into antagonistic classes as in a capitalist state, law becomes not only a tool in the hands of the ruling bourgeois class but also substantively expresses the values of this class in opposition to the workers⁶ and the poor including the peasants.

4. Over-employment is used here to designate the employment of workers whose work is disproportionate to the wages they are paid for such work; rather, fruit of their labour is realised by the bourgeoisie in the form of profits '... Profit is unpaid labour' (Kay, 1975, p. 46) which originate in the sphere of production that characterizes the underdeveloped economies.

5. We all need property in order to be able to initiate and complete a mode of production and hence achieve use-values: it is the way social relations in production are structured that either creates equality in development or inequality in underdevelopment. As Marx and Engels said, '... The distinguishing feature of communism is not the abolition of property generally, but the abolition of bourgeois property' (1972, p. 95).

6. This argument is drawn from two theories: the Marxian theory concerning the dialectic between the superstructure and the economic base, and the observation that law is an expression of economic relations (and, as we have said, political relations) as stated by Engels. See the letter from Engels to C. Schmidt, 27 October 1890. In sociological theory, we may identify law with Mills' 'master symbols of legitimation' which are value-enforcing tools in a conflicting social system (Mills, 1959).

Accepting that during the transition from colonialism to independence political power was inherited by a class interested in preserving the status quo, at least as far as the flow of economic commodities was concerned, between the metropolis and the satellite nation law became an expression not only of economic relations but also of political values (see Engels to Schmidt, 1890). This connection is stronger in a system where the division of labour has not reached an advanced stage, where one finds that those in direct political control are the same people engaged in business activities either as industrialists or merchants. We must also remember that statutory laws are made by political legislatures, though the residual powers of promulgation are conferred on the administration.

Having identified law as a tool for imposing the values of the ruling class on the masses, we go on to maintain that this process may take the form of supporting the existing order, of opposing it or of realigning the economic relations and the supporting legal principles and institutions. There exists ample empirical evidence supporting the view that law is generally used to maintain or even intensify the basic colonial economic structure. Since by definition colonialism means domination, exploitation and inequality, the role of a legal system that contributes to this process is not developmental. This is the basic hypothesis that emerges from our analysis; we shall now support it with some empirical evidence. To guard against an accusation of being simplistic we must mention that contradictions do emerge from the role of law as part of the state superstructure and law as the basic economic reactor. As we have indicated however, the two functions are very closely interrelated in a political-economic situation such as in Kenya. Developmental legal orders will only occur out of the contradiction between the ruling class and the masses - the masses vote for political leaders and obviously ruling class occasionally gives in to the mass's demands. This analysis will demonstrate on the whole, however, that the history of law and development in Kenya is a history of underdevelopment.

THE ROLE OF LAW IN UNDERDEVELOPMENT IN KENYA

We have so far deliberately concentrated on dispelling the myth of development as economic growth which has been supported by most affluent members of Kenyan society to defend the existing structure. Merely pointing to economic growth at macro level does not address the problems of bridging the gap of inequality, eradicating unemployment or stamping out relative and absolute poverty within the social organization, and these must be our

primary concerns. Economic growth policies in this context are only minimally developmental, or non-developmental, or (and this is the central feature of Kenya's economy) underdevelopmental.

Most of the published work to date on the theory of underdevelopment in the ex-colonies has concentrated on analysing the dependency relations that exist between the metropolitan advanced states and the exploited peripheries.⁷ The classic work on Kenya is Colin Leys's, where he traces the origin and development of the process as characterized by:-

'... the application to them /the underdeveloped countries / of western capital, know-how and political power ... in ways which had structured (and continued to structure) their economies and societies so as to continually reproduce poverty, inequality and, above all, political and economic subordination to the interests of western capital (1975, p. xiv).

This is ensured through unequal terms of exchange (Leys, 1975, p. 8) and monopoly foreign capital which prevents the emergence and growth of an indigenous national industrial bourgeoisie (Leys, 1975, pp. 5, 10).

Whereas the argument regarding unequal rates of exchange and dominance of international capital is not disputed, the notion that no indigenous industrial class can emerge within such a framework is highly questionable. Kay has disputed this point on a theoretical plane and it has been empirically refuted for Kenya by Swainson's analysis of the emergence of a strong class of indigenous industrial capitalists who have been able to challenge international capital (1976). This emergent class has successfully manipulated state power and used the knowledge gained by association with international capitalism to enhance their own positions. It must be noted however that the presence of indigenous industrial capitalists does not make an economy developmental, since the local capitalists are tuned to export manufacturing which is subject to international capital in the world market. Also, it should be noted that in many cases the apparently indigenous industrial capitalist enterprises are in fact partnerships with

7. See Kay, 1975, p. 9, as well as Engel's letter to Schmidt and Mills, 1959). Kay designates this school of thought as 'structuralist economists', as opposed to the 'neo-classical economists' who emphasise per capita income and gross national product.

international capital, thus perpetuating exploitation by the agents of the metropolis. The economy is not developed merely by the emergence of a local exploiting class. As long as the economic actors, whether international or local, fail to address themselves to the basic problems of society, we must reject them as underdevelopmental. Otherwise we shall be arguing for a capitalism whose growth depends on inequality and the exploitation of human labour. In fact, Kay has warned appropriately that, '...industrialisation is now such an integral part of underdevelopment that it can no longer be considered as its solution, at least not in its present capitalist form' (1975, pp. 125-126).

Given the nature of Kenya's political-economy of underdevelopment, we go on to indicate the role that law is playing in this process. From our conceptualisation of law and its potential contribution to the process of economic development or underdevelopment, we must pay attention to situation where legal lacunae permit either development or underdevelopment. We have accepted that it is the political cum economic actors who make laws in the legislature, so that any failure of legislation to intervene in the economy must be construed to be in their interest. In the case of underdevelopment as it has been described, legal machinery, either through laws or the absence of restrictive laws, was used to permit the investment of exploitative industrial capital in Kenya. Merchant capital, which concentrated on buying and selling the surplus of production, was also allowed to operate in a favourable legal atmosphere. Even without mentioning specifically the particular laws that were involved we can see from their general effect that they aided underdevelopment. Similarly at the level of exploitation of workers, the lack of legal constraints constitutes the contribution of the legal system to underdevelopment.

There are laws governing the expropriation of profits to the metropolis which contribute to underdevelopment by limiting the incentive for local capital accumulation. Legal machinery has also been used to create monopolies in certain industries which bar entry even by the very poor whose primary need is only to employ themselves in the face of widespread unemployment. The development of the self-employment in the informal sector especially in the urban areas, has been restricted by such legal monopolies.

Finally, legal principles have been used to support the development of two social groups in the rural areas - land owners and the landless, who have the option of either becoming wage labourers or serfs. We are here concerned with the entrenchment of the capitalist legal principle of the

sanctity of private individual ownership of agricultural property. Our choice of this area for more detailed analysis is prompted by the obvious fact that agricultural land has been and is by far the most important productive asset for the majority of the population.

Through the use of force and later the retrospective employment of legal principles to help create a semblance of justice and the rule of law, the colonial state aided in the individual appropriation of land by the settlers. It supported their efforts to demonstrate the supremacy of individual private owners his over the traditional communal land tenure-ship pattern which was made out to be primitive and inferior. Ironically the state continued to rely heavily on the production of small farmers who operated under communal land tenureship in the reserves (Leys, 1975, pp. 36-40). In fact, the insistence on private ownership of agricultural land was based on the desire to develop inequality and unemployment in order to produce a landless class whose labour could easily be exploited. The creation of two classes - of the haves and the have-nots - was viewed as a 'development' along the lines of capitalism as initiated by the superimposed colonial state.⁸

In the 1950s, the Swynnerton Plan was proposed, not to change the inequitable economic structure, but rather to bolster it up in the face of the political pressures of the time. It stated explicitly that:-

Former government policy will be reversed and able, energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and landless class... a normal step in the evolution of a country (Swynnerton, 1954, p. 10).

Here then was a theory postulating that, in order to develop along the lines of western capitalist states, the creation of inequality, poverty and unemployment which result from the displacement of the majority from their means of production was a necessary step.

Law was immediately invoked to compel the implementation of this economic philosophy. It was done, we must stress, at a time when the arable

8. According to Leys, 'The "inner secret" of the drive towards complete individual free-hold land tenure was thus not so much its particular merits; it flowed logically from the critical decision to accept the general structure of the colonial economy' (1975, p. 72).

land available to the Africans was extremely limited, particularly in terms of the population involved.⁹ The Native Land Tenure Rules (Legal Notice No. 452/1956) were the first 'command' type of law in this area.¹⁰ This was superceded by the Native Lands Registration Ordinance, Legal Notice No. 27 of 1959. In 1961 the Land Registration (Special Areas) Ordinance took over, only to be followed a few days before independence by the Registered Land Act of 1963, which is currently used to create the classes necessary for capitalist economic development (chapter 300, Laws of Kenya). Registration is not optional.

Having created the landed and the landless, some free market laws were created to ensure that only those who had means were guaranteed security in land ownership and use. Increasingly, most demarcated plots are unviable, even for subsistence, let alone production for the market. Many family members are excluded from inheritance of land, since only upto five individuals can be registered on one plot. Land has acquired the status of a market commodity, and can be bought up by wealthy salary-earners or those with political connections who can acquire loans from private and parastatal finance institutions. More and more smallholders have been bought out of their land and have only their labour power which is purchased at prices set by the landlords or owners of merchant and industrial capital.

The property gained through this 'free' economic intercourse is protected by the general law (Section 95 (3), Registered Land Act) and firmly entrenched under the constitution (Article 203 of the 1963 Constitution and the whole of Part XII). Even the state is denied the right to appropriate individual private agricultural property at a reasonable price - not the highly inflated legally set price - for re-distribution.* Here is a good example of one of the few instances when the law becomes supreme in preserving property relations.

9. The history of the limitation of land available to Africans is already well documented, as well as the laws that were used. Two new pieces of legislation were added at that time, which served to exclude even more Africans, especially those who had affiliations with the mau mau movement. See the Forfeiture of Lands Ordinance, No. 11 of 1954, as amended by No. 40 of 1955, and ultimately repealed by No. 27 of 1959, and The Indemnity Ordinance, No. 36/1956.

10. This argument is taken from Prof. Trubek's analysis of the nature of law within command and market economies. See Trubek, n.d., pp. 1-40.

* (see the Land Acquisition Act, 1968 (Cap. 255, Laws of Kenya), and Article 19 of the 1963 and Article 75 of the 1969 Constitution).

Law then has been effectively used as a tool in the hands of those who stand from the entrenchment of inequality. Poverty arises automatically from the inequal distribution of the means of production, as does unemployment. The role of law in underdevelopment in Kenya is simply demonstrated by empirical observation.

CONCLUDING REMARKS

We have attempted in this paper to develop a coherent theory of law and underdevelopment, not so much because law usually acts as an underdevelopment tool - it doesn't - but because it is an independent instrument that can be utilized to put into effect the whims of the ruling class. It can create injustice and it can implant justice. In other words, law can be perceived as an instrument of administration. Once we are clear on this fairly obvious fact, it becomes easy to study the role of law in any type of socio-economic structure and the process of change which may result. We must only ascertain who is in control of power relations within a given political economy - these are the people shape the law for their own ends.

Kenya's political economy is characterized by economic development strategies which concentrate on economic growth, the increase in per capita income and industrialization, but not the realization of human needs for the masses through the destruction of poverty, inequality and unemployment as goals of development. It is the type of change that is now popularly referred to as underdevelopment and law is a tool used in the administration and perpetuation of this perverse process. We conclude, then, that the question is not whether or not law can be an instrument for effecting socio-economic change, rather, it is what kind of law is necessary for promoting the desirable change or development.

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PART 2: THE LAW OF DEVELOPMENT ADMINISTRATION

GENERAL PERSPECTIVES ON THE LAW OF DEVELOPMENT
ADMINISTRATION

by

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FACILITATIVE LAW

The legal order, as we know it in the Western world and as it has been replicated in most of the less developed countries, is highly authoritarian. Lawmakers promulgate laws which are supposed to affect the activities of role-occupants and law-enforcers. Law-enforcers impose sanctions on role-occupants. Classical elite theory argues that oligarchy was the inevitable result. Social engineering in the interests of the mass is a chimera. The oligarchy will inevitably use the state to coerce the masses through sheer power, or manipulate them to accept their dictate.

The classical response has been the celebration of the free market economy. Social engineering and planning are perceived as the very opposites of the free market; intervention is the opposite of nonintervention. The legal expression of social engineering is perceived as a set of commands directed by the state to various citizens. The legal expression of the free market is perceived as facilitative law, of which the law of contract is the archetype. As social engineering is the opposite of a free market, so command law is the opposite of facilitative law.

We examine here these supposed dichotomies, and put forward two alternative theories that purport to explain how facilitative law (and contract law is the archetypical sort of facilitative law) actually works.

Many sorts of law, on their face, are rules expressing how the law-maker expects the targets of the law to behave, on pain of sanction. Criminal and tort law fit this model nicely. A rule is promulgated; if a person violates the rule he is punished, either directly as in criminal law, or through the imposition of a judgement for damages as in tort law.

Many other sorts of law, however, seem to be cut from a different bolt of cloth. Contract law does not require people to do anything. It merely prescribes that if certain agreements are entered upon, and broken,

the courts may be required to levy a sanction. General corporation laws do not require anyone to enter into a corporation. They provide a facilitative form. If parties wish to enter into a corporate relationship, the law prescribes some of the consequences. Because role-occupants are not required to enter into particular contracts, or to enter into particular organizations, the facilitative form seems to free the role-occupant of coercion and to release him from the shadow of overarching power.

Is it true that facilitative law frees the role-occupant from coercion? I shall denote the two contrary answers to this question as the classical and the anti-classical views.

The Classical Perspective

The classical paradigm asserts that facilitative law does free the citizen from state coercion. Long ago Sir Henry Maine said that the movement of all progressive societies heretofore has been from status to contract. By this Sir Henry meant that:-

The Individual is substituted for the Family, as the unit of which civil laws take account ... Starting, from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals.

Jurisprudential theories were developed which gave ideological support to the idea of contract. Thomas Hobbes said that the definition of injustice 'is no other than the nonperformance of Covenant'. Nietzsche, perhaps sarcastically, was even more extravagant: 'To breed an animal that is able to make promises -- is that not precisely the ... task which Nature set for herself as regards man?'

Contract is a device for social cooperation. In a highly complex society, people must do many different things. Manufacturers must buy from suppliers, employ labour, sell to customers; landlords must rent to tenants; submanufacturers must contract with manufacturers; wholesalers and retailers and customers must interact with each other to keep the vast engine of the economy moving.

Without planned organization of the interchanges necessitated by the division of labour, it seems preferable for every man to seize his own opportunity. Through contract, the parties to an exchange define the norms of conduct for the occasion. The market becomes a giant communication

system, by its 'invisible Hand' advising individuals concerning the sort of norms to demand and accept in order to maximize their personal benefit.

From the point of view of the parties to a contract, they are merely exercising a personal freedom to conduct their affairs in accordance with their emergent needs and desires. They exercise freedom by themselves determining the norms to which they will be bound.

The notion that contract law embodies 'freedom' is closely intertwined with the ideal type of the market economy. If perfect competition prevails, then by definition no individual has the power to affect market price. The availability of other potential bargaining partners, who offer their services, or goods on terms and conditions, defined not by themselves, but by the 'Invisible Hand' of the market, protects both parties from the possibility of arbitrary power exercised by the other.

What ideal type of legal order is apt for this ideal conceptualization of the economic order? Unless an individual can exclude others from interfering with his possession of things, he will not purchase them. The law of property and of torts purports to guarantee rights of peaceable possession. Unless there are guarantees that the law of marginal utility will not continue to operate after a bargain is struck, promises of future performance become mere pious intentions. The law of contract purports to ensure that promises, once made, will be kept.

The classical view implies a model of the state as a value-neutral framework whose task it is to ensure only that in case of dispute these bodies of law are enforced. It presupposes a sharp discontinuity between state action in the private sphere and state nonaction. The former consists of intervention and social engineering; the latter consists of adjudicating disputes arising in the private sector. In this view, the *laissez-faire* ideal of the state is the very opposite of social engineering. State inaction is markedly different from state action.

We can summarize the classical perspective in a series of propositions:

- 1) facilitative law permits the parties to an interaction to determine their own norms of conduct;
- 2) the perfect competitive market ensures that neither party has power over the other;
- 3) the state is a neutral, impartial framework within which bargaining can take place and conflict can be resolved peaceably;
- 4) the state, by limiting its function to conflict resolution

does not engage in ordering the society; there is, therefore, a sharp discontinuity between state inaction and state action; and 5) facilitative law therefore ensures 'voluntariness'.

The Anti-classical Perspective

The anti-classical paradigm is at issue with the classical on all but the first of these propositions. Facilitative law does permit the parties to the transaction to determine between themselves the norms defining their interchange. Through it, the state delegates to the contracting parties a portion of its sovereign power. The two parties legislate for themselves in the act of bargaining; they lay down rules; the state proceeds to enforce them. 'From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised in accordance to the rules agreed upon between the parties to a more or less voluntary transaction.'

Parties to bargains are seldom of equal bargaining strength. To the extent that they are not, contract, however it may appear to the parties, is not a matter of freedom of choice, but of command. Is it significantly different to say to a man, 'I will pay you a wage if you will work for me' rather than, 'You will get no wage unless you work for me?' Two hundred years ago Lord Chancellor Northington expressed it succinctly: 'Necessitous men are not, truly speaking, free men.'

At law, to treat unequals notionally as equals is in fact to elevate the stronger to a position of domination. In a bargaining situation, the stronger imposes upon the weaker the norms of conduct which he desires. There is no 'equality' between African labourers and a giant copper mine or plantation. An African who must raise cash to pay a poll tax, or go to jail, has no freedom to decline to work for cash wages.

The power to create norms of conduct, that is, to legislate, and the use of state power to enforce such norms are two of the three familiar attributes of government. The net result of contract law is to transfer to the economically superior classes in the community the most significant powers of the state, all under the fictional disguise of equality and freedom. Facilitative law and 'voluntariness' begin with notions of 'freedom'. They end by subjecting the weaker party to the power of the stronger. Facilitative law manipulates the weaker party, as does planning law or social engineering. The principal difference lies in who does the manipulating.

Classical theory meets this claim by reliance upon the 'Invisible Hand' of the market to determine 'objectively' the terms and conditions of any particular interchange. The anti-classical model argues not only that the perfectly free market in fact never appears in the real world, but also that it is theoretically impossible for it to exist. The model of perfect competition assumes that all preferences can and must be expressed through the market. Before the principle of marginal utility nothing is sacred. If there are effects of economic activity which are not taken into account in setting prices, that is, externalities, to that extent the market mechanism does not function.

All laws and customs are externalities in this sense. They impose constraints on bargaining, constraints that do not fall before the principle of marginal utility, for they are supported by police, judges, bailiffs, sheriffs, jailers and, ultimately, the army. Willard Hurst has made the consequences of this proposition central to his jurisprudence.

Law influences the decisions made by 'private orders'.... Every entrepreneur in deciding how to invest his time, energy and money, calculates the profits expected from the course open to him. Every calculation includes an assessment of the law's impact on profits: subsidies make some investments more attractive while laws that force the entrepreneur to absorb the 'external' costs of an activity make that activity less attractive. To each entrepreneur, then, the law appears as a factor which affects his decisions but over which he has no control.

Warren Samuels, following Robert Lee Hale, makes a useful distinction between voluntary freedom (the opportunity or capacity to determine the alternatives themselves) and volitional freedom (the choice between existing alternatives). Since law structures the range of alternatives open to participants in any given market, the participants have only 'volitional freedom'. The state alone has 'voluntary freedom'.

Society conveniently can be defined in terms of its normative (or institutional) system. That is what distinguishes it from a hive of bees. Norms can be expressed only in terms of law or of custom. To state that all law and custom are externalities is to say that all society is external to the ideal type construct of the free market. At precisely the point at which the ideal type conceivably could exist, society disappears. To state that the market cannot exist without law, but that all law is an externality, is to state a paradox.

To the extent that the free market does not exist, its 'Invisible Hand' does not limit the power of one party in making an exchange with another. Since law and custom to a very great degree define the extent to which the ideal type free market does not exist, the power of one party over another must itself be a function of law and custom. Since law and custom are the indispensable components of organized society, this is to say no more than that the 'free market' exists in society, and society itself determines the relative power of the participants.

The anti-classical understanding of facilitative law, therefore, focusses upon the framework of institutions within which bargains are struck and upon the power relationships of the parties. A bargain implies 'freedom' only in that, given the available alternatives, both parties prefer the bargain struck. It is the framework which structures the alternatives available to each party which determines the extent of their volitional freedom.

It is further argued that the model of the value-neutral state providing an impartial framework within which conflict can be resolved peacefully is not only empirically, but also theoretically impossible. A decision-making structure--and the state is, par excellence, a decision-making structure--cannot be value-neutral. The rules that define any decision-making process necessarily limit the range of potential inputs, conversion processes and feedback functions. These rules, to that degree, predetermine the outputs, that is, the decisions. The state, perceived as a framework for the resolution of conflict, is a decision-making structure. No more than any other decision-making structure can it be value-neutral.

If the decision-making structure cannot be value-neutral, its output cannot be value-neutral. The ~~laws~~ laws of property and contract which are required by the ideal type model of the market economy therefore cannot be value-neutral, for they are products of a decision-making structure.

The law of property, for example, contains a huge number of separate normative propositions: No other person may appropriate my desk unless certain conditions are met; I may dispose of it as I will; I may rent it, and so forth. The conventional definition of the word property is that it is a bundle of rights, duties, powers and liabilities with respect to something. In most societies, the content of that bundle buttresses the shape of the economy. In an interdependent society, property is necessary to the livelihood of many more people than its owner. Ownership gives the proprietor

the power to command others, through the exercise of contract. The precise scope of this power is determined by the details of property, tort and contract law.

This normative character of property law is exemplified in the laws of land tenure. They define much more than who has the right to sell land or to exclude others. They limit who can obtain credit (if I do not own land, I cannot use it as security for a loan); who can hire labour (if I do not own land, I cannot hire anyone to work it); who can market crops (if I do not have an interest in land, I cannot farm and therefore have nothing to sell).

