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Appendix I: Drafting legislation for development: lessons from a Chinese project

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Appendix I

DRAFTING LEGISLATION FOR DEVELOPMENT: LESSONS FROM A CHINESE PROJECT

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The world around, many governments try to use the state and the legal order radically to change the character of their economies -- in Eastern Europe and in China, from centrally planned to more or less market economies; in much of the Third World, from dependent colonial to independent economies; in South Africa, from an apartheid-soaked to a color-blind system. Economists and lawyers engaged in designing the transformatory legislation demanded by these projects divide on several theoretical issues:

(1). Neo-classical economists[3] and orthodox Law and Economics scholars[4] basically treat a society's economic and other institutions as a black box; institutional economists and many drafters instead identify institutions as the principal variable in economic analysis.[5]

(2). If institutions have no relevance to market behaviors, then it makes sense to repeal every law that structures institutions, and permit actors to behave in accordance with their marginal utilities. That notion underpinned the "big bang" theory of transformation from a centrally-planned to a market economy. (The Eastern European countries have mainly followed this strategy.[6]) If, however, institutions significantly define market behaviors, a sensible strategy for change consists of carefully restructuring each of the manifold institutions within

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[1] Clark University and Boston University School of Law.

[2] Boston University School of Law

[3] Samuelson

[4] Psoner?

[5] Samuels? Tool?

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which market behavior nestles.

(3) The claim that institutions constitute a black box rests on the assertion that all markets work in basically the same way. Some scholars infer from that that markets everywhere can use the same laws as their framework. That leads to the conclusions that one country looking to create a market economy can readily copy the laws of another, notionally "successful" market economy. In opposition, others assert that law addresses repetitive patterns of behaviors, that is, institutions. Since time-and-place- specific factors shape those behaviors, a law that induces one sort of behavior in a particular time and place will onbly serindiptously induce the same behavior in a differen time or place.

(4). Resonating with classical philosophical positivism, neo-classical economists and their Law and Economics analogues hold that facts and values occupy discontinuous spheres. It follows that values are non-commensurable. That leads to a theory that holds that legislative outcomes depend entirely upon the power of affected interest groups. That perspective instructs a drafter to find out what relevant interest groups demand, and to write a law that responds to their respective power vectors. An alternative view rejects the assumption of a chasm between facts and values. That view holds the potential for generating legislation grounded not merely on power, but on reason informed by experience.

This paper reports on a project for drafting 22 priority laws in connection with transforming the Chinese economy from a centrally-planned to what the Chinese denote as a 'socialist market economy'. That project provides some data that may shed some light on these debates.

In recent decades, China's experience seemed different than that in most of the rest of the socialist and the developing worlds. As the 20th century waned, most third world development programs lay in shambles. Real per capita incomes declined. Poverty deepened. In Eastern Europe, the countries that formerly comprised the USSR struggled to transform their economies. In practically all of these countries, instead of moving into a new era of plenty, the incomes and quality of life of most of their people slid towards the abyss.

In the mid-1980s, by contrast, the World Bank[7] reported, "China's past strategy and present system have created, on the whole, an extraordinarily equal society." Others pointed out,

China has had one of the world's highest sustained rates of

World Bank, 1985. China -- Long Term Development Issues and Options: A World Bank Country Economic Report. Baltimore: Johns Hopkins Univ. P., p. 29.

> industrial growth during the past thirty-five years. It has broadened its industrial base to encompass an increasingly full range of production, and it has expanded its industrial employment to provide 63 million jobs, equal to the industrial employment in all of North America and Western Europe. China has do ne this while being isolated from the rest of the world for long periods and while undergoing frequent and often radical changes in the organization of industry. Since the 1950s, it has continually adapted the Soviet central-planning model to develop unique forms of organization, such as locally controlled small-scale industry, in line with the strategy of 'walking on two legs'[8]

By the miserable standard of most of the third world, China did well. A substantial minority of Chinese, especially in the rural areas, remained poor. Most people, however, enjoyed higher real living standards than other low-income countries. Agricultural collectivization had prevented the emergence of an impoverished class of landless laborers. The state guaranteed the minimum necessary food supply. Primary school enrollment was high. Most people had access to basic medical care and family services. In 1985, life expectancy, "probably the best single indicator of the extent of real poverty," averaged 67 years -- well above the Third World median.[9]

The situation in the early 1980s led China's governors to move towards a new legal order. China had its own difficulties, especially, a mixed bag of technologies: Perhaps 5%, late 20th century (mainly in the military and military production); about half, a decade or more out of date; the rest, far behind the first world. China fed 22% of the world's population on 7% of its arable soil, but to do so employed 80% of its population (By contrast, about 2% of the United States's population not only fed their own population, but produced substantial food surpluses for export.) China's government concluded that, to accelerate economic growth, it must introduce fundamental economic reforms and open its economy to the outside world. Their new strategy produced some remarkable successes. As the decade of the 1990s began, the World Bank

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[8] Tidrick, Gene, and Chen Jiynan. 1987. China's Industrial Reform. New York: Oxford University Press, p. ix; see also World Bank, 1985. China -- Long Term Development Issues and Options: A World Bank Country Economic Report. Baltimore: Johns Hopkins Univ. P. p. 110.

[9]. World Bank, 1985. China -- Long Term Development Issues and Options: A World Bank Country Economic Report. Baltimore: Johns Hopkins Univ. P..

suggested that China might become another Asian miracle.[10]

To accomplish their new program required massive institutional changes in practically every aspect of China's economic system. Those institutional changes required massive changes in the legal order. This paper reports on a five-year, United Nations Development Programme-financed project to assist in drafting 22 priority laws, and in the course of that effort, to improve the capacity of Chinese drafters.[11] The paper first describes the difficulties that led to China's request for assistance, primarily delays in drafting bills and laws that failed to accomplish their purpose. Second, it analyzes the causes of those difficulties: principally, the drafters' inappropriate conceptualizations of their task; their lack of knowledge about foreign law and experience, especially how to use it in drafting Chinese legislation; the inadequacy of their social science research skills; and their insufficient knowledge of drafting techniques. Third, it describes the project's proposed solution: Grounded in an adequate theory of legislation, to train Chinese drafters by engaging them in completing the 22 priority bills. Finally, it concludes with some observations about the project's lessons for the use of law to facilitate development.

I. THE DIFFICULTY THAT EXCITED THE PROJECT

This section outlines, first, how China's perceived need for new legislation implied a need for institutional transformation; second, the organizational steps that prior to the UNDP project the Chinese government had already taken to meet that need; and third, the deficiencies in the existing drafting system.

A. THE NEED FOR TRANSFORMED INSTITUTIONS AND MORE LEGISLATION

As China began to restructure institutions to implement the Reforms and Open Policy, its leaders recognised the necessity to create a new legal order appropriate for a market economy. This section first outlines the considerations that persuaded to the Chinese that China needed new legislation, and, second, how the demand for new legislation implied a demand for new institutions, i.e., for new behaviors by a range of social actors.

1. China's need for new laws. In 1979, China's new governors proclaimed a programme aimed at transforming the national economy from a centrally planned one to a 'socialist market economy'.[12]

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[10]. World Bank, East Asian Miracle - Economic Growth and Public Policy (Oxford University Press, 1993)

[11] We served as Chief Technical Advisors to the project from its inception. This paper rests on our personal experience in connection with the project.

[12] [documents etc.] During first three years of the UNDP/BLA project, the very definition of the kind of market economy the government proposed remained subject to debate. At first, government officials frequently used the term 'planned commodity

They largely de-collectivized agriculture.[13] Increasingly, they sought to submit investment decisions in all sectors of the economy to the guidance of market forces.[14] At the same time, they tried to end the three decades of international isolation imposed after the 1949 revolution by external factors and government policies.[15] To reap the benefits of the knowledge and advanced technologies developed elsewhere, their 'open door' policy aimed to attract foreign private investment, managerial skills, 'know how' and access to international markets.[16] By the late '80s, they realized the need for appropriate legislation, not only to articulate relations within the planned sector and between the planned and the market sectors, but also to ensure orderly, equitable development of the institutions that shaped its emerging markets. Today, nobody doubts that markets cannot exist without a legal structure. Investors need laws to ensure the stability and predictability they need to risk their capital.[17] These include two sorts of laws: The laws sometimes called 'private' law (principally, contract and property law in all their multitudinous varieties), and the laws that structure the institutions that supply market actors with opportunities, capacities and interest to participate in the market (banks, a skilled work force, adequate transportation, a reasonable infrastructure, a functioning government, for farmers, an agricultural extension service, and so forth).[18] These rules take many different forms; the sorts chosen helps to define the sort of

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market economy.' By 1994, most referred to a 'socialist market economy' and sometimes just to a 'market economy.' In the course of the project, it became clear that the 22 priority laws the participants drafted would contribute to defining the kind of market economy introduced.

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[17] Max Weber. 1947. The Theory of Social and Economic Organization. Tr. A.M. Henderson and Talcott Parsons; ed. Talcott Parsons. New York: The Free Press; _____. 1978. Economy and Society. G. Roth and C. Wittich, eds. Berkeley: University of California Press

[18]. Posner, Richard A., The Economic Analysis of Law. Boston: Little, Brown, 3rd ed., 1986; Weber, Max. Economy and Society. G. Roth and C. Wittich, eds. Berkeley: University of California Press, 1978; and Max Weber, ed. The Theory of Social and Economic Organization. Tr. A.M. Henderson and Talcott Parsons. NY: The Free Press, 1947.

market that exists in any given country.

To induce social actors to behave in new ways to improve the interactions between market units and within firms, China's government, like those elsewhere, had no alternative but to invoke the machinery of the law.[19] To solve its manifold problems of management and administrative performance it required new administrative law;[20] to avoid environmental disasters it must enact appropriate environmental laws;[21] to increase the role of women in development it must introduce new laws to improve their opportunities and capacities to participate in the economy.[22]

By the late 20th century, throughout most of the world, legislation and administrative regulations had become the only legitimate source of new rules.[23] To transform existing institutions in order to implement the Reforms, China's law-makers,

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[19] [See authors in Hungarian book on L&modernization]; cf. Skocpol, Theda, "Bringing the State Back In: Strategies in Current Research", in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol, Bringing the State Back In, Cambridge, Cambridge U. P., 1985). For critique, see Gabriel A. Almond, "The Return of the State". 82 Am. Pol. Sci. Rev. 853-74 (1988) and replies by Eric A. Nordinger, Theodore J. Lowi and Sergio Fabbrini, pp. 875-901.

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[23]. In the 19th Century, in England, then the most powerful of the emerging capitalist countries of Europe, historical circumstances endowed courts with broad powers to interpret those rights and duties. They principally exercised those powers in the context of litigation between private parties. This helped to generate the analytical positivist myth that, far from shaping markets to facilitate the development process, laws can at most define bargaining parties' rights and duties. See below, text at n. xx.

too, had to redraft old laws and write new ones.

