LAW AND DEVELOPMENT: A GENERAL MODEL

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As Mark Twain once remarked about the weather, everyone talks about law and development, but nobody does much about it. How does law "set off, monitor, or otherwise regulate the fact or pace of social change?" (Friedman, 1969). Atomistic studies[1] relating specific norms of law to specific sorts of social change are plentiful. Holistic studies purporting to explicate general propositions relating rules and behavior can hardly be found. The few that do exist do hardly more than assure us, most sincerely, that yes, there really is a relationship between law and social change.

What is needed is a general model relating law and social change. Here, we discuss (1) the definition of the problem; (2) its parameters; (3) an heuristic model; and (4) a variety of "middle-level" hypotheses that can be suggested. The specific focus of this discussion is on Africa.

THE DEFINITION OF THE PROBLEM

So amorphous is our subject that there is no agreement even about the problem which requires attention. Most studies do not purport to explicate a general theory. Some, despite broader claims in their titles, are really no more than atomistic studies of specific laws (Allott, 1963; Elias, 1966; Nwabueze, 1966). Among others, two trends can be distinguished.

One defines the problem out of academic interests. For example, Marc Galanter (1966) enumerates the characteristics of a "modern" legal system, abstracted, presumably, from a study of those systems he chooses to denote as "modern." (Had he found that all of them used a decimal system in numbering statutes, would that become a characteristic of a "modern" system?) He tells us that his model "does not represent a goal to be pursued for its own sake: these features of a modern legal system are not necessarily a good thing per se" (Gallanter, 1966: 164). His disclaimer exempts him from real-life problems.

Lawrence Friedman shoots a shotgun-full of questions. ("Does the type of legal system and legal institutions that a society uses help or hinder that society in its march toward

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modernization? How does law influence the rate of economic growth? How does law brighten or darken the road to political wisdom or stability? How can a society improve its system of justice? What happens when laws are borrowed from more advanced countries?" [Friedman, 1969a: 29].) His central concern is to describe the concept of a legal *system*, which he argues consists of three elements: substantive rules of law, legal institutions (courts, etc.), and a new construct, "the legal culture" (values and attitudes toward law). Friedman purports to lay the conceptual groundwork upon which a research framework can be erected to answer the question: Which legal *system* best contributes to developments? His interest, like Galanter's, is academic. After all, whatever American scholars may believe about the superiority of the legal system of Ruritania, one may doubt that the decision makers in Kenya will give a hoot.

Other writers have defined the problem in terms they believe arise out of existential social problems. William B. Harvey addresses himself to "law as institution" — i.e., norms addressed to official actors "so as to pattern their conduct for the actual doing of desired tasks," (1969). J. D. Nyhart reaches much the same conclusion: The lawyer must participate in social engineering by drafting rules that will induce the desired activity (1962; see also Podgerecki, 1962; Ocran, 1970). He quotes an economics student:

> . . . The new pace of desired development has called forth a "monster" known as economic development. Those who guide and plan this creature are generally professional economists whose training and feel for social problems is all too often completely lacking. The general attitude is that such problems are "someone else's problems," the result being that the economist is often blind to the implications of his plan. This gap is uniquely suited to the lawyer's experience. . . . Even the most efficient plan seems to fail in action, usually for lack of understanding or anticipation of social actions. Here then I suggest is a real and vital role for law and lawyer in development. (Nyhart, 1962: n. 408.)

This is an important felt need in Africa: To develop knowledge and techniques apt to generate rules which will have a high probability of inducing desired activity directed toward development.

PARAMETERS

If one becomes aware of a fire in a theater, before deciding that is the problem, one must ascertain the location of the exits (Dewey, 1938: 109). What are the parameters of the prob-

lem of institution building? The need for institution building arises out of demands for development. Development in the underdeveloped world is a special form of social change. Social change is cabined always by the present position, and the value sets to be served by the policy makers.

Africa struck out on the mist-shrouded paths of independence burdened with the social and legal legacies of colonialism. Adriano Moreira has defined the colonial situation:

> There is a colonial situation whenever one and the same territory is inhabited by ethnical groups of different civilization, the political power being usually exercised entirely by one group under the sign of superiority, and of the restraining influence of its own particular civilization. (Moreira, 1957: 496; see also Balandier, 1951).

The colonial situation in its Anglophonic African mask was defined by a plural legal system. The normative structure of pre-British tribal society was mainly shaped by, and supportive of, a subsistence economy. The British imposed as the "general law" "the common law, the doctrines of equity, and the statutes of general application of England" as they stood on the date the territory received an "independent" legislature (Seidman, 1969). An exception was carved out, however, reserving for Africans rights accruing under customary law. (Tankanyika, 1920: Art. 14.) In the result, customary law held sway over Africans, and English law — the law of a capitalist economy based on market relationships — governed Englishmen.

Colonial societies and colonial economies conformed to the pattern of their legal structure. Two Africas arose: One, the Africa of the colonialist enclave, devoted to the growth or extraction of raw materials for export overseas, with a degree of specialization and exchange, and norms of economic interaction determined mainly by private contract; the other, the Africa of the hinterland, inhabited mainly by Africans, with an economy dominated by subsistence agriculture and precious little specialization and exchange. In the settler territories of East and Central Africa, additional rules were imposed — poll tax, master and servant laws, restrictions upon the marketing of cash crops by Africans, land tenure laws. Their not-so-latent consequences were to impel Africans by threat of criminal punishment into European employment.[2] Elsewhere, great English factors bought peasant-grown primary products — cocoa, groundnuts, cotton — at low prices to sell on the world market.

The pluralistic social, political, economic, and legal legacy of colonialism generate current demands for change. What is their content? Hiding in every definition of development lies as assertion of generalized goals. A variety of non-Africans have told us what they think these goals should be. The parameter for law and development in Africa, however, is what *Africans* think they should be.

Whatever else Africans demand, it is an improvement in their standards of living. Fifty percent infant mortality; life expectancies of 32 years; diets of 1800 calories per day — in the fat seasons; kwashiokor, river blindness, malaria, bilharzia, and sleeping sickness; two percent literacy rates; hovels for homes; water drawn from wells five or eight miles distant; and annual migrations for many working men of 500, 800, even 1,500 miles each way for jobs that pay $10.00 per month in wages. Africans know that these horrors are no longer inescapable. They look to the state and to law for change (Friedman, 1969a: 38.)

These deplorable conditions, like the plural society and the plural legal systems, were part of the colonial legacy. They can be transformed only if the entire economy becomes monetized and integrated, with a high degree of specialization and exchange (Holt and Turner, 1966: 45). "Development" can be defined as the process by which that transformation is accomplished.

Development demands transformation away from the plural economy and society, and toward — what? The range of choice for African policy makers is limited not only by physical and institutional constraints, but also by the value sets of the policy makers. Values are a function of acculturation. The value sets of African policy makers are limited by the configurations of their milieu.