In short, the 'free market' is not merely an ideal type which is approximated more or less closely by various societies. It is an impossibility. The market cannot exist without law, but law is an externality. The market cannot exist without a value-neutral law and state; but the state and its principal output -- law -- cannot be value-neutral. Behind the 'Invisible Hand' there is a thumb on the scales. Gunnar Myrdal makes the same point:-

Price are manipulated. They are not the outcome only of the forces in the market: they are in a sense 'political prices', depending also on the regulating activity of the state, of quasi-public and private organizations and of private businesses. The state interferences in the price system are, in a sense, the ultimate ones....

The state must, willy-nilly, favour some and disadvantage others. For the state to stand by and permit the private activity of citizens to determine the configurations of the economy is as much state action as overt intervention. Cui bono? is not simply a possible query; it is the most significant question of all.

We can summarize the anti-classical model in a second set of propositions: 1) facilitative law permits the parties to an interaction to determine their own norms of conduct; 2) facilitative law ensures that the more powerful party to an interchange will impose his desires upon the weaker. Furthermore, the perfectly free market does not and cannot exist as a protection against the imposition of private power; 3) the state, by enforcing private agreements, lends its reserved monopoly of violence to enforce the norms agreed upon by the parties of the interchange; 4) since every decision-making function is necessarily value laden, the state is not and cannot be a value-neutral arbiter; 5) the enforcement of private bargains made under the guise of facilitative law is therefore as much a form of state

intervention as more direct commands from the state to citizens; and 6) facilitative law therefore ensures that the state will delegate its power to the more powerful party.

Implications

If the anti-classical explanation is in fact not diswarranted, and the classical one is, a variety of implications arise. We discuss two of them here.

State Action and Non-action. It is obvious that the existence of positive law on a given subject raises legal questions. Does the absence of positive law on that subject also raise a legal question?

The problem has arisen directly in the United States by the line of cases growing out of racially restrictive covenants. In Shelley v. Kraemer, a racially restrictive covenant prohibiting any 'non-Caucasian' occupancy was denied enforcement by a court on the ground that to enforce it would require state action depriving the Shelleys, who were blacks and the contract purchasers of a parcel of land purportedly covered by the covenant, of the equal protection of the laws. Car Auerbach and others have asked: 'Shall we say, then, that when the state chooses not to exercise its power to prohibit racial discrimination, it is sanctioning such discrimination and such inaction constitutes state action subject to constitutional commands?'

Questions of the same order can be asked about the problems of law in Africa. In colonial Kenya, the colonial state patently intervened on a massive scale into the economic order. In colonial Gold Coast, apparently the colonial government was content with the market economy at a time when the economy operated to the great advantage of the English trading firms. Shall we say that by not appearing to intervene, the Gold Coast colonial government was exercising state power on behalf of the trading firms?

If the answer is affirmative, the consequences for one's understanding of the interactions between the legal system and the social order seem far-reaching. But for the particular application or nonapplication of state power at hand, the social situation might be otherwise. The shape of institutions, whether formed overtly by legal rules or covertly by custom in the face of which the state has some power to effectuate change, is determined by the state. Society is not a mindless, accidental concatenation of roles and statuses. It is the existence of state power which makes possible rational

directed social change. Given that potential, the state must be charged with responsibility for whatever institutions exist if there are resources in the state sufficient to change them.

The perception that explicit state nonaction and action equally forms of state action requires the conclusion that there is no such thing as an economy without state intervention. The form of intervention may be relatively obvious, as in the Kenya case, or relatively concealed, as in the West African case. Both economies were shaped by state intervention through law.

So radical a perception is a necessary preliminary to any meaningful science of directed social change through law, that is, of a discipline of law and development. Unless one perceives a potential for change, it is fatuous to talk of inducing change. If there is a potential for change, then the state is responsible for permitting the existing situation to continue. Conversely, the fact that the state is responsible for maintaining the status quo demonstrates the potential for change through the use of state power, that is, through law as it was defined earlier.

Conflict or Consensus. Rather tentatively we propose one other consequential proposition which seems to flow from the analysis so far. We have asserted that, however desirable it may be for the state to constitute a value-neutral framework within which struggle can take place, it is not only practically difficult but also theoretically impossible for it to fill that role. The pluralist conception, which rests upon the ideal of a value-neutral state, is equally implausible.

If the state cannot be value-neutral, then it is impossible to argue that it rests upon value consensus. The modern school supports the notion of value consensus upon the theory that the state exists to adjust conflict. Both classical and anti-classical perspectives agree that conflict is pervasive in society. The value consensus claimed by the structural-functional school is limited to the neutral, peacekeeping, society-conserving function of the state as arbiter of conflict. Once the impossibility of that function is demonstrated, then the minimum basis of societal consensus likewise is destroyed.

To say that there is no value consensus, of course, is not to deny that there are particular sets of values, or paradigms of society, which are very widely shared. Yet consensus, as opposed to the values or interests

of a shifting majority, can exist only upon the terms of survival. Survival of the polity, in the pluralist view, requires a value-neutral state as the framework of struggle. That ideal is conceptually impossible.

That the state has a monopoly of legitimate violence in the polity is an axiomatic proposition. If its use of violence is not limited to a supposedly value-free function which rests upon a value consensus as to its appropriate role, then, as Ralph Dahrendorf says of the conflict model, 'every society rests on constraints of some members by others'. In short, it is the very existence of law and its enforcement institutions which best demonstrates that the conflict model, rather than the value consensus model, best explains society.

THE IMPLEMENTATION OF LAW

Societies consciously bring about social change by inducing a variety of actors to change their patterns of behaviour. To do this, governments apply conformity-inducing measures to role-occupants. That is the business of development administration. Soft development is characterized by the wholesale failure of this process.

The myth of laissez-faire has it that the administration is concerned internally only with law and order and the collection of taxes. The regulation of the economy is accomplished by the market. Conflicts within the economic system are adjudicated by the courts. They also serve to keep the boundary between government and the citizen immune from bureaucratic poaching. Besides the courts and the civil service, there are no other governmental implementation institutions.

Self-evidently, this myth bears no resemblance to the reality of the African world. Courts have been largely irrelevant to development (although they have served a significant dispute-settlement function). The administration has been deeply involved in activities very different from maintaining law and order and collecting taxes mainly, but not exclusively, inducing new economic activity. An entirely new sector of governmental institutions concerned with implementation has arisen -- the parastatals and government corporations.

Neither courts, administration nor parastatals have worked very well to bring about development. The result has been clouds of rhetoric, even some laws purporting to bring about radical institutional transformation, but little actual change -- that is, soft development.

In order to generate a theory explaining this widespread failure, we must first characterize the sorts of decisions required of the implementation institutions. We shall then put forward a general model of decision-making structures as the basis for their analysis, and, finally a very general theory explaining the relative failure of the institutions of implementation.

The Decisions Required for Development

The general model of government that we all learn in school separates its functions into legislative, administrative and judicial. Law-makers create rules; the bureaucracy or a private individual in the first instance asserts that there has been a breach; the courts decide guilt or innocence and assess punishment. Administration in this view is usually thought of as accepting goals from outside the system, as depending upon resources from other systems and being instructed in the use of means!

These instructions as to goals and means are packaged as rules laid down by higher authority. The function of the administration is to apply rules.

Another function of these institutions may be distinguished. This we denote as problem solving: '...developing goals within the system using resources over which the system has control, and being free in the use or means'. In this function, the law-makers do not enact rules to guide the behaviour of the administration. Rather, they identify problems and turn them over to the administration to solve.

Difficulties for which government has always accepted responsibility -- for example, maintaining law and order -- have long since been solved in ways more-or-less satisfactory to the ruling elite. Because they are long-term they are defined by rules. The criminal law is an example. That is what is meant by 'institutionalization'. New difficulties arising in these areas can be resolved by incremental changes in the existing corpus of rules. Of course, this leads frequently to frustration, for it happens sometimes, ~~that~~ the existing solutions will no longer do, no matter how much incremental tinkering is attempted. When that happens, the system is in crisis. The criminal justice system in the United States today is an example.

When the African countries achieved independence, their governments inherited institutionalized systems for dealing with law, order, taxes

and the economy. Now, however, they had a whole new set of difficulties thrust upon them, the demands for development. The existing sets of rules are plainly insufficient for dealing with these new problems. The structure of the formal law-making organs (cabinet, party and legislature) has been incapable of generating solutions. The best that they have been able to do has been to identify the difficulties at hand and turn them over to the bureaucracies to solve.

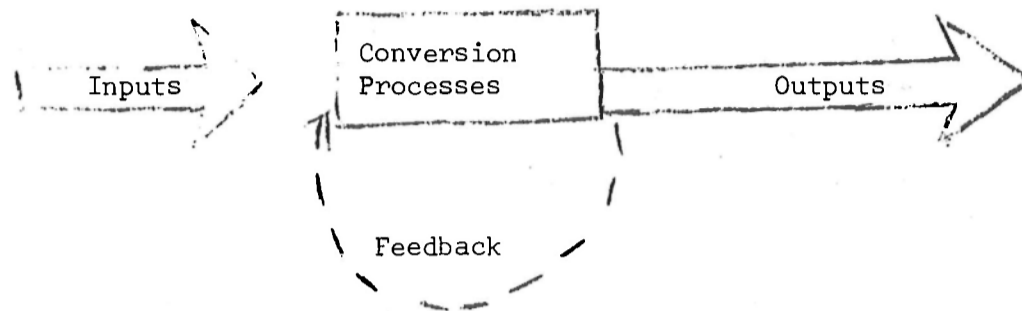
Much the same process took place in the United States. Federal judges have increasingly found themselves trying to solve problems such as school integration, due process for prisoners and the like, rather than applying fixed rules to neatly defined cases. The great administrative agencies of government, too, have been called upon to solve problems, and in the course of doing this to create the necessary rules.

As a result, the traditional allocation of decision-making to the legislature and implementation to the bureaucracy has become inapplicable. The task of the highest political authorities has become only the ordering of priorities in solving problems. The process of actually analyzing the difficulty, devising a programme to solve it, implementing the problem and then learning from that experience how to improve it was turned over to the bureaucracy or other 'implementation' agencies (such as parastatal organizations). The determination of policy in the traditional sense of devising a fairly detailed programme to solve mergent difficulties passed from the supposed policy-makers to the supposed implementers. Typically, formal legislation has done little more than define a difficulty and empower a minister to promulgate subsidiary legislation looking towards its actual solution.

The received implementation machinery of the African states did not succeed very well in their new task of problem-solving because they could not. Decision-making machinery is never capable of universal application. That is to say these institutions lacked the capacity to meet the new requirements imposed upon them.

Decision-Making Systems and the Range of Decisions

In order to explain why it was that the implementation institutions in Africa lacked the capacity to generate the sorts of decisions required for development, it is necessary first to provide a framework for analysis of decision-making systems. Every decision-making system can be conceptualized as consisting of inputs, conversion processes, outputs and feedbacks:-



Inputs include the recruitment and socialization of decision-makers, the troubled situations chosen for examination, the candidate explanations selected, the data collected, the proposals for solution, the bodies of reliable knowledge and data against which these are tested, and the sorts of large-scale paradigms or ideologies (or values) used to guide discretionary choice in problem-solving. The conversion processes are processes by which these materials are combined into a decision. That decision, usually purporting to solve the difficulty poses by the input process, is the output. The feedback is the process by which the output and its performance in the real world becomes an input to new decision-making, so that the system can learn from what it has done to improve its subsequent decisions and, sometimes, its own working rules.

Decision-making systems in government always consist of many roles. Some provide inputs, some are involved in the conversion process, others in feedback. As roles, they of course act in patterned ways, defined by formal rules or informal conventions. These patterns define the range of choice of the decision-making system as a whole.

Human behaviour can be explained by asking two questions: What is the range of choice and why do the individuals involved in the conversion process make the choices they do within that range? When this decision-making model is used to analyze individual decisions, too often it takes as given the patterned behaviour which makes it a system. The only question asked is, 'was the particular choice made within the range thrown up by the system?' The model then directs attention only to those matters that actually arise for decision and the range of choice thrown up. It does not analyze non-decisions.

So used, the model is inherently static. It assumes as given the existing structure of the system. It ~~therefore~~ cannot lead to explanations

in terms of structure upon which to ground changes in the working rules. It leads to explanations for decisions which rest upon the personal characteristics of the decision-makers.

Our interest is in structure - that is, in the working rules that define the structure and explain, not the values of individual decision-makers, but why decision-makers of this sort are so consistently recruited. This requires that we examine the working rules. Thus used, we think the model avoids being static.

In an abstract never-never land of decision-making, the most rational decision would be one which considered all the potentially useful data, all the potential hypotheses, all the various bodies of ideas against which suggestional might be reasoned and all the possible consequences of a decision. Real life is more difficult. Inputs and conversion processes are necessarily limited. First, as a simple matter of logistics, not every potential solution can be weighed in the balance. In the real world, every decision-making body, even the government, has some substantive restraints placed upon it when dealing with particular subjects. A constitution may prohibit the legislature from enacting any statute impairing the right of the people to carry arms. A corporate charter may limit the decision-making power to the manufacture of cement. Second, every real life decision-making body follows repetitive patterns of behaviour which define its processes - its working rules. These rules, too, whether of law or custom, necessarily limit the activity of the various role-occupants. In consequence, inputs and feedback are also limited, which limits the range of potential outputs.

Conversion processes are limited as well. First, every decision-maker brings to the decision a set of culturally acquired values or (which comes to the same thing) a model of society. These values or models place limits upon the variables which the decision-maker will consider appropriate to take into account. The decisions of British judges concerning matters involving witchcraft in Africa plainly excluded various considerations which might have seemed germane to the Africans involved.

In consequence, to the extent that the rules of recruitment and socialization of law-makers limit selection to those apt to have a particular set of values, these rules pro tanto preform the conversion processes and hence the output.

Conversion processes are also constrained by the working rules which determine how decisions are to be taken. A conversion process that requires the output to be only incrementally distant from an existing rule for example, may have a very different output from one which operates with rules that admit the possibility of more radical solutions. His own values and ideologies further limit the decision-maker's range of choice.

In short, the scope of grants of power and the working rules of the decision-making process necessarily constrain the range of inputs, feedbacks and the conversion process. The result is to limit the range within which potential outputs must fall.

'Values' and the working rules of the system are thus seen to be functional equivalents. They both serve pro tanto to preform the decisional output, for they both guide the discretionary choices made in problem-solving. In this sense, every decision-making process is necessarily value-laden, for process and capability are functional equivalents to values. A genuinely neutral decision-making process is inconceivable.

In designing decision-making structures, therefore, lawyers must determine what sorts of inputs, what sorts of conversion processes, and what sorts of feedbacks will be functional to achieve rational decisions within the range of outputs required. The rules that define the processes of decision-making, by determining their limits, preform the range of decisional output.

A Theory of the Law of Development Administration

The misfit between the problem-solving tasks faced by development administration and the existing rules defining its structure suggests an explanation for its relative failure. Courts and administration in the *laissez-faire* model were designed to apply rules. That function requires rules imposing responsibility, accountability and the instrumental character of administration.

Discretion is their very opposite. Discretion unconfined is the essence of authoritarianism. Bureaucracy is inherently hierarchical. Only the fact that it is rule bound, and therefore accountable (it must conform its behaviour to the rule), prevents it from becoming dictatorial. To give broad discretion to a bureaucracy insulates it from accountability.

In the colonial period, the bureaucracy was Janus-headed. With respect of the white settlers, it was usually rule-bound and accountable and, where discretion existed, there was great participation on decision-making by its white public. With respect to Africans, it was a dictatorial machine characterized by broad discretion and freedom from rules and no participation by Africans at all.

On independence, the new administration continued as the old. In form it was hierarchical and compartmented. As such, it was useful for applying rules. It was not very well organized to solve problems.

Yet the broad discretion given high-level bureaucrats by the law continued. Now, however, they were given new problems to solve, and with them came new grants of discretion. Whole areas of jurisdiction were carved out and given to the parastatals, precisely because it was believed that parastatals had the discretion and power required to be 'dynamic' and 'entrepreneurial' -- that is, to solve problems.

In neither case was the discretion granted easily held to account. As a result, the administrators and managers used their discretion as administrators and managers are wont to do everywhere: to maximize rewards and minimize strains for themselves and their bureaucracies. They aggrandized themselves, or did favours for friends and relatives -- hence the development of a 'bureaucratic bourgeoisie'. Rather than creating new solutions for difficulties, it was usually easier and more rewarding for them to fall back into old ways of doing things -- or, what is the same thing, to do nothing to induce change. Radical change threatens the existing holders of power and privilege, who are best able to reward bureaucrats.

This can be formulated as a theory to explain the pervasive failure of African systems in the administration of development, and hence of the laws which define them. We put forward here a very general set of hypotheses:-

1. The working rules defining the inputs, conversion processes and feedbacks of a decision-making system preform the potential range of outputs.
2. At independence, the working rules defining African systems for the implementation of law (i.e., the courts and the civil service) created authoritarian, compartmented systems capable of applying punishments as behavior-inducing measures and endowed with broad grants of discretion.

3. Development requires problem-solving, not rule-applying.
4. The working rules defining problem-solving institutions must allow wide discretion, must be capable of providing rewards and educative conformity inducing measures as well as punishments, and must provide that the role-occupants themselves engage in a problem-solving process leading to decisions concerning how to behave.
5. Courts have been only marginally relevant to development.
6. The substantive law of development in Africa vested broad discretion in the civil service and created the parastatal sector, whose managers also had broad discretion and which were also authoritarian.
7. The received rules of administrative law, and the structure of the parastatals, contain only very weak controls over discretion.
8. Role-occupants vested with broad discretion in authoritarian organizations will tend to use their discretion to maximize rewards and minimize strains upon themselves and their organizations.
9. In Africa, the existing economic and political elite have been the most important source of rewards and strains for the bureaucracy and parastatal managers.
10. In Africa, bureaucrats and parastatal managers have maximized rewards and minimized strains for themselves and their organizations by:-
 - a. Aggrandizing themselves, their friends, associates and relatives, and
 - b. Making incremental rather than radical changes in institutions, or not changes at all.

This explanation can be condensed: authoritarian institutions whose managers are vested with great discretion are incapable of generating decisions which foster development. Paternalism is an authoritarian system with broad grants of discretion. It cannot work. 'Development from above' cannot work. When it was tried in Africa, the consequences have been soft development and the bureaucratic bourgeoisie.

PERSPECTIVES: THE INTELLECTUAL CONTROL OVER VALUE CHOICE IN RESEARCH
AND THE DEFINITION OF 'DEVELOPMENT'

In the course of research following the methodology we have suggested, there are a host of discretionary choices to be made. Whose trouble should we attend to? What stock of propositions should we draw upon to put forward possible explanations? What proposals for solutions should we try? What counts as adequate or successful implementation? In this sense all social science is value-laden not only in the selection of the troubles to be examined, but at every stage except one. That exception is in the conscientious search for falsifying evidence. The scientific temper implies a commitment to truth. If we cannot falsify explanations by data publicly accessible, which any two scientists using the same methodology must accept, then knowledge itself is impossible. That one critical point aside, every step in the research agenda is discretionary. It is dependent upon 'values'. Since this is so, the policy advocated as the result of research depends upon these 'values'.

Mainstream social science generally at this stage abandons the scientific enterprise. Max Weber taught that all that social science can do is to tell one the probable consequences of alternative courses of action. What sort of choice I make depends upon what sort of man I am. That is (as Pound called it) a give-it-up philosophy.

How to impose intellectual controls over these discretionary choices made in the course of research? We believe that the answer can be found in the functional equivalence of values, ends, paradigms (models) and explanations.

Large-scale ends-in-view such as legal liberalism are related to paradigm as proposals for solution are related to explanations. Paradigms (or models of society) are explanations of how social systems work. Adam Smith did not write a propaganda tract for capitalism. He put forward an explanation for the wealth of nations. Karl Marx in Capital did not write an exhortation for socialism. He set out an explanation for the political economy of nineteenth-century England.

What are commonly called 'ends' (that is, desirable states of affairs) are proposals for solutions. Capitalism is a solution to the difficulties examined by Smith, corresponding to the explanation of capitalist society. Every so-called 'end' or value in principle rests upon an explanation, implicit or explicit. For every end, therefore, it is possible to discover

an explanation upon which it must rest.

The function of values, ends, paradigms and explanations in the research enterprise is the same: they guide the discretionary choices that must be made in deciding what troubles to examine, what possible explanations to test, what solutions to offer. For example, it does not matter whether I make certain choices because I adhere to socialism as an end or because I believe the Marxist explanation of underdevelopment to be true. The choices will be the same.

The great difference is that explanations are in principle falsifiable. They are propositions about facts. Ends are not. They are expressed in propositions about matters of faith. The bulk of the Wealth of Nations is data to support the explanations advanced. So is the bulk of Capital. The choice between the two ought not to depend upon the sort of man one is, but upon the persuasiveness of the data. Passion is all very well in the research enterprise. In fact it is required¹-except at the point of assessing data. There, an icier mood is appropriate.

The function of large-scale explanations (that is, models) in policy research is to guide the search for a just (and therefore also practical) solution to a specific trouble. The success or failure of that solution to resolve the difficulties which excited the research is the validation or falsification, not only of the particular design but of the underlying principles upon which it was based. The activity of implementation generates data to test every aspect of the research. The systematic examination of experience converts it from mere ongoing activity into activity whose purpose is in part at least to generate knowledge - that is, into experiment.

It is well known that there is no general agreement on large-scale explanations for the problems of poverty and oppression in the less developed countries (LDCs). Rather, there are a host of explanations in all the social sciences.

These are divided in two ways. Some theories ask only why people behave as they do within the existing institutional order, and others also ask why the existing order is as it is. The first asks why people choose as they do, taking the existing range of choice as given, the second treats the range of choice itself as problematic.

The other division is between theories which view the world from the perspective of the Establishment, of those with power and privilege, and those which view the world from the view point of those without power or privilege. Four categories of theories thus emerge :-

Point of View

Range of Variables Considered.

	Elites/ruling class	Mass/the poor
Institutions as given	- - (1)	- + (3)
Institutions as variables	- (2)	+ + (4)

We shall discuss each of these theories in turn according to eight headings:-

1. The trouble examined, and the principal explanations advanced,
2. The rate of change - from doing nothing, through incremental change to radical institutional change,
3. Conflict or consensus theory,
4. The sort of social theory involved,
5. The sort of political theory involved,
6. The sort of economic theory involved,
7. The prescriptions for change derived from the theory, and
8. The definition of 'development' typically used.