China's legal history differed from that of most other third world countries. At independence, those countries made only marginal changes in their inherited legal system; almost invariably, these proved inadequate to foster development.[24] In contrast, in 1949, almost uniquely, China's revolutionary government declared invalid the entire corpus of its received (Kuomintang) legal legacy.[25] Its leaders tended to govern through administrative decrees rather than formally-adopted statutes.[26] During the decade of the Cultural Revolution, university law departments closed, reopening again only in 1986.[27] As a result, China entered the 1980s Reform period with a legal order frequently characterized by arbitrary administrative decision-making. Its law-makers had little knowledge or capacity for drafting new legislation to induce social actors to behave in orderly, predictable ways. The government did enact some new laws,[28] but a vast amount of legislation basic to any market economy, socialist

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[24]. See Seidmans, State and Law in the Development Process, op. cit. Chs. 2, 8.

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[28] These included a patent law (cite), a copyright law, (cite) three foreign investment laws (cite), a bankruptcy law (cite), a state enterprise law (cite), and others. Training programs provided opportunities for advanced study (frequently overseas) for high-level personnel. The authorities invited foreign experts to advise them on administrative, banking, foreign trade, and other legislation.

or otherwise, remained absent or inadequate: banking law, corporation law, domestic investment law, foreign trade law, budget law, and a gaggle more.

Held together by various sorts of normative instruments, the existing social practices relating to the economy lacked four characteristics a legal system requires to underpin a market: rules that --

(1) emerge from the society's legitimate, deliberative law-making system;

(2) the state promulgates publicly, so that relevant market actors know of their own and others' expected behaviors;

(3) have a logical internal consistency, so that market actors can obey them; and

(4) have as much precision as possible, both to advise social actors of the likely consequences of their own and others' behaviors; and to limit officials' discretion. [29]

2. The nexus between laws and institutions. That China required new laws reflected its felt need for new institutions appropriate to its developmental goals. By definition, "institution" means patterns of repetitive behaviours by various actors.[30]

Every proposal for change through law proposes changing an institution. All law prescribes repetitive patterns of behavior for its addressees. In this sense, however incrementally, new law always prescribes institutional change. When China's 1990 Five Year Plan called for a new banking law, a new education law, a new

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[29] Lon Fuller? Other? Cf. Luhmann on the specificity of law (from Ed Rubin)

[30] Homans, George Casper. The Nature of Social Science. N.Y.: Harcourt, Brace and World, 1967.

budget law, and new drafting regulations, it called for new social behaviours of the actors who comprised its banking, educatioal, budget and drafting institutions. To draft these new laws, China's drafters had to become experts in changing those social behaviors.

Most capitalist countries' institutional structures and their associated legal orders acquired their market-oriented cast incrementally over centuries.[31] China needed a whole bookcase of new laws, and a whole forest of new institutions -- immediately. Its law-makers had to design whole new legislative programs -- that is, whole gaggles of new institutions -- instanter.

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[31] Horowitz

[32] Homans, George Casper. The Nature of Social Science. N.Y.: Harcourt, Brace and World, 1967.

[33] Whatever classical economics's claim to treat institutions as a black box, to the extent that they purport to offer advice about legislation, even practitioners of its legal offspring, law and economics, cannot avoid considering institutional causes of role occupant behavior. Even considering incentive structures requires looking at the law and the institutions that structure those incentives. In fact, in its policy- and law-making modes, law and economics does look carefully at the institutions that structure the market, sometimes while denying that they do so. Cf. Stokey and Zeckhauser, ... (All social problems constitute

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Initially, the Chinese drafting system proved incapable of meeting so formidable a challenge. Most visibly, it failed to produce laws promptly. By 1991, no matter how brief or narrow a regulation's scope, from the date of its assignment to the drafters to its appearance as a bill took, on <u>average,</u> about a year; enactment of a law, two years. From conception to enactment, large, important, or contentious bills took much longer: eleven years for the copyright law; eight years for the Bankruptcy Act; thirty years for the Maritime Regulations (and still counting). By 1991, at the inception of the UNDP/BLA project, almost all the specified 22 bills and regulations had gestated for years, many for a decade and more. China's leaders searched for solutions.

B. CHANGES IN BILL-CREATING INSTITUTIONS

By the end of the 1980s, China's new leaders had already taken important strides in reforming the country's administrative

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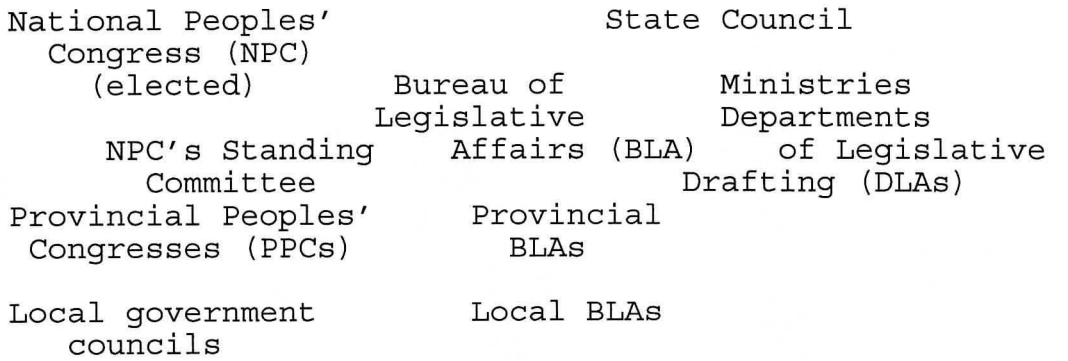
market failures; market failures result from failures of information, factor mobility, adequate incentives, sufficient numbers of market players to avoid monopoly, and the other requirements of a perfectly free, perfectly competitive market). Although Stokey and Zeckhauser never denote these as institutions, plainly these market failures consist not merely of resource allocation failures, but also of failure of the <u>institutions</u> that supply information, permit factors more or less mobility, supply incentives, permit entry into markets, predatory behavior by market actors, and so forth.)

and legal systems. They changed the constitution; they enacted some laws relating to the market economy; and they restructured the institutions that created law.

1. **Constitutional changes**. At least on paper, the new 1982 Constitution[34] established the supremacy of law. By 1991, when we began to work on the project here described, formally the law-making power descended from the National People's Congress (see Figure 1).

Figure 1: CHINA'S LAW-MAKING SYSTEM, 1990



The National People's Congress (NPC) exercised the general legislative power. Article 67 of the Constitution endowed the NPC's Standing Committee with certain law-making powers. The State Council,[35] whose constituent agencies include the national government ministries and major departments, constituted the highest administrative structure. The Constitution [Article 89(1)] empowered the State Council to "enact administrative...

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[35] The State Council serves essentially the same function as does the Cabinet in other governments.

regulations". Within their respective jurisdictions, as empowered by relevant statutes, the Ministries and Commissions may issue orders, directives and rules. (Article 90). The People's Congresses and Standing Committees of local provinces and cities directly under the Central Government "may adopt local regulations which must not contravene the Constitution, the statutes and the administrative rules and regulations...." (Article 100). Lower level congresses may "issue decisions and orders"(Article 107). The NPC's Standing Committee has the power [Article 67(7),(8)] to annul lower organs' regulations or laws if they contravened the Constitution or applicable law.

2. **Institutional changes: Creating the BLA and the DLAs.**[36] China's leaders also improved the nation's legislative drafting capacity, especially by creating and progressively strengthening the Bureau of Legislative Affairs (BLA). Between May 1980 and July, 1981, the State Council set up a Bureau of Law and Legal Institutions under the General Office of the State Council, and an Economic Legislation Research Center. In 1986, it amalgamated these to form the BLA. By 1990, the national BLA employed 260 personnel, including 164 legislative drafters.[37] It had loosely affiliated branch offices in every province and even cities that assisted and

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[36] Factual material in this section based on interviews with BLA officials, 1991.

[37]. About two thirds constitute professional staff -- drafters, researchers and administrators. The remaining one third constitute support staff.

supervised local law-making and law-implementing activities.[38] In addition, by the 1990s, every central government ministry and department had established a Department of Legal Affairs (DLA) to draft laws and regulations to implement its policies and programs. Averaging about twenty members in each, all told the national DLAs employed about 1200 professionals.

3. **The tasks of the BLA and the DLAs**. The BLA had two principal tasks. With the assistance of the DLAs, it bore the laboring oar in drafting the legal blueprints for re-shaping the institutions required to implement the Reforms. Implicitly, it also had the principal responsibility to draft bills likely to further the Rule of Law.

a. **Institutional reform through the legal order**. Early in the Reforms, the National People's Congress delegated to the State Council the power to enact draft regulations concerning taxes and all matters "concerning the reform of the economic structure and the open policy". The State Council delegated to the BLA most of the tasks related to the exercise of these powers, and relied heavily upon the BLA's advice. By 1991, BLA had the following powers[39]:

+ To draft the legislation program of the State Council;

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[38] Provincial and local BLAs had an important function of informing provinces and localities about the requirements of new laws. They served provincial state councils in a way analogous to the relationship between BLA and the State Council at the national level.

[39] "The Bureau of Legislative Affairs of the State Council of the People's Republic of China," Beijing, 1987 [in English and Chinese] pp. 5-7.

+ To coordinate all the legislative work of the DLAs, that is, of the State Council's constituent agencies;

+ To review and clear draft laws, treaties, agreements and administrative regulations prepared and proposed by DLAs.

+ To draft important laws and regulations, especially those that involve the responsibility of a number of State Council units;

+ To interpret administrative regulations;

+ To codify promulgated regulations;

+ To oversee the application of economic and administrative laws and regulations;

+ To study the needs and issues that affect the legal base of China and advance recommendations on these matters to the State Council;

+ To continuously examine the validity and applicability of laws and regulations;

+ To compile all locally passed regulations and rules, to review them, and to codify and record them;

+ To conduct academic exchanges and consultations with both domestic and foreign legal entities and circles;

+To familiarize itself with the legal systems and theories of other countries;

In cooperation with the BLA, each DLA had to carry out three more specialized tasks:

+ to work out legislative plans for its ministry, including bills, regulations and rules;

+ to review and where necessary rewrite the laymen's drafts prepared by another ministerial department; and

+ to draft bills, regulations and rules for its ministry.

These tasks implicitly made the BLA the guardian of the rule of law.

b. **Guarding the Rule of Law.** The Rule of Law has diverse aspects. Among others, the canon of valid law must remain free of

internal contradictions; it must be cognoscible, that is, accessible to ordinary citizens; and it must actually induce the behaviors prescribed (for if laws consistently do not bring about the behaviors they prescribe, government rapidly loses legitimacy).[40] BLA's obligations to codify promulgated regulations, and to "study the needs and issues that affect the legal base of China" dealt with these aspects of the Rule of Law. Even without explicit directions, however, BLA's responsibility for protecting the Rule of Law ineluctably emerged from its role as central drafter. As Britain's central drafting office discovered many decades earlier, by assuming the responsibility for drafting all laws, it inevitably undertook to keep them consistent with each other. It had to ensure that the laws not only avoided crass contradictions, but that they retained an internal logic. Britain's office of Parliamentary Counsel became de facto the Office for the Protection of the Rule of Law.[41] In China the BLA assumed the same responsibilities.