The agenda of history limits the value sets of Africans to three broad categories. The central theme of the normative structure of the subsistence society is that right depends upon status (Gluckman, 1965: 48). English law controls relationships in the export, formerly colonialist enclave. That law permits the norms of economic activity to be defined by the parties to the activity themselves, under the rules of contract law. Contract law, under the fiction of "freedom of contract," in fact permits the economically most powerful party to impose the norms that *it* deems desirable upon the weaker. It is therefore the principal legal theme of a capitalist system. Under the

colonial regime it was a system unrelieved by the limitations of the welfare state and liberal democracy. Its consequences were marked disequalities in income between the colonialist owners of productive property and the mass of Africans (Seidman, 1969a).

That African independence occurred in the era of the development of the socialist world made it inevitable that the socialist option would be one to which some African elites would be attracted as the solution to underdevelopment. The induced economic activity of a socialist economy derives its norms from the physical planning of specific economic activity (Berman, 1963: 97-101). It may frequently permit considerable self-selection by individuals to determine whether they will or will not participate in the socialist sector. For example a government may create a program of production cooperatives, but permit individuals to elect whether or not they will participate. A socialist economy, however, cannot permit private initiative alone to be the engine for the economy. It cannot, consistently with its central principles, permit the norms to be developed from bargaining between notionally "equal" parties. By denying economically superior parties the power to invoke state power to enforce and endorse their position, the regime of Plan necessarily and explicitly purports to point toward a society whose social divisions are not based on the employment relationship. To the goal of an increased per capita GNP, it adds another: egalitarianism.

These historical circumstances create constraints on choice as limiting as physial ones. Socioeconomic options that were available in other areas and other epochs realistically are not open to African governments. They can no more create a feudal society modeled on Henry Adams' ideal than they can whistle into existence a society modeled on that of classical Greece. History limits the choice of jural themes in Africa to a catalogue with three entries: Status, Contract, and Plan.

By definition customary law cannot lead to development. Customary law arises from and supports a subsistence economy. That its rules may be warped in such a way as to maintain their outward form, but with radically changed content, is, of course, possible. For example Asante has shown how precisely this has occurred in Ghana, where the customary rule that land cannot be alienated save with consent of the chief has been maintained in form, but deprived of its content by validating any alienation provided that a small payment is later made to

the chief (Asante, 1965). The development of legal institutions everywhere has in large part been accomplished by pouring new wine into old bottles. To rely upon a Status-oriented system of law to develop a monetized economy with a high degree of specialization and exchange, however, is to delude oneself (Nwabueze, 1966; Seidman, 1966; Smith, 1968).

The constraints on African development arise out of the plural society which creates the demand for change. Plural legal systems, plural societies, and plural value sets set the limits to policy choice.

A GENERAL MODEL

The process of social inquiry can be conceptualized as a series of steps: (1) The existence of a troubled state of affairs; (2) its recognition by the policy maker; (3) the determination of the problem that underlies the troubled situation, by the formulation and warranting of a theory explaining it; (4) the development of ideas or suggestions for the solution of the problem; (5) a reasoning process in which these ideas are compared and examined in the light of the existing knowledge on the subject; (6) the examination of the probable consequences of the propsed hypotheses for solution through a process of deliberation; and finally (7) the initiation of the activity prescribed by the hypotheses (Dewey, 1968).

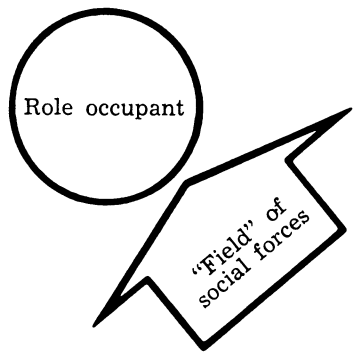
At every step, the policy maker must make a choice. He cannot attend to every troubled situation; he cannot examine every explanation; he cannot consider every possible idea or suggestion for its solution; he cannot test his ideas against every theory concerning the problem; he cannot deliberate upon all the potential consequences. Unless the criteria for choice at each point are made explicit, inarticulate value premises will control. The function of a model of law and development is to articulate the criteria for choice, and to expose them to reasoning, deliberation, and, ultimately, the test of use.

These criteria of choice must give guidance of two sorts. In the first place, every rule of law that is really meant to be obeyed is designed to induce certain sorts of behavior (Edwards and Howard, 1969: VII-9; Braibanti, 1968; Perry, 1968). An adequate model of law and development must direct the lawmaker's attention to the various categories of data that he must consider in order to predict the behavioral consequences of a proposed rule. Without it, his deliberation upon probable consequences will be guided only by his intuition of relevance.

In the second place, the ideas that come to mind as candidates for the status of hypotheses, the body of "accepted" knowledge against which they will be examined, and the data considered, are plainly filtered by the experience, values, and ideologies of policy makers. An adequate model of law and development ought to supply an heuristic guide so that the lawmaker can have some assurance that he has not unwittingly permitted his own subjective values to obscure plausible alternative explanations or solutions.

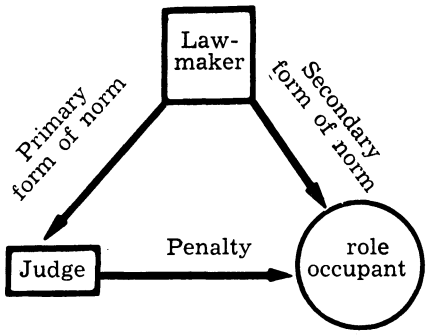
Almost every senior civil servant in Africa was socialized in the colonial situation. What is "accepted knowledge" in the colonial situation frequently is knowledge which reflects and supports that system. If development is to come to pass, new solutions, incompatible with the colonial situation, are required. Unless lawmakers have their attention directed to new sorts of solutions, and new bodies of knowledge, there is a high likelihood that the potential solutions considered will be those compatible with the colonial situation. Such solutions cannot, save serendipitously, bring about development.