Theories that examine the poverty and oppression of the LDCs from the viewpoint of the elite or the economic ruling class and which take existing institutions as given typically argue that the troubles of the LDCs are function of the values of the people who live there (for example, their lack of 'entrepreneurship'). They are sometimes implicitly or explicitly based on racist assumptions. They argue that no real change is possible until these 'values' are changed, a long, slow process. Usually they invoke notions of consensus -- that is, that there is a set of values that are possessed by practically everyone within the polity. The social theory involved is

usually some variant of elitist theory. Those with power and privilege have reached their position because of their superior personal qualities. Political theory tends to match social theory, justifying existing political arrangements by the qualities of the elites. Economic theory is ordinarily some variety of laissez-faire economics, which takes the institutions of the economic order as a given which need not be examined. Given an ongoing economic order, changes in inputs of land, labour and capital should lead to corresponding changes in output of goods and services. The prescriptions for change ordinarily are simply to do more of what is already being done--to produce more coffee or cocoa or copper--based upon exhortations or education of peasants (especially 'progressive' farmers) to import capital and technological skills from abroad and to improve the infrastructure in order to lay the basis for capital enterprise. 'Development' is usually defined in terms of increased per capita GNP. An example is the work of David McLelland on 'high N Achievement' of the 'Achieving Society'.

Theories that take the viewpoint of the elite or ruling class, but perceive institutions as potentially manipulatable variables, tend to explain poverty and oppression by the weaknesses of existing institutions to provide entrepreneurial opportunities -- land tenure systems or family institutions, for example. They propose, therefore, incremental changes in these institutions in order to facilitate a market system. They usually advocate state corporations as a source of 'soft' financing for private enterprise, or even as productive enterprises where there seems no possibility of private entrepreneurship providing specific productive facilities. Sometimes the advocacy of state corporations is coupled with the proposal that, once established, they should be sold to private enterprise. In terms of social theory, these theories lean heavily upon structural-functionalism, finding inspiration principally in the work of Max Weber and the American sociologist Talcott Parsons. Political science theory tends to be some version of American pluralism, emphasizing differentiation of function as a mark of modernity.

In economics, theories of this type are a limited version of institutional economics. Typically, they prescribe some form of state capitalism as the solution for underdevelopment. Entrepreneurial initiative is the principal engine for development, with the state acting as surrogate where entrepreneurs are not likely to come forward to initiate economic activity. 'Development' is usually defined by reference to Western, capitalist models, and measured in terms of differentiation of function, secularism, and increased per capita GNP. Examples are the work of T. W. Schultz, 'Modernization and Economic Development', and the work of David McLelland, 'The Achieving Society'.

and increased per capita GNP. Examples are legion: W.W. Rostow, W. Arthur Lewis, Almond and Powell, and a host of others.

Theories that take institutions as given, but take the perspective of the mass rather than the elite or the ruling class, tend to see elite self-interest as the sole cause of poverty and oppression, usually in alliance with the rapaciousness of foreign exploiters. They sometimes involve race or ethnicity as an explanatory variable. Their proposals for change tend to focus on replacing the existing elite or ruling class with a counter-elite whose sympathies will be with the masses. Theirs is, of course a conflict theory, which perceives all society as based on the opposing interests of rulers and ruled. Their social theory explains behaviour in terms of the conflicts of self-interest between mass and elite or the economic ruling class. Their political theory, therefore, tends to explain the political choices made by the various strata in society according to their respective economic self-interests. Since that fails to explain why the mass of the people do not immediately revolt, they fall back upon elitist theories that characterize the peasantry as 'fatalistic' or dominated by false consciousness. In economics, they tend to adopt a kind of dependency theory that blames all the ills of underdevelopment on international corporations and foreign exploiters. Some theorists in this category offer no prescriptions for change. If the explanation of the difficulty is the world capitalist system, and the LDCs are impotent to change that system, what can be done? Other theorists in this category call for immediate revolution, usually violent. 'Development' is usually defined, if at all, in terms of success in changing the dependency relationship of the national economy upon the world capitalist system. Examples are Walter Rodney's How Europe Underdeveloped Africa and much of the writing of Franz Fanon.

Theories that adopt the viewpoint of the mass, and take institutions as a manipulatable variable, perceive the institutions of society themselves as the principle explanation for poverty and oppression, and the intervention of the state as the principal vehicle of change. Since it is the institutions of society which cause poverty and oppression, their radical change must be accomplished. These theories are invariably based on a conflict interpretation of society. The social theory explains behaviour principally by the notion that people make choices among the constraints and resources thrown up by the institutions of their society, as they perceive them, and that they are motivated in the final analysis by self-interest. The power of elites and ruling classes can be explained, by such institutions as property and contract law, or by the system of political rule by which various individuals are

recruited for their roles and the power which they are given once recruited. In economics, such theories base themselves on Marxist explanations, or on those versions of dependency theory which include institutional explanations. Such theories prescribe radical institutional change, looking to a severance of dependency upon the world capitalist system, widespread participation by the mass in political decision-making, and the creation of an integrated economic system with a high degree of internal production and exchange consciously created by the state. 'Development' is typically measured by an increased per capita GNP and a progressive improvement in the quality of life of the mass. Examples, again, are legion: Samir Amin, Colin Leys, Giovanni Arrighi, R.H. Green, and many others.

Of these four sets of theories, only the third and fourth are of interest with respect to law and development. The legal order is an instrument to change repetitive patterns of behaviour and 'institutions' is only another word for repetitive patterns of behaviour. The very definition of the subject matter of law and development requires that institutions be considered as the principal manipulatable variables.

In fact, theorists of the first and third types have surprisingly little currency today in the social sciences. Classical laissez-faire, like the old soldier in the song, does not die, but has slowly faded away. Romantic revolutionaries congregate in cocktail lounges as well as in universities. The real choice for the LDCs lies in perspectives derived from the second and fourth sets of theories, that is in explanations pointing either to state capitalism or to socialism.

Both of these sets of theories, of course, insist that they are directed to resolving the problems of poverty and oppression. We sketch here an example of each of these theories, and their consequences for the legal order. We label these respectively contract and plan theories.

Contract Theory

How should societies move away from a regime of status to some other regime of high specialization and exchange? There are many explanations for poverty which lead to quite different prescriptions for action. Most of these can be placed into one of two categories. A typical example of the first sort is that of Paul Samuelson, in an early edition of his textbook on economics. His explanation can -- very sketchily--be restated thus:-

1. The poor countries are deficient in the four 'economic fundamentals', viz., population, natural resources, capital formation and technology.
2. Without these economic fundamentals, there can be no opportunities for profitable investment nor investors with capital.
3. Without opportunities for investment and investors with capital, there will be no investment.
4. Without investment, the productive capacity of a country remains low.
5. Poverty exists where the productive capacity of a country remains low.

Lurking behind this explanation lies an important unstated assumption put nicely by Herbert A. Simon. He distinguishes between the 'inner' and 'outer' environment of a system. The former is the substance and organization of the system itself; the latter, the surroundings in which it works. Since any given system has made some sort of an adjustment to its environment, it can be supposed that given a small change in the environment there will be a corresponding adaptive change in the system. Thus,

we can often predict behaviour from knowledge of the system's goals and its outer environment, with only minimal assumptions about the inner environment. An instant corollary is that we often find quite different inner environments accomplishing identical or similar goals in identical or similar outer environments-- airplanes or birds, dolphins or tunafish, weight-driven clocks and spring-driven clocks, electrical relays and transistors.

Samuelson makes an analogous assumption. Underlying his analysis is the belief that if adequate incentives are offered, individual entrepreneurs will come forward to invest in such a way as to increase production. Given a change in the supply of 'economic fundamentals', one can expect a change in the economic output. This assertion can be made without an particularly close examination of the inner environment --the institutional structure of the economic system itself. His explanation directs attention away from that structure as a 'cause' of poverty.

Proposals for solutions are invariably addressed to governments not to private entrepreneurs. Only governments consciously have the goal of development in mind. Entrepreneurs act with profits as their goal. Society, it is assumed, benefits incidentally from entrepreneurial profit-seeking.

As a consequence of Samuelson's implicit acceptance of the notion of system adaptability, his proposal for government action in aid of development is not to change the institutions of the inner environment (the economic system itself). Rather, it is only to change the outer environment so as to provide the conditions in which private entrepreneurs will invest, i.e., to create favourable investment opportunities. Governments must reform existing institutions which do not encourage or give free play to individual entrepreneurship--tax systems, land tenure, and systems of private commercial law. In addition, the state can help private entrepreneurs directly, by providing cheap risk capital or soft loans through development finance corporations. Many states also seek to create entrepreneurial spirit and skills through institutes of business administration and the like.

Most theorists today, like Samuelson, go beyond classical laissez-faire. Despite his commitment to the premise that the initiative for development can only be taken successfully by private entrepreneurs, Samuelson recognizes that there are practical difficulties. Certain sorts of enterprises are socially desirable, but not profitable, and the profit motive can sometimes lead to undesirable uses of capital, e.g., speculative real estate operations. Hence he urges that the state undertake 'social overhead projects which, while extremely valuable, create intangible benefits that cannot be expected to yield pecuniary profits to private investors'. Many theorists also urge that the state use its taxing power, pioneer industry statutes and the like to channel investment into socially desirable projects.

Samuelson's economics resonates easily with a popular paradigm of politics. Because Samuelson excludes as causative factors the institutions of the economic system--especially the institutions for the production of goods and services--he necessarily excludes any changes in these institutions from the purview of state activity. He bifurcates the policy between economics and government.

According to this view, the functions of government are sharply limited. It must maintain or create the conditions within which enterprises can function; it must extract enough taxes to maintain government itself. Since most African governments came to power under a rhetoric which promised the people the benefits of the welfare state--roads, water systems, schools, hospitals, better housing, and so forth--the state must extract from the economic system as much as it can to be spent for these various infrastructural and consumption purposes. Theorists such as Samuelson generally, however,

perceive the legal order as discontinuous with the economic order. Most of the ways in which states seem to intervene in the economy--i.e., by the purchase of 51% of the shares in major industries--are not devices to change the institutions of the economy. Rather, their function is to extract a larger share of the surplus from the existing economic system for governmental purposes, without changing the behavioural patterns involved.

Samuelson's explanations of underdevelopment by implication imposes a political imperative. The main political problems are perceived as dual: first, to insulate the economic system against tinkering by social radicals, and second, to ensure that the government is honest and competent and that it will use government revenues in ways consonant with the wishes of the majority. This model implies, therefore, a state which is neutral and within which social conflict can take place--the model suggested by interest-group pluralism.

Samuelson's explanation focusses in part on the insufficiency of capital for development. After all, capitalism cannot succeed without capitalists. By definition, a capitalist is one who has managed to accumulate capital. Samuel's explanation requires sharp differentials in income, so, that capital can be accumulated in private hands. He therefore defined 'development' without regard to distribution:-

An underdeveloped nation is simply one with real per capital income that is low relative to the present day per capita income of such nations as Canada, the United States, Great Britain, France and Western Europe generally. Usually an underdeveloped nation is one regarded as capable of substantial improvements in its income level...

What legal order is implied by this explanation and set of proposals? In the first place, the state is required to provide a legal order to support the economy, but not to intervene in it. It must provide facilities so that individual economic actors can determine the shape of their economic activities, without actually commanding them to do so. The solution is to be found in the model of liberal legalism: basically, an autonomous legal system consisting in the main of protections for private property, and the rules of contract law because:-

1. Specialization and exchange require a high degree of coordination between economic units, and
2. The law of contract permits the parties to economic transactions to define the norms of economic co-ordination themselves, with state power used to sanction their breach.

The agenda for lawmakers demanded by the regime of contract seems reasonably well defined. It consists of the conventional Western wisdom for economic development. What is needed are legal devices to make possible entrepreneurial activity, principally contract law in all its ramifications. Facilitative forms must be provided by which capitalists can organize the economy. Finally, in some states, there may be a direct delegation to entrepreneurs of the lawmaking power, by the creation of officially endorsed cartels in particular industries, the outlawing of trade unions, and the like. Law can help to encourage private capital by providing an hospitable investment climate: easy tax laws, an educated labour force, research institutes, law and order, a well-developed infrastructure generally. In the realm of political affairs, the law can provide for clear lines of demarcation between administrative power and individual rights, and devices to ensure that the governors are fairly selected by the majority of the population. Beyond the range of potential solutions are direct state interventions into the economy or systems of cooperative ownership (such as producers' cooperatives) which are antithetical to individual ownership. Planning is mainly a matter of setting targets for the private sector, and preparing an agenda for government expenditures on infrastructure.

Plan Theories

An alternative set of explanations is exemplified in an article by Ann Seidman. Her explanation of the poverty of nations is quite different from Samuelson's:-

1. The way that members of a society interact with each other given the material conditions of a particular society, determines how material resources are allocated in that society.
2. How members of a society interact with each other is a function of the norms defining their roles and the sanctions supporting those norms.
3. In every modern polity, the state possesses some formally legitimized power to formulate norms, and the best organized and most powerful instruments of coercion to enforce them.
4. In every society, the classes or groups that have economic power and privilege tend to control the machinery of the state in their own interests.
5. In every less developed country, the formal and informal normative structures existing on the emergence from the

imperial era denoted a dual economy: They consisted of the following:-

- a. An export enclave, consisting of a few foreign entrepreneurs, local entrepreneurs, managers and bureaucrats with high incomes; wage workers and cash-crop peasants with low incomes; and an economy with a high degree of specialization and exchange, predominantly producing raw materials for export overseas to the developed countries;
 - b. A hinterland, consisting of the great mass of peasants engaged in subsistence farming with low technology in conditions of poverty;
 - c. A system of compulsions supported by state power by which peasants are driven from the subsistence sector to form a labor force at low wages for the entrepreneurs of the export enclave.
6. The power and privilege of the political elites and the economic ruling class in the export enclave can be maximized by continuing the existing set of institutions and making incremental changes only where necessary to maintain stability and equilibrium or to increase their own power and privilege.
 7. In most countries, foreign and local entrepreneurs, managers and bureaucrats in the export enclave have effective control of the state machinery.

This explanation points to significantly different variables than does Samuelson's. Rather than asserting that private entrepreneurs are the necessary engine of development, it suggests that it is the state, in its relative control over the normative system, that determines the shape of development, although it leaves problematical, whether in any given case private or public enterprise is to be preferred. Rather than ignoring the institutional structure, it asserts that it is precisely the received institutional structure, embodied in the dual economy, which is the cause of the poverty of the great mass of the population. Since the African polities experience their present deplorable economic conditions as the result of a colonial regime in which contract was the central jural theme, this explanation suggests that contract, far from being a solution for the troubled situation, was its cause. If the institutions of contract are left as they are, they will reproduce themselves. Unless they are changed, this explanation suggests that poverty will continue.

This model does not make the sharp distinction between economics and politics that underlies Samuelson's. On the contrary, precisely because it insists that the explanation for poverty lies in the institutions of the economy, it proposes that the state must consciously intervene into the economy to change those institutions. Far from limiting the state to

extracting revenues from the private sector for governmental purposes, this explanation points towards an explicitly interventionist policy. Rather than limiting the state to infrastructural or social welfare functions, it suggests that the appropriate role of the state includes doing whatever is necessary, particularly in the productive sectors, to induce development. Rather than pointing towards marginal changes in the existing law, it looks to major changes in the institutional structure. It suggests that until changes are made in the elites who control the machinery of the state, the existing relationships will change, if at all, only incrementally. It argues that because the existing institutional structure will necessarily provide greater profits to entrepreneurs, will direct production to overseas markets and preserve the existing economic system, state power must be used to restructure the existing institutions to provide a balanced, nationally integrated economy with a strong internal market.

Finally, and perhaps most important of all, it suggests that so long as particular classes have radically disproportionate shares of power and privilege, they are apt to gain control over the political machinery in their own interest. Therefore, institutional change will be necessary to bring about more equitable shareouts of income and greater participation in decision-making by wage earners and peasants.

This definition of 'development' is markedly different from Samuelson's for it includes a distribution function:

The explicitly stated goal of development is attainment of increased specialization and exchange leading to increased productivity directed to raising the level of living of the entire population as rapidly as existing material constraints permit.

The regime of law suggested by this explanation and its associated solutions seemingly is toto coelo different from that suggested by Samuelson's model. The process by which law is used to order new behaviour appears, at least superficially, to be entirely removed from the process by which law merely extends facilitative devices to economic actors. Rather than separate, seemingly autonomous systems, law, government and the economic order become a continuum, erasing the sharp discontinuity so beloved by analytical jurists and Weberian scholars alike. We can state this as the law of the plan:-

1. Specialization and exchange require a high degree of coordination between economic units.

2. How members of a society interact with each other is a function of the normative system defining their roles and applying the related sanctions.
3. The state can and does determine what the content of this normative system is or ought to be.
4. The state should use this power to define institutions which will lead away from the dual economy towards a nationally unified and integrated economy, expressed in national plans.
5. The political structure of the state must provide for maximum feasible participation of the large masses of the people in the decision-making processes.

The law of the plan is obviously a very different sort of law than the law of contract. Indeed, much of the conceptual difficulties that have plagued the study of law and development have arisen from an insistence that somewhere, somehow there was a magic formula which would explain the uses of law in every sort of economy. We shall explore the difference between the law of the plan and of contract in the remainder of this chapter.

The Choice Between Alternatives

The different definitions of development advanced by these two writers are plainly related to, and arise out of, their explanations of underdevelopment. The choice of definition is not, as it might appear, an exercise in taste or values. It flows from the different explanations advanced. Not the definitions, but the explanations are functional to problem-solving.

How to choose between these all-embracing explanations?

The function of these paradigms is to guide problem-solving, policy oriented research. The last and most important test of the research is whether the implementation of the solutions for which it argues alleviates the difficulties which inspired it. In the case of development, the paradigms used can be tested by asking whether they have led to a reduction of poverty and oppression.

There is an enormous amount of data to examine -- far beyond the confines of this chapter. Analyses such as Samuelson's have dominated the policy of most of the less developed entries which are usually included in the inaccurately-named free world. Everywhere, these states have sought to attract foreign capital, tried to improve infrastructure, encouraged the

production of export crops, and in general followed the sorts of recommendations that flow from Samuelson's explanation. In Africa at least, these programmes did not differ radically from those followed in the last decades of the imperial regime.

These programmes, in Africa and elsewhere, have not in fact resulted in a significantly increased pace of development. The reasons seem apparent. The principal opportunities for investment at a short-term profit in the less developed countries today, as in the colonial period, lie in the production of raw materials for export and the import of manufactured goods for sale. Increasingly, there are opportunities for investment in manufacturing, taking advantage of pathetically low wage rates. Samuelson's explanation for underdevelopment suggests that the 'poor countries' ought to exploit these comparative advantages (or 'opportunities for investment') and encourage private investors to increase their activities in these areas. Pursuant to similar prescriptions, immediately after independence every African country sought to increase its production of traditional export products. Ghana doubled its cocoa production in a few years, and the production of coffee and tea in Kenya, cocoa in Ivory Coast, sisal in Tanzania and copper in Zambia all increased. (Largely in consequence, of course, their prices slipped disastrously, giving these countries small advantage for their efforts). The solutions arising from Samuelson's explanations lead to continued or even increased external dependency by the less developed countries, not to increased independence. They have not, in general, led to a significant increase in internal specialization and exchange. They have not tended to decrease the bifurcation of the economy. Rather, they have tended to exacerbate it.

The countries usually included in the equally inaccurately named Communist bloc have in broad outline adopted the sort of policies that tend to follow from Ann Seidman's explanation. They seized the commanding heights, nationalizing export-import trade, major industries and financial institutions. Rather than relying upon private enterprise, they have consciously sought to change economic institutions through the planning process. A few of them have explicitly tried to develop new sorts of participatory institutions.

The relative success of these different policies can hardly be analyzed in gross. Detailed case studies are required. In fact, such case studies exist for a large number of countries, although far more have been published in English about the free world countries than about those which have chosen a

different path. A comparative empirical study is feasible, assuming that it is the troubles of the disinherited that are to be resolved. Such a study is, of course, far beyond our scope here.

Conclusion

History permits policy-makers no easy exit from the necessity for self-reliant problem-solving. The methodology of problem-solving proposed in this chapter is inherently value laden. We have suggested that intellectual controls over value-filters can be imposed by converting sentiments and vague beliefs into propositions, reshaping these propositions into explanations of the world, and then testing these large-scale explanations in the fire of practical work.

Now it must be confessed that this inquiry does not propose a complete solution. The process of inquiry suggested that intellectual controls can be developed for every choice of values, except one. The one choice which seems beyond intellectual control is the decision of which overarching trouble requires explanation. That question comes down to this: to whose trouble ought a lawmaker attend? Out of that question derives one's paradigm of society, and it is that paradigm of society which guides the particular inquiry to the solution of a particular problem.

In theory, that question cannot be answered in intellectual terms alone. On the scale of whole societies, it is a question that can only be answered, ultimately, by force. For individuals, and especially for academics, it can be answered only by an act of will. The issue comes down, in the final analysis, to the question, with whose troubles does one empathize? A familiar folk song puts it more directly: which side are you on?

To assert that all problem-solving inquiry is ultimately controlled by the researcher's response to that question is to say that all research is necessarily in a sense committed research. Whether or not he claims that he is merely 'descriptive' or 'positivistic', in fact every researcher must make discretionary choices in the course of research. Those choices will be controlled either by his stated or unstated residues, or by his paradigm or explanation of the world. Those residues, or that paradigm, in the final analysis must be addressed to the solution of somebody's troubles. All research is therefore necessarily committed to those whose troubles are its ultimate subject-matter.

To say that all research is, in this sense, committed, is not to say that the researcher can ignore intellectual controls in favour of what he intuits to be the interests of those to whom he purports to be committed. The entire thrust of the argument here is that intellectual controls can be asserted over every state of enquiry saving only the decision of whose troubles to investigate. The researcher who ignores the controls of social science is no longer a researcher, but a propagandist, and usually a yes-man for those in authority. As such, he is useless, both to those he nominally serves and those to whom he declares his commitment.

For most of us, of course, the question is much simpler. It is answered by the rhetoric of every government and every constitution. Every government asserts that it represents 'the masses'. The notion of one man-one vote underpins every modern constitution. No doubt supporters of the ancient regime might argue that it is the troubles of the aristocracy, not of the masses to which one ought to attend. The ancient regime, however, no longer commands much articulate support. Given a commitment to resolve the difficulties faced by the majority of the population, we argue that what the government ought to do is a question which can in principle be answered by a rational problem-solving inquiry.