4. **The drafting process**. Having established the BLA as its new legislative drafting institution, China's reformers assumed that it and its associated DLAs would draft priority legislation. To do that, they had to resolve manifold policy dilemmas. In this respect, China implicitly rejected the British and American myth that drafters concerned themselves, not with a bill's substance,

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[40] Robert B. Seidman, "Drafting for the Rule of Law"....

[41] W. J. Chambliss and Robert B. Seidman, Law, Order and Power (2d ed.); R. B. Seidman, "Leg drafting in Africa".

but only its form. In that myth, only legislators made policy decisions.[42] In China, the National People's Congress has always approved bills submitted to it by its Standing Committee.[43] Only very rarely did the Standing Committee and the State Council disapprove of a draft submitted by the BLA. Furthermore, the drafters' nominal political superiors give them few instructions, typically only identifying the difficulty the proposed law should address.

In practice, therefore, China's drafters explicitly had to deal, not merely with issues of form, but issues of substance.[44] In addition, China's drafters often had to resolve disputes over turf, interest group debates, conflicting ministerial missions --all the

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[42] See ....That this constitutes a myth, see. . . .

[43] This is typical of Parliamentary systems everywhere, and almost all presidential systems as well. In only a few countries, in which individual legislators have their own political base, will legislator-politicians meaningfully dissent from a Cabinet that invariably contains the Party leaders. See.. . .

[44] In the world of practice rather than myth, in every system the civil service (including the legislative drafters) resolves substantive issues. For example, in the British drafting process, ministerial civil servants devise the legislative program, embodied in a memorandum, or sometimes in a 'layman's draft' of the bill. After approval by the Cabinet Committee on Legislation, that goes to the drafters. Inevitably, the drafters must devise the details for inclusion in the final bill. That goes back to the civil servants for review, and for comment by 'interested parties' selected by the civil servants. Although the British and Chinese adopted different notions of what the word 'drafting' subsumes, in practice their respective systems constitute functional equivalents. The explanation in each case seems also the same: as in China, so in Britain. In each case, the parliamentary system guarantees a built-in automatic government majority. Except in very rare instances in Britain, government bills come to Parliament with an assurance of enactment. Before arriving there, the bill's authors must have resolved issues of substance and conflicts of power and interest. See....

contradictions that in other systems legislators and ministers notionally resolved.

For complex bills like those in the UNDP/BLA project, China's drafting process encompassed nine steps[45]:

Step 1. BLA personnel meet with ministry officials and people from important relevant government agencies and occasionally from organized interest groups (for example, in the case of labor law, the trade union organization) to work out the legislative programme.

Step 2. BLA identifies drafting group members. In a bill originating in BLA, some of these will come from BLA, and others from relevant DLAs.

Step 3. The drafting group formulates an outline for the draft.

Step 4. The drafting group drafts the bill.

Step 5. Several group meetings examine the initial draft. The group has discretion as to whom to invite to these meetings. Usually, if the matter of the draft touches some organizational interest, the group will invite that organization to send a representative; if many government and non-government organizations have an interest, the drafting group decides whom to invite.

Step 6. After revision in light of the criticism by the affected organizations, the group sends the draft back to the ministry for review and approval. The group leader explains the bill at a meeting within the ministry.

Step 7. After ministerial approval, the ministry sends to the State Council the draft and the statement of reasons; the State Council forwards it to BLA, which reviews the draft both technically and in light of national strategies. It also sends copies to those whom BLA identifies as interested people. Their critiques sometimes reveal major unresolved problems. To invite comments on an important bill, BLA, at its own discretion, may publish it.

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[45] Less complex bills usually arose in a single ministry. After a first draft by the ministerial DLA, the ministry forwarded it to the State Council. The State Council; immediately referred it to BLA, which then undertook the same review as it undertook in the more complex process mentioned in the text.

Step 8. The group then revises the draft to meet those comments. If it cannot reach consensus, the group usually defers decision; if they can, they forward the draft to BLA.

Step 9. A group of senior BLA drafters reviews the revised draft. If they approve, they prepare a statement of reasons justifying the draft, and forward it the State Council. If they disapprove (for example, because the draft grants the ministry powers that exceed the ministry's authority), they may either return the draft to the drafting group requesting revision, or they may forward the draft to the State Council recommending rejection.[46]

5. **Preparing to draft priority legislation.** The Eighth Five Year Plan (1989) identified the 22 priority bills whose drafting formed the core of the UNDP/BLA project.[47] The BLA appointed high- and lower-ranking officials and drafters from the relevant DLAs and BLA to nine task groups. Each task group focused on a priority legislative area: Macro-economic control; enterprise; market; agriculture; foreign trade; environment and resources; education; legislative techniques. The ninth group, the liaison group, coordinated the efforts of the others with the BLA's overall activities.

Each task group inherited a substantial body of research findings gathered earlier by relevant ministries or one or more of China's numerous research institutes. Some initiated further research; all proceeded to formulate preliminary draft bills.

These changes in the institutions and processes of bill-creation, however, also encountered difficulties.

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[46] Provincial and local governments must also submit drafts of bills or regulations to BLA for review.

[47] In fact, after consultations with the ministries, BLA proposed the 22 bills for inclusion in the five year plan.

C. DEFICIENCIES OF THE LEGISLATIVE DRAFTING INSTITUTIONS.

In the summer of 1991, at the request of the BLA[48], we served as a UNDP mission to review a draft proposal for UNDP assistance in the drafting process. We met for a day with each of the drafting teams BLA had created -- in effect, focus groups.[49] We structured the group discussions around a problem-solving agenda: the nature of the problems the drafting teams had encountered in drafting their bills; their initial explanations for them; and the steps they considered necessary to overcome them.

Those discussions identified identified four serious deficiencies in China's drafting system: inordinate delays limited the quantity of bills drafted; the laws enacted too often failed to induce the prescribed behaviors; some had unintended, perverse consequences; and the emerging legal framework lacked coherence and cognoscibility.

1. **Quantity**. Especially at the beginning of the Reforms, China's law-makers commonly enacted laws based on administrative regulations previously enacted by the State Council and implemented for a period of time on an experimental basis.[50] In the decade

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[48] In 1989-90, as Fulbright Professors, we had taught at Peking University. In the course of our year there, we had given a four-day series of lectures to a course in legislative drafting then run by BLA, in which we taught the legislative theory discussed below.

[49]. See, eg., David L. Morgan, Focus Groups as Qualitative Research (London: Sage Publications, 1988).

[50] This provided useful experimentation, but also perpetuated contradictory practices and arbitrary decision-making. These fostered unpredictability and instability, threatening market growth. For example, government gave the island of Hainan (pop.

after 1979, the NPC and its Standing Committee adopted 80 laws, i.e., only eight per year. The State Council adopted five times as many regulations, but, for China's 125 or so ministries and departments, governing almost a quarter of the world's population, those totalled only 40 per year. Provincial and local governments, too, proved incapable of enacting the local ordinances and regulations required to implement the Reforms. The enactment of important legislation took many years: eleven years for the copyright law; eight years for the Bankruptcy Act; thirty years for the Maritime Regulations (and still counting). By 1991, at the inception of the UNDP/BLA project, almost all the specified 22 bills and regulations had gestated for years, many for a decade and more. In a period of forced-draft institutional reforms, this legislative output seemed paltry.

2. **Inducing prescribed behavior**. As in other countries, China's new laws and regulations did not always induce the behaviors they prescribed. Two examples: (1) The ordinary stroller in Beijing, one of the cities with the most air pollution in the world, might learn with some surprise that China had enacted an air pollution control statute.[51] (2) In the 1980s, in response to inflationary tendencies, year after year China's political leaders directed banks to reduce loans for undesirable capital expenditures; year

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6,000,000) almost complete freedom from national economic laws. It became a free-booter's paradise, a major source for smuggled goods and a serious leak for foreign exchange.

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after year those expenditures rose.[52] 3. **Perverse consequences**. Some of China's new laws had perverse consequences. For example, to stimulate enterprise vitality, the Government introduced a two-tier pricing system, giving farms and enterprises the power to sell goods produced over the contract-defined minimum at higher-than-plan prices.[53] Not infrequently, enterprise managers siphoned off inputs delivered at the planned low price and sold them at high market prices for their own account; existing rules failed to prevent this corrupt speculation.[54]

4. **Coherence and Cognoscibility**. For any type of market economy to function well, its legal order requires coherence and cognoscibility.[55] That calls for precise formulations of laws and regulations, as well as codification, indexing and publication.[56] Not infrequently, Chinese laws contained vague terms, evading the substance of that requirement.[57] No place did China's relatively few laws and vast number of administrative regulations appear in a codified, indexed form. Scattered in innumerable decrees, many lost in ministerial files, citizens had little or no possibility, before taking action, of discovering their complete contents. Yet,

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as Lon Fuller[58] emphasized, secret rules do not merit even the name of law.

The UNDP/BLA project aimed to help Chinese drafters resolve these four difficulties. In conformity with the problem-solving methodology,[59] together with the task groups we further explored their causes.

II
EXPLANATIONS FOR THE PERCEIVED DIFFICULTIES

Unless a solution addresses a difficulty's causes, too easily it will but poultice symptoms. Our discussions with the drafting groups indicated several explanations for China's new drafting institutions' difficulties:[60] the drafters' misconceived the function of law and their corresponding drafting task; they lacked appropriate training in legislative theory and methodology; and rules purporting to define the drafting process proved inadequate.

A. MISCONCEPTUALIZATION OF THE DRAFTING TASK

The drafters offered two inconsistent reasons for their difficulties that reflected misconceptions of the role of law and their drafting task. Some adopted a crude version of a popular Marxist metaphor to describe the relationship between law and society: The mode of production, the 'base,' determines the

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[58] Fuller, Lon. 1960. Adjudication and the Rule of Law. Proceedings of the American Society of International Law 1.

[59] See below, text at n. xx.

[60] About one, the project plainly could do nothing directly: China's budget constraints limited BLA and DLA staff members to a number that seemed far too small to draft all the legislation required for a quarter of the world's population.

superstructure, that is, ideology, religion, institutions, the State, civil society, and law.[61] The causality goes only one way: law can only mirror social realities.[62] Since rapid change and widespread uncertainty characterized China's mode of production during the Reforms, some Chinese drafters held that they could not draft adequate laws until economic conditions 'settled down.'

Other drafters expressed a contrary view that resonated with the 19th Century British analytical positivist notion that a law represents the 'command of the sovereign'.[63] That view reflected the notions that law's central function consists in guiding courts in the resolution of disputes,[64] and that society and especially markets function best without state intervention. These Chinese drafters concluded, therefore, that laws could only establish 'rights and duties' to facilitate dispute-settlement.

Neither view could guide drafters in writing bills likely to induce change in either economic or other institutions. The crude Marxist version denied that law, as part of the superstructure,

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[62] See, e.g., ... A more sophisticated version emphasized the dialectical relationship between basis and superstructure, thus holding out the possibility of using law (as part of the superstructure) to affect the basis. Cf. Engels, Friedrich. 1968. Letter to C. Schmidt, 27 October 1890 in Marx, Karl, and Friedrich Engels. The Marx-Engels Reader. (2d. ed.); ed. Robert C. Tucker. New York: Norton, 1978.

[63] Austin, John. 1954. The Province of Jurisprudence Determined: and The Uses of the Study of Jurisprudence. London: Widenfeld and Nicolson. [First edition 1834].