1. *The Prediction of Consequences.* The consequence of any proposed rule of law that is significant for social change is the behavior it induces in various role occupants. The behavior of any individual is a function of the entire "field" within which he operates (Lundberg and Lansing, 1937). The normative and institutional structure, the ideologies, the physical constraints of the society, the class structure, the myths and traditions of the community, the values held — all these, and a host of other forces, determine, frequently with very narrow limits, his area of choice. We can represent this fact diagrammatically thus:



The policy makers have only a single tool with which to affect the activity of role occupants: they can promulgate rules. Hans Kelsen (1967) taught that the rules promulgated by a law-

making authority in a modern state have a dual aspect. The rule of law addressed to a citizen directing him to act in a certain way (the secondary form of the rule) is simultaneously addressed to the judge, directing him that if it appears to him that the citizen has breached the rule, the judge shall impose a sanction (the primary form of the rule). Every rule of law, therefore, in its primary form is a fragment of a hypothetical judgment. The same rule that tells the citizen that he shall not commit murder tells the judge that if the citizen commits murder, the judge shall impose a certain sentence. We can, therefore, represent the more complete form of the legal order postulated by Kelsen:



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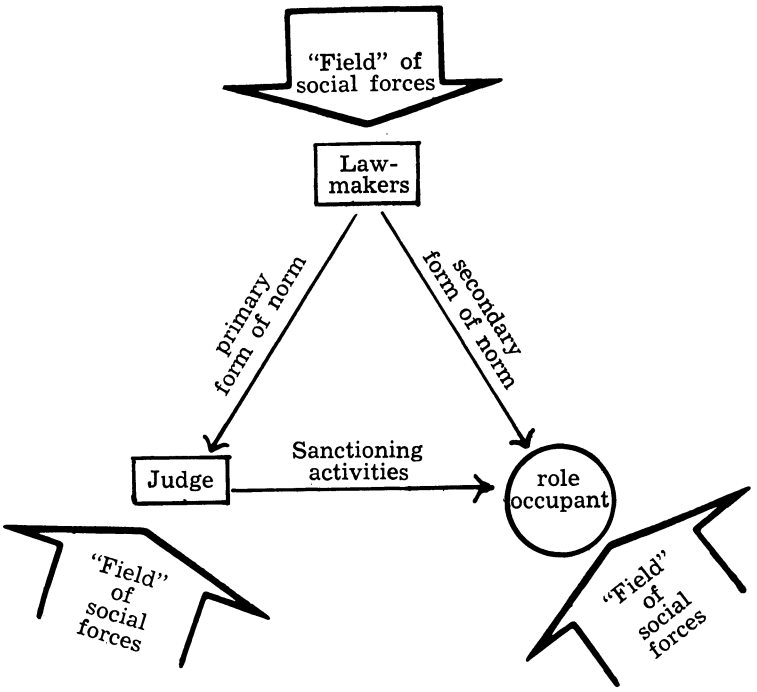
Since judges and lawmakers are also role occupants, we can assimilate our two diagrams:



The demand of the American legal realists to study "law-in-action" — i.e., behavior — as well as the law-in-the-books — i.e., the normative structure — led them to much the same sort of model.

It is evident, however, that this realist model of the legal process as it affects the individual role occupant is based upon a definition of "law" which restricts it to generalized norms addressed to the citizenry at large, typically enforced by courts. Sawer has shown how law thus conceived tends to be limited to "lawyers' law." He contrasts it with the "law of social administration," concerning such matters as "collectivized industries, and services, collective marketing of farm products, welfare services for the masses (health, pensions, unemployment, etc.), provision of regulation of entertainment (radio, television, etc.), regulation of the activities of the private sector of the economy and of economic development and stability generally, and the conduct of defence and foreign relations." He suggests that "in a nation which gave effect to the social theories of Herbert Spencer, social administration would hardly exist. Most law would be lawyers' law, occasionally amended as social change

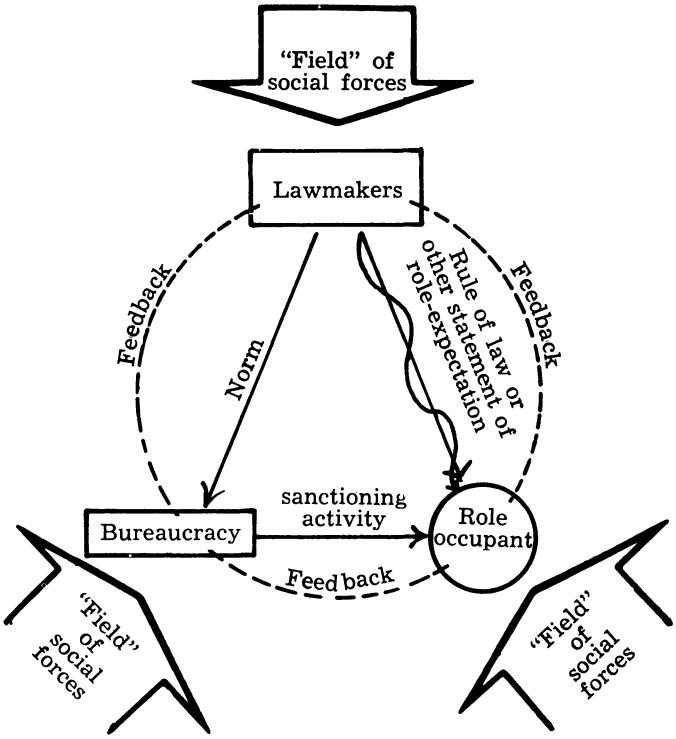
necessitated." (Sawer, 1965: 138-39.) However much African polities may disagree, on so much is there consensus: none of them subscribe to *Social Statics*.

The realist model is not a model for change in Africa for another reason. When used as an instrument in effecting social change, the norm to which it is desired the citizen conform, or the goal set for his position, will frequently not be explicitly set forth in statute or formal rule, backed by negative sanctions. More frequently, the desired activity of the role occupant is induced by activities of bureaucrats, acting pursuant to rules addressed to them. These rules are seemingly unrelated to the norms directed toward the citizen. For example, if the lawmakers want the citizen to join cooperatives, only rarely will they direct him to do so under pain of criminal penalty. Ordinarily, they will instead direct various bureaucrats — the Ministry of Cooperatives, for example — to act in certain ways that hopefully will induce the sort of action desired. They may direct the Ministry to offer credit only to farmers in cooperatives; they may instruct the Ministry of Agriculture to limit extension services to cooperative members; they may order marketing boards not to buy his produce, or to pay a differential price for it, unless he is in a cooperative; they may require the Treasury to increase the tax upon non-members.

We can accommodate these two criticisms of the realist model by making two changes. In the first place, we shall substitute for the judge as the enforcement agency the wider term bureaucracy, including in that term all the agencies which lawmakers use in order to induce desired activity by role occupants. Second, we shall indicate that many of the statements of role expectation addressed to the citizen role occupant are not set forth as formal rules by a wavy line from lawmakers to role occupants.

Our model is still incomplete. Any law, once passed, changes, either by formal amendment, or the way in which the bureaucracy acts, from the day of passage. It changes because the social, economic, and other forces operating on the various elements of our model change, and especially because of various reactions from the role occupant to both lawmakers and bureaucracy, and from the bureaucracy to the lawmakers. If citizens object seriously and strenuously, for example, to growing cash crops when the lawmakers have set that as a norm for their activity, the activity of the bureaucracy to enforce the norm is apt to change in the face of the opposition — perhaps to in-

crease their efforts, perhaps to reduce them in order to lessen strain upon themselves. We can, therefore, complete our model thus:



This model can be restated in a set of propositions:

I (A)

a. Every rule of law prescribes how a role occupant is expected to act.

b. How a role occupant will act in response to norms of law is a function of the rules laid down, their sanctions, the activity of enforcement institutions, and the entire complex of social, political, and other forces affecting him.

c. How the enforcement institutions will act in response to norms of law is a function of the rules laid down, their sanctions, the entire complex of social, political, and other forces affecting it, and the feedbacks from role occupants.

d. How the lawmakers will act is a function of the rules laid down for their behavior their sanctions, the entire complex of social, political, ideological, and other forces affecting them, and the feedbacks from role occupants and bureaucracy.