Patently, no real-life lawmaker is as totally rational or as scientific as pragmatic decision-making requires him to be. Rather, real-world decision makers tend to be enchained by interests of their own and of the powerful and the privileged, rather than by science and reason. So long as government responds to troubles by measures based not on reason, but parochial or class interest, prejudice, myth, legend and blind chance, so long will their solutions be rather components of the trouble. Being based on unreason, disputes about such solutions cannot be resolved by reason. Irrationality excites the raw assertion of power in lieu of argument and data. The raw assertion of force saps legitimacy.

Justice is not a static state of affairs. It is not a blue-print of how things ought to be. Rather, it is a set of propositions instructing people how to act to solve the troubles that plague the human condition. Justice is the process of rational inquiry.

LAW AND DEVELOPMENT ADMINISTRATION WITH ILLUSTRATIONS
FROM KENYA

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INTRODUCTION

Administration is a creature of its environment. Environmental factors such as politics, economics, law and history affect the structure and behaviour of administrations in different ways and to varying degrees according to the development or underdevelopment of the system in question.

In developing countries, political and economic factors play major roles in shaping the nature and orientation of public bureaucracies. Law is subordinated to the two - especially to the political sub-system. Yet this does not mean the absence of legal provisions which are supposed to guide the behaviour of officials. However, these legal provisions, wherever they exist, are rarely observed by those in power. The political leadership often disregards the rule of law. Elements of the law enforcement agencies often violate the law. These combine to provide a negative effect on the administrative sub-system. The administrators take their turn accordingly and begin to pay only lip-service to statutory requirements. The practice is so common in developing countries that one can safely propose that law has very little effect on the behaviour of administrators in these countries. Law is here defined in a rather broad sense to include rules and regulations established for the purpose of regulating the behaviour of administrators.

This paper argues that law, as defined here, may have enabling or dysfunctional effects on development administration. The scope of the paper is somewhat narrow. It is primarily concerned with how the legal system affects the behaviour of administrators engaged in planning and implementing national development programmes. In other words, it is concerned with the analysis of the interaction between law and administration in the development process.

In every society, there is a set of rules and regulations which is supposed to govern the behaviour of public officials as they carry out their duties. We are not here so much concerned with internal organizational rules and regulations. Rather our major concern is with those rules and regulations (commonly known as law) which, though 'external' to the bureaucratic organization, stipulate how it has to relate to the general public in carrying out its duties. Here both constitutional and administrative law are important. The two concern the principles which regulate the exercise of power by central and local government, the

organization and functions of government authorities, and the relation of government authorities to the general public and the individual citizen. This paper aims to analyse the effect of these principles on the behaviour of administrators in the process of development.

Development has become a major concern of political leaders in many developing countries. This concern, where it is genuine, has led to the reorganization of public administration with a view to achieving development. Development administration is thus concerned with the management of change. As a process, it involves structural as well as behavioural changes. As a system, it is that aspect of public administration, in collaboration with other non-public organizations, working toward the achievement of positive social change - i.e., development.¹ How the legal environment hinders or aids this process is the subject of this analysis.

ISSUES OF CONTROL

A major concern of law in the administrative process is the question of control. The need to control public services grows as their scale increases (Chapman, n.d., p. 181). Legal control ensures that the actions of private citizens or public authorities conform to the law of the land. There is also the control of policy and expediency. This ensures that the public authorities act in accordance with the declared policy of the government or the legislature (Chapman, n.d., p. 181). These types of control, although analytically separate, are functionally inseparable. As we discuss the legal issues involved in development administration we shall treat them as such.

The approach to the question of controlling the public administration reflects both the philosophy of the state and the national social psychology (Chapman, n.d., p. 182). Historically, as Chapman points out, there have been times when no control of the administration at all was deemed necessary because the philosophy of the state denied the subject any rights. On the other hand there have been countries which insisted that the administration and officials acting on its behalf were not different from other citizens and were equally liable before the courts of law. There have also been countries in which the officials as individuals were regarded as being on the same footing before the law as ordinary citizens but in which the administration possessed powers and rights which could not be challenged in the courts. Sequentially these categories could be termed:-

1. This is not the place to define the concept of development. For excellent definitions see Khosla 1967, pp. 16-31, and Panandiker, 1967, pp. 199-210.

1. State supremacy,
2. Supremacy of the Law, and
3. Executive supremacy.

In developing countries today one observes variations of all of these, with three occurring most often. Regardless of where the emphasis lies, it does seem that many political systems today recognize that the government bureaucracy wields a lot of power vis-a-vis the private citizens. There is some fear arising from the size and complexity of today's bureaucracies that, if care is not taken, they could degenerate into arbitrary instruments of suppression which could alienate the people from their government.

There are several factors which make it necessary to exercise some control over the administration system. These are:-

1) To ensure that the administration acts according to the law. This ensures that the general public is protected against an arbitrary administration. Social development requires sustained enthusiasm on the part of the people, and where administrators violate the law through arbitrary rule the partnership between the government and the people in the development process breaks down. It is therefore important for a government to establish ways and means to ensure that the administration does not jeopardise that partnership by arbitrary actions which violate the law; 2) a second reason is to ensure that the administration acts impartially. Administrators are the agents of a sovereign power for the distribution of resources and services. In developing countries these resources and services are usually scarce. As a result there are often more people needing attention than can be served with the resources available. In such a situation, those who are not served must be assured that justice has been done. The administration should therefore establish unbiased criteria for the allocation of services where decisions are made on biased considerations the people who are discriminated against naturally turn against the administrators and refuse to cooperate with them. This inevitably limits the effectiveness of development administrators. Accordingly, some agency should be established to which all those who feel excluded may appeal for redress. In the legal context, this would be more often than not an administrative court or an officer such as ombudsman or parliamentary commissioner for administration; (3) thirdly the control of public servants ensures that they are accountable to the public by accepting responsibility for any damage they cause in the performance of their duties. The principle of holding the bureaucracy accountable for its own actions is a central theme in the control process. The simple meaning of this principle is that administrators can be sued for mistakes they make while carrying their duties as public servants.

Consequently it means that they can be made to compensate the wronged party for any losses incurred through administrative actions; 4) a fourth reason is to ensure that public servants do not abuse their powers. Abuse of power by administrators results in the administration using its power for purposes other than those intended. A rural chief in an African country vested with the powers of arrest and confinement may use those powers to harass his opponents. A police officer may use his powers of arrest for the purpose of 'redressing' personal grievances. A district officer may use his mobilization powers to compel villagers to participate in the implementation of a project they do not wish to be associated with. Thus abuse of power by a public officer can greatly impede the relationship between the administration and the general public and impair harmonious working relationships in the development process. The availability of control mechanisms ensures that this does not happen.

All these reasons indicate that there is a strong need to ensure that people are 'legally' protected from any infringement of their rights which might arise from the activities of public officials. Whereas this is a desirable objective, however, in practice it is very difficult to attain in most developing countries for reasons which will be outlined here.

PROBLEMS OF ESTABLISHING LEGAL CONTROL FOR DEVELOPMENT PURPOSES

The problems associated with the introduction of legal institutions for controlling the behaviour of public officials are deeply rooted in the underdeveloped nature of our societies. The very nature of underdevelopment makes it difficult to transplant successfully institutions evolved in developed societies. Historically, we find that both the political culture and the psychology of the people are not adjusted to the use of these institutions. That explains why institutions such as ombudsmen have not been introduced with success in the developing areas.²

The very nature of such institutions requires openness, whereas administrative systems in developing countries are often reluctant to open their doors to 'outsiders'. The reasons are obvious. Most of them are ridden with corruption and unethical practices, so that opening their

2. Kjekshuse's study of the institution in Tanzania (1971, pp. 13-29) attributes its apparent success to the ideological content of the Tanzanian political system. This is rare in African countries. See a second positive assessment of the Tanzanian experience in Ghai (1969).

doors would 'compromise their positions unduly'. Institutions of control which seek access to relevant information are accordingly mistrusted. This attitude makes it difficult for institutions such as administrative courts or ombudsmen to function, for their success depend inter alia on:-

1. The willingness of the public and the bureaucracy to cooperate with them;
2. The proper observance of procedures,
3. The adequate presentation of cases,
4. The availability of evidence from both sides,
5. Access to all relevant documents,
6. Compensation paid to aggrieved parties, and
7. The identification of the individual at fault.

These requirements are fundamental to the control of the public administration, but they are frequently not satisfied in underdeveloped countries. Often these requirements are at the back of the minds of senior civil servants when they advise a government against the adoption of such institutions. In a recent decision rejecting the introduction of ombudsmen in Kenya, the official government spokesman stated. It is feared that the Ombudsman might be misused for witch-hunting and undue victimization (quoted in Rukwaro, 1974, pp. 115-119). This fear is deeply rooted in the civil service mentality.

The establishment of a legal control mechanism also depends on the acceptance of the rule of law principle, which involves the absolute supremacy or predominance of law, as opposed to the influence of arbitrary power or wide discretionary authority on the part of the government. This notion also excludes the idea of any exemption of officials or others (covertly or overtly) from the duty of obedience to the law which governs other citizens or from the jurisdictions of the ordinary tribunals (A.V. Dicey, quoted in Severeid, 1969, pp. 202-203).

The dilemma as Severeid points out, is that the growth of the administrative process has appeared to be in conflict with the rule of law. The placing of wide discretionary powers in the hands of administrators seems to invite arbitrary rule. The fact that many administrators act as judges and decide matters by the peculiar rules of administrative law would indicate that they are supplanting the ordinary courts of the land (Severeid, 1969, p. 15). A relevant question then is how to control the situation which seems to have developed legally through judicial review of administrative action. The purpose here would be to decide whether the bureaucracy (or the individual bureaucrat) had the authority to do what it did, and if so whether that authority was exercised correctly. This task is made difficult by the reluctance, especially

of senior administrators, to obey the law or to support legislation aimed at ensuring legal control.

But even if devices to ensure legal control were established, their proper functioning would still be impaired because the majority of the people do not know their legal rights or how to defend them. Before the institution of Permanent Commissioner of Enquiry was introduced in Tanzania, Nyerere had recognized this very problem when he observed. 'The educational backwardness of the majority of our people means that automatic checks of abuse of power are almost non-existent' (quoted in Kjekshus, 1971, p. 24).

DEMANDS ON DEVELOPMENT ADMINISTRATION

What makes the availability of legal control mechanisms even more necessary are the demands which development puts on administrators. In an environment of scarcity, choices concerning the allocation and utilization of scarce resources must be made. In situations of scarcity, queues are naturally long, and those wishing to jump them through corrupt practices are many. Many administrators capitalize on such situations and are careless about those waiting to be served. Sometimes they may even adopt a paternalistic attitude about handling public affairs. Sometimes they may succumb to pressure from those who wish to corrupt them. When such a situation develops, services are provided on the basis of who can afford 'to play the game' rather than on individual need or national criteria. A lot of development resources are wasted through this process, and those who are aggrieved are not able to have their grievances redressed.

There are many such cases in Kenya today. A loan officer, whose duty it is to approve loan applications submitted by needy farmers, decides to make things unnecessarily difficult for an applicant. The farmer wonders why he is being treated in this way until his colleague who has gone through the same ordeal 'reminds' him of what to do. After corrupting the officer, he gets the form signed and forwarded to the relevant authorities. Yet the farmer has nobody to complain to except perhaps the police or the officer's immediate superior, both of whom may view the incident as 'normal'. He may not wish to get the officer in trouble, so naturally once he has gotten his loan he will forget about the whole transaction. The system of corruption thus becomes institutionalized with all kinds of negative effects on the success of development programmes.

Another example concerns the recruitment of Junior Agricultural Assistants. The Ministry of Agriculture in Kenya has delegated this task

to the Provincial Directors of Agriculture. A Provincial Director may in recruit such personnel only from the people of his home area. Those from outside the area are appointed only if they are 'appropriately' introduced after working hours by their relatives. Those that are excluded through this unfair process usually have no means of appeal. Over time such a practice becomes institutionalised, but there are many negative effects on development which arise from giving appointments to people otherwise unqualified. In fact one can argue, though empirical data are lacking, that such practises may in part explain why Junior Agricultural Assistants in Kenya tend to be incompetent. Other similar examples could be given.

The administration of development involves the mobilization of resources, both human and non-human, and this task may involve extra-legal means to arrive at the desired objectives. We shall take the provincial administration in Kenya to illustrate this point. Members of the provincial administration have many discretionary powers which are often abused or misused. They have frequently compelled villagers to work on projects against their wishes, particularly in the case of self-help projects. A major principle of self-help development is voluntary participation by the public, but in rural Kenya today this principle has given way to compulsion. Officers of the provincial administration, especially chiefs and assistant chiefs, use (or misuse) their powers by confiscating the property of those 'unwilling' to contribute and auctioning it off to pay the owners' financial contribution. It is often alleged that some chiefs use the Chiefs Act to lock up individuals who refuse to give in to such compulsion. Such allegations are common during question time in the Kenya National Assembly, but often they are dismissed in a one-sentence reply by a government spokesman. Once so treated, a villager becomes hostile toward the administration and any development activities that may be introduced thereafter.

All these abuses occur because, apart from the regular courts, there are no legal institutions in Kenya which review the legality of administrative actions, and the regular courts are not effective for this purpose. In a landmark study of Kenya, Ghai and McAuslan observed:-

On the surface the courts' power of review of administrative action is greater under an African Government than ever it was under the Colonial authorities, and this power remains relatively unmolested. But it is not beyond the bounds of possibility that the reason for the immensity of the court's control powers is that they are infrequently exercised and when they are, it is rarely in the crucial areas. The court's powers, in other words do not really affect the administrative process. When they do, or might, they are whiffled down....

We may say then that formally the courts appear as an institution of control performing a function similar to that which they perform in England. Actually their influence on the administration is small because there are relatively few people who think of them or use them for this purpose compared to the number of people who could, and the number of occasions in which the circumstances warrant it, and because there is little impediment in the way of administration reducing their control function to a very small ambit (1970, pp. 303, 304).

In addition, development everywhere requires initiative and a willingness to try out new ideas, but many development administrators in Kenya lack the discretionary powers given to the provincial administration. As a result, they find it difficult to take initiative in the course of carrying out their duties because any new ideas they may have are subject to approval by those higher up in the administration before they can be implemented. These restrictions limit the effectiveness of development administrators in many respects. In the planning process for example, all the plans formulated must be approved by the centre, and this may take much longer than expected, resulting in delays with all kinds of unintended consequences. The implementation of development projects is similarly delayed because finances are usually centrally controlled and the release of funds takes time.

The situation is much more serious for local authorities wherever they exist in developing countries. Local authorities are creatures of the central government which give them their legal personality. Their nature is such that they cannot do anything except what has been explicitly designated as within their power. But even in the areas in which they are empowered to act, they cannot proceed until their programmes have been submitted to the central government for approval. In Kenya for instance, local authorities cannot do anything which is not specified in the 1963 Local Government Regulations and their amendments. For example, a local authority which wishes to levy an agricultural tax (commonly called cess) must make an appropriate by-law which is then subject to approval by the central government which will consider how it affects the people in the area and whether it is within the power of the authority to make such a by-law. For this, the authority must be able to identify a clause in the Regulations which empowers it to make such a by-law.

The power to intervene in the affairs of local authorities extends even to routine administration. The central government can institute an

investigation into the administration of a local authority.

The effects of these regulations on the activities of local Authorities are many. The act literally imposes a ban on initiative at this level. It also creates an attitude of dependency in the minds of administrators. This may explain why most local authorities, especially in the rural areas, are static or actually becoming less active. This state of affairs does not conform to the requirements of development administration. Local authorities are corporate bodies which can sue and be sued in ordinary courts of law. In carrying out their activities they are the most closely controlled institutions in Kenya. It is rare to find a local authority, or an officer of a local authority, abusing its powers without being made answerable. This comprehensive control has proven healthy in some cases, but in others it has stifled the initiative and discretion necessary for the administration of development.³ This situation is found in many developing countries.

CONCLUSION: RESOLVING THE DILEMMA

From the foregoing analyses it is apparent that there is a need to balance control and discretion in the administration of development. There is a need to establish some machinery for judicial review of administrative action to avoid illegal activities, biased decisions, lack of accountability and the abuse of power.

At the same time it is recognized that development by its very nature requires the delegation of discretion if those charged with the administration of development programmes are to be effective. In the absence of such delegation, they will be unable to innovate or to respond to new situations created in the process of change. The question, however, is how much to delegate to development administrators without surrendering authority and control. It is submitted here that delegation in administrative organizations does not necessarily mean surrender of 'sovereignty'. The delegating authority often retains the right to intervene as necessary. If there were no such provisions, there would be no way to reconcile the conflicts that arise in the development process among various administrators.

3. For more on local government and development in Kenya see, e.g., C lebatch, (1973).

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The relationship between control and discretion, and the kinds of institutions established to control the behaviour of development administrators, depend on the nature of the political environment. Where the rule of law is given only lip-service (as in totalitarian military regimes), there are few institutions regulating the behaviour of the administrators. Rather, all agencies of the government are geared to serving those at the top.

In civilian regimes dominated by an elite group, again institutional checks on the administration have little meaning. Bureaucratic elite are the governors and are untouched by any administrative law.

A major argument in this paper has been that law can aid development by prescribing correct behaviour for the administrators of development programmes. We have also argued that law can be dysfunctional by stifling the initiative of development administrators. How to harmonize these two functions is a major task, and not an easy one. A lot depends on the system of government which given country adopts, either by default or design.

This paper makes no pretensions of raising all the relevant issues involved in law and development administration. As the reader is fully aware, this is a research area still to be explored. In the meantime, all we can do is to make some broad generalizations in the hope that one day somebody will systematically examine the issues raised here.

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PART 3:

LAW AND DEVELOPMENT EXPERIENCE
THE LAW OF DEVELOPMENT ADMINISTRATION:
PERSPECTIVES ON EXPERIENCE

by

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and
Robert B. Seidman

In the less developed countries, the courts were poorly designed to implement rules looking toward development. That task fell upon the administration.

Two demands were made simultaneously upon the civil service. The British cultural heritage required that officials confine their activities within boundaries defined by law, expressed in the rubric, 'the Rule of Law'. Simultaneously, they had to meet the demands of what nowadays is called development administration, that is, the implementation of coordinated, creative and flexible development programmes. The second made for change and innovation. Together the two were an African version of the universal paradox of the law: law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need for stability and the need for change. The African dilemmas of administration and administrative law have exemplified this paradox.

THE DILEMMA OF AFRICAN ADMINISTRATION

By 1974, Africa had the worst of both worlds. Neither the rule of law nor development administration were in practice achieved to an acceptable degree. We examine in turn the traditional visions of bureaucracy and the rule of law; the inability of the bureaucracy to solve developmental tasks; and, last, the paradoxical African situation, which achieved neither change nor stability.

Traditional Bureaucracy and the Rule of Law

The myth of bureaucracy is that it is an instrument for the implementation of policy: infinitely flexible, turning its diverse talents as easily to the denationalization as to the nationalization of industry, to running a postal system, a large industrial corporation or a navy, to implementing policies as well in foreign affairs as in prisons.

If this were a description of reality, the troubles which plague African administration would disappear. The bureaucracy would be capable of implementing both rules looking towards change and rules designed to maintain the system. The description, unhappily however, is mythical.

The classical paradigm of modern bureaucracy was Max Weber's celebrated ideal-type. It had the following characteristics:-

- 1) A continuous organization of official functions bound by rules.
- 2) A specified sphere of competence. This involves: a) a sphere of obligations to perform functions which has been marked off as part of a systematic division of labor; b) The provision of the incumbent with the necessary authority to carry out these functions; c) That the necessary means of compulsion are clearly defined and their use is subject to definite conditions...
- 3) The organization of offices follows the principle of hierarchy; that is, each lower office is under the control and supervision of a higher one....
- 4) The rules which regulate the conduct of an office may be technical rules or norms. In both cases, if their application is to be fully rational, specialized training is necessary. It is thus normally true that only a person who has demonstrated an adequate technical training is qualified to be a member of the administrative staff of such an organized group, and hence only such persons are eligible for appointment to official positions....
- 5) ... The members of the administrative staff should be completely separated from ownership of the means of production or administration....
- 6) There is also a complete absence of appropriation of his official position by the incumbent....
- 7) Administrative acts, decisions and rules are formulated and recorded in writing....

Weber developed his ideal-type as part of a lifelong endeavour to understand why Western capitalist societies developed as they did. He assumed that the governments of western Europe were governments in the interests of the capitalist class. They had to achieve the objectives of that class: instrumentality, predictability, equality before the law, and authority. His model of bureaucracy, he thought, achieved these objectives.

Feudal law endowed the governors with a property right in their office. It did not violate the law if they used their office in their own interests. To require the bureaucracy to be instrumental to publicly defined goals struck at the heart of particularist power. The ideal-type of bureaucracy achieved instrumentality by subjecting administrators to the governance of rules. 'The bureaucracy is supposed to be politically "neutral"; it does not participate in policy determination, it has no specific interests of its own, it does not exercise any important power. It is, in other words, the obedient servant of the

government, hence of the public whom the regime serves.'

Secondly, the system made official behaviour predictable. Policy was set out in rules. Emergent difficulties were converted into cases. The rules stated how administrators were to deal with those cases. Predictability was maximized. Predictability was, of course, a principal demand of entrepreneurs.

Thirdly, the system tended towards formal equality before the law.

It led to....

the dominance of a spirit of formalistic impersonality, sine ira et studio without hatred or passion.... The dominant norms are concepts of straight-forward duty without regard to personal considerations. Everyone is subject to formal equality of treatment; that is, everyone in the same empirical situation....

Equality before the law has always been a demand of a rising class.

Lastly, the new entrepreneurs required an authoritarian government to enable them to dominate the lower orders'. Bureaucracy provided the required means, and the operation of such a system is clearly evidenced by the scope and function of commercial law in African countries.

The most significant indication is insistence upon appointment, as contrasted with election (of bureaucrats), but (Weber's) delineation of the hierarchical aspect, as well as of discipline and control are also symptomatic. The very words vibrate with something of the Prussian enthusiasm for the military type of organization, and the way seems barred to any kind of consultative, let alone cooperative, pattern.... It seems... striking that Weber's fully developed bureaucracy is most nearly represented by three modern-organizations: 1) an army, 2) a business concern without any sort of employee or labor participation in management, 3) a totalitarian party and its bureaucratic administration. Weber defines 'imperative control' as the probability that certain commands from a given source will be obeyed by a given group of persons. Is it not equally revealing that discipline is defined as the probability that a command will receive 'prompt and automatic obedience in stereotyped forms' as the result of habituation?

It was not the case, however, as Professor Lon Fuller naively supposes, that these demands by the middle classes represented the wishes of all of us.