[64] [British J. Soc Law article re: codifications in nineteenth century].

could change the behaviours that constituted the basis; the crude analytical positivist notion at best told lawyers to ask what constituted a just allocation of rights and duties, not what behaviours best served the public interest. Both versions denied law's role in social engineering,[65] as government's primary means for channelling the human behaviors that comprise every institution. In the face of massive demands for new laws to restructure institutions, these ideologies, combined with their relatively weak drafting capacity, tended to immobilize Chinese drafters.

B. THE DRAFTERS' CAPACITIES

In China, as elsewhere, those responsible for creating bills not only had to draft laws in the narrow sense of writing laws in acceptable language; they had to design whole legislative programs. They needed much more than the relatively narrow linguistic and writing techniques that constitute the core of Anglo-American drafting instruction.[66] (The Chinese did, of course, need those skills too, but expatriates could hardly teach Chinese drafters how to write in Chinese[67]). After briefly describing the Chinese

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[65] Pound, Roscoe. Social Control through Law. New Haven: Yale Univ. Press, 1942.

[66] sEE DRAFTING TEXTS

[67] The project did include funds for preparation of a handbook on drafting rules and regulations, including rules for drafting in Chinese. The project participant assigned to the task read as many legislative drafting handbooks in English as he could find, and discussed the issues with experts from the US, Denmark and England.

drafters' formal qualifications, this section considers their level of knowledge and skills in three areas: social science research; knowledge of relevant foreign law and experience; and, above all, legislative theory.

1. **Formal qualifications**. Aside from a brief BLA-run course, no BLA or DLA drafter had any formal legislative drafting training. Almost all had degrees from universities, where many had majored in (typically compartmentalized) social sciences, especially in economics,[68] or in history, the physical sciences, or, after 1986, in law.[69] Among 164 BLA drafters, about 40 had graduate degrees in various disciplines. Others had upgraded their skills through on-the-job experience. Reflecting the general state of China's higher education,[70] even the drafters with social science degrees, though well-acquainted with their subjects, had not learned much about how to utilize social science research findings, far less to conduct research to gather evidence to justify their draft proposals.

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[68] As it did to university law departments, the cultural revolution destroyed sociology as a university-taught discipline. University departments of sociology have restarted only comparatively recently. [Cite?]

[69] With the exception a course at we introduced in Peking University in 1988-89 (Professor Lisa Stearns continued it for two years thereafter), none of China's newly re-established university law departments offered a course on drafting bills.

[70] "Legal Training and Eduction in the 1990's: An Overview and Assessment of China's Needs" by William P. Alford (Harvard) and Fang Liufang (China University of Political Science and Law), assisted by Lu Zhifang (University of International Business and Economics) (World Bank)

2. **Social science research skills.** Law can only exercise its social engineering function by changing the repetitive patterns of behaviors that comprise institutions.[71] People decide to behave as they do in the face of a rule of law by choosing among the constraints and resources thrown up by their environments.[72] These include, not only their objective circumstances, but also their own subjective interests, values and ideologies. Figure 2 captures that proposition.

Figure 2:
THE FACTORS SHAPING A ROLE OCCUPANT'S RESPONSE TO A LAW

Rule of law

Role occupant

"The arena of choice" - i.e., the constraints and resources in the role occupant's (country-specific) circumstances, or environment.

To draft laws likely to change the existing behaviors of their addressees ("role occupants"[73]) calls for evidence concerning the

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[71] Seidman and Seidman, State and Law in the Development Process, op. cit., esp. Chs. 2,6.

[72] Cf. Frederik Barth, Models of Social Organization. Royal Anthropological Institute. Occasional Paper 23. Glasgow: The University Press, 1966. Seidman and Seidman, State and Law in the Development Process, Ch. 6.

[73]. The model uses the term 'role occupant' to denote the class of persons who, as addressees of a state-made rule, perform a social role. A law's addressees, or role occupants, may therefore consist of every member of society ("Thou shalt not commit murder"), a defined class of non-officials ("No director of a corporation may use insider knowledge for private benefit"), or an

causes of those behaviors. Capturing that data calls for social science research skills. Drafters must know how to use facts to warrant explanations of the causal factors that influence social actors' behaviors in the face of existing rules. Only then can they draft bills likely to alter or eliminate those causes, thus making it more likely the actors will conform with the proposed new rule.[74]

For decades, some BLA and DLA staff members had engaged in their ministries' research and practical work; they had extensive knowledge of the facts of the substantive problems their bills addressed. As we discovered during the course of the project, however, they had little knowledge about the causes of the behaviors that led to those perverse resource allocations. The foreign consultant for the underground water bill, for example, reported that the drafting team's members seemed able to provide detailed information about every cubic meter of underground water in China. They had few hypotheses and less evidence, however, as to why Chinese peasants or industrial firm personnel overused or polluted it, and had few of the skills required to investigate those causes. While the study of foreign law and experience obviously could not provide evidence relating to China's country-specific circumstances, it might potentially prove helpful in designing the relevant social science research.

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official ("The Public Utilities Commission shall prescribe fair and reasonable rules for the generation and distribution of electricity").

[74] Justifying Legislation

3. **How to use foreign law and experience.** As everywhere, Chinese drafters grasped at foreign law as a model for their new legal order. Many seemed convinced that someplace 'out there' lay an 'international standard' for every law relating to education, national parks, mining, whatever: Foreign law and experience would provide them a model they could copy. A number of drafters explained their difficulties by their lack of knowledge of foreign law and experience.

Reflecting their inadequate comprehension of the relationship between law and behaviour and therefore of law and institutions, these drafters misconceived their problem. As Figure 2 suggests, the behaviour induced by any particular law depends not merely upon the law, but also upon the social surround of the law's addressees, including the behaviours of the implementing agency. Copying a law or a presumed 'international standard' could only induce in its new home the same behaviours as in its original one if both the implementing agency in the new country, and other factors in the social surround of the addressees closely resembled those in the law's place of origin.[75] Like those of every other country, China's circumstances, of course, are unique. Laws that seem to 'work' elsewhere will only serindiptously produce the same results in China. The Chinese drafters' belief that copying foreign law or an 'international standard' made their study of foreign law not merely useless, but positively dangerous, for it led them to draft bills which would almost undoubtedly fail to induce their

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[75] State, Law and Development

prescribed behaviours.

Without an adequate understanding of how law works, the study of comparative law can yield little useful knowledge.[76] The UNDP/BLA project aimed to equip Chinese drafters with a legislative theory to guide their study of foreign law, not to copy it, but to learn from the experiences it generated. They also needed that theory to guide research into the causes of behaviours in the face of a rule of law.

4. **Lack of an adequate legislative theory.** As figure 2 suggests, whether role occupants will conform to a particular rule prescribing their behaviors depends not only upon the terms of the rule and its prescribed sanctions, but also upon all the other, non-legal factors that influence the choices they make in deciding how to act.[77] Nobody, however, can do research about all aspects of a role occupant's environment; nobody ever has enough research resources to examine more than a tiny corner of realty's endless mazes. Researchers require a map of the relevant circumstances to advise them where to find to fertile fields, and what arid deserts to avoid. Theory should provide that guide.[78]

Without an adequate legislative theory to guide their analysis, drafters too often give up using reason informed by experience to discover explanations for behavior in the face of a law. Instead,

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[76] See R.B.Seidman, (Watson book review); Paul Brietzke on comparative law.

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[78] Graham Allison, Essence of Decision (theory a net whose mesh determines what facts one catches).

they either copy foreign law, or substitute for the real world their imagined realities: ideal-typical competitive markets,[79] or people with mythical characteristics (innately "conservative" peasants,[80] or women who work only for "pin money"[81] and whose "innate characteristics" suited them for usually low-paid jobs[82]). Without a theory, drafters have no way of knowing -- far less convincing policy-makers -- that the laws they draft will lead to more appropriate behaviors in the unique circumstances of their own countries.

A principal explanation for the Chinese drafting system's difficulties lay in the drafters' apparent innocence of any theory relating law and behavior: in the deepest sense, their lack of any real knowledge about the sociology of law. Without an adequate legislative theory, they floundered. The existing drafting rules and processes gave them little guidance.

C. DRAFTING RULES AND PROCESSES

Instead of the pre-UNDP/BLA project drafting rules guiding the drafters in their task, mainly they delineated the routes draft

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[79] Eg see Posner, Richard A. The Regulation of the Market in Adoptions. 67 Boston University L. Rev. 1987. 59.

[80] Eg Quick, Stephen A. Bureaucracy and Rural Socialism: The Zambian Experience. Stanford: PhD Thesis, Stanford University, 1975.

[81]

[82] Cf. Nash, June, and Maria Patricia Fernandez Kelly. 1983. Women, Men and the International Division of Labor. Albany, NY: State University of New York Press.

bills must travel from Ministry to State Council to BLA and back.[83] Not a single legislative drafting textbook existed in Chinese.[84] The form of the memorandum that supposedly accompanied and justified draft bills remained subject to the drafter's discretion. In practice, they did little more than restate the bill's contents. Its amorphous character left the drafter to decide what evidence, if any, they should present to the State Council or the National Peoples Congress in support of their draft bills -- and that granted them equally unlimited discretion to decide what research a bill required.

Nobody can assess the wisdom of a draft bill on its face. As Figure 2 suggests, a proposed law will induce the prescribed behavior only if it nestles comfortably within the relevant role occupants' unique circumstances. Only to the extent that a research report details the evidence that exposes the causes of those role occupants' existing behaviors can policy-makers assess whether the draft bill will likely change them. The form and content of the accompanying report serves as a quality control for the bill. Its utility for that purpose rests mainly upon its detailed structure. To leave the justification for a bill to the drafters' discretion -- especially if they have inappropriate notions of the law-society relationship and little social science research capacity -- all but ensured insufficient research, and

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[83] See above, p. xx.

[84] By contrast, many exist in English, all, regrettably, concerned almost exclusively with techniques for chaining words together.

therefore insufficient bills.

D. SUMMARY

A decade after initiating its Reforms and Open Policy, China's government confronted inordinate delays in drafting, and the laws passed too often failed to resolve the social problems they addressed. At heart, the explanation lay in the drafters' adherence to general theories that denied the social engineering function of law and their lack of an adequate theory to guide them in drafting legislation for that task. In addition, they had an inadequate grasp of foreign law and experience and in general insufficient social science skills. Vague drafting rules and practices reflected both the lack of an adequate theory and a miscomprehension of the proper use of foreign law and experience. The UNDP/BLA project sought to address these causes of the drafters' difficulties in trying strengthen China's legal framework.

III

SOLUTIONS: THE THEORY AND STRATEGY OF THE UNDP/BLA PROJECT

The project aimed to address all four difficulties by:

1) facilitating the prompt drafting of the 22 priority bills;

2) in the process helping the drafters to learn an appropriate legislative theory, some social science research skills, and knowledge of relevant foreign law and experience and their appropriate uses in the drafting enterprise;

3) by providing funding and assistance for writing a handbook on the subject, and by drafting detailed regulations for the drafting process, institutionalizing adequate research procedures in the drafting process and systematizing drafting in Chinese;[85]

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[85] See footnote ___above.

and

4) providing computer capacity to BLA, and putting all Chinese laws, regulations, and other rules into appropriate data bases.[86]

This section only discusses the project's proposed remedies for the first two difficulties: The drafters' limited capacities for their task, and the inadequacy of the drafting rules and procedures. At heart, both these reflected the absence of an adequate legislative theory and methodology. This section therefore first describes the legislative theory that underpinned the project; and, second, the pedagogical strategy the project adopted to teach that theory and methodology.