2. *Values.* Our model is stillborn if it does not help guide normative choices. It must, therefore, provide criteria with respect of values.

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Roscoe Pound urged that the appropriate guide to determine the serial order in which to pay off claims and demands upon the legal system was what he called the "jural postulates" of the society (Pound, 1942). E. Adamson Hoebel describes these as "the broadly generalized propositions held by members of a society as to the nature of things and as to what is qualitatively desirable and undesirable" (1964: 13). Pound and Hoebel seemingly perceive values as summa bona. Following Dewey, we suggest that their function in social inquiry is better understood as filters. They screen from perception certain categories of data, exclude certain ideas which might lead to solutions, and limit the body of "accepted" knowledge against which ideas can be examined in order to formulate hypotheses.

Pound apparently believed that in any "civilized" society there was a single, homogeneous set of values which would subsume "most" of the claims and demands made upon the legal system. Whatever may be the case elsewhere, that is plainly not the African circumstance. Status, Contract, and Plan compete for recognition. Our model for law and development must specify the jural postulates for each, so that the lawmaker can assure himself that his personal predilections have not unconsciously imposed blinders upon his search for explanations and solutions.

What is the source of these postulates? There is no methodology by which one can make an empirical examination of the claims and demands in fact made upon the legal order, as Pound supposed. Absent a methodology to make such an examination, any statement of jural postulates must represent merely the observer's intuition.

An alternative may exist. Values have the function in inquiry of directing attention to some variables and away from others. It is in this sense that they impose limits on the inquiry. Models or paradigms, as we have suggested, serve the same function. It is possible to construct paradigms, in the sense of ideal types, for each of the three categories of legal systems in Africa, much as Max Weber did for a capitalist economy (Weber, 1954). Here we do no more than specify for each type the generalized ends and the leading variables relied upon to induce change.

Guides to normative choice ought as well to define the change agent's role in the developmental process. Robert Chin (1961) suggests three ideal types to describe in generalized terms how the process of change appears to the "change agent."

In a *systems* model, the goal is a return to equilibrium after manifestation of tension. In a *developmental* model, the system is perceived as having its own inner dynamic. The role of the change agent is to remove blockages so that the system can realize its own potential. In a *model for changing,* the direction and speed of change are determined by the change agent consciously in response to a perceived need.

I (B)

1. (a) The generalized ends of a Status-oriented polity are the maintenance of stability and the avoidance of change, by allocating power and privilege by ascriptive right.
   (b) The change-model is the systems model.
2. (a) The generalized ends of a Contract-oriented polity are an increase in per capita gross national product, to be achieved through
      (i) the initiative of private entrepreneurs motivated by the desire for profit, exercised within the legal framework of contract; and
      (ii) the initiative of the state in providing an infrastructural and institutional climate conducive to the activity of private entrepreneurs.
   (b) The change-model is the developmental model.
3. (a) The generalized ends of a Plan-oriented polity are an increase in per capita gross national income accompanied by a more egalitarian distribution of power and privilege, to be achieved through state initiative and direction in the productive as well as the infrastructural sector, exercised through a national plan.
   (b) The change-model is the model for changing.

Propositions such as these can be, of course, no more than very general guides. Every legal order in Africa today is a mix containing examples of laws subsumable under all three sets of propositions. Whatever the ideology of a particular government, particular decisions to resolve a problem in terms of Status, Contract or Plan — i.e., the customary, private, or public sectors of the economy — are subject to imperatives against which philosophy may be unavailing. Such decisions, however, ought at least to be made with awareness of the choice. Some statements of the general alternatives are necessary before the choice between them can consciously be made.

We can add these further propositions, that really do no more than expand our definition of development:

I (C)

a. The jural themes of African law are Status, Contract, and Plan, each associated respectively with the subsistence

economy, the market economy of the private monetized sector, and the productive relations of the public sector.

b. These jural themes form frameworks within which the several specific laws relating to economic activity will fall.

c. Development requires laws which will lead to a monetized and integrated economy with a high degree of specialization and exchange.

d. The jural theme of Status is appropriate to a subsistence economy, not the sort of economy demanded by development.

e. Therefore, it is to be expected that the rules of law relating to development will have jural themes not of Status but of either Contract or of Plan.

Our model, therefore, has a dual thrust. In the first place, it suggests the areas to which the lawmaker must look if he is to make an empirically based estimate of the probable consequences of a proposed rule. Secondly, it suggests the two potential frameworks within which a proposed rule must fall, thus requiring the policy maker to make a conscious choice of the social problems he will seek to relieve, and the alternatives available.

THE CLOSURE OF THE MODEL: AN AGENDA FOR RESEARCH

The nature of the questions to which it is addressed makes it unlikely that a model designed to help to provide answers will do more than direct attention to significant data. As stated, however, the model is so general that it does little more than outline broad areas of inquiry — societal forces operating on the role occupant, the nature of the sanctions, the activity of the bureaucracy, the feedbacks, the pressures on lawmakers. It requires closure in two directions: first, with respect to the general social forces affecting activity and, second, with respect to the implications of two potential jural themes which we have adumbrated.

Closure could be accomplished if it were possible to develop a set of interrelated, verified "middle level" propositions with high predictive power. Far too little research has been done, however, to do more than to propose a few hypotheses, together, perhaps, with a few illustrations which tend to support them. We discuss in turn first, propositions of a general nature; second, propositions relating to the social forces operating upon the role occupant; third, those relating to the bureaucracy; fourth, those relating to feedback; fifth, propositions relating to sanctions; sixth, those relating to policy choice;

and, last, propositions relating to decision making and the design of decision-making structures.

In General

II (A)

a. Development requires people to act in new ways.
b. The legal regime received at independence structured institutions which induce people to continue to act as they did during the colonial era.
c. Therefore, widespread changes in law may be expected to be a concomitant of development.

II (B)

a. Colonial law institutionalized the dual society and economy, represented by coexisting regimes of Contract and of Status.
b. A unified economy requires a unified set of institutions.
c. Therefore, it may be expected that over time the dual legal regime will tend to disappear, to be replaced by a unified legal system.

A whole school of lawyers, led by Professor Allott, has taken this as their principal theme for the reform of African law (Allott, 1958). Tanzania has moved in this direction by its Declaration of Customary Law, which makes a start by unifying the customary law of the various groups (Tanzania, 1963).