The propertyless masses especially are not served by a formal 'equality before the law' and a calculable adjudication and administration, as demanded by 'bourgeois' interests. Naturally, in their eyes justice and administration should serve to compensate for their economic and social life-opportunities in the face of the propertied classes.

It was a principle of the Weberian model of bureaucracy that the rules defining power grant no more than a minimum of discretion. 'Equality before the law' and the demand for legal guarantees against arbitrariness required a formal and rational 'objectivity' of administration, as opposed to the

personally free discretion flowing from the 'grace' of the old patrimonial domination. Functions cannot be said to be bound by rules when the official had unlimited discretion to act or not to act, or to decide what acts to perform, or the grounds upon which to act or not act.

Lawyers, developed much the same notions as Weber, only somewhat earlier, under the rubric of the rule of law. In 1885, Dicey wrote that law consisted of a body of fixed and ascertainable rules. By the rule of law, we:-

mean... that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.

The rules of administrative law were the principal instrument of lawfully controlling the administration and therefore to implement the rule of law.

Ideal-types have a well-defined tendency to pass over from intellectual construct to normative goal. Weber waxed positively rhapsodic:-

Experience tends universally to show that the purely bureaucratic type of administrative organization...is...capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of carrying out imperative control over human beings.

As for Weber, so for all of us. Bureaucracy in the ideal form defined by Weber, and its concomitant legal ideology in the form of the rule of law, passed into the common culture. African lawyers, too, came to believe that adherence to the norms implied by these concepts would ensure the infinite flexibility, perfect obedience and superior efficiency of the administration, capable of implementing any programme of government, performing equally well whatever tasks might be asked of it, without sacrificing efficiency, predictability and equality before the law. This was the myth about bureaucracy.

Substantive Legitimacy and Development Administration

There was a counter-myth about bureaucracy. Bureaucracy was, in its vulgar usage, 'bureaucratic': hide-bound, conservative, snarled in red tape, unable to get out of its own way. It was incapable of change and development.

The bureaucratic ideal-type paid a price for legal-rational legitimacy: it was rule bound. It was through the device of rules that the bureaucratic

structure ensured instrumentality, predictability and equal treatment.

Control may have produced certainty. It rarely produced creativity. Development meant change. It required an administration to solve novel problems. 'Hierarchy and routinization are appropriate institutional characteristics of the classic governmental tasks of maintaining order, collecting taxes and providing services', but 'flexibility and innovation are the traits a bureaucracy needs to promote development'. Bureaucracy may be useful to tend the machine; it is impotent to change it.

The myth about bureaucracy extolled its infinite flexibility. The response to the demands for development was not to change its structure, but to give bureaucrats exceedingly broad grants of power and discretion. Discretion is the opposite of governance by rules. The result was an administration that contradicted the legal-rational ideal.

The myth and the counter-myth seemed contradictory. It seemed that one might enjoy instrumentality, predictability and equality before the law and suffer authority, narrow discretion, and compartmentalized, hierarchical decision-making. One might enjoy change, creativity and flexibility -- and suffer discretion. One could not have both simultaneously. That was the 'deadlock' of development administration.

Practically all African leaders believed that they were faced by just such a dilemma. Not surprisingly, they tended to opt for broad discretion. Ghai and McAuslan conclude that in Kenya',...in an attempt to increase the effectiveness of the administration, wider discretions are conferred upon officials by law, and these officials are prepared to take, and can get away with taking, short-cuts'. As in Kenya, so everywhere. Dean Pound wrote that 'Almost all the problems of jurisprudence come down to a fundamental one of rule and discretion'. Broad discretion in Africa opened the door to particularism, corruption, favour and oppression.

Perhaps the African fall from the grace of the rule of law might have been tolerable if it had led to development. Unfortunately, Africa fell between two stools.

African Administration: Neither Stability nor Change

Bureaucracy or development administration? Rule of law or legality? Stability or change? Brake or accelerator? These choices between opposites seemingly posed insoluble dilemmas. Africa managed, by and large, to achieve the worst of both worlds.

On the one hand, African administrations by 1974 were shot with particularism. Hyden said of the Kenyan civil service that:-

at present everyone pulls his own strings in order to get things done or settled in the civil service. There is often inconsistency in treatment, because both politicians and members of the public have come to realize that the quickest way of achieving results is often in contacting friends in the relevant ministry who can arrange that the matter is given preferential treatment.

President Nkrumah made a similar observation about Ghana. The same was true all over Africa: discretion was omnipresent. It was used in large part for private ends.

Despite the broad discretion which in action permeated African administration, on the other hand it was a common complaint that African bureaucracies had the usual constraints on administering development. The administrations were highly compartmentalized. What Dresang says of the Zambian bureaucracy was true elsewhere: it was not 'a unified and hierarchical body that is capable of pursuing a common policy. Rather, the administrative system is best characterized as a collection of departments enjoying a great deal of autonomy and only loosely tied to each other.' National planning in such a condition is an exercise in frustration.

Nor were African administrations noted for their creativity or experimentation. Robert Jackson asks:-

Whether this essentially bureaucratic system of administration (in Kenya) -- with its sharp hierarchical structure, its preoccupation with defining and delimiting jurisdictional area, its emphasis upon replicability within a framework of clearly indicated rules and precedents -- is entirely appropriate for present development needs.

He comments that in Kenya:-

the most striking feature of government administration is... its rather rigid bureaucratic nature which is a contemporary legacy of the colonial past. The structure is well adapted to the quest for control but was not fashioned with the aim of initiating and guiding development change.... Bureaucratic administration requires and fashions leaders who tend to be preoccupied with procedure and routine and with correctly applying predetermined rules to every decision confronted. But development and social change generate novel problems and new situations for which pre-existing rules and decision-making precedents may offer no solution.

Kenya's Ndegwa Commission summed up prevailing dissatisfaction with existing administration (and it might have been speaking for all Africa).

The administration:-

must be highly change-orientated; it must reward initiative and experimentation; it must have a high concern for cost-effectiveness and a routine habit of evaluating all ongoing programmes; it must be prepared to compromise between unified central control and the need for flexibility, variety and a degree of autonomy in field organizations charged with implementing policy; It must be extremely strong on action, time sequences, logistics and clearly defined goals; and at the same time it must retain a clear consciousness of its role as the servant, not the master of the public, if its efforts to induce change are not to be self-defeating.

This paradoxical combination of de facto discretionary powers and compartmentalized, non-developmental bureaucracy both destroyed legal-rational legitimacy, and fell short of developmental goals. It resulted instead in the maximization of the power and privilege of the bureaucrats and the political and economic elites with whom they were allied.

These results came about despite the existence of the same rules of administrative law that lawyers fondly believe maintain the rule of law in England. We turn now to an explanation for the African dilemma.

AN EXPLANATION

We attempt an explanation of the failure of African administration in a summary form:-

1. The task of inducing development in Africa imposed upon administrators the task of solving problems, rather than implementing rules laid down by political authorities.
2. Hierarchical, authoritarian, compartmented institutions limit output to incremental change.
3. African administrations were hierarchical, authoritarian and compartmented.
4. Authoritarian, hierarchical bureaucracies tend to be punishment-oriented.
5. African administrations were authoritarian and hierarchical.
6. The rules defining the roles of administrators in Africa endowed them with broad, discretionary powers.
7. Bureaucrats will tend to exercise their discretion to maximize rewards and minimize strains for themselves and the bureaucracy of which they are a part; this tendency is strengthened to the extent that:-

- a. Subordinates and clients have little power to resist it; and
- b. Decision-making is secret.

8. In Africa:-

- a. Subordinates and low-status clients had little power to resist; and
- b. There was great secrecy in administrative decision-making.

Development requires changed behaviour by wide numbers of people; behavioural change is best accomplished by participation; African administrations were authoritarian. Development requires problem-solving; problems come as a whole, not broken into bits; African administrations were compartmentalized. Development requires much more than punishment as an obedience-inducing measure; African administrations were punishment-oriented. Where African administrations dealt with matters that might be routinized in rules, excessive grants of discretion defeated the rule of law. Where they dealt with emergent problems of development, hierarchy, authority and compartmentalization blocked their goal. They fell between two stools.

'Development from above' must always fail in this way. Law, so long as it is a set of rules handed down from above and enforced through compartmented, authoritarian, punishment-oriented organizations can at best haltingly induce social change.

THE FAILURE OF ADMINISTRATIVE LAW IN AFRICA

Administrative law as received in Anglophone Africa takes as a basic assumption that the bureaucracies with which it deals match the classical Weberian pattern -- that is, that the rules defining the bureaucracy outline an authoritarian, hierarchical structure; that they divide the overall task of the organization into sub-tasks; that they limit the power of each official to his sub-task, with little scope for discretion; and that they provide that where there is discretion, it is exercised only for the purpose for which it is granted. Thus, the rules are completely devoid of flexibility, but they provide the authoritarian governmental system which the few entrepreneurs need to enable them to dominate the lower orders.

Taking these characteristics as given, the rules of administrative law provided a set of concepts: to ensure that officials stayed within their boundaries, (the ultra vires rule); to limit the scope of granted discretion; to ensure that where discretion was granted, it would be exercised only with account to appropriate considerations; and to provide a set of institutions

(the courts) with which to enforce these rules.

As received from the former colonial government, however, the bureaucracies denied the Weberian requirements in two principal ways. They were shot with discretion, and hence defied review by courts; and in any event, courts were unavailable to most Africans. These factors have continued in independent Africa. In the event, the received administrative law remains incapable of controlling the administration.

POSSIBLE SOLUTIONS

African governments have made some attempts to solve the problems of administration, although in the main they have responded to the felt insufficiencies of classical bureaucracy by separating out particular problems into parastatal organizations, circumventing compartmentalization by central planning, and trying to undercut the impact of authoritarianism by developing decentralized, participatory structures.

Concerning the bureaucracy itself, Ghana attempted a constitutional rule requiring structured discretion; it was eviscerated by the judges construing it. In a few places, decisions and their reasons have had to be recorded. Tanzania, Ghana and Zambia made provisions for an Ombudsman, a new enforcement agency; of these, only Tanzania's has had a substantial amount of experience. It is plainly one of the most innovative legal institutions to emerge in Africa.

COMMERCIAL LAW AND DEVELOPMENT IN KENYA

By

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INTRODUCTION

In this paper we attempt to analyse how two branches of commercial law, that is, sale-of-goods law and hire-purchase law, facilitate development in Kenya. A complete paper on this topic would have to include analyses in particular of banking law and negotiable instruments, company law, insurance law and the law of agency. Our attempt in this paper will inevitably include an incidental analysis of the law of contract which forms the basis of the two branches of commercial law to be analysed. These two branches of commercial law are relevant when we discuss the neo-colonial roles imposed upon Kenya by international capitalism. International capitalism has imposed upon Kenya three roles: 1) Kenya must provide raw materials to monopoly enterprises and foodstuffs to metropolitan populations; 2) Kenya serves as an area of investment of foreign surplus value in the form of finance capital; and 3) she also serves as a market for foreign manufactured goods. The common denominator of all these roles is the maintenance of the status quo in the international capitalist economic system as more fundamentally facilitated by the class alliance between the international bourgeoisie and the Kenyan African petty-bourgeoisie.¹

1. Our only quarrel with the works on Kenya is that they tend to mystify class analysis. One of the glaring errors of these analyses is the view that in Kenya we now have an African bourgeoisie proper. Undeniably there are a few individuals in Kenya who have accumulated their own capital which they can invest. But we would think that these few individuals have consolidated a sub-class of their own. Their class position is petty-bourgeois, and we feel Rodney is right about Kenya if we construe his general analysis to refer to Kenya. He points out:-

The South Africans contain a national bourgeoisie with capital to invest. This is distinct from the rest of Africa where mainly we have a petty-bourgeoisie proper. The distinction is essentially that our so-called bourgeoisie is dependent for sources of capital. They become very imitative and lack dynamism. (1974, p. 42)

A class analysis of Kenya has been undertaken by Colin Leys (1975), Brett (1973), Mutiso (1975), Mutunga (1974), P. Noworjee (1972) R. Van Zwanenberg (1974).

Our other task in this paper is to discuss the role of the two branches of commercial law in the dialectic of underdevelopment in Kenya. This will involve a jurisprudential perspective on the role of law in the development of Kenya. We will then follow this up with a theoretical discussion of how the two branches of law facilitate the neo-colonial roles set out above. We will then briefly look at the effective facilitation of these roles, that is, the effectiveness of the legal rules on the ground. This latter point emerged from field research which focussed on the Kenya National Trading Corporation, the Coffee Board of Kenya, Brooke Bond Liebig (Kenya) Ltd., and Cetco, Ltd. The study also included a number of car dealers in Nairobi, among them D.T. Dobie (Kenya) Ltd., Cooper Motor Corporation, Ltd., Westlands Motors, Ltd. and Simba Motors, Ltd. Four major finance companies were also studied: Credit Finance Corporation, National Industrial Credit, the Diamond Trust, Ltd. and the National Bank of Kenya. All these institutions are directly relevant to the neo-colonial roles discussed here.

We must point out at the outset that we do not attempt to discuss the role of customary sales law in Kenyan development. There are, of course, relevant issues worthy of discussion in that field: for example, the impact of general sales law on customary sales law with the attendant conflicts. Such conflicts are inevitable when a more progressive mode of production - British monopoly capitalism - is imposed upon a less progressive mode of production - Kenya's traditional economy. What we may call customary sales law is part of the decadent superstructure protecting the old, dead and dying traditional economic base - dualistic approach here would be misleading. Kenya must be seen entirely as an underdeveloped capitalist country and our discussion of law and development renders irrelevant any discussion of customary sales law.²

We realise that in such an attempt we tread on grounds that are slippery for a lawyer. And indeed this is one of the purposes of this seminar. Ruthless criticism by economists, political scientists, accountants or any

2. Shem Ong'ondo has written a very good and convincing dissertation on the impact of sale of goods law on customary sales law in Maragoli Kenya. He notes the persistence of customary sales law and how it is being phased out by general sales law, giving a thorough analysis of the conflict and the political-economic ramifications.

other discipline is very acceptable. Non-lawyers are also entitled to say what law for development ought to look like.

LAW AND DEVELOPMENT

Development

What is development? Definitions of the word can correctly be said to fall into two camps: there are definitions which seek to justify and perpetuate the capitalist economic system; others reject that system. Writers consciously or unconsciously take sides when formulating a definition. There are also the mystified ones who attempt a middle way and fall in between the two camps. Our opinion is that there is no middle way. On deeper analysis, writers who propose a 'middle-of-the-road' definition of development either fall in with the capitalists or do not. For exploited societies there is not even a question of taking sides: Few people in an exploited society seem to opt openly and consciously for capitalism. Thus the innumerable brands of 'socialisms' characteristic of most of the exploited societies, and undeniably characteristic of normal petty-bourgeois false ideology, are enough to assure revolutionary optimists in these societies that something, if not everything, is wrong with capitalism and that socialism is widely accepted as the only cure for all social ills.

We will begin with definitions of development which perhaps consciously or unconsciously seek to justify capitalism. One of these is given by Professor R.B. Seidman:-

By development, ... we mean 'the process whereby the entire economy is monetized and integrated, with a high degree of specialization and exchange together with associated political, social and other changes.

This means, and especially for the exploited societies, capitalist development. A capitalist society is based upon the economic phenomenon of the exchange of commodities, buying and selling. This can squarely be read into the definition. The associated political, social and other changes are assumed to follow logically from that economic phenomenon.

The following definition, which appears in the International Legal Centre publication Law and Development, confines itself to the exploited societies. The Research Advisory Committee on Law and Development gives this definition of development:-

We agreed that 'development' includes efforts by the LDCs (Less Developed Countries) to secure some of the material, social and cultural conditions that prevail in materially wealthier societies.

But we do not limit the term to such efforts; we also use it to refer to attempts to enrich and deepen the cultural traditions of the LDCs, spread the unique benefits of these traditions to wider groups within society and to seek new and original paths for the realization of a better life for the people of these countries. Thus 'development' in the broad sense used here means activities through which the LDCs seek to realise their own values and secure the goals they define for themselves (1975, p. 2, emphasis added).

This definition justifies capitalism, neo-colonialism and imperialism. Further and deeper integration into the international capitalist system is envisaged. The narrow definition - that of achieving some form of developed capitalism - has been condemned as false and impossible.³ The International Legal Centre definition also indirectly seems to assume the impossibility of the goal by its use of the word 'some'. The broader definition of course does encompass socialist activities in LDCs, but socialist activities in LDCs have tended to be capitalist, and 'attempts to enrich and deepen the cultural traditions of the LDCs ...' are unhistorical and undialectic.⁴ We, therefore,

3. See Baran (1972), P. Jalee (1970), W. Rodney (1972), Tamas Szentes (1971), D. Wadada Nabudere (1976) and Frank (1967).

4. Works of Okot P'Bitek are famous in this regard. See in particular his Song of Lawino and Ocol, (1972). Just to quote a stanza from Song of Lawino:-

Listen Ocol, my old friend
The ways of your ancestors are good,
Their customs are solid and not hollow
They are not thin, not easily beakable
They cannot be blown away by the winds
Because their roots reach deep into the soil (p. 48).

See also L. Senghor (1964):-

We shall retain whatever should be retained of our institutions, our techniques, our values, even our methods. From all this - African acquisitions and European contributions - we shall make a dynamic symbiosis to fit Africa and the twentieth century ... (p. 9).

This sort of exercise has been condemned as preparing Africa for Fascism. For whatever that argument is worth, these exercises do not advance the cause of African revolution. They either support the status quo unconsciously, or they are dangerously retrogressive in that they fail to understand the essence of the conflicts of the two modes of production referred to here and the effect of those conflicts on African traditional values.

need to analyse the essence of these activities within the broader definition before we call them development.

Then there are definitions which reject the capitalist system. They try to show that capitalism is a stage of development which must give way to a more progressive stage of development, that is, socialist development and ultimately communism. Thus, Walter Rodney criticises the superficiality of definitions or explanations given by bourgeois scholars for the phenomenon of development. He rightly points out that the essence of the phenomenon is left out. He argues:-

No mention is made of the exploitation of the majority which underlay all development prior to socialism. No mention is made of the social relations of production or classes. No mention is made of the way that the factors and relations of production combine to form a distinctive system or mode of production, varying from one historical epoch to another. No mention is made of imperialism as a logical phase of capitalism.

In contrast, any approach which tries to base itself on socialist and revolutionary principles must certainly introduce into the discussion at the earliest possible point the concepts of class, imperialism, and socialism, as well as the role of workers and oppressed peoples.... However, one has at least to recognise the full human, historical and social dimensions of development, before it is feasible to consider 'underdevelopment' or the strategies for escaping from underdevelopment (1972, pp. 20-21).

Rodney, a committed Marxist and revolutionary, is interpreting Marx on the stages of development of human society which the bourgeoisie have limited to economic development - analysis of productive forces in isolation from the socio-economic order of society. Marx's analysis of the stages of development is set out in the preface to A Contribution to a Critique of

5. See Brett (1973):-

The term 'development' is...used.... to denote a change process characterized by increased productivity, equalization in the distribution of social product, and the emergence of indigenous institutions whose relations with the outside world, and particularly with developed centres of the international economy, are characterized by equality rather than dependence or subordination (p. 18).

Political Economy.⁶ These stages of social development are communalism, slavery, feudalism, capitalism and communism. Socialism has been observed as a transitional stage prior to communism.

The Role of Law in Development

The various schools of bourgeois jurisprudence have defined law.⁷ David Williams (1973) has dealt with this issue at some length. His view is that only two schools are relevant to us: the sociological school of jurisprudence and Marxist theory of state and law (p. 193). Our view is that the positivist school of jurisprudence is worth discussing as well, and it is relevant to East Africa because it is the dominant school of jurisprudence here. This school emphasizes the maintenance of the status quo without much mystification. Hart defines positivism in his Concept

6. Marx wrote:-

In social production for their existence, men inevitably enter into definite relations, which are independent of their will, namely, relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic foundation on which arises a legal and political superstructure and to which correspond definite forms of social consciousness... At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or - this expresses the same thing in legal terms - with the property relations within the framework of which they operate hitherto. From forms of development of productive forces these relations of production turn into fetters. Then begins an era of socialist revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.

7. See, generally, Lloyd (1972). For a brilliant and successful attack of these schools, see S.S. Golunskii and M.S. Strogovich (1972).

of Law, making it clear that a positivist approach to law rejects all other approaches.⁸

The sociological school of jurisprudence also emphasises the maintenance of the status quo; Roscoe Pound's (1954) mystification does not disguise this fact.⁹ Pound realizes that his scheme of individual, public and social

8. Hart's definition is as follows:-

Legal positivism: The expression 'positivism' is used in contemporary Anglo-American literature to designate one or more of the following contentions:-

1. That laws are commands of human beings;
2. That there is no necessary connection between law and morals or law as it is and law as it ought to be;
3. That the analysis or study of the meaning of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and critical appraisals of law in terms of morals, social aims, functions, and so on;
4. That a legal system is a closed logical system in which correct decisions can be deduced from predetermined legal rules by logical means alone;
5. That moral judgement, cannot be established, as statements of facts can, by rational argument, evidence or proof....

9. At the end of the last and the beginning of the present century, a new way of thinking grew up. Jurists began to think in terms of human wants or desires or expectations rather than human wills. They began to think that what they had to do was not simply to equalize or harmonize wills but, if not equalize, at least harmonize the satisfaction of wants.....