A. THE LEGISLATIVE THEORY UNDERPINNING THE PROJECT[87]

In much of academe and in much of the real world, social engineering through law has a bad name.[88] Without a theory relating law and behavior, a drafter has no guide to using law to solve perceived social problems. Most legislative theory hardly deserves the name. What passes for theory mainly denies even the possibility of rationally using legislation to bring about social change through reason informed by experience. Those theories

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[86] By 1994, BLA had substantially accomplished the task of putting 13 data bases of Chinese law on line.

[87] Robert B. Seidman, "Justifying Legislation.... Harv.J.Leg. (199?) describes the theory and methodology in general terms; Ann Seidman and Robert B. Seidman, State and Law in the Development Process: Problem-solving and Institutional Change in the Third World (London: Macmillan, 1994) describes it in more detail and relates it specifically to the development project.

[88] Peter Fitzpatrick, The Mythology of Modern Law (London: Routledge, 1992); Griffiths; Kidder; Buchanan.

typically perceive legislation as the outcome of power struggles between interest groups,[89] or a bargaining match between law-makers and interest groups.[90] These offer little sustenance to a drafter seeking to write a law thatg will work. Jack Davies writes, for example, that a drafter's greatest knack lies in finding an ambiguous form of words that can paper over disagreement between opposing interests.[91] Brody at al. state that the drafter's main task consists of satisfying the client --thus uncritically importing into the public sphere legal ethics at best approporiate to the representation of private clients. Other writers apparently have no theory at all. Caldwell's agenda for research for drafting consists mainly in research into who constitute the conflicting interest groups. Fordham et al.'s agenda focusses mainly on the existing state of the law.[92].

Everywhere, too easily the drafter runs around like a rat in a maze, looking for an exit by butting head at random spots in the wall. Too often, the law that results merely defines the desired future state of affairs in normative terms, leaving the administrators to figure out how to get there:

"The idea of legal engineering, of achieving social and economic

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[90] [Public choice theory]

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[92] Thornton, the most widely used drafting text in English consists in large part of forms that the drafter might copy, suggesting that the author has nothing to offer the drafter to guide him to determine what legislation might best solve the problem faced in the drafter's particular circumstances.

> shape through government law, still ranks foremost in the arsenal of development techniques. Law as a desired situation projected into the future is used as a magic charm. The law-maker seeks to capture desired economic and social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law-enforcement, or expressed more generally, to the implementation of policy."[93]

Rather than try to understand the causes of role occupant behavior, and draft laws addressing those causes, drafters too often simply prescribe criminal penalties:

> "Undoubtedly there is a great temptation to make new legal norms when legal regulation has failed, instead of identifying the causes of failure, and ultimately to use the penal code, as an instrument of bringing success, the result of which would be a tough 'policy of penalties', the limitation of law to penalty only. Such prominence for criminal law has always resulted in consequences seriously damaging to modernization, in the slowdown of the process, and even in temporary halts."[94]

The alternative to a normative depiction of the law-maker's vision consists of detailed rules that systematically aim at the causes of the problematic social behaviours that excited the legislation. The alternative to law's typical punishment orientation lies in rules that mainly invoke roundabout measures systematically addressing the defects identified in the explanations.[95] The alternative to invoking law as magic charm lies in invoking it pursuant to reason informed by experience. That requires an adequate legislative theory to guide the drafting

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[93] Von Benda-Bechmann, "Scapegoat and Magic Charm: Law in Development Theory and Practice", 28 J. Legal Pluralism and Unofficial Law 133-34 (1989).

[94] Kalman Kulcsar, Modernization and Law (Budapest: Akademiai Kiado, 1992) 255.

[95] Robert B. Seidman, State, Law and Development (London: Croom Helm, 1978) Chapter xx.

enterprise.

The UNDP/BLA project rested on an institutionalist hypothesis: Institutions constitute society's building blocks; law constitutes government's chief instrument for creating and changing institutions. The project's legislative theory therefore had to guide drafters in using law as an instrument for changing the repetitive patterns of social behaviours that comprise institutions. The pedagogical task of the project centered around providing the drafters with an adequate theoretical guide to their research into the causes and solutions for social misbehaviours. Legislative theory provides that guide by supplying criteria of relevance for the nuggets of data that the researcher must win. Like all theory, legislative theory performs that function by providing a methodology, a perspective, and a set of categories.

1. **Methodology**. Methodology begins the task of defining relevant evidence. The UNDP project adopted a problem-solving methodology qualitatively different from the ends-means methodology more commonly used for policy-making. Ends-means methodology requires the researcher first to specify the ends desired, and then to determine the means of achieving them.[96] That approach conforms to the positivist dichotomy between facts and values: Ends derive wholly from values, means, from data and experience. That places the basis of the new legislative initiative -- the ends -- wholly

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[96] Lindblom, Rubin; etc.

beyond the reach of reason informed by experience.[97]

Like most drafters, China's drafting teams began to work, not in response to the policy-makers' statements of ends, but their perceptions of difficulties: Underground water drying up and getting polluted; a budgetary process that failed to meet the expanding needs of an increasingly decentralized governmental system; a mining sector seeking a legal regime to attract foreign investment. The drafters needed a methodology to help find legislative solutions to these difficulties.

Adapted to law-making, the problem-solving methodology[98] instructs drafters to conduct empirical investigations -- as the Chinese put it, "to learn truth from facts" -- at each of four stages:

a. Identifying the difficulty. Perception of a difficulty sparks the drafting process. As their first task, the drafters must identify the social actors, or role occupants, who behave in ways that produces the difficulty their bill aims to ameliorate, and provide evidence as to the nature and scope of their misbehaviors.

b. Proposing and warranting explanations. Effective laws must address the causes of the problematic behaviours. To do that, drafters must examine the objective and subjective milieu within which role occupants act, propose hypotheses to explain those behaviors, and then capture the evidence required to test their validity.

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[97] See, eg, Max Weber, Methodology of the Social Sciences.

[98] As used here, 'problem-solving' does not mean incrementalism (but cf. Cox, Robert 1986. "Social Forces, States and World Order Beyond International Relations Theory," in Robert O. Keohane, Neorealism and its Critics, 1986 (New York: Columbia University Press, 1986)). Here, 'problem-solving' as distinguished from incrementalism holds open the possibility of addressing issues of fundamental institutional change (see Seidman and Seidman, supra n____, Ch. 4).

c. Assessing proposed laws. The drafters must design new laws or regulations that appear likely to eliminate or alter the factors that caused the role occupants' problematic behaviors. To do that, they must consider alternative possible legislative solutions, including those suggested by their review of foreign law and experience. To avoid drafting just another 'paper tiger', they must focus especially on data concerning the new law's effective implementation. Finally, they must assess the evidence as to their probable social and economic costs and benefits to decide which to incorporate in their draft bill. So far as we know, uniquely in the world, the UNDP/BLA project in their cost-benefit assessment required Chinese drafters to include specifically the effect of the proposed legislation on women, children, the poor, minorities and the environment -- that is, all the interests usually poorly represented in the halls of power, and, without specific requirements that the drafter attend to their needs, too easily overlooked.

d. Monitoring implementation. Finally, the bill must incorporate feedback and evaluation mechanisms to ensure that, after its passage and implementation, an appropriate monitoring agency assesses the new law's social and economic impact. This becomes particularly important when pressures to pass legislation quickly preclude adequate research.[99] Only such an assessment enables law makers to determine whether the relevant social actors in fact behave as prescribed, and with the anticipated consequences, or whether they must propose additional measures.

At each stage this agenda requires empirical evidence. The second and fourth steps provide the critical links in the agenda's underlying logic. The second step overcomes a fundamental weakness in the ends-means methodology, which in effect jumps from a statement of a difficulty (inverted as a statement of an end) directly to the proposed means. By formulating and testing explanations of the relevant social actors' behaviors, problem-solving's second step ensures that, rather than merely poulticing symptoms, the solution addresses causes.

Problem solving's fourth step, requiring monitoring and

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[99] A reality always confronting drafters throughout third world, and often in the first.

evaluation of implementation, provides the essential feedback that enables law-makers to learn the law's consequences. In a sense, that step recognizes that every law constitutes a social experiment. Its implementation constitutes a test of the process of logic and use of evidence that went into its formulation. As do all experiments,[100] a legislative experiment generates new evidence that practitioners can use to test their hypotheses, leading thus to improvements. Just as the collapse of a bridge forces the engineers to question its construction, its design and even the underlying theories of mechanics, so a law's failure should force law-makers to review all the preceding steps of the problem-solving methodology. Monitoring and evaluation make possible the use of reason informed by experience to guide the law-making enterprise.

The problem-solving methodology's four stages tell drafters what part of the prairies to plough in order likely to find evidence to justify a proposed bill. The drafter's perspectives also guide them in making the unavoidable discretionary choices along the way.

2. **Perspectives: the function of grand theory.** That problem-solving rests on data does not imply that it is "value-free". Drafters must make discretionary choices at each step: In determining what difficulty to examine, what hypothetical explanations to test against the evidence, what range of possible legislative solutions to assess, and what counts as adequate

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[100] Dewey

implementation. Researchers can guide those discretionary choices in one of three ways: By their domain assumptions (that is, the -- usually unexamined -- baggage of valuations and propositions about what makes the world go that we all carry with us[101]); by ideal types of the good society[102] -- what President Bush called "the vision thing"; or by grand theory (that is, large scale explanations of the world, such as Adam Smith's explanation for mercantilism, or Karl Marx's, for nineteenth century capitalism).[103] Of these, only grand theory in principle consists of propositions justified by reason informed by experience. To the extent that in problem-solving researchers guide their discretionary choices by grand theory, those choices ultimately rest on reason informed by experience.

That differs from the usual notion of grand theory's function in policy-oriented research. Usually, people think of grand theory as delineating in generalized terms a picture of (or metaphor for) reality. A researcher can therefore solve the social problem addressed in terms of that metaphor, and apply the policy outcome to the real world. Makgetla once wrote that it as though one described his true love as a red, red rose -- and then wooed her

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[101] Gouldner, Alvin. 1970. The Coming Crisis of Western Sociology. N.Y.: Basic Books.

[102] Max Weber on the Methodology of the Social Sciences. Trs. and eds.: Edward A. Shils and Henry A. Finch. Glencoe, Ill: Free Press, 1949.

[103] For a brief comparison of these grand theories in relationship to the issues of third world development, see Seidman and Seidman, supra n. xx, Ch. 5.

(as the metaphor suggests) with dew and well-rotted manure. By contrast, the legislative theory used in the UNDP/BLA project employs grand theory only as a guide to discretionary choices in the course of problem-solving. Thus does it serve the function of winnowing out relevant evidence.