II (C)

a. A law which induces a particular sort of activity in one socio-political-economic context with a specific set of sanctioning agencies will not, save by chance, induce similar activity in a different socio-political-economic context.
b. (i) Therefore, it is not to be expected that the English law received in Africa will produce the same sort of activity by role occupants that it produces in England.
   (ii) Therefore, it is not to be expected that law which induces one sort of activity in one period in Africa will produce activity of the same sort in another period.

Of all the propositions offered here, II (C) is the only set which perhaps can be regarded as having been demonstrated. For example, the criminal law of Africa is substantially the same as in England; its consequences are quite different (Seidman, 1965; 1966b; 1966c). The patent law of Tanzania is copied from the English statute; again, its consequences are different (Grundemann, 1968). The law of public corporations in much of Africa is modeled on that of England; a glance at the activity of public corporations in Africa, however, demonstrates the difference in the activity induced. Numerous case studies demonstrate how the activity generated by customary norms has changed under the changing pressures of society (Asante, 1965; Gulliver, 1958).

The Identification of Behavior-Affecting Forces

In order to identify the forces which tend to affect behavior, and thus to limit the number of variables with which one must deal, it may be that traditional deviance theory may be helpful. Deviance is sometimes defined as behavior which violates *any* norm, whether of law or custom.

Our concern is narrower. We define "deviance," therefore, as "behavior that violates a norm of law addressed to the role occupant." Deviance theory teaches that role occupants may have either conforming or nonconforming motivation, and conforming or nonconforming activity (Blake and Davis, 1964). This can be demonstrated by a four-cell model:

		BEHAVIOR	
MOTIVATION		Conforming (+)	Nonconforming (−)
	Conforming (+)	(1) ++	(2) + −
	Nonconforming (−)	(3) − +	(4) − −

What this model teaches is that nonconforming behavior may occur in the face of conforming motivation, and vice versa (cells 2 and 3). Nonconformance can arise, therefore, even though the role occupant wants to conform. This could only occur in cases in which the role occupant is unaware of the norm, or where the norms are dysfuntional to the goals set for the position.

We can therefore state the following very general hypothesis:

III (A)

Whether a role occupant will act in accordance with the rules laid down for his activity depends upon three variables:

a. Whether the norm has been communicated (Seidman, 1972);
b. Whether the norm is functional to the goals set for the position;
c. Whether the role occupant is deviantly motivated.

Following these general propositions, it should be possible to generate a variety of middle-level hypotheses which are susceptible to empirical verification and which will identify the relevant variables. For example:

III (B)

1. A norm of development may be expected to be dysfunc-

tional because it is not capable of performance under the existing physical conditions.[3]

2. Norms of development may be expected to be opposed by entrenched interest groups and classes.[4]
3. Existing institutions may be expected to foster behavior to which the proposed norm of development is dysfunctional.[5]
4. Role conflict between roles held in traditional society and the norms of development may be expected to lead to deviant motivation.
5. Many role occupants may be expected to be deviantly motivated with respect of the norms of development because the norms of development embody values contrary to those extolled by the system of cultural values.[6]
6. Many role occupants may be expected to be deviantly motivated with respect to the norms of development because their reference groups adhere to contradictory norms.[7]
7. Many role occupants may be expected to be deviantly motivated because the catalogue of roles presented by the existing culture contains many roles which are contradictory to the role of development.[8]
8. Many role occupants may be expected to be deviantly motivated with respect to the norms of development because they have adopted an ideology at variance with the ideologies of development.

Bureaucracy

Our model suggests that the activity of the role occupant is conditioned in part by the sanctioning activity of the bureaucracy. One cannot predict how a law aimed at the role occupant will work, therefore, unless one can make predictions about how the sanctioning institutions will work.

Our general model, however, will apply in such a case, placing the individual bureaucrat in the position of the role occupant for the purposes of study. If one seeks to determine whether a ministerial rule directed to the *bwana shamba*[9] will be effective, one must look to the social, political, economic, and other forces acting upon the *bwana shamba,* the sanctions for the rule, and the bureaucratic activity enforcing it. What we have said thus far about the role occupant, therefore, may be useful in examining the activity of bureaucrats.

The very fact that bureaucrats are organized into complex organizations, however, suggests a whole line of additional hypotheses, largely drawn from the sociology of complex organizations. For example:

IV (A)

a. Law-sanctioning bureaucracies and their members tend to act in ways which will relieve tensions upon, and maximize rewards for, the organizations.

b. Those classes in the community which possess power and privilege can create the greatest tensions and offer the greatest rewards for the bureaucracy.

c. Therefore, one can expect law-sanctioning bureaucracies to tend to sanction the norms of development in conformance to the demands of the classes in the community who possess the greatest power and privilege (Chambliss and Seidman, 1970).

A set of middle-level propositions might be generated from these more general ones:

IV (B)

1. Unless counteracted, bureaucracies in Africa may be expected to act in accordance with the interests of those classes already holding power and privilege, viz.: (i) traditional elites and ruling classes; (ii) expatriate economic interests and their African representatives; (iii) the bureaucratic elites themselves.
2. To maintain legal-rational legitimacy, African governments may be expected to develop new institutions and laws to prevent goal-substitution by bureaucracies.[10]
3. To the extent that bureaucratic feedback to lawmakers is effective, lawmakers will not develop legitimacy-maintaining institutions.
4. The more committed a government is to the doctrine of egalitarianism, the more likely it is to develop norms preventing goal substitution by the elites.
5. The broader the scope of discretion granted to bureaucrats, the greater the likelihood of goal substitution.
6. The more a government is committed to development, the more likely it is to grant broad discretion to bureaucrats.[11]
7. The more a government is committed to development *and* to egalitarianism, the more likely it is to try simultaneously to develop broad grants of power to bureaucrats and institutions to prevent goal substitution. (Seidman, 1969c.)
8. Governments committed to Plan are more likely to maintain legal-rational legitimacy than governments committed to Contract. (Seidman, 1969c.)

Feedback

The enactment of a new law does not immediately produce a particular sort of activity, which then remains constant throughout the life of the law. The sort of activity that it produces will change constantly during its term. The law of contract in England, for example, obviously produces a very different sort of activity today than it did 100 years ago.

V (A)

a. The activity of a role occupant in response to a norm addressed to him is a function, in part, of the activity of bureaucrats.

b. The activity of bureaucrats is, in part, a function of the reaction of the role occupant to the norm and to the bureaucratic activity itself.

c. Therefore, one can expect the activity of bureaucrats with respect to the role occupant to vary as the reaction of the role occupant is brought home to the bureaucracy.

For example, there is evidence that a Tanzanian statute forbidding the sale of real property without the consent of government is violated in many areas because of economic pressures. There is also some evidence that primary court magistrates countenance these sales, despite the statute. The activity of the primary court magistrates can only be explained in terms of their reaction to the response to the statute by the role occupants — the very people whose illegal activities they are supposed to sanction!