Three elements contributed to shift the basis of theories as to the end of law from wills to wants, from the reconciling or harmonizing of wills to reconciling or harmonizing of wants. The most important part was played by psychology which undermined the foundation of the metaphysical will philosophy of law. Through the movement for unification of social sciences, economics also played an important part, especially indirectly through the attempts at economic interpretation of legal history, reinforcing psychology by showing the extent to which law had been shaped by the pressure of economic wants. Also the differentiation of society, involved in industrial organisation, was no mean factor, when classes came to exist in which claims to a minimum human existence, under the standards of a given civilization, became more pressing than claims to self-assertion. Attention was turned from the nature of law to its purpose, and a functional attitude, a tendency to measure legal rules and doctrines and institutions by the extent to which they furthered or achieved the ends for which law exists, began to replace the older method of judging law by criteria drawn from itself (p. 42).

interests cannot be secured in entirety: 'Put simply, it has been and is to secure as much as possible of the scheme of interests as a whole as may be with least friction and waste' (1940, p. 76). This legal theory also justifies state intervention into the economy. The view is that the capitalist can protect his private property, and, while enjoying that right, he can serve the general welfare. State intervention in the economy has only one acceptable justification to prop up and perpetuate the irrational capitalist economic system. Then laissez-faire policy which decreed the state's non-intervention in the economy was disproved by crises - the First World War, the Great Depression, other inter-war crises, inflation, etc. The capitalist states had to resist the revolutionary potential of these crises, as stated by Engels (1972).¹⁰

On the question of the role of law in development we will confine ourselves to the Marxist theory of state and law as the only relevant theory for discussion. For the Marxists, law is a 'system of judicial standards and prescriptions expressing the will of the ruling class and protected by the coercive power of the state' (Duff, 1968, p. 127). This definition brings in the role of law in terms of economic classes and its close alliance to the institution of the state. While for the bourgeoisie the state is an impartial institution, the Marxists agree with Engels that the state is the 'collective capitalist', 'a dictatorship of the dominant class and its political arm' (Chkhikvadze, 1969, p. 13). They trace the origin of law to the birth of the state (Engels, 1972). Both state and law are to the Marxists tools of exploitation in the hands of the most powerful and economically dominant class. Thus

10. Engels maintains:-

Because the state arose from the need to hold class antagonisms in check, but because it arose, at the same time, in the midst of the conflict of these classes, it is as a rule, the state of the most powerful, economically dominant class, which, through the medium of the state, becomes also the politically dominant class, and thus acquires new means of holding down and exploiting the oppressed class. Thus, the state of antiquity was above all the state of the slave owners for the purpose of holding down the slaves, as the feudal state was the organ of the nobility for holding down the peasant serfs and bandmen, and the modern representative state is an instrument of exploitation of wage labour by capital (1972, p. 168).

the state and law cannot be divorced from the socio-economic order of a society and its class struggles.

In analysing law and development it is important that we understand two important terms in Marxist political economics, economic base and superstructure. The economic base refers to the economic system at a certain stage of social development, that is, the sum total of the relations of production. The relations of production refer to the relations established among people in the process of the social production of material goods. Relations of production have three crucial aspects: the first and decisive aspect is the form of ownership of the means of production. This aspect is the basic relations of production. It determines the social division of a society and its class composition, and the class composition in turn determines the character of all the superstructural features. The superstructure embraces social views on politics, law, philosophy, art, religion, etc. and the political, legislative and judicial bodies and systems corresponding to these views.

Dogmatic Marxists interpret Marx to hold that the only way of effecting development is by changing the economic base and that making minor changes in the superstructural features such as law will not bring about social change. Their argument is that the economic base plays the principal and decisive role. The superstructure is formed on the economic base and its character is decided by the character of the base. They argue further that the decisive role of the economic base can also be seen in the fact that Marx wrote that, 'with the change of the economical foundation the entire immense superstructure is more or less rapidly transformed'.

This view of the dogmatic Marxists must give way to the view that the superstructure does not merely conform to the economic base passively. It is relatively independent and has its own immense effect on the economic base. An advanced superstructure is established to meet the needs for growth of an advanced economic base. It promotes the formation and consolidation of its base, destroys the old economic base and becomes the progressive agent propelling the growth of production forces. A decadent superstructure protects the old economic base and hampers the growth of the new economic one. For an obvious example of this analysis, we need only refer back to our views on customary sales law.

In relating these two terms to the Kenyan situation we need to point out that this is an underdeveloped capitalist society fully integrated in the world economic system. That is our economic base. Our neo-colonial state

The doctrine of freedom of contract¹¹ is the fundamental basis of all principles of the law of contract.¹²

The obvious point at which to start is when the bourgeoisie seized political power in Britain. The British history of the law of contract is relevant here for the obvious reason that Britain was later to impose this law on Kenya. British capitalism was built on the ruins of British feudalism. The bourgeoisie demanded a 'free' labour market and the 'free' play of economic forces on which capitalism was built on the ruins of

11. See Otto Kahn-Freud (1962):-

As a social fact, that which the law calls 'freedom of contract' may in many spheres of life (not only in labour relations) be no more than the freedom to restrict or to give up one's freedom. Conversely to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally and socially unfree will (p. 16).

R.B. Seidman notes:

Parties to bargains are seldom of equal bargaining strength. To the extent that they are not, contract, however it may appear to parties, is not a matter of freedom of choice, but of command. Is it significantly different to say to a man, 'I will pay you a wage if you will work for me?' Rather than, 'You will get no wage unless you work for me?' Two hundred years ago Lord Chancellor Northington expressed it successfully: 'Necessitous men are not, truly speaking free men'.

At law, to treat unequals notionally as equals is in fact to elevate the stronger to a position of domination. In a bargaining situation, the stronger imposes upon the weaker the norms of conduct which he desires. There is no 'equality' between African labourers and a giant copper mine or plantation. An African who must raise cash to pay a poll tax, or go to jail, has no freedom to decline to work for cash wages (p. 556).

12. For the general principles of law of contract, see Cheshire and Fifoot (1972), MacNeil (1968) and R.W. Hodgkin (1975).

British feudalism. The bourgeoisie demanded 'free' labour market and the 'free' play of economic forces on which capitalism was to be based for a long time. A 'free' labour market meant workers who were 'free' of the feudal fetters of dependent serfdom and 'free' of property (the serf depended on land for his subsistence - by freeing him from land, he was also freed from his sole means of subsistence) and who would be driven by hunger to the factories. To quote Marx:-

The workers were to be free from the old relation of clientship, villeinage or service but also free from all goods and chattels, from every real and objective form of existence, free from all property. Such a mass would be reduced either to the sale of labour power or to beggary, vagabondage or robbery as its only source of income. History records the fact that it first tried beggary, vagabondage and crime, but was herded off this road on the narrow path which led to the labour market by means of gallows, pillory and whip (1964, p. 98).

Finally, law permanently declared all persons equal. A worker was in law equal to a capitalist. Thus Seagle, in his Quest of Law, has written that 'there was no god but contract and Sir Henry Maine was its prophet' in the 19th century (p. 266). The doctrines of 'freedom of contract' and the 'sanctity of contract' were the inevitable counterparts of the free-enterprise system. In a society based on private ownership of the means of production and where law had declared all to be equal, this 'freedom' actually served to strengthen the dominant position of the property-owning class.¹³ Legal relations are always fundamentally derived from economic relations. They are property rights. The indispensability of contract to the development of capitalism is well advanced by F. Kessler:-

With the development of a free enterprise system based on unheard of division of labour, capitalistic society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common law lawyers, responding to this social need, transformed 'contract' from the clumsy institution that it was in the sixteenth century into a tool of almost unlimited usefulness and stability. Contract became the indispensable instrument of the enterpriser, enabling him to go about his affairs in a rational way (1943, p. 629).

13. Mandell writes:-

At the same time money begins to conceal the real economic relationship, formerly transparent, between serfs and lords, between necessary and surplus labour. Landowners and tenants, employers and wage earners meet on the market as free owners of commodities, and the fiction of this 'free exchange' hides the continuation of the old relationship of exploitation under its new forms (1968, p. 97).

Later in the 19th century, the individual enterpriser was replaced by large-scale enterprises and ultimately the multinational corporations. The form of the contract changed, but its essence continued. The new form was more detailed and elaborate with more exemption clauses. It was the necessary development of the concept of contract, stemming from the development of large-scale enterprises under monopoly capitalism.¹⁴

Right from the beginning, freedom of contract had a class content. Freedom of contract, stripped of its ideological cloak, means no more and no less than freedom to exploit and be exploited. In a class society where parties will not have equal bargaining power, except where two equal capitalist firms are involved (see McCaulay, 1969, p. 194ff), it is false to talk of freedom of contract. In truth, state intervention in contracts by legislation partially recognises that this equality is illusory. Trade union movements underline this basic fact as well. So does the judicial creation of the doctrine of fundamental breach (see Whitford, 1969, p. 87). Physical freedom, which the doctrine of freedom of contract emphasizes, ignores the relevant consideration - the economic power of the parties to a contract.

This doctrine of freedom of contract has been imposed on Kenya.¹⁵ As for the general principles of contract law, based on this doctrine of

14. Kessler writes:-

The development of large-scale enterprise with its mass production and mass distribution made a new type of contract inevitable - the standardised mass contract. A standardised contract, once its contents have been formulated by a business firm, is used in every bargain with the same product or service. The individuality of the parties which so frequently gave colour to the old type of contract has disappeared. The stereotyped contract of today reflects the impersonality of the market. It has reached its greatest perfection in different types of contracts used on the various exchanges. Once the usefulness of these contracts was discovered and perfected in transportation, insurance, and banking business, their use spread in all other fields of large-scale enterprise into international as well as national trade, and into labour relations. It is to be noted that uniformity of terms of contracts typically recurring in a business enterprise is an important factor in the exact calculation of risks. Risks which are difficult can be excluded altogether. Unforeseeable contingencies affecting performance, such as strikes, fire and transportation difficulties, can be taken care of. The standard clauses of insurance policies are most striking illustrations of successful attempts on the part of business enterprises to select and control risks assumed under a contract (1943, p. 629).

15. See section 3 of the Judicature Act, 1967 (No. 16 of 1967).

freedom of contract,¹⁶ the Contract Act of 1872 of India was imposed on Kenya by Britain. This act was repealed by the Contract Act, Chapter 23 of the Laws of Kenya (section 3). This latter act adopts the English law of contract for Kenya (section 2). The Kenyan Sale of Goods Act, Chapter 31 of the Laws of Kenya, enacts the Sale of Goods Act, 893 of Britain with very minor modifications. The Kenyan Hire-purchase law is also fundamentally English law. What the Kenyan Hire-Purchase Act, 1968 has done is to modify, confirm and supplement English common law concerning hire-purchase (Mutunga, 1975).

THE NEO-COLONIAL ECONOMY

The neo-colonial economic system has already been described in terms of roles and the maintenance and perpetuation of the international capitalist economic system. Metropolitan finance capital is invested in the production of raw materials and foodstuffs (Nabudeze, 1976, chapter 11) where it earns better returns. Metropolitan industrial capital (more correctly, finance capital because industrial capital cannot free itself from finance capital) is invested in the production of manufactured goods which find a ready market in less developed countries. For the industrial capitalists to realize their surplus value (profits), these goods must reach their ultimate consumer, and this process is facilitated by the role of commercial capital which serves industrial capital.

Mandel correctly paraphrases Marx on this topic:-

When the production of commodities is completed, the industrial capitalist already possess the surplus-value produced by workers. But this surplus-value exists in a particular form; it is still crystallised in commodities, just as capital advanced by the industrialist is too. The capitalist can neither reconstitute

16. A good example of this is the general rule that a court will not determine the adequacy of consideration in contracts (although it will determine equity in certain circumstances, see Treidel, pp. 65-66). This rule has been justified on the following grounds:-

It is rather than they (the courts) should not interfere with bargains freely made.... The courts are not well equipped to deal with the social and economic questions involved in determining whether a bargain is fair; and it seems that their refusal in general to judge adequacy of consideration is correct (Treidel, pp. 64 - 65).

Again, behind this argument the doctrine of freedom of contract is clearly operative. This general rule supports the essential feature of all contracts in capitalist societies - that they are tools of exploitation. This is why the exploitation of one party to a contract by the other does not make the contract invalid.

this capital nor appropriate the surplus-value so long as they retain this form of existence.... To realize the surplus-value must sell the commodities produced. But the industrialist does not work for definite customers (except when he carries orders for the 'ultimate consumer'); he works for an anonymous market.

Every time that a production cycle is completed, he would thus have to stop work at the factory, sell his commodities in order to recover his outlay, and then resume production. By buying what the industrialist produces, the traders relieve him of the trouble of going himself to look for the consumer. They save him the losses and charges involved in interrupting production until the commodities have reached their destination. They, so to speak, advance him the money capital that allows him to carry on producing without any interruption.

But the traders who advance to the industrialists the funds they need to reconstitute their capital and realise their surplus value, must in their turn quickly sell the goods thus bought, so as to begin the operation anew as soon as possible (1968, p. 185).

The ultimate objective of all this is quick appropriation of an increased surplus-value, as Mandel points out:-

Now each production cycle brings in the same amount of surplus-value, provided that the capital and the rate of surplus-value remain the same. Increasing the number of production cycles accomplished in one year means increasing the total amount of surplus-value produced that year. Reducing the circulation time of commodities is thus not only a way of realizing surplus-value more quickly, it is also a way of increasing the amount (1968, p. 187).

And commercial capital shares in the division of the total surplus-value on equal footing with industrial capital 'because by reducing the circulation time of commodities it help the industrialists to increase the total amount (of surplus-value) and the annual rate of surplus-value' (Mandel, 1968, p. 187).

The whole question of investment centres on the fact that capital invested reaps higher returns in less developed countries through high rates of interest. In Kenya, there are beneficiaries from the investments of finance capital. The producers of raw materials and foodstuffs, though they surrender interest to their creditors, still earn more than if they had not borrowed. These beneficiaries are the African and European petty-bourgeoisie. While the European mixed farms have been transferred to the middle and lower levels of the African petty-bourgeoisie, the upper

levels of the African petty-bourgeoisie have become capitalist farmers. (Leys, 1975, pp. 63-66). In the commercial sector, the sub-class of the Asian commercial petty-bourgeoisie has not been liquidated. The European, Asian and African commercial petty-bourgeoisie all participate in the distribution of foreign manufactured goods (Leys, 1975, pp. 150-159). Their role takes the form of commercial capital, which in reality in Kenya is finance capital advanced to these sub-classes who then function as merchant capitalists. The role of commercial capital in Kenya is to cement and perpetuate the alliance between the local petty-bourgeois sub-classes and the international bourgeoisie. Because of the on-going class struggles between the sub-classes, the alliance which is really significant is between the African petty-bourgeoisie and the monopoly bourgeoisie. The African petty-bourgeoisie control the state, and the European and Asian sub-classes are definitely in the process of dissolution.

THE LEGAL RULES AND THEIR APPLICATION

Contract is the fundamental legal rule in a capitalist system. The law, covering the sale of goods (section 3 of the Sale of Goods Act) and hire-purchase agreements (section 2 of the Hire-purchase Act) are based on the doctrine of freedom of contract. The definition of goods under Sub-section (1) of the Sale of Goods Act and section 2 of Hire-Purchase Act encompasses raw materials, foodstuffs and foreign manufactured goods. The sub-section under the Sale of Goods Act defines goods to include 'all chattels personal other than things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale'. The section under the Hire-Purchase Act contents itself by providing that goods under the act 'have the same meaning as in the Sale of Goods Act'.

Protection of private property is supported in both acts as a fundamental principle in a society whose economic structure is based on private ownership of the means of production. In both fields of law this legal expression is enshrined in the principle of nemo dat quod non habet which literally means 'no one can give what he does not have'. Sub-section (1) of Section 23 of the Sale of Goods Act reflects this principle. It provides:-

Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had

The Hire-Purchase Act adheres to the same principle under Sub-section (1) of Section 2. This is clear when the definitions of hirer, owner and hire-purchase agreement are analysed.¹⁷

Both acts facilitate the circulation of commodities as described above. Under monopoly capitalism, the nemo dat principle has come to be a legal fetter in the field of commercial law. While under feudalism it had performed a useful function in a personalised market, under capitalism, and in particular under monopoly capitalism with its mass production and mass distribution of commodities, this principle has had to be modified. Exceptions to the principle must be seen in this light. The unmitigated legal expression of the nemo dat principle could inhibit merchant or commercial capital from serving industrial capital. The Sale of Goods Act, for example, specified the following exceptions to the nemo dat principles:-

1. Where the owner is stopped from denying the seller's authority to sell - S. 23 (1),
2. Where the sale is by a mercantile agent - S. 26 (3),
3. Where the goods are sold under any special common law or statutory power of sale or under an order of a court of a competent jurisdiction - S. 23 (2) (b),
4. Where the apparent owner disposes of the goods as if he were a true owner thereof - S. 23 (2) (a),
5. Where the seller's title is voidable and at the time of sale has not been avoided - S. 24,
6. Where the goods are seized under a writ of execution and are sold to a bona fide purchaser - S. 27, and
7. Where goods are disposed of under the conditions described in sub-sections (1) (2) of section 26.

17. For example a hire-purchase agreement' means an agreement for the bailment of goods under which the property in the goods will or may pass to the bailee.....'.

The fundamental principle under hire-purchase law, that property in the goods does not pass until the hirer exercises the option to purchase, is clearly enacted; c.f., Holby v. Mathews (1895) H.L; Bandali v. Lombark Tanganyika Ltd. (1963) E.A. 304; Matayo Musoke v. Alibhai Garage (1960) E.A. 31; Mukembo v. Republic (1974) E.A. 100.

Under the hire-purchase law, the form of transaction facilities the circulation process as well. In the so-called triangular transaction, whereby the dealer sells the goods to a finance company which then lets them out on hire-purchase to the hirer, the circulation process is initiated when the dealer finds a customer who is ready to buy the goods and the finance company agrees to finance the buyer. This triangular transaction involves two forms of contracts: a sales contract between the dealer and the finance company and a hire-purchase agreement between the finance company and the hirer. Besides this transaction, there must also be a sales contract between the industrial capitalist (the real owner of the goods) and the dealer. That contract favours the interests of the industrial capitalist in terms of his production cycle and profits.

Under the provisions of both acts, are not specified, according to the doctrine of freedom of contract. Nor is there any regulation of the interest rates charged by finance companies which provide credit to facilitate the quick circulation of goods.¹⁸

How are these legal rules facilitated in practise? Research was carried out on transactions involving two raw materials produced in Kenya: coffee and tea. For tea, we looked into the operations of Brooke Bond Liebig Kenya, Ltd., which produces tea and exports it to other African countries and elsewhere in the world. The mode of payment is invariably by a letter of credit, and the payment process consists of the following stages:-

1. The importer completes a bank form which contains full instructions on how the letter of credit should be constructed,
2. The importer's bank transmits the letter of credit to its correspondent bank in the exporting country,
3. The correspondent bank notifies the exporter and sends him the detailed letter of credit, containing all the requirements and showing the value of the credit and the length of time for which it is valid,
4. The exporter then proceeds with shipment and carefully collects all the required documents ensuring that they conform with requirements specified in the letter of credit,

18. For a more detailed discussion on the half-heartedness of the Hire-Purchase Act, see Mutunga (1975).

5. When the credit, documents are complete, the exporter presents them (usually together with a draft) to the correspondent bank, which checks them for conformity and then pays according to the form of credit (Walker, 1970, p. 124).

It is important to note that a letter of credit will specify the basis for the export/import contract (for example, C.F., F.O.B., F.O.R., etc.), but the basic contract for the entire transaction is a separate document. The letter of credit also specifies which documents are required as evidence of current shipment (for example, a bill of lading or insurance policy), the name of the ship and details of the voyage, particulars concerning the goods to be shipped, etc. of course the details vary according to the mode of transportation.

In the case of Brooke Bond, the company transports its tea to London, paying all the expenses and insurance. In London, the company has agents who auction the tea weekly in the London market. The company pays the agents a commission. The agents advise the company on the stock available in London and sends the money earned at the auctions the following week through a system of bank transfers. The company also sells tea in the USA and Canada through its sister companies there. The mode of payment is by a letter of credit valid for 60 days.

The Coffee Board of Kenya has weekly auctions in Nairobi and it is paid the week after the auctions. The exporters, CETCO, for example, are also paid by letters of credit valid for periods of from 60 to 120 days.

The Kenya National Trading Company (KNTC) plays a key role in the distribution of manufactured goods in Kenya. The KNTC was launched by the government in 1965 in an effort to Africanise commerce. The KNTC is an importer of foreign goods with agents all over the country.¹⁹ The agents purchase imported goods from the KNTC either for cash or by banker's draft. The KNTC's mode of payment for imports is by a letter of credit, usually a sight letter of credit. The period of credit varies from 60 to 120 days. The pricing system of the KNTC is based on expenses and profits, as with any merchant capitalist. The KNTC invests capital in the distribution of

19. For imported goods, these agents are in fact legally designated as buyers, not as agents.

goods, which is actually finance capital from the ICDC (Industrial and Commercial Development Corporation), financed by government and foreign financial institutions. The KNTC has many foreign suppliers, principally from Western capitalist countries.

Car dealers in Kenya were also investigated. There are car dealers who are importers, such as D.T. Dobie, Simba Motors, the Cooper Motor Corporation and Westlands Motors. There are also sub-dealers who buy from the importers, for example Joginder Motors. The mode of payment by all car importers is by letter of credit, the duration of credit varying from 60 to 90 days. The dealers sell the cars to finance companies who make hire-purchase agreements with the consumers.

Four finance companies were studied. All four operate as savings banks, but the local capital which is invested is denationalised (Shivje, 1973, pp. 359-382). A close look at these companies reveals that they ask for a deposit of 50% of the hire-purchase price. The other 50% is paid off over periods varying from 18 months to 2 years. The National Bank of Kenya departs from this pattern, however, when dealing with civil servants. The other three finance institutions have all offered 20% of their share capital to the public.

These companies charge exorbitant interest (Goode, 1970, p. 51). The Credit Finance Corporation, for example, gives 6% interest on money deposited, but charges 12% interest on loans. Loxley (1966, p. 765) and Mandel (1968, p. 236) correctly argue that the rate of interest charged over a period is actually higher than the stated rate because the balance is reduced monthly over the period. A flat rate of, say, 10% per annum, they argue, is effectively equal to almost 18% per annum. It can be argued, therefore, that the Credit Finance Corporation charge 21.6% per annum on all loans.

Such institutions undeniably facilitate the circulation process, both of final consumer goods and of raw materials and foodstuffs. Production in monopoly enterprises can proceed uninterrupted, as the necessary supply of raw materials and sale of products are uninterrupted.

CONCLUSION

There is no doubt that the two branches of commercial law discussed here are effective legal expressions of neo-colonial roles. If we agree that

in Kenya we have skipped certain stages of development and that we cannot accept a state of underdeveloped capitalism, then we consider these two branches of law as part of a decadent superstructure, protecting an underdeveloped capitalist base which should be eradicated. The two branches are tools of underdevelopment, imposed upon Kenya by monopoly capitalism.

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THE NEED FOR FLEXIBILITY IN LAW AS AN
ADMINISTRATIVE TOOL IN DEVELOPMENT

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INTRODUCTION

This paper focusses on the administrative applications of law. The treatment of the subject is not meant to represent a specialist view of law but a generalist administrative interpretation of law and administrative problems which have legal implications. It is hoped that the legal and administrative issues discussed will stimulate thought on the application of law in general, and administrative law in particular. The paper is written with Kenya in mind, but the theoretical examples given will also apply to other countries, both developing and developed. As far as possible, practical examples will be avoided, but the theoretical examples given will be real and close enough to practice to enable discussants to cite actual examples relating to various countries.