3. **Categories**. Researchers also need a set of boxes in which to classify the available facts -- variously labelled "categories", "vocabulary"[104] or "concepts". A theory's categories must focus on explanatory factors relevant to the kinds of problems it aims to resolve. Together with methodology and grand theory, categories help guide towards the relevant evidence.

Categories guide empirical research indirectly. They invariably come in broad terms -- "incentives", "transaction costs", "class", "values and attitudes". These capacious words properly have the function not of telling researchers precisely what to do, but to inspire "middle level propositions".[105] Those relately detailed hypotheses, subsumed by the relevant broad category, and resonating with the researcher's grand theory, spark the search for falsifying data. Thus do categories guide the hunt for data. The legislative theory that underpinned the UNDP/BLA project incorporated the teachings of law and development studies[106] and the sociology of

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[104] Finch

[105] George Homans

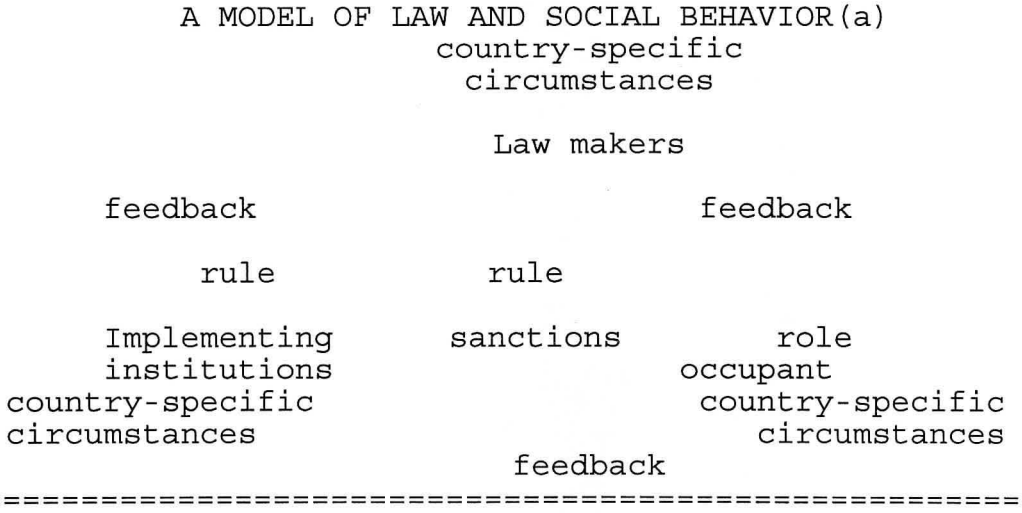
[106]. For the theoretical background, see Ann Seidman and Robert B. Seidman, State and Law in the Development Process - Problem-Solving and Institutional Change in the *Third World* (Macmillan, 1994)

law.

a. The underlying model. The theory posits a basic model of the factors likely to influence a social actor's[107] choice as to how to behave in the face of a law (Fig. 3).[108]

FIGURE 3

A MODEL OF LAW AND SOCIAL BEHAVIOR(a)



The model holds that role occupants behave as they do in the face of a rule of law not merely because of the rule itself, but also because of the constraints and resources in the role-occupant's time- and place-specific circumstances, including the behavior of implementing institutions. It implies that a law that induces one sort of behavior in a particular time and place will only serindipitously induce the same behavior in another time and place; whatever the similarity of the rules, the country-specific

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[107] Derived from sociology, we use the term 'role occupant', that is, the addressee of a norm.

[108] The model derives from three sources: 1) legal realism (eg, Karl Llewellyn); 2) Fredrik Barth. Models of Social Organization. Royal Anthropological Institute. Occasional Paper 23. Glasgow: The University P. 1966); and 3) Hans Kelsen, General Theory of Law and State. Cambridge, MA: Harvard Univ. P. 1949.

circumstances always differ.

To write a law that actually changes the role occupants' behavior, the drafter must ensure effective implementation.[109] The common complaint, that "we have good laws, but bad implementation" states an oxymoron. A badly implemented law by definition does not warrant the characterization of "good". A sine qua non of a "good" law (in this sense) is that it effectively channels the behavior of its addressees into conformity.[110] A law that, on pain of punishment, merely prescribes the opposite of the behaviors that constitute an existing social problem[111] addresses only a presumed failure of incentives as the cause of the misbehaviors. In most cases, that misses most of the causes of misbehaviour, and hence must inevitably fail to bring about its prescribed solution. A drafter must provide for the implementation of the new law, both by addressing those causes in detail, and by prescribing rules that make likely effective implementing agency behaviour. A competent set of categories constitutes the foundation for acurate analysis of the causes of both role occupant and implementing agency behaviors.

The same categories can guide drafters as well in formulating legislative solutions. General explanations for behavior also serve as predictions of future behavior. It particular, the categories that serve to excite hypotheses that explain behavior in

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111 Supra, text at n. 63 [Benda-Bechtmann]

face of a law can equally excite a legislative solution that will likely change the behaviors of the law's addressees -- i.e., a law susceptible of effective implementation.

b. The ROCCIPI categories. Most legal realists would likely agree with the insights incorporated in Figure 3. That model, however, leaves vague all the non-legal social and other constraints and resources that influence choice. The realists' descendants disagreed among themselves about which factors within that milieu would likely influence specific role occupants' behavioral choices. One of realism's most vociferous descendants, law and economics, for example, argued that law makers should limit their interventions to reducing transaction costs, that is, to removing impediments to a free market[112] That directed them to consider as causes of behavior only a limited range: blocks to factor mobility, barriers to market entry, poor market information, insufficient incentives, and so forth.[113] That blinded them from considering other causal factors that might explain the behaviours at issue.[114] Another of realism's children, sociological jurisprudence, tended to limit the search for explanations to role occupants' values and attitudes.[115] That constricted possible

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[112] Posner, etc.

[113] Stokey and Zeckhauser

[114] Stokey and Zeckhauser stated this quite bluntly: [quote]

[115] Roche, J.P. and M.M. Gordon. Can Morality be Legislated? New York Times Magazine, May 22, 1955) (Values and attitudes as primary if not sole explanation for addressees' failures to obey the law.); Lawrence Friedman, The legal Culture....

legislative solutions to changing the institutions that selected and socialized the role occupants.

To avoid missing critical causes of behavior, drafters need, not narrowly restrictive categories, but expansive ones. Drafters whose categories omit factors likely to influence behavior cannot propose detailed, implemntable measures to change the behaviors. Instead, the drafter resorts to broad prohibitions of the undesired behaviors supported by penalties both draconian and unimplementable.

The legislative theory employed by the UNDP/BLA project -- call it an "institutionalist" research agenda -- specified a set of categories that subsumed and went beyond those of both law and economics and sociology of law.[116] That agenda addresses three sets of factors: (1) The rule of law; factors that bring the role occupant to the point of choice (opportunity, capacity, and communication); and factors that influence choice (interest, process and ideology).

(1). The Rules. Behaviour takes place within a cage of laws. As suggested by Figure 3, those rules constitute an important constraint or resource that the role-occupant must take into account in choosing a course of behaviour.[117] What behaviors do the relevant laws specify? How precisely do they prescribe those behaviors? (The broader the discretion of role-occupants, the

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[116] Seidman, State Law and Development; Seidman and Seidman....

[117] [Book review of Hurst]

more likely they will act pursuant to their personal interests or values and ideologies) Do the laws specify adequate implementation procedures with adequate resources for enforcement? Do they provide for monitoring their implementation?

In addition to examining the particular rule directly addressing the problem at hand, researchers must consider the larger framework of laws and implementing agencies within which role occupants act. For example, water polluters act not only in light of the rules conventionally labelled "water pollution law", or "environmental law", but within a system of laws affecting water use: property law, contract law, water law, tax law, constitutional law, and so forth. That legal framework always implicitly includes the general rule that what the law does not forbid, it permits. Unless a law expressly forbids landowners from polluting streams that run through their property, they have a legal right to pollute it.

(2). The Requirements of Choice. Most theories of action analyze only how a person chooses to behave within a given institutional framework.[118] Serious social problems, however, frequently arise because the institutional framework insulates relevant actors from the point of choice. To obey implies conscious choice. (To say that a babe in arms "obeys" the law against driving a car faster than the legal speed-limit misuses the word "obeys"). A role-occupant will consciously choose to obey a law only when, in addition to the existence of a relevant rule, three additional categories of factors coincide:

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[118] Cf. Parsons, a Theory of Action [?]

(a) The role occupant's institutional and physical environment supplies an opportunity to choose to obey or disobey. A banker has many opportunities to embezzle other people's money; a poor person very few.

(b). The role occupant has the capacity to obey; that is, she possesses the skills and resources to perform the task the law prescribes. For example, a rule that directs legislative drafters to draft good bills will not likely achieve its objective if the drafters lack adequate knowledge of legislative theory and techniques. A new law cannot create competent role occupants by mere fiat. To locate the causes of role occupant incapacities, drafters must analyze the institutions that select and socialize role occupants.

(c). The role occupant knows of the applicable rule, that is, that the rule has been communicated to her. For example, China's Fisheries Law required the responsible ministry to define the minimum size mesh for fish-nets for various localities and species.[119] Unless the fishermen know about that lawand the relevant regulations, they will obey only by accident.[120] As the basis for remedial legislation, drafters must investigate the causes of relevant instititions' failures to communicate the law.

(3). **Factors influencing choice**. Once a role occupant confronts the necessity of choice, three factors may influence that choice:

(a). Material incentives have a powerful influence on

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[120] Here, researchers should consider: (1) whether the form of the legislation adequately communicates the law-makers' intention (Allott, Antony. 1980. The Limits of Law. London: Butterworths, pp. 236-37; Rubin, Edward L. 1989. Law and Legislation in the Administrative State. 89 Col. L. Rev. pp. 408 et seq); and (2) whether the way law-makers communicate the law to its addressees promotes their understanding of it (R.B. Seidman, 1972. The Communication of Law and the Process of Development in Anglophonic Africa. Wisc. L. Rev. 680, p. 680; Gifford, D.J. 1970. Communication of Legal Standards Policy Development and Effective Conduct Regulation. 56 Cornell L. Q. 409. Robertson, John H., Robertson and Phyllis Teitlebaum. 1973. Optimizing Legal Impact: A Case Study in Search of a Theory. Wisc. L. Rev. 665. pp. 695ff).

choice.[121] Drafters must discover whether role occupants perceive the behaviors prescribed by the law as serving their interest. That requires examining the various incentives and disincentives thrown up by the role-occupants' environment. Those include legal sanctions: not mere paper penalties or (less frequently) rewards, but those that implementing authorities will likely impose. If role occupants violate a criminal law, for example, what likelihood exists that implementing institutions will detect the violation, arrest the perpetrator, and impose criminal sanctions?