Thus conceptualized, feedback is merely at category to be examined if the behavior by bureaucrats and rule makers consequent upon enactment of a new rule is to be anticipated. The structuring of feedback channels, however, has important consequences upon legitimacy, participation, and the institutionalization of new behavior.

Legitimacy is defined by the extent to which government is perceived by its various constituencies to be acting in their interests. In the narrowest self-interest of governing elites, feedback is essential because without information about the relative success of past decisions, new decisions are not apt to be very successful. The relative success of past rules is conveyed to decision makers in large part in the claims and demands made by various publics. To the extent that government responds to those claims and demands, its legitimacy will be enhanced. Adequate feedback channels are thus a necessary (although not sufficient) condition to the maintenance or enlargement of legitimacy.

Secondly, the articulation of feedback channels is the first step toward participation by role occupants in decision making. To the extent that role occupants can influence the activity of the other factors in the legal system, to that extent do they participate in making the decisions which define their own roles. The easier it is for role occupants to communicate their claims and demands to bureaucrats and rule makers, the more they are apt to influence their behavior. The institutions of feedback define, in part, the extent of participation.

The limiting case occurs when role occupants participate

in the actual decision making of lawmakers and bureaucrats. The structuring of feedback channels thus starts by being a device required by elites to get the information they need to manipulate role occupants, in order to maintain their own legitimacy and thus their own power. Pursued to its conclusion, however, it becomes a device in which social engineering becomes not a scheme by which those in power shape the society to their own ends, but the central institution by which social engineering can become a process for the restructuring of society in the interests of the ordinary citizen.

Feedback channels have still another dimension. For genuine change to come about, new behavior must be institutionalized. Role occupants and bureaucrats must adhere to the norms of development not because of the constant threat of sanction, but because they believe it to be right and proper so to act. Bennis, Benne, and Chin have proposed that a "collaborative relationship" between change agent and client is an "essential component" of planned change (Bennis, Benne, and Chin, 1969). This includes a "joint effort that involves a mutual determination of goals," and "a power distribution in which the client and change agent have equal or almost equal opportunity to influence one another." The more articulated the feedback system — the closer it reaches the limiting case of complete participation — the more chance there is for a genuinely collaborative relationship among role occupants, bureaucrats, and lawmakers, and hence the greater the likelihood of bringing about the changed behavior which *is* development.

Some middle-level propositions might be suggested:

V (B)

1. The more strongly held the norms which purport to be changed by the new forms of development, especially in the areas relating to family life and relations between the sexes, the more intense the reactive feedback by role occupants to bureaucrats, and hence the less likely that bureaucrats will enforce the new norms. (Cf. Massell, 1968.)
2. The more clearly articulated the feedback channels to lawmakers, and the more vigorously they are used, the greater the probability of legitimacy with the public which has access to that feedback channel.
3. The more clearly articulated the feedback channel, the greater its volume of messages, and the fewer the steps in the channel between sender and decision maker, the greater the participation by role occupants in decision making.
4. The greater the participation by role occupants in decision making, the more probability that the changes sought to be induced by lawmakers and bureaucrats will be institutionalized.

Sanctions

The function of sanctions is to provide an additional increment and incentives to follow the desired norm. In societies not subject to rapid change, laws have frequently been conceived as being congruent with the norms evolved by society through its own processes (Bohannan, 1966). Sanctions have therefore been conceived as being essentially negative in character, designed to coerce the occasional deviant to conform by adding an additional element to his calculus of pleasures and pains (Patterson, 1953: sec. 233). As a corollary to the proposition II (C) above:

VI (A)

a. Sanctions which induced a particular sort of activity in response to a rule of law in one socio-political-economic context will not, save by chance, induce similiar activity in different socio-political economic context.

b. Therefore, it is not to be expected that sanctions which induce a particular sort of response to a rule of law in England will induce the same sort of response to a similar rule of law in Africa.

For example, many commentators have remarked on the inappropriateness and ineffectiveness of prison as the sanction for much African criminal activity (Milner, 1969).

Proposition VI (A) suggests that the concept of sanctions as negative punishments is insufficient for the problems of law and development. As we have seen, the problem for law and development arises because, ex hypothesis, development requires people to act in new ways — i.e., to *become* "deviant" under traditional norms. Sanctions, conceived merely as negative or harm-producing effects imposed by government, no longer are an altogether adequate concept. No government has sufficient resources to coerce its population into compliance with the new norms — and if it tried, its legitimacy would rapidly be lost.

A new definition of sanctions would seem required. The traditional content of "sanctions" can be retained: It concerns those activities of government designed to induce or coerce compliance with the rules of law. We shall conceive of this very broadly. We therefore define "sanctions" as "all the activities of government designed to overcome the deviant tendencies of the role occupant." (Hall, 1961.)

We might reexamine many of the propositions we have suggested above with respect to deviance and restate them as

imperatives with respect to sanctions. Thus, one can state that sanctions (as we have defined them) must be devised to overcome the absence of supporting institutions, the problem of role conflict, deviant motivation, etc.

VI (B)

a. "Sanctions" means all the activities of government designed to overcome the deviant tendencies of role occupants.
b. In conditions of development, the effort of the law is to induce people to act in new ways that may seem deviant from the perspective of the existing culture.
c. In Africa, the function of legal sanctions under conditions of development is not merely to add a slight additional strength to the existing societal sanctions, but to create conditions which will oppose the existing societal sanctions which may tend to punish compliance with the norms of development.
d. Therefore, one can expect that sanctions will typically cover a far wider range of governmental activity than the mere punishing of deviants.[12]

A few sentences are suggested:

VI (C)

1. Law relating to development typically will be sanctioned by rewards rather than penalties.[13]
2. Law sanctioned by rewards typically creates the opportunity for self selection by individuals to fill the new roles of development.
3. The more sanctioning activity is designed to encourage creativity and initiative by role occupants with respect to development, the more likely are the goals set for the position with respect to development to be achieved (Cliffe and Cunningham, 1969).
4. If laws relating to development are to succeed, educational, training, and ideological institutions designed to develop cadres with specific skills, education, and training must be created.

Values

We have earlier suggested that the two alternative frameworks for development in Africa are those of Contract or Plan. These are, no doubt, ideal types, with many areas of overlap. This is not say, however, as is sometimes supposed (perhaps most notably in the well known Kenya Parliamentary Paper No. 10, "African Socialism and its Application to Planning in Kenya"), that there is no difference between them.

VII (A)

Laws which produce activity appropriate to the private sector will not, save by chance, produce activity which is appropriate for the public sector.

For example, when firms have been nationalized in Africa, typically the government has simply become the majority or only shareholder, retaining the same legal form as the corporation had when in private hands. In such circumstances, it is not to be wondered that the decisions taken by the corporation remain much as they were when the corporation was held by private entrepreneurs (Van de Laar, 1968). One of the important purposes of nationalization — i.e., to take economic decisions in the interest of the entire economy and the nation, rather than solely with a view to maximazation of profit, is thereby defeated.