This paper also attempts to discuss the pace of legal development in the context of general social change, which in many developing countries is occurring very quickly. The point is briefly made that law, in its theory and practice, tends to be conservative in its outlook and can be accused of insensitivity to its social context.

The main objective of the discussion of various examples in this paper is to highlight problems that are felt to be relevant to the application of law in development. The paper is too short to develop comprehensively some of the issues it touches on relating to the development of theory and practice. It is hoped, however, that such issues will be handled on a practical level during discussions on law and administration.

Some of the accusations made in this paper concerning the law and lawyers could apply to many other professions. But due to lack of space and time, the discussions and examples are deliberately confined to legal matters.

THE ORIGINS OF LAW AND ITS PROBLEMS AS A SCIENCE

Law as a social science faces many problems both in development and application. Its development originates from the ideas of men in the context of history. This historical context has had, as a component, the various cultures of the world, which in the past have been very many and distinct, but which at present are becoming more and more difused into one mass-culture shaped by modern communication technology. The world has become smaller and the ideas of men are communicated much faster.

If the Englsih law made sense in England in 1850, today it would come into contact with, and be influenced by, Puerto Rican or Japanese law much more quickly. If we were to develop, for example, something called Tanzanian law, and insist that the Norwegians use it, the Norwegians would consider us crazy or unfair, to say the least. And yet some of us consider it natural to be applying in Africa what we believe is Englsih law. The crit'isim that a view like this is unscholarly is based on the assumption that the development of any science ought to be research-based. Lawyers ought to carry out national and international research to derive principles from human action and make such principles the basis for legal development, both situationally and universally. It is only through this that we can discard the idea of Kenyan law, English law or Chinse law. It is surely time law developed a more universal context in theory and in practice, basically concerned with human behaviour. Feelings of inferiority from the colonial era should not continue to dominate and inhibit scientific development.

Law, like all other disciplines in the social sciences, should identify its area of concern as human behaviour, and should concern itself with observing, understanding, explaining, controlling, influencing, changing and, where possible, predicting human behaviour. Human behaviour is always dynamic and explanations for human behaviour cannot be based on dated and static English notions that are several centuries old.

One would wish to believe that the study of law is based on certain universal principles which explain its operation as a science. If this is so, concepts that limit a whole body of science according to cultural biases and prejudices should surely be abandoned. A lot of credit is given to various scholars for certain theories that they have developed through research or by accident. Such theories or hypotheses could have been made

in the fields of physics, sociology, economic, or engineering, but knowledge developed in these fields is not identified by its country of origin as with, e.g., English law. No one talks of Kenyan sociology or Tanzanian mathematics. Why should we continue to talk of English law, as if lawyers cannot develop frames of references other than those that are English. Where is the place for comparative analysis in law? How can such an analysis fail to be both international and comparative?

In the study of law, one is aware of examples of local acts, which provide local sources of law, and legal scholars in each country should study these sources, using a common scientific approach so that this work can contribute to the international scientific development of law. The principles would be universal, but application would be local, adapted to specific situations.

It is only through such an approach that the conservative and rigid attitude of the legal profession can be relaxed to facilities its effective role in development competency and the absence of local research leads some scholars and professionals to accept foreign ideas too readily. Some over-identify with foreign ideas, so much so that they cannot engage in the type of analysis which would enhance the development of their profession and help make its local application effective.

To what extent are law and lawyers subject to this accusation? Is it possible, for example, in Kenya that we believe an African cannot make a good lawyer and that a good lawyer in Kenya must necessarily be an Englishman, or at least not a black African? To what extent may this feeling of inferiority be plaguing the legal profession in Kenya and in Africa? Must one wait to hear Lord Denning speak to learn and appreciate the extent to which law should be viewed as a well-balanced social science? He is not so naive as to demand that the application of law be confine exclusively to the English interpretation, and yet he himself is an Englishman. Why? This is because he is not an active professional dead-wood (or maybe because he did not develop the sense of personal inferiority which comes with living in a black colony).

Management and administration suffer from these attitudinal limitations, even more than law.

The sources of law should be closely related to what constitutes

human behaviour in general. Principles of law that are to be used in Africa in the 1980s should be derived from Africa's needs of the 1980s, and not from the English experiences of 1784. One is not saying that the history of law or any discipline should be disregarded, but rather that its application should be modernized and made relevant to present real-life situations rather than to the situation in another culture hundreds of years ago.

Such a frame of reference cannot be developmental. Law, and some lawyers, tend to suffer from this. Lawyers should see law as an administrative tool, and should endeavour to facilitate its research-based development, to make it relevant to the needs of the society in which it is to be applied.

One expects that there ought to be by now some universal legal principles which serve as a basis for legal practice. Such principles should be flexible enough to enable the appropriate application of law in different situations. Otherwise, it would be difficult to conceive of law as a social science, which it is. Development presupposes flexibility and change; a static approach to the explanation of individual and group behaviour cannot be developmental.

Lawyers-in-training should spend more time studying behavioural science to learn about the area which law is expected to influence, change, control and predict, human behaviour.

The basis of law ought to be seen as human behaviour, both by lawyers and non-lawyers who deal with legal matters. The basic problem for all legal workers is the problem of understanding human behaviour. Added to the problem of human behaviour is the problem of the social environment. Human behaviour varies according to different cultures, and the social sciences have not yet developed a scientific way of developing, controlling and predicting human behaviour. In many cases, we just sit and wait for people's actions to show us what their intentions are. Lawyers share some of these problems with other professionals, and they will not solve them successfully by being rigid in their approach to explaining human situations. It is a widespread rigidity and non-flexibility which in fact justify a seminar such as this one. Development logically pre-supposes flexibility. If law is to be an effective tool for development, it has to be flexible and relevant to people's real needs. The legal behavioural

frame of reference also has to be current, and not exclusively historical. Lawyers should be innovative and risk-taking. Lawyers should also inject more of a challenge into legal training by pushing it beyond the mere mastery of old established ideas, to the quest for new ideas which will facilitate an acceptable and modern application of law.

THE APPLICATION OF LAW TO DEVELOPMENT

This section is meant to reiterate and explain the obvious: that law is, and has always been, a necessary part of human development. Law is, in fact, quite a natural phenomenon in human life and behaviour. It is naturally built into the statuses people hold and the roles they play which all constitutes human behaviour. In a process of social interaction, people are motivated to satisfy their needs in response to certain stimuli. Behavioural expressions can be negative or positive depending on whether they do or do not satisfy expressed needs. Negative behaviour is extinguished by many forms of social pressure and positive, acceptable behaviour is reinforced. Law contributes to this function of controlling human behaviour in a more formalized way through institutional arrangements.

Rules and regulations are an essential part of a bureaucracy. It would be impossible to set standards, set deadlines and lay down dos and don'ts, if there were no rules and regulations. It would be impossible to sequence activities and control behaviour if some generally agreed upon rules and regulations did not exist.

Bureaucracy needs rules and regulations to exist, or else there would be chaos. Governmental development activities, which are based on bureaucracies, can only survive on the basis of rules and regulations. All of these activities have legal aspects, while some are directly legal.

Much as these laws are needed, they must be flexible if they are to facilitate development. Whether rigid or flexible, laws are needed, and one cannot conceive of a society without codified and publicised laws. Even within the short period of a military coup (a topic on which Africa is the consultant/expert), people have to plan some strategy to which they must adhere for some given time. It is the responsibility of lawyers as members of the judiciary to interpret and implement legal procedures as a service to the legislature, to the executive and, most important of all, to the society which is the focus of change and development. If law did not exist, there would be bureaucratic or social chaos.

Law and Politics

In modern government, politics is the source of both administration and law. In the first instance, the notions of the 'separation of powers' and the 'independence of the judiciary' are determined by law. Parliament creates laws, but it then becomes the responsibility of the judiciary to interpret and to apply these laws. In other words, the powers of the judiciary are distinct from those of the legislature and the executive. Everybody knows that this distinction is clearer in theory than it is in practice. In practice, it always tends to be the politician's world.

In the interaction between law and politics, lawyers face a great challenge with regard to their role and influence in development. Not only in the developing countries but also in the developed world, the lawyers are often helpless in the hands of politicians. Lawyers have sometimes been the instruments of very antisocial acts and policies. There are also cases in many countries where political/legal issues are reported in the press on which legal guidance is urgently needed, but the lawyers remain silent as a matter of expediency. Sometimes lawyers have violated the law themselves, although the public would expect them to be good examples. This may appear an unfair and personal attack but then where does one draw the line? Is it unfair to expect lawyers to follow the legal principles they are expected to uphold?

Administrators and politicians are known the world over for corruption. Should we expect the same of lawyers? One would wish to say, no. It would seem to be inviting chaos and anarchy to leave law in the hands of amoral lawyers, who may want to redefine the law to suit their personal goals.

There have been cases where national politicians have gone so far as to amend constitutions to justify their own actions or to perpetuate their interests in the struggle for power and material wealth.

Precisely in this area of law and politics, firm rules and guidelines are called for, and yet this is the one area where law becomes so fluid as to be non-existent. There should be an effort to control politics by legal means so that for example, economic planning and development can be more rational and effective.

CONCLUSIONS AND SUGGESTIONS

Conservatism, rigidity, lack of innovation and consequently irrelevance, these are some of the qualities that have been attributed to legal practice in this paper. As an administrative tool needed to cope with dynamic situations, law should be flexible and development-oriented. In a developing country, where the pace of change is even faster than elsewhere, law needs to be particularly flexible and responsive if it is to be effective as a change agent. It needs to keep ahead of social change if it is to control and guide it.

This flexibility requires a re-orientation, both in the statutes and in the lawyers who interpret and apply statutes. This re-orientation has by necessity to be research-based rather than the result of armchair theorizing to ensure its scientific validity.

In Kenya, as has been mentioned above, it appears that law has borrowed too heavily from England. This situation tends to perpetuate conservatism and rigidity and results in irrelevant applications. A legal case described here provides an example of a situation where an English explanation legal precedent may not be appropriate or beneficial in a Kenya context.

A Divorce Case in Kenya

A man and a woman, both Kenyans from the Kikuyu tribe, were married. The man was an agricultural officer and the wife a trained primary school teacher. They married in the Christian church, though many of the man's ideas about marriage and property ownership remained traditional. Disagreements developed in the marriage and the woman moved away from the man's home and took up residence in a rented house with her children against the expectations and wishes of her husband and his relatives.

Unfortunately, without writing a will, the husband died while his wife was still living separately. The woman then moved back to her husband's home to live in his house and claim his property. The relatives of the deceased chased the woman away, denied her all access to her husband's property and refused to cooperate with the government officers responsible for arranging the administration of the dead man's estate. The woman then hired an Indian lawyer to seek redress through the application of the English law in a Kenyan court.

This is a case of two Kenyans having a legal dispute in Kenya and asking an Indian lawyer to use **English** law to solve their conflict. This is a commonplace example in Kenya today. People try to solve conflicts in the absence of a common frame of reference, due to the dynamics of social change. It takes a long time before any solution is reached. In the meantime the lawyers become wealthy, collecting fees from people with problems which possibly have no clear legal definitions.

The problem here goes beyond the individual lawyer or the individual member of the community. It is the responsibility of legal researchers to increase our understanding of marriage problems, including such issues as social structures, family structures and roles, family functions, family relationships, the power structure within the family, acquisition of property and inheritance, the economic power of family members and the traditional notion that a wife is always dependent on a husband economically.

This case is an example of a situation where the application of law has **lagged** behind social change. In the USA and Britain it is still mistakenly assumed that a working woman depends on her husband economically, with the result that it is the wife who normally benefits financially from a divorce, but never the husband.

Through research carried out by lawyers on the economics, the sociology, psychology and politics of the family, a legal framework ought to be developed which is relevant to modern family life. Legal decisions should have a degree of universality, but should also be flexible enough to accomodate individual cases and more general social change.

The problem of money-making is a common problem that the legal profession shares with many others. Lawyers provides a service which is very much needed by individual members of the public and by public and private organizations. To make matters worse, the legal profession has developed an aura which functions as a very strong built-in mechanism for survival. Lawyers, who are basically social scientists, use a terminology which is **unintelligible to many people**, although the cases they handle involve human beings, and issues which should be familiar. They show a strong trade union mentality, which keeps lawyers, in their training and practice, in a closely-knit inward-looking group.

Lawyers are well placed in a developing country where people are forced to explain themselves in new ways in which only lawyers are experts. In a country such as Kenya, a lawyer in private practice, if he works hard and has good business sense can become rich very quickly. He can do this while sticking to his legal ethics, or by violating them. And it is difficult to control the **practices** of lawyers. Members of the public have no idea what is a fair charge for legal service. Sometimes people do not even know when they need a lawyer to protect them from other members of the public, or from other social systems. And these problems stem mainly from the language used by lawyers. For example, hardly anybody, including highly educated people, can claim to understand their life-insurance or motor-insurance policies, both of which are the work of legal draftsmen.

This deliberate wall of jargon built between the law and the public enables lawyers to get away easily with unfair profit-making and corruption. The legal charges for house purchase in Kenya, for example, are very high, but members of the public have no avenue for formal complaint.

The quest for money and the get-rich-quick mentality does great harm in many professional areas. Law, medicine and administration are very good examples of this problem in Kenya today. Every week, at least one case is reported in the press of corruption in law, medicine or administration.

It is evident that because of money, lawyers also will compromise all standards of scholarship or ethics. They will **overcharge**. They will distort the law to seek favours and survive politically. They will become professors or lecturers at a university, but will spend their time in regular, full-time private legal practice to make more money. This will make it impossible for them to do research to continue to study on to develop a high degree of professionalism.

When professionalism is widely compromised for money, all professionals find it difficult to uphold high standards. They may fail to influence issues in the way the public expects. For instance, lawyers and administrators often fail to prevent or mitigate socially undesirable political acts.

Can lawyers take their professional responsibilities seriously,

rather than merely concentrating on becoming wealthy? Should it not be possible for lawyers to play a beneficial role when other groups, or the whole social system, are suffering from serious problems?

This is the role one would wish to see the law and lawyers play in development. The legal system provides mechanisms to act as a brake when a social system is politically and economically moving towards increased problems and chaos. If law cannot do them, then the greed for money and power will continue to bring about social chaos in pursuit of the self interest of a few leaders.

APPENDIX 1 : WHY DO PEOPLE DISOBEY LAW

THE PROBLEM OF HIGH-LEVEL BRIBERY

by

Ann Seidman and

Robert B. Seidman

High-level bribery - that is, payments to high level political decision-makers in return for the exercise of discretion in favour of the briber--is plainly a difficulty the world around. It effectively transfers power to make the decision from the official to the briber. It therefore serves as a vehicle to subvert government policies.

Everywhere, the criminal law contains stringent prohibitions against bribery. Everywhere, the criminal law is disobeyed by high-level officials. How to explain this systemic disobedience?

A GENERAL THEORY OF OBEDIENCE TO LAW

Role-occupants obey the law when their behaviour conforms to its commands. They behave as they do because they make choices within the range of constraints and resources thrown up by their physical and social environment as they perceive them. Of what elements relevant to choice does the environment consist?

Explanations of behaviour in the face of law fall into two general categories. Sociologists and psychologists have generally focussed on the issue of deviance. Their definition of deviance leads them to invoke the individual's internalized values as the explanatory variable. Legal tradition favours a contrary model! 'A person weighs the benefits to him of the prohibited conduct against all the costs and the chances that he will have to pay those costs'. The sociologists' model emphasized the subconscious operation of values and attitudes; the lawyers', conscious choice.

The sociologist' model was built upon three assumptions. In the first place, it was assumed that disobedience to law was relatively rare. Disobedience threatens both the stability of the state, and our own security as middle-class academics. Classical strands of jurisprudence reinforced this sentiment. Analytical jurisprudence ignored the question of the efficacy of law;

it was merely assumed. Sociological jurisprudence taught the contrary, but paradoxically reached the same result. So long as law matched custom, it would be obeyed. The common law claimed to be 'the custom of the country'. Obedience was to be expected. It became the fashion to deny the independent efficacy of law. In fact, of course, disobedience to law is everywhere widespread. Nobody would enact a law which merely prescribes behaviour which in any event will occur. Disobedience is as 'normal' as obedience.

Second, the sociologists' model is based upon a consensus version of society. Third, it assumes that people do not calculate in deciding whether or not to obey the law. They are, as it were, programmed by the values and attitudes built into their neural nets. That is a circular notion.

Given these three assumptions, disobedience can never be an issue. Of course everyone will disobey positive law which does not match the consensus. Deviance is the issue: Why are there a few individuals whose values and attitudes differ from those of all of us, and thus lead them into deviant behaviour? The principal explanations inevitably have been psychological, not structural.

The lawyers' model has, of course, many versions. In all its versions, it differs from the sociologists' model described above by its emphasis on choice, and hence on calculation. Two principal arguments are made against the proposition that people calculate.

The first argument made against the lawyers' model attacks a caricatured version of it. That model sometimes is taken to assume that the only consideration taken into account in making choices about behaviour is the legal sanction. Self-evidently, choices are made in the light of all the constraints and resources of the environment, of which the commands and sanctions of the law are only a part.

The second argument made against the lawyers' model is more substantial: that the ordinary functioning of society denies that we make conscious choices in deciding to obey or disobey the law. Most people go to their jobs, return to their families, engage in their everyday activities, without consciously 'choosing' to do so. We do not calculate our advantage minute by minute. Even criminals frequently do not do so.

This argument is obviously the case with respect to a great deal of law in any reasonably well-integrated society. Any society is a society because of the repetitive patterns of behaviour which define it. It is a going concern. However well it responds to the claims and demands made upon it, at whatever level it functions, nevertheless it does function. It functions because the whole set of norms and roles, of positions and statuses, of value sets, of formal and informal rewards and penalties --in short, the entire culture --is more or less integrated. If it were not, the society would not be a society, but anarchy. Laws that are more or less consistent with the existing social order need not rely upon the threat of legal sanction to induce obedience. The surrounding institutional matrix structures rewards and punishments, constraints and resources so that the role-occupant usually makes a personally advantageous decision - at least in the short run - when he chooses to conform. So obvious is the choice that likely he is not conscious of making it. Indeed, it is precisely in such cases that one can talk about behaviour being institutionalized.

There are many situations, however, even in highly institutionalized societies, in which choice does occur. Firms calculate the consequences of tax law and of anti-trust law in deciding how to run their businesses. My decision about where to park my car is frequently dependent upon the parking ordinance, and the chances of getting a ticket. As Lemert puts it, 'the captured position of individuals in modern, pluralistic society sheds light on the choice of ends and means. One general consequence of this position is the increase in calculational behaviour and a heightened awareness of alternatives, a necessary willingness to consider a wide variety of values and norms as functional alternatives to end.' Many legal rules require or permit doing what would ordinarily not be done if the rules did not exist. Since these rules have such a high nuisance value for human beings, or, conversely, sometimes offer such great advantages, it seems inconceivable that most people do not calculate extensively.

The laws concerned with development are mainly rules which do not match institutionalized ways of doing things. They look to induce changed behaviour. They require the role-occupant to choose between norms, a condition characterized by Durkheim as 'anomie'. Calculational behavior is a chief consequence. A farmer does not change from the subsistence crop that has for generations kept his family alive, to a new cash crop without considering the consequences. Developmental rules require whole sets of acts done 'on purpose.' The proposition that all behaviour is non-calculational is plainly contradicted by the facts. Especially,

laws aimed at changing behavior induce calculated responses.

If both law and behaviour are the mere epiphenomena of values and attitudes, then neither can be changed until values and attitudes are changed first. That is at best a slow process. It runs into the 'common paradox' of the sociologists: 'If a law is not supported by the mores of the community, it is ineffectual; if it is, the law is unnecessary!' Some evidence of the invalidity of that paradox is that around the world governments do seek to use law to induce change, based on the belief that people do calculate. Do they all act in vain? Ought they be told to abandon their efforts to improve their lot?

In lieu of these two sorts of explanations for obedience to law, we offer a third that tries to define the categories of choice.

A role-occupant will choose to obey a law aimed at changing his behavior if, but only if, the following elements are present:-

1. The occasion arises for him to make a choice, whether or not to obey the law, requiring
 - a. That the law be effectively communicated to him, and
 - b. That he has an opportunity to either obey or disobey the law: and
2. He has the capacity to obey the law; and
3. The law maker has calculated that to obey the law will be in the interests of the role-occupant (including conformity-inducing measures by the state) and has included in that calculation all the factors affecting choice by the role-occupant; and
4. The role-occupant perceives that the rewards for obeying the law are greater than the disrewards, which depends upon:-
 - a. The processes by which he solves the problems posed by the requirement of choice; and
 - b. The perceptions, tastes, role-self images, ideologies and other subjective factors which enter into decision making by the role-occupant.

This theory is still dismayingly general. It can be made more specific.

A person will obey a law aimed at changing behaviour if, but only if, all the following conditions are present:-

1. The law is communicated to him in a way that will lead to his acting upon it,
2. He is physically able to comply with it,
3. His social place is such that he can comply with it,
4. Others supply any inputs that are necessary to obedience,
5. He has the capacity to obey,
6. Performance is likely to yield a net reward for the role-occupant, including in the balance all the facts affecting choice, to wit:
 - a. The premiums and penalties paid or imposed by existing institutions for such behaviour;
 - b. The manifest and latent consequences of official activity;
 - c. The sanctions imposed by antagonistic interest groups;
 - d. The sanctions imposed by antagonistic interest groups upon whom the role-occupant is dependent;
 - e. The sanctions imposed by disobedient reference groups; and
 - f. The sanctions imposed by other members of the role occupant's class, elite grouping, or other stratum,
7. The role-occupant will likely obey if he perceives obedience as likely to yield a net reward (that is, if his assessment of the constraints and resources of his environment matches what the law-maker expected his assessment to be), which depends upon:-
 - a. Whether the role-occupant uses a means-ends methodology for deciding whether or not to conform,
 - (i) Whether his personal ends are those which the law-maker expected him to hold,
 - (ii) Whether his perceptions and weightings of the constraints and rewards of the environment are those that the law-maker expected him to have; and
 - (iii) If the announcement of the decision to conform or not is made publicly, the announced decision (but not necessarily the consequent behaviour) is likely to be conformity,
 - (iv) Whether the role-occupant has internationalized any norm which he believes is so powerfully sanctioned as to outweigh his perception of the net gain otherwise accruing from obedience to the new law; and
 - (v) Whether his role-self image requires him to disobey the new law;

- b. If the role occupant uses a problem-solving methodology for deciding whether or not to conform,
- c. If the difficulties to which the law is addressed, the alternative explanations, the data, the alternative possible solutions, and the experience with those solutions are similar to those used by the law-maker in deciding to enact the law; and
- d. If the new law involves matters of immediate use and enjoyment, according to his personal tastes.