(b). Individually or in complex organizations, whether role occupants obey a law depends in part upon the process by which they reach their decision. For example, if the ministry which manages a national park conducts negotiations with a foreign firm concerning the exploitation of minerals within the park in secret, it may make a different decision than if it holds public hearings at which environment-protection groups testify. In its larger sense, process determines whether and to what extent the state and the legal order foster democratic community participation (see Fig. 4).[122]

(c) Although values and attitudes -- broadly, ideology -- alone do not determine social behavior,[123] nevertheless role occupants' world views do influence their actions. First, societal sentiments commonly sway their choices. In China as throughout the third world, especially in rural areas, for example, traditional values favoring large families frequently persuaded women and men to try to evade government policies aimed at limiting family size.[124] Second, and more pervasively, actors' actions acquire meaning only in the context of their own

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[121] Drawing on neoclassical economic theory, law and economics theorists tend to narrow explanations for social actors' behavior solely to their 'interests' (eg, Posner, Richard A. 1987. The Economic Analysis of Law.

[122] Process may also determine what the role occupant ever reaches the point of choice, for it determines what issues the institution will accept for decision. See Bachrach and Baratz

[123] But see note xx [Roche; Friedman]

[124]. In post-reform China, rural families not infrequently tried to evade the one child family policy by not registering second children, especially girls.

> subjective understandings, their "domain assumptions".[125] Drafters, for example, can only explain why one person gives another some thin metal discs if they know how the actors perceive the discs: Perhaps as medals, and the recipient as a craftsman who will polish them; as religious objects, and the recipient as a priest or shaman; or as money, and the recipient as a tradesman receiving them as payment.[126] To explain role occupants' decisions in the face of law, researchers must understand the ideologies that define their relevant behaviors.[127] Researchers cannot rest there. Once again, they must analyze the institutions that so selected and socialized role occupants that they have the ideologies they do.

Together, broadly construed, these seven categories arguably encompass all the factors likely to influence the behavior of any given role occupants. (A mnemonic, ROCCIPI, helps to remember them: **R**ule, **O**pportunity, **C**apacity, **C**ommunication, **I**nterest, **P**rocess and **I**deology). For each category, drafters should review the evidence and critically assess all the middle-level explanatory propositions suggested by alternative large scale theoretical

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[125] Weber, Max, 1949. Max Weber on the Methodology of the Social Sciences. Trs. and eds.: Edward A. Shils and Henry A. Finch. Glencoe, Ill: Free Press: 87 ff; T. Talcott Parsons, "Introduction", in id: 3, 10 ff; Schutz, Alfred 1965. The Social World and the Theory of Social Action in Braybrooke, David, ed. The Philosophical Problems of the Social Sciences. Englewood Cliffs, NJ: Prentice-Hall, 1987??????.

[126] Winch, Peter, 1958. The Idea of a Social Science and its Relation to Philosophy. London: Routledge & Kegan Paul: 117; Kronman, A. Precedent and Tradition. (1990) 99 Yale L. J.1029: 1051; Weber, Max. Economy and Society. G. Roth and C. Wittich, eds. Berkeley: University of California Press, 1978: 7.

[127] Moore, Omar K., and Anderson, Alan R., "Puzzles, Games and Social Interaction" in Braybrooke, Philosophical Problems....1965:68. 72; Ellickson, Robert C. 1986. On Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County. 38 Stan. L. Rev. 623.

explanations.[128] They should then incorporate the seemingly most fruitful into the hypotheses that constitute the map to guide their collection of facts.[129] Warranted by evidence (or, more likely, revised in light of evidence), these explanations will logically suggest concrete new measures to eliminate or alter the causes they reveal, and therefore likely to induce more desirable behavior. Thus can the categories that their legislative theory provides guide the drafter's search for relevant evidence to justify their draft bills.

c. The complexity of implementing institutions. The ROCCIPI agenda purports to guide research into behavior in the face of a rule. As Fig. 3 argues, implementing agencies also behave in the face of rules. That agenda can, therefore, also guide investigations into implementing agency behavior.

Too often, observers deal with a complex organization by invoking a metaphor of a single rational actor.[130] Complex decision-making structures, however, involve the interacting behaviors of many actors, each behaving as they do in the face of a set of

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[128] Different theorists' perspectives, or grand theories, generate very different explanations for social actors' behaviors. Neoclassical economists, for example, emphasize micro-level entrepreneurs' interests, whereas institutionalist economists tend to focus on historically-shaped structures and class relationships (Seidmans. State and Law in the Development Process, Ch. 5)

[129] Sometimes, consideration of explanations in one or more category may seem superfluous. For example, law-makers usually communicate relevant rules and their contents to key role occupants, officials, in government implementing agencies.

[130] Allison, Graham T. 1971. Essence of Decision; Explaining the Cuban Missile Crisis. Boston: Little, Brown.

rules. To explain a complex decision requires that we explain those interacting behaviors. By blinding drafters to those processes, the rational actor metaphor hinders them from adequately explaining implementing agency behaviors.

As the first step in discovering the factors likely to influence their counter-productive decisions, a simple input-output process model (Figure 4) helps to locate a complex institution's relevant role occupants.

Figure 4[131]

A MODEL FOR ANALYZING INSTITUTIONAL DECISION-MAKING

input processes → conversion processes → output processes

feedback processes

Figure 4 suggests significant categories for investigating organizational decision-making. It teaches that the general tenor of agency decisions depend upon how the agency's structure and processes[132]. Those processes consist of sets of role occupants, acting in the face of both formal and informal rules (see Figure

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[131] The conventional input-output decision-making model explains particular decisions by examining how particular inputs, feedbacks and conversion process worked in that instance (e.g., Hose, Edgar F. 1975. Organization Development and Change. St. Paul: West Publishing: 35). Peter Bachrach and Morton Baratz (1963. Decisions and Non-Decisions: An Analytical Framework, 57 American Political Science Review 632) argued this model fails to explain 'non-decisions', issues which never even enter the system. It ensures decision outputs that never threaten power structures. This model set out in Figure 4 transforms the simple input-output model as explaining a single decisions in to a process model that purports to explain the thrust of a range of decisions. It does that by focusing on the processes and structures that determine both what issues to process and their outcomes. (R.B. Seidman, 1978. State, Law and Development. London: Croom-Helm).

[132] (Hose, supra n. :37

3). Input processes accept, filter and change the inputs (i.e., issues, facts, theories and personnel) the various sets of role occupants within the agency will consider. Feedback processes determine whose and what feedbacks they will receive about previous decisions' effects.[133] Conversion processes define how agency personnel will combine these elements in deciding whether and how to implement the law. Thus do an agency's processes determine the range of its decisions.

Process determines participation, and thus whose interests the agency will represent. If implementing agencies' decision-making processes only permit the rich and powerful to supply issues and evidence, implementing decisions will tend to favor power and privilege. If those processes ensure participation by the mass of the population, the decisions of the implementing agency may tend more towards addressing the needs of the poor and disinherited. Process defines democratic participation in government.

While process shapes substance, the converse also holds: When law-makers come to fashion a solution, the kinds of outputs they desire ought to determine their choice of implementing structures and processes. To justify proposals for structuring an implementing agency's decision-making processes in particular ways, a drafters must present convincing evidence that the proposed processes will create input, feedback and conversion processes likely to produce a range of implementing decisions appropriate to enforcing the law at hand. Only then will policy-makers have any

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[133] Deutsch; Hose:37

way of assessing whether the proposed implementation processes will likely produce the desired outcomes.

Together, the problem-solving methodology, the ROCCIPI research agenda and the decision-making model served as the foundational building blocks of the UNDP/BLA project's learning process.

B. STRATEGIES FOR TRAINING DRAFTERS: THE LEARNING PROCESS

The UNDP/BLA project pedagogical strategy rested on the notion that its task did not consist of teaching legislative theory and methodology, but of training drafters. It aimed to enhance the participating drafters capacity by engaging them in drafting of the 22 quality priority bills, and on that occasion helping them to acquire the necessary knowledge and skills to use relevant legislative theory and specific drafting techniques. This section examines three aspects of that learning process: The institutionalization of the research report; the project's learning-by-doing pedagogical approach; and the unanticipated problems stemming from the drafters lack of adequate social science skills.

1. **The institutionalization of the research report.**[134] The legislative theory on which the project rested underscores that competent legislation must rest on competent research. As Figure 3 holds, behavior depends not merely on the rule, but on the entire non-legal surround within which the role occupant chooses. Without

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[134] At first, the project denoted the research report as a Memorandum of Law, a title drawn from British legislative practice (see R.B. Seidman, "The Memorandum of Law" Harvard Journal of Legislation, 1992). Later, BLA and the CTAs changed this to research report, as better describing its contents.

an adequate investigation of that non-legal surround, drafters have no assurance that their bills will in fact induce the desired behavior; without knowing the research on which the drafter bases the claim that the bill will induce that behavior, law-makers cannot assess the quality of the draft. Absent information about the underlying research, decision-makers must make that judgment on the basis of their own experience and prejudices -- both famously unreliable.

The project adopted a requirement that a drafting team accompany its bill with a quality research report, with a highly structured contents. That requirement had three implications. (i) Drafters could no longer accompany their bills by a hastily stitched-together memoranda that merely gave simplified explanations of their contents. They now had to produce <u>two</u> quality documents for every proposed law: the bill itself, and a carefully-structured research report. (ii) The requirement that the research report conform to the dictates of the problem-solving methodology and the ROCCIPI research agenda established a set of norms for the research the drafters must undertake. (iii) The research report provided the basis for informed assessment by decision-makers about the quality of the bill.

The Chinese have now institutionalized the requirement of a research report in two ways. First, as one of the 22 priority bills, a drafting team prepared procedural regulations for the BLA and the DLAs. It is expected that when completed those regulations will include a requirement that each bill come with a structured

research report. Second, the textbook on drafting in Chinese[135] will include a section explaining the importance of the research report and specifying its required form.

2. **Pedagogical method: 'Riding the bicycle'.** The project's learning process used a learning-by-doing pedagogical method. Drafters learned theory, methodology and legislative techniques in the course of working on specific bills.[136] Both Chinese and foreign educators have criticized China's legal education system's almost excludive reliance on lectures as the system of instruction.[137] To explicate the project's alternative pedagogical method, the project used the metaphor of 'riding a bicycle.' If for a month an expert lectured students about the theory and practice of bicycles, at the end of that time the students probably still could not ride one. In contrast, anyone can show novices how bikes work and help them get on one. In a short time they can peddle away. This section reviews the three elements of the project's training system: summer workshops, four-month fellowships abroad, and short study tours.

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[135] The principal author of the manual participated as a trainer in the team that drafted the BLA's regulations for drafting legislation.

[136] This approach attempted to respond to the pedagogical problem the CTAs had encountered when teaching as Fulbright Professors in Peking University in 1988-89, the same problem identified by the Alford Report in 1993: Traditional Chinese higher education courses focus almost entirely on what Paolo Freire termed the 'sponge method': lectures through which the teacher pours The Word into the students' minds, and examinations which squeeze it out again -- usually leaving very little behind.