A number of hypotheses may be suggested arising from the central differences between the way norms are created under Contract and Plan, and the consequences with respect to the development of an egalitarian society:

VII (B)

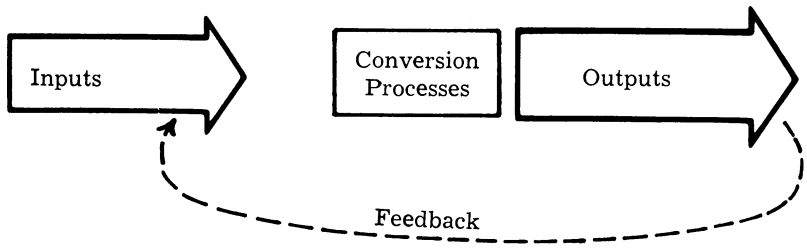
1. The rules of law with respect to development in a Contract-oriented polity will tend to be power-creating rules, while those of a Plan-oriented polity will seek to induce specific activity in role occupants.
2. Planning in Contract-oriented economies will in the main set targets which it is hoped will be reached as the result of private entrepreneurial efforts, while planning in Plan-oriented polities will tend to set for the specific physical projects calling for specific role activity.
3. Laws are to be expected placing sanctions upon specified sorts of investment in the private sector, and initiating specific government productive investments in the public sector, the former being emphasized in Contract-oriented polities, the latter in Plan-oriented polities.
4. The more rapidly a government seeks to accomplish development, the more it is apt to adopt the jural theme of Plan.
5. The more a government relies upon Contract as the central jural theme of the laws relating to development, the more likely it is that the existing dualistic economy will replicate itself.

Decision Making and Decision-Making Structures

What we have thus far described are propositions designed to direct the decision maker's attention to the relevant considerations in determining the consequences of an existing or proposed rule of law related to development. These suggest a variety of propositions concerning the processes by which they can be converted into a rule of law, and the institutions which will make such decisions. Referring to our original model, these are propositions relating to the role of the lawmaker.

Just as we saw that it is possible to examine the role of a bureaucrat by placing him in the position of the role occupant in our model, so is it possible to examine the role of the lawmaker. This leads us to a consideration of the content of the norms defining the lawmaker's role — the subject matter of much of administrative and constitutional law; the forces operating upon him — a matter extensively canvassed in the political science literature; and the various institutions (usually vague and diffuse) for sanctioning his activity.

1. *Decision-making Institutions.* Decision-making institutions can be conceptualized as consisting of four elements: inputs, conversion processes, outputs, and feedback:



The structure of the institutions which determine the inputs, the conversion processes, and the feedback obviously all condition the output.

The appropriate norms to define the role of the decision maker, therefore, must be determined by looking to the kind of output desired. The inherited decision-making structure — all defined by law, subsidiary legislation, regulation, and convention — were designed for the problems perceived by the colonial service. These were, in the main, a matter of tension management. The procedures evolved — minute papers, commissions, consultation of interested parties — were appropriate to that end (Seidman, 1970).

Independent Africa in the process of development faces more far-reaching problems. What is required now is a machinery of decision making able to cope not merely with tension management, aimed at returning to an equilibrium, but the constant process of *induced* change. The output being different, we can only expect that the decision-making apparatus will be different.

IX (A)

a. Bureaucracies embody a particular decision-making structure.

b. Decision-making structures must be relevent to the agenda of decisions faced by the bureaucracy.
c. The agenda of decision making for independent African governments in conditions of development is vastly different from those of colonial governments.
d. Therefore, one can expect radical changes in the law defining decision-making processes in African governments.

The striking and rapid development of planning law and institutions in Africa is, of course, the most obvious example (Pratt, 1967).

A corollary to this set of propositions may explain the rapid rate of change of constitutions and administrative structures in Africa:

IX (B)

a. Bureaucracies are goal-directed institutions.
b. The goals of independent African governments purport to be different from the goals of the colonial governments.
c. The organization of bureaucracies vary as their goals.
d. The organization of government bureaucracies is defined by law.
e. Therefore, it is to be expected that the law defining the organization of government bureaucracies in conditions of independence will change from the organization of such institutions under colonialism (Seidman, 1969).

2. *The Rate of Change.* Two social scientists and a philosopher at Yale have generated considerable interest in the problem of the rate of prospective change and its impact upon the rationality of decision making (Dahl, 1966; Dahl and Lindblom, 1953; Braybrooke and Lindblom, 1963). They distinguish between incremental, comprehensive, and revolutionary or utopian change. Echoing the strictures of Karl Popper (1957), they insist that only incremental change is rational.

Although one need not adopt their conclusions, their scheme is suggestive. Without damaging it too greatly, we shall collapse their tripartite categorization of change into a bipartite model. "Incremental change" we shall define as any change which does not require a significant shift in the allocation of power and privilege. "Comprehensive or revolutionary change" we shall define as change which does require such shifts. Incremental changes involve a relatively continuous process of slight adjustments to the going working rules; comprehensive or revolutionary change a discontinuous one.

The very nature of development, however, is that it is likely to be a discontinuous process. Incremental changes are, almost by definition, less risky than comprehensive or revolu-

tionary changes, in the sense that the smaller the change, the less far-reaching the disaster in case the program miscarries. The process of development, however, requires deep-seated changes in the existing institutional structures. It requires, therefore, deep-seated changes in the power structure, based as it is upon the existing dualistic economic and social structure. Shifts in power have rarely in history been accomplished by incremental means, and when they have, they have occupied time spans that probably are not given to nascent African states.

IX (C)

a. Development requires that the existing dualistic economy and society be radically altered.
b. In the process of alteration, it is inevitable that those classes and interests which derive power and privilege from the existing structure of society will be displaced.
c. Therefore, it is to be expected that development will require comprehensive or revolutionary change, rather than a series of incremental changes.

Several corollaries follow:

IX (D)

1. Changes in the law related to development within the framework of Contract will tend to be incremental rather than comprehensive or revolutionary.
2. Changes in the law related to development within the framework of Plan will tend to comprehensive or revolutionary change until new institutions are created, after which changes will be incremental.
3. The more comprehensive the change demanded by a law relating to development, the less likely is it to bring about the desired activity.
4. African polities may be expected to develop devices to reduce the risk attendant upon comprehensive or revolutionary change, such as:
   a. pilot projects;
   b. changes in the "key links" rather than changes on the periphery of development;
   c. increased attention to planning;
   d. the use of legislation with built-in devices for rapid feedback and amendment;
   e. the accomplishment of comprehensive change in limited geographical areas at a time, rather than seeking to accomplish such change on a national scale all at once.

3. *Costs and Benefits.* Until operational definitions are available for most of the concepts which have been used here, it is doubtful that the assessment of the costs and benefits of any particular proposed rule will ever advance very far beyond the intuitive. One can, however, sum some of the implications

of our model for the ultimate decision with respect of costs and benefits.