EXPLANATIONS FOR HIGH-LEVEL BRIBERY.

High-level bribery involves two different sets of role-occupants: officials and the givers of bribes. We suggest an explanation for the behaviour, first, of high-level officials who accept bribes.

High-level officials in developing countries frequently accept bribes because:-

1. The processes of development create manifold opportunities for the exercise of discretion by officials (in granting government contracts, import licenses, pioneer industry status, and so forth), which favour some entrepreneurs and not others,
2. The laws defining the power of officials in these various programmes clothe them with broad and usually unreviewable discretion;
3. The laws defining the power of officials in these various programmes permit them to exercise their discretion secretly,
4. The laws defining the power of officials contain few procedures ensuring accountability for many of the actions of officials in connection with these programmes,
5. Private entrepreneurs exist and compete for government favours;
6. It is in the economic interest of officials to accept bribes;
7. Many bribes are received and used for political purposes, to increase the power of officials;
8. Detection, prosecution and punishment of high-level officials is extremely rare, because the difficulties of detection and the political pre-eminence of the high-level officials taking bribes insulate them from prosecution;

9. The reference groups of politicians approve of bribery,
10. Many politicians believe that it is right and proper for politicians to take bribes;
11. Many politicians adopt the role-self image of the 'big man' and require very large sums to support their clients, and
12. The decision to obey the laws against bribery are invariably made privately and secretly.

An explanation can also be suggested for why expatriate businessmen, sometimes (but by no means invariably) with excellent reputations for probity in their own country as they step off the airplane in a less developed country seemingly metamorphose into arrant corruptors:

1. There are ample opportunities for corruption (see preceding explanation);
2. If any single businessman is prepared to bribe, and an official is prepared to accept it, then all businessmen dealing with that official must be prepared to bribe if they want to do business with him,
3. The executives of multinational firms doing business in any particular less developed country do not have reference groups within the country which might disapprove of bribery; although such groups sometimes exist in some of the developed countries;
4. The executives of the multinational firms doing business in the less developed countries frequently have racist assumptions about the moral character of officials in the less developed countries;
5. The executives of the multinational firms doing business in the less developed countries frequently believe that the culture of these countries requires and approves of bribery: That belief became a self-fulfilling prophecy; and
6. The ideologies and role-self images of businessmen combine to justify them in an amoral search for profits.

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REFORMS IN THE FIELD OF LAND ADJUDICATION AND CONSOLIDATION

by

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INTRODUCTION

The paper is intended to provide a summary of the most important directions in which land reform has been achieved in Kenya during recent years.

The paper consists of two sections dealing with reform through conduct of land consolidation and adjudication and reform in the field of registration of titles to land. These sections have been prepared by the Department of Land Adjudication in the Ministry of Lands and Settlement of the Government of Kenya.

It will be appreciated that in a short paper of this kind it has not been possible to consider in detail all aspects of Kenya's programme of land reform. It is hoped, however, that delegates to the seminar will be able to satisfy their desire to know more on particular points.

REFORMS IN THE FIELD OF LAND ADJUDICATION

In this paper an attempt is made to indicate the manner in which the law governing land tenure in the former African reserves of Kenya has evolved from a tribal system under which land is held communally by clans or tribes to a sophisticated system of individual holdings held by farmers with a Government-guaranteed registered title. In a short paper of this kind, it is not possible to go into much detail on the question of the tribal land tenure system, which varies widely from one tribe to another, and notably between pastoral and arable tribes, the former having clung more tenaciously to the traditional communal system of land ownership. Suffice it to say that the customary system of land tenure in Kenya, like that of any other nation, is based fundamentally on the rights of a man and his sons to the use, so long as they need it, of whatever farming land they have hacked out of the bush; over the generations the family becomes a clan, and as it is required, new land is cleared by members of the clan for the clan's

use - and the elders of the clan determine any disputes arising over the allocation of unoccupied land. But the rights allocated are only rights to use the land, not rights of ownership. As population rises the land comes to have an exchange value, the concept of individual proprietary rights in land emerges, and the sale, mortgage and lease of the land (as distinct from its use) are recognised by the tribe in its customary law.

As early as 1930, the concept of individual ownership of land was emerging in certain parts of Kenya, and notably in Central Province. However, it was not until 1954 that it became the Government's policy, with the acceptance of the Swynnerton Plan, to issue African farmers with individual titles to their holdings. In his 'Plan to Intensify the Development of African Agriculture in Kenya', Mr. R.J.M. Swynnerton high-lighted the urgent need, from the agricultural development point of view, to take active steps to furnish each African farmer with an indefeasible title to his land. 'Every African farmer', he said, 'must be provided with such security of tenure, through an indefeasible title, as will encourage him to invest his labour and profits into the development of his farm, and as will enable him to offer it as security against such financial credits as he may wish to secure from such sources as may be open to him' He strongly recommended that where farmers' holdings were severely fragmented, and particularly in the densely populated Central Province (as a result, largely, of the tribal customs concerning marriage and succession, as related to land tenure), a process of consolidation of fragments and the establishment of rights to holdings, possibly through special courts, should be introduced; that where, in the rather less densely populated areas of communally held land, as in Kericho District where the process of enclosure of individual farming units was being carried out, urgent action should be taken to create conditions **to prevent** subdivisions below an economic level and thus forestall possible fragmentation through inheritance; and that fully negotiable registered titles should then be issued to the farmers whose rights to their holdings (after consolidation in Central Province) had been satisfactorily established. The process of land consolidation and registration was thus introduced in Kenya as part of an overall plan to intensify agricultural development.

In June 1956 the Kenya Government issued the following policy statement: 'It is the policy of the Government to encourage the emergence of individual land tenure amongst Africans, where conditions are ripe for it, and in due course, to institute a system of registration of negotiable title...'. .

The first legislation enacted to put these policy decisions into effect consisted of the Native Land Tenure Rules 1956 (published in October 1956), and the African Courts (Suspension of Land Suits) Ordinance 1956 (published in January 1957). Prior to the enactment of this legislation, but as part of the implementation of the Swynnerton plan for intensification of African agricultural development, a process of determination of land rights and of consolidation of fragmented holdings had been in operation in Central Province for some time (in Nyeri and Kiambu Districts as early as 1953).

The object was to ascertain what land each person was entitled to, and then with a view to improving agriculture by the elimination of scattered fragments of land of uneconomic size, to allocate to him, in a planned layout, a single plot of land equivalent to the aggregate of the plots to which he had been found to be entitled. There is not sufficient time to give a detailed description of the land consolidation process, but the following is a brief outline of the procedure. The field work of determining, for each sub-location, the boundaries and ownership of existing holdings in the area and of deciding upon the siting of each individual's new consolidated holdings is carried out by committees of local elders, applying their own intimate knowledge of the history of the land, but with the guidance and assistance of various government officers - Measurers, Recorders, Demarcation Officers, Surveyors, Field Supervisors, etc.; the work is planned and controlled, and objections are heard by Adjudication Officers, each one normally responsible for a province originally, though these days there is an Adjudication Officer in charge of a single district. Originally these officers were attached to District Commissioners, but in 1963 the direction of this work was centralised under the Minister for Lands and Settlement, in a new Department originally known as the Land Consolidation Department, but now named the Land Adjudication Department.

It should be stressed that this work is carried out only after the land adjudication process and its effects have been widely publicised at baraza (meetings) held in the area, and only after, in open barazas, the people of the area have agreed to it being carried out and have chosen the numbers of their local Land Committee from amongst their elders. All successfully established claims to land are entered in the Record of Existing Rights and after objections have been settled, consolidated plots are demarcated on the ground by the Committee and recorded in the Adjudication Register and Demarcation Plan. Everything is widely publicised, including the dates and places for inspecting the Record of Existing Rights and the Final

Adjudication Register, and these two records are available for inspection and objections for a period of two months each. In allocating new consolidated holdings, the Committees provide first for public-purpose land (for roads, schools, etc.) on a percentage basis, and then take care to allocate to each individual, so far as possible, land of a similar quality and similarly situated to the land previously held by him. A noteworthy feature of this Committee system - a system, incidentally, which differentiates Kenya's land tenure reform methods from those of most other countries in the world - is that it is firmly rooted in customary law, in so far as the Committee members are, for the most part, the elders traditionally empowered to allocate land within their clan areas. The result of this exercise of their power, however, is to remove those powers from them in respect of any land adjudicated upon by them, since in future any disputes relating to that land will be decided by courts of law, on the basis of the statute law relating to registered title to land. Thus the new sophisticated system of land tenure is soundly based on the old customary tribal system.

This system of land consolidation and registration, which had been started in Central Province as early as 1953, was given legislative sanction by the Native Land Tenure Rules 1956 and the African Courts (Suspension of Land Suits) Ordinance 1956. This latter ordinance was needed to prevent the work of the Committees from being upset by proceedings pending in or subsequently commenced in African courts which by themselves could not possibly cope with the task of adjudicating upon all land rights. The principles of adjudication, consolidation and registration of land rights were accepted, and the benefits accruing from this process were rapidly appreciated, though here and there small pockets of opposition were experienced. There arose a steadily increasing demand for the work to be introduced, not only in Central Province but in any other parts of the country, and people sent parties to Central Province to see the process in operation. Indeed the momentum was such that grave and widespread discontent would have ensued if any attempt had been made to slow it unduly.

However, certain difficulties arose over the Native Land Tenure Rules. One of the chief difficulties stemmed from section 68 of the Native Lands Trust Ordinance, under which the rules had been made, and which provided that 'every African tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing law and custom or any subsequent modification thereof;' by this section the Government was precluded from recognising or creating, by the rules made under that section,

any rights unknown to the law and custom of the tribe concerned. Thus under these rules it was not possible to make clear the nature of the rights to be recognised by the act of registration, or to discriminate between rights amounting to ownership and lesser rights for which no legislative provision had been made in the rules, but which existed in customary land law. Furthermore the African Courts (Suspension of Land Suits) Ordinance 1956 had never been intended to be more than a temporary measure pending substantive legislation. The Working Party on African Land Tenure 1957-58 therefore recommended that a new ordinance should be enacted (to take the place of the Native Land Tenure Rules 1956) so as to embody legal provision for the staying of land suits; to provide for definition of the nature of the rights in land recognised by registration so as to differentiate between those rights which do and those which do not amount to full ownership of the land; to provide for a fully detailed procedure for the registration of title after final adjudication and allocation of holdings, for the registration of subsequent transactions, and for the maintenance of full land registry; and for implementing a number of modifications to the procedure prescribed by the rules, found necessary, in the light of experience. In 1959 the Native Land Registration Ordinance was enacted, based on a bill prepared by that working party. Apart from the points already referred to above, the main innovations in the new ordinance were an increase from 5 to 25 in the minimum number of members of a committee, and provision for a panel of between 6 and 25 from which an Arbitration Board might be appointed with a minimum membership of 5, (as against a previous fixed membership of 8) - this was done to reduce the risk of partiality by such bodies; provision for the committees to specify the rights in land which may be converted into ownership, and for the recording of rights enjoyed by tenants under customary law, and for other rights and interests existing at the time of adjudication; under the rules any objections to the Record of Existing Rights were referred by the District Officer back to the committee whose decision was final, but under the new ordinance the Adjudication Officer was given certain powers of hearing appeals against decisions of Committees and Arbitration Boards reflected in the Record of Existing Rights; the period for submitting objections to that record and to the register (restyled Adjudication Register in the new ordinance) was increased from 30 days to 60 days in each case; and provision was included to empower the Committees to safeguard the interests of those claimants with rights not amounting to ownership, even when the owner of the land in respect of which they claimed rights lost possession of that piece of land in the process of consolidation or provision of public purpose land.

The work of land adjudication, consolidation and registration has proceeded at a steadily increasing pace under the comprehensive provisions of the Native Land Registration Ordinance 1959; the following year its title was changed to the Land Registration (Special Areas) Ordinance, and then in 1963 this ordinance was broken down into its two major component parts, dealing respectively with the adjudication of claims to land (together with consolidation of holdings), and with the registration of titles to those holdings after adjudication and consolidation (together with subsequent transactions in such holdings). The result was the Land Adjudication Act 1963 and the Registered Land Act 1963. The latter will be considered in the section of this paper dealing with registration of titles. The former was unfortunately mis-named, since it provides a procedure for not merely adjudicating claims to rights in land, but also for consolidating holdings the rights to which have been successfully established. It should perhaps have been styled the Land Consolidation Act, but this will be referred to later. Suffice it to say at this point that the legal provisions of the Land Adjudication Act 1963 relating to adjudication and consolidation are to all intents and purposes identical with those of the Native Lands Registration Act 1959 and the Land Registration (Special Areas) Act 1960.

During the early 1960s, and especially after independence in December 1963, the demand intensified for Land Consolidation teams to be set to work in different parts of the country. Practically every Member of Parliament brought pressure to bear on the Minister for Lands and Settlement, to persuade him to arrange land consolidation work to be pressed ahead in that member's constituency. In consequence, the staff and resources of the Department of Land Consolidation, in spite of being considerably augmented, were widely dispersed over practically the whole country - a most uneconomic use of available resources. This tremendous pressure brought to light the fact that a further 25 million acres of land in Kenya still required to be processed and that, at the then rate of about 300,000 acres a year, it would take an unacceptably long time (upwards of 80 years) to complete those 25 million acres of Kenya, unless some considerable acceleration of the process could be effected.

In 1965 a joint Kenya-British mission, under the chairmanship of Mr. J.C.D. Lawrance (formerly Permanent Secretary for Land Tenure in Uganda), was appointed to carry out a study of land consolidation and registration work in Kenya, to advise on an accelerated programme of such work and its costs, and to suggest the best means of implementing such a programme. Up

to the end of 1965 when the mission started work, rather less than two million acres had been completed in the ten years or so that work had been in progress. The report of that mission contains a great many recommendations for improving the methods used, for varying the process to suit the particular circumstances of the categories of area processed, i.e. consolidation areas on the one hand, and non-consolidation areas on the other, including lightly-populated arable areas, areas suited to irrigated or other agriculture of a block-cultivation type, pastoral areas, and areas where the process was simply one either of enclosure or of distribution. They also made numerous recommendations relating to the staffing of the three departments concerned (i.e., Lands, Surveys, and Land Consolidation), and for the production of the mapping required by the field staff, and for land registry plans. The major recommendations on the question of legislation were that a new Land Adjudication Act should be enacted providing a simplified and speedier process for application to non-consolidation areas where no consolidation of fragments was needed; that the same Adjudication Act should be applied to this new act, and that the existing act to be re-styled Land Consolidation Act; that provision be made for registration of title to land held communally by groups, particularly in pastoral areas; and that the present Registered Land Act should be amended so as to provide for an appeal to be made to the High Court, by leave of the Court, for the rectification of the Register in respect of any first registration of title which is alleged to have been effected by fraud or error (under the Land Adjudication Act the Land Adjudication Officer's decision on an objection is final, and the Registered Land Act specifically excludes first registrations from the scope of any of its provisions relating to rectification of errors in the Register).

The Government accepted practically all the mission's recommendations, and has been implementing them over the years. As regards the mission's recommendations on legislation, two new bills were enacted by Parliament: the Land Adjudication Act, Chapter 284 of the Laws of Kenya, and the Land (Group Representatives) Act, Chapter 287. The major one, the Land Adjudication Act, provides for a process of adjudication of land rights and their registration without any consolidation of fragments as is the case under the Land Consolidation Act, Chapter 283. It clearly defines the powers and responsibilities of the officers legally concerned with this process: Recording Officers, Demarcation Officers, Survey Officers and Adjudication Officers. The duties of the Committees are reduced to little more than taking decisions on disputes as to ownership or boundary alignment that the recording and demarcation officers cannot settle, and therefore submit to them. The

statutory minimum period of six months for submission of claims is omitted, and with the omission of consolidation and the related Record of Existing Rights it could be possible to complete the adjudication process, up to the finality of the Adjudication Register, within six months in any given area. Practice has shown, however, that it takes at least one year to complete the process in the agricultural areas. In the act provision is made for the registration of groups and for such groups to be advised to apply for incorporation of group representatives. Appeals to the Arbitration Board, to the Adjudication Officer and to the Minister are provided for, and responsibility for collection of land adjudication fees is transferred from the Director of Land Adjudication to the Chief Land Registrar, who may enter them as a charge against the title, to be cleared before any transaction may be effected. These are the main points on which the Land Adjudication Act differs from the Land Consolidation Act, these changes being aimed at greater speed and efficiency, together with increased opportunities to appeal against what might be thought to be an unfair decision.

The programme administered by the Registrar of Group Representatives under the provisions of the Land (Group Representatives) Act is concerned with the initial registration and subsequent supervision of groups of people as owners of group ranches in the range areas. It forms an important part of the development programme for the range areas. The act provides for the appointment of a Registrar of Group Representatives and for the procedure by which such representatives are selected by a group and incorporated by the Registrar. It also provides for the powers and duties of the group representatives and for the submission of returns by them to the Registrar, and for the maintenance of records. In the act, a group means a tribe, clan, section, family or other group of persons whose land under recognised customary law belongs communally to the persons who are for the time being the members of the group. The act was introduced to deal with the specific situation where it is felt that in a particular area block farming is more desirable than individual farming and hence the need for registration of the block of land is favour of the group representatives, who will have perpetual succession to the land and in whose favour it will be registered under the Registered Land Act, Chapter 300.

The Government's land reform programme, operated through the medium of the Land Consolidation and the Land Adjudication Acts, has manifold benefits. Time and money no longer need be spent on land

litigation, nor is it necessary for farmers to waste time travelling between numerous scattered plots of land. The reform acts as a powerful stimulus to agricultural development. Farmers are willing to make long-term improvements to their land, and they can obtain agricultural credit more easily to help them effect these improvements, for the land title deeds provide good security for agricultural loans. Because agricultural development proceeds more rapidly after land rights have been adjudicated, the reform also tends to encourage a much higher level of employment in the rural areas.

The agricultural development strategy pursued during the last few years had placed major emphasis on the acceleration of land adjudication and registration. By the middle of 1973, 2.5 million hectares had been registered, covering 632,000 holdings in 21 districts in all provinces except the arid north-east. In addition, adjudication was in progress on another 1.6 million hectares. Thus, 37 per cent of total registrable land was either adjudicated or under adjudication, compared with only 5 per cent in 1963.

In spite of the great advances made in the land reform programme, there still exists the problem of devising some effective means of preventing new fragmentation by inheritance of consolidated holdings, in a country with a high rate of population increase, but almost entirely dependent on agriculture. The provisions of the Land Control Act 1967 may help, to some extent, in holding this process of refragmentation in check, but is unlikely to provide anything like a complete answer to this problem. However, the Kenya Government is satisfied that the programme has had a very beneficial effect on the economy of the country to date, and is determined to press ahead with applying it throughout the country. Currently, out of a total of 23 districts being adjudicated, consolidation under the provisions of the Land Consolidation Act, Cap.283, is being undertaken in only three. In the majority of areas, the work involves only adjudication and registration of land rights under the Land Adjudication Act, Cap.284.

REFORMS IN THE FIELD OF REGISTRATION OF TITLES TO LAND

The purposes

to assure title to the land and to simplify dealings and . . . them less expensive. The first purpose is achieved by means of a Register and Registry Map compiled and maintained by the state. The Register contains a record of all privately owned land and the ownership of interests therein and is kept up to date as dealings take place. The title of the registered owner is guaranteed by the state. The Registry Map facilitates the identification of any particular piece of land and its boundaries. The second purpose is achieved by providing simple document forms which must be used for effecting dealings with registered land.

A system of titles registration was first introduced in Kenya under the provisions of Part X of the Government Lands Act 1915, and the great majority of the titles granted by the state prior to 1920 are still registered under that system. It does not, however, fulfil the conditions of an ideal system as the titles registered under it are not guaranteed and simple document forms are not provided.

In 1920, a further system was introduced under the provisions of the Registration of Titles Act 1919. This applied to all titles created from then onwards, and remedied the two principal defects in the previous system by providing for the guarantee of titles and the use of simple document forms. This system is still in operation, not only in respect of titles granted since 1920 but also in respect of all titles now being granted in areas to which the Registered Land Act 1963 does not apply.

Neither of the two acts under which these earlier registration systems were established in any way affected the law governing the rights of landowners and parties to land transactions. This law is contained in the Indian Transfer of Property Act, which remains the substantive real property law except in respect of land the title to which is registered under the Registered Land Act, dealt with later in this paper.

In 1954, the Kenya Government, with the object of increasing the country's agricultural productivity, decided to embark upon a programme of land consolidation in areas where land was owned under African customary law. It was immediately recognised by Government, first, that this form of ownership did not give the landowner the security of tenure necessary to encourage him to develop his land, and, second, that it would not be acceptable as

security for any loan which he might require for development purposes. As this would have largely frustrated the Government's aim of increased productivity, it was decided that each landowner should be given a registered and guaranteed title.

The Native Lands Registration Ordinance was therefore enacted in 1959. This provided not only for the consolidation of landowner's holdings into one, more economic unit, but also for his registration as the guaranteed owner. The system established under this act was a considerable advance on the two existing systems, as it not only provided for a guarantee of title and simple document forms but also included a code of real property law to take the place of that contained in the Indian Transfer of Property Act. A good deal of this new law was based on the experience and legislation of other countries, but adapted to the outlook and needs of the African landowners where this could be done without infringing the basic principles of title registration.

The position in 1959, therefore, was that there were three registration systems under which land titles were registered and two codes of real property law, all differing widely in their effect. This prompted Government to appoint in 1961 a small Working Party 'to examine the existing law and to make recommendations for the co-ordination and unification of the existing systems.' As a result of the Working Party's report the Registered Land Act was enacted in 1963. It is intended that this Act should eventually be the only law governing real property and the registration of land titles. It provides a code of law and a system of registration which are capable of application in all circumstances. The property law and registration provisions of the Native Lands Registration Ordinance, the title of which had been altered to the Land Registration (Special Areas) Act, have been replaced and all titles which arose from land consolidation and adjudication are now registered under the act. All future titles arising from land consolidation and also, where practicable, those in respect of future grants of land by the state will also be registered under it. With regard to existing titles registered under the earlier acts, these are gradually being converted into titles under the act. In the course of time, therefore, all titles will be subject to the same law and registered under the same system.