IX (F)

a. The costs of a proposed rule include:
   (i) the probable adverse consequences of the activity of the role occupant which the rule will induce;
   (ii) the costs of the sanctions invoked;
   (iii) the costs of the sanctioning activity by the bureaucracy;
   (iv) the feedback activity that will be induced by the activity of the sanctioning bureaucracy.

b. The benefits of a proposed rule include:
   (i) the probable favorable consequences of the activity of the role occupant which the rule will induce;
   (ii) the educative effects on role occupants of bureaucratic activity designed to sanction the rule;
   (iii) the educative effects on the bureaucracy of its attempts to enforce the rule.

c. Whether a proposed alternative will be adopted depends upon two criteria:
   (i) whether it falls within the framework of values of the lawmakers; and
   (ii) whether, within that frame of values, benefits exceed costs.

These propositions, in short, suggest that the assessment of the costs and benefits of a rule are far more extensive than the simplistic question, "What will be the consequences if the rule is descriptive as well as prescriptive?" Rather, it suggests that the questions are always, "How *much* compliance can be expected for how *much* investment in sanctions and sanctioning activity? How *much* will the sanctioning activity bring about desired results, and how much will it bring about undesired results?"

They also suggest that the values of the lawmakers do not define the assessment of costs and benefits. They determine whether a particular group of lawmakers will even consider a particular alternative. For example, Tanzania's original villagization scheme was advanced in response to President Nyerere's proposal to initiate cooperative production in agriculture. Nevertheless, there is no evidence that cooperative land tenures were *ever* considered on any level by the bureaucracy. The law relating to land tenures which emerged plainly contemplates individual land holdings within the framework of villagization. It would seem that the values of the bureaucracy filtered out the alternative proposed by the President.

Methodology

The most striking aspect of the problems which we have suggested is the almost complete lack of research in the field. The model we have suggested requires, first, the elucidation of the law — what *are* the existent norms? It further requires a careful empirical study of the manifold conditions of activity. The first is the daily diet of lawyers; the second is the central problem of the behavioral sciences.

Social scientists, however — at least those in the modern positive, behavioral tradition — have somehow bemused themselves into believing that policy is none of their concern. As Llewellyn once remarked in a different context, social scientists in their approach to policy matters resemble the Victorian virgin tubbing in her nightgown. The converse is also true. Lawyers have not a whistle of experience, let alone method, for the investigation of empirical matters of the sort required. They start from square one.

Precisely what methods will be evolved in this field, one cannot say. Methods, we are constantly told, are a function of the research problem, just as the definition of the problem is a function of the methods available. One might suggest, however, that in the present state of the field, a great deal of research can be done using existing materials. There exists a vast social science literature concerning many areas of interest to lawyers, and reams of legal literature in the same subjects. What remains is the marriage of the two.

CONCLUSION

These hypotheses do not pretend to be either exhaustive or logically consistent; in at least some cases they are no more than trivial, nor are they anything more than hypotheses. Yet if lawyers and social scientists are ever to contribute to wise decision making about the precise form of specific governmental programs — and in Africa that is the end product of their socially useful work — typically, they must make an estimate of the probable consequences of a proposed rule and a sound policy choice about its desirability. This they cannot do without making a shrewd estimate of the probable consequences of the proposed legislative program in all its ramifications: its costs and benefits with respect to social organization, the cost of enforcement, the effect of sanctions, the probable nature of citizen reaction, the extent of probable noncompliance, and latent consequences of all sorts. The empirical investigation that an

estimate of probable consequences requires lays the basis both for the judgments of value and of the effectiveness of the legislation that must be made if the lawmaking process is to be rational.

Every investigation of what is the case necessarily assumes a model, either explicitly or implicitly. If it is possible to develop a verified set of propositions of the sort suggested, perhaps in time it will be possible to present to lawmakers an heuristic framework directing their attention to the relevant data and reliable knowledge about probable interactions. It could provide them with powerful tools, both for the prediction of the sorts of activity probably consequent upon the enactment of a proposed rule and for the making of policy choices based on something more than intuition. Until that is done, the problems of law and development will remain a field for the necromancer rather than the social scientist or the lawyer.

FOOTNOTES

[1] I am indebted to Ocran (1970) for the useful distinction between "atomistic" and "holistic" studies, as well as many other ideas.

[2] In the non-settler territories of West Africa and Uganda, the dialectic of the market brought some Africans into peasant cash-crop farming of exportable agricultural products (cocoa in Ghana, ground nuts in Northern Nigeria, cotton in Uganda, coffee in parts of Tanzania), which were bought by great English factors for resale overseas. In these areas and with respect of these farmers, customary law adapted itself to the imperatives of a market economy (Asante, 1965). The result was that in West Africa "independent" peasants labored for the profit of the English factors.

[3] Cf. the great Groundnut Scheme, which failed mainly because of physical problems (Frankel, 1954). The provisions of Ghana's Prison Ordinance have been systematically breached since 1888, because of the architectural limitations of Ghana's prisons (Seidman, 1969).

[4] For example, entrenched groups have frequently negated the objectives of the cooperative ordinances (Miracle and Seidman, 1968; Khider and Simpson, 1968).

[5] For example, existing marketing institutions made cooperative tomato farming in Northern Ghana dysfunctional (Miracle and Seidman, 1968).

[6] This proposition is an adaptation of Merton's anomie theory.

[7] An adaptation of Sutherland's theory of differential association.

[8] Based on a theory advanced in Cohen (1966). For example, the role of the "big man" is common in many traditional societies; it may lead to deviance when adopted by a minister or bureaucrat in a developing society.

[9] In East Africa, the agricultural extension officer.

[10] Based upon Zolberg's theory (in turn following Weber) that in Africa, governments are too young to rely on traditional legitimacy, charismatic legitimacy decays, and in the end only legal-rational legitimacy is available (Zolberg, 1966).

[11] Ghana under President Nkrumah is the paradigm example (Seidman, 1969c).

[12] For example, in Tanzania land will be granted to farmers by the government only if they form a cooperative. In a group of tobacco farmers in Iringa studied by David Feldman, however, these nascent cooperatives rapidly fissioned into much smaller units, because all the supporting institutions encouraged not cooperative but individual enterprise. The sanctioning apparatus for the statute was insufficient, assuming that it was the government's goal for the role occupants that they maintain cooperative production. The supporting institutions were not fashioned in such a way as to encourage compliance rather than deviance (Feldman, 1969).

[13] For example, in Bukoba District in Tanzania the agricolas wanted to induce the Wahaya to farm their biganja land (coffee and banana plots) in the "modern" rather than in the "traditional" way. To support this, they refused to distribute new seedlings unless they were planted in the "modern" way. New shambas planted with seedlings received from the government were therefore planted in that fashion; existing shambas, and shambas with the farmer's own seedlings, continued to be planted in the traditional way (Rald, 1969).

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