[137] Eg, see Alford and Fang Liufang, supra n.___.

a. The summer workshops. The summer workshops[138] hads two objectives, to teach general legislative theory, and foreign law and experience. First, they aimed to introduce all the drafting team members --some 180 in all -- to legislative theory in the context of their work with their foreign consultants on their bills. Each workshop dealt with only 5 to 10 bills.[139] During the first week, at first we as CTAs, then later with the trainers' help, engaged the drafters in thinking through the implications of the theory as a guide to their research reports, and as to what they might learn from foreign law and experience (especially, it taught that no country can successfully copy the law of another country). For these sessions, BLA translated an article[140] which described the legislative theory and methodology, as well as some sociology of law readings that drew on Chinese materials[141]

In the 1992 workshop, the meager quality of their draft research reports and bills reflected the trainers and the other participants absence of prior contact with legislative theory. For subsequent

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[138] The project originally scheduled three summer workshops, all of which have been completed (in 1992, 1993, and 1994.) Another is now scheduled for 1995.

[139] see Appendix II for the 22 bills. In 1994, the UNDP, the BLA and the Ministry of Labour agreed to add three more dealing with old age pensions, workers' compensation, unemployment compensation and occupational safety and health.

[140]. Robert B. Seidman, The Memorandum of Law, 15 Seton Hall Legislative Journal xx (19xx).

[141] Prepared by the CTAs and others for a course at Peking University.

sessions, we held two-day workshops in the spring[142] to teach the rudiments of legislative theory to the two drafters selected from each team to become trainers. The trainers, in turn, worked with their teams to prepare draft bills and to outline research reports for the summer sessions. Some of the trainers who had completed the BU study course assisted in the following summer the teams whose members came from their DLAs.

From the outset, communication between the drafters and the consultants proved difficult. In the first week of the summer workshops, a highly qualified translator translated into Chinese our introductory remarks relating to the use of theory. Then, sitting together as a group at separate round tables in the conference room, the members of each drafting team discussed (in Chinese) the implications of the topic for their work. For example, after an introduction to the problem solving methodology, the drafting teams discussed the social problems their bills addressed, and critically reviewed their initial explanatory hypotheses. After an explanation of the ROCCIPI agenda, they sought to identify, in the Chinese context, the relevant role occupants and the social problems constituted by their behaviors; and the hypotheses they had generated for those behaviors by considering each of the ROCCIPI categories, and the available

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[142] The CTAs returned to China each spring to participate in annually tripartite assessment of the project's progress which, under UNDP rules, involved representatives of the BLA, the China UNDP office, and CICETE (the Chinese government's agency for managing the finances and supervising all foreign assistance programs).

evidence relating to those hypotheses. After the teams discussed a topic for 30 to 45 minutes, two or three of the teams reported on bills, followed by discussion. (The translator translated all the statements from English to Chinese and vice versa, a tedious process). By the end of the first week, most of the teams had at least outlined the main difficulties and had begun to identify the central role occupants and the behaviors their bills aimed to address.

Second, the summer workshops aimed to expose the drafters to relevant foreign law and experience -- and how to learn from it. A central theme of the first week concerned the uses and abuses of foreign law in drafting. When the foreign consultants arrived at the beginning of the second week, the teams had begun to structure the questions they wished the consultants to address.[143] With its consultant, each team of six to eight members then met separately for two weeks of intensive small seminars.[144]

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[143] About a month before the summer workshop, in both In 1993 and '94, the trainees had sent the teams' draft bills and research reports to the consultants. These enabled the latter to bring with them foreign legislative materials likely to prove the most useful. The research reports also laid the basis for each seminar's agenda. Since all the drafters lived in the same hotel, they easily arranged their working schedules to facilitate the most fruitful discussions and work sessions. Usually, a team member served as translator. Unfortunately, their translating abilities varied. Communication with our Chinese colleagues constituted the most sertious constraint on the project's effectiveness.

[144] The CTAs drew on networks of contacts throughout the world to nominate three candidate consultants for each bill; the relevant drafting team made the final selection. To avoid possible conflicts of interest, the UNDP/BLA project document specifically excluded nominees who themselves or whose firms were currently engaged in business in China. Most of the consultants had worked as university teachers. The consultants reflected as wide array of

The consultants played a role somewhat different from that of many foreign consultants. Although on its face ludicrous, in China as elsewhere many foreign experts have frequently drafted laws for their host country. As elsewhere, in China these efforts have too often produced mere copies of foreign laws, that rarely produce in the new country the same behaviors as they induced in their countries of origin.[145] In contrast, the UNDP/BLA project expected its consultants to serve primarily as resource persons, providing information about relevant laws and experience in other countries, and more generally, as counsellors and advisors. Almost all of the consultants had many years of teaching experience, most, considerable experience as well in counselling clients. They were nominated in part because they had a well-developed sense of the law-society relationship.[146]

That the drafting groups worked with their consultants to produce

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international experience as could be arranged, given time and logistical constraints; for example, in 1993, the group of consultants included a Dane, a South Korean, two Englishmen, and a Chilean.

[145] See, e.g., The EnvironmentalProtection Law (1979), Article 6 (requring an environmental impact statement in planning new or extended projects, obviously modelled on U. S. law. In the Untied States, the environemntal impact statement has served an admirable purposes in implementing environment laws because tow preconditions existed: A numbner of non-governmental organizations existed with the expertise, resources and will to challenge impact statem,ents, and a court system long accustomed to trying cases between citizen and government. Neither of these condityions exist in China.)

[146] Notably, the project did not expect its consultants to have a special Chinese expertise; Chinese, after all, know their own law and social conditions. Foreign consultants brought information about other countries' efforts to use law to deal with problems analogous to those that the drafters sought to address.

a revised version of their draft research report and bill proved an indispensable pedagogical tool. Instead of teaching abstractions about legislative theory and methodology and about foreign law and experience, the consultants found themselves training people to write better research reports and bills. That concrete task transformed the learning exercise from one of digesting vast amounts of difficult philosophical and social science notions into the concrete tasks of organizing and writing reports and bills. Learning to ride the bicycle really does require getting in the seat and starting to pedal.

At a two day plenary session at the end of the three weeks' work, the drafting teams and the consultants reported on what they had learned. As expected, none of the teams had completed their bills. Their discussions had structured presently available information in ways useful for develioping a legislative program to resolve the social problem at issue, and had identified a research agenda as to the additional evidence they should look for, both in China and in their study tours abroad. Comments at the spring tripartite evaluation sessions suggested the summer workshops did help to improve the relevant team members drafting skills.

b. <u>The trainers' four month course of study</u>. As a second major component of the learning process, two trainers from each drafting team spent four months in a specially-tailored program in the Boston University School of Law. The UNDP\BLA project document specified that, when the trainers went abroad to study legislative theory and their particular areas of comparative law, they should

go in groups and if possible live together. Dealing in a foreign language and a foreign culture, they could assist each other to maximize their benefits from the learning process.[147] Given a sizable group, furthermore, the host university could lay on a program adequate to meet their collective and individual needs.

The program BU laid on for the trainers had six elements:

(1) Working in teams of two, under the supervision of professors from BU or, where appropriate, from other Boston area universities, the trainers' read intensively in the comparative law and experience in their respective fields, and further developed their research reports and bills.

(2) The trainers participated actively in a Law and Development Seminar in which a number of BU law students[148] worked in groups together with the Chinese drafters to study legislative theory and methodology. Each BU student wrote a 30-60 page term paper (essentially a research report) explicating the relevant law and experience of a third world country (other than China) on topics relevant to the Chinese drafters' bills. These added substantially to the trainers' knowledge of relevant foreign law and experience.

(3) The trainers attended a weekly seminar in legislative drafting techniques, designed especially to meet their needs.

(4) The trainers attended a weekly workshop in which they systematically critiqued each other's draft bills and research reports. Experience in the China project, as well as in the BU experience in teaching legislative drafting to US students,[149] proved these critiques an excellent method of deepening their understanding of legislative theory.

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[147] This proved especially important since, although most of the trainers had studied English, and all could read it (albeit some very slowly), some had not sufficiently mastered the ability to understand it when spoken, no matter how slowly; a few had to rely heavily on their compatriots to translate for them.

[148] All, of course, graduates, most with work experience in and some of them citizens of other third world countries.

[149] A legislative drafting program in which BU students prepare bills for government officials and legislators in the Boston area.

(5) In the 1994 session, a sociologist will give a weekly workshop in social science reswearch techniques for legislative drafters.

(6) A few of the trainers audited courses in the Law School related to the subjects of their bills.[150]

On their return to China, these trainers played a leading role in facilitating their respective teams' completion of their bills and research reports for the State Council. Some ministries assigned them to teach other drafters, both nationally and on provincial levels. A number received promotions in their respective departments, becoming deputy and even division directors.

c. Short-term study tours. The UNDP/BLA project sent most of the non-trainer drafting team members on short-term tours abroad to study foreign law in action. Mainly, these consisted of interviews with operating personnel in the various countries. After completing their trips, the teams wrote reports on their findings.

Originally, we had looked on these tours with some skepticism. When an engineer goes on a study tour, she can examine concrete artifacts -- a bridge, a sewer or water system, a factory. What would legislative drafters examine? Too easily, these trips might become costly boon-doggles, giving the drafters merely an expense-paid tour of foreign countries.

The tour reports submitted by the teams, however, suggested that

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[150] The fact that most BU courses, as in other US law schools, focused on US-related issues, coupled with language difficulties, prevented the trainers from learning much from them. This further underscored the necessity of designing a tailor-made program to meet their needs.

our skepticism erred: Using what they had learned during the summer workshops as guides, the drafters seemed to have learned a good deal from their tours. For example, the report on tour to study securities laws elsewhere explained how the Korean law of securities operated, its advantages and disadvantages in the Korean context, and the extent to which the Korean experience had relevance for the Chinese situation.

3. **Drafters as competent consumers of research findings.** No one can 'learn truth from facts' without access to 'the facts'. In the course of the project, however, it became increasingly evident that the Chinese drafters lacked the skills necessary to gather and assess the evidence required to test hypothes explaining role occupants' behaviors.

Obviously, drafters themselves can only rarely undertake all the research required to ground their legislative proposals in the facts. Unlike academics, they operate under severe time constraints. They need a methodology appropriate, not necessarily to the academic, but to the policy- and law-making enterprise.

That suggests four criteria for training drafters in social science research skills. (1) Drafters always know a good deal about their own culture. If on Friday they must start drafting a bill and memorandum for presentation on Monday, rather than employing a by-guess-and-by-God methodology, at least they should try to order the facts they already know in relevant categories like those suggested by the ROCCIPI research agenda, draft on that basis, and identify the gaps in their factual information. (2)

More frequently than not, time constraints require them to conduct their search for facts, not in the field, but in the library. They require enough knowledge of social science research techniques to assess the utility and worth of the research findings they may discover there. (3) If no one else has conducted relevant research, they may also need enough understanding of research techniques to work with researchers who have the time and skills to undertake it. (4) Finally, they need comprehend the limits as well as potential uses of qualitative research that may indicate trends, but provides no quantitative measure of their dimensions. As for most Americans, for many Chinese behavioral research means surveys, with random samples, coded questionnaires, data banks and the rest. Drafters almost never have either time or resources for original quantitative surveys, nor do they invariably prove helpful. Drafters or researchers with whom they work, however, may have time to conduct interviews or to meet with focus groups[151] to identify difficulties and to test explanatory hypotheses. Drafters need training adequate to understand and use the results of those kinds of techniques for gathering qualitative information.

As originbally written, the UNDP/BLA project did not adequately provide for improving the drafters' social science capacities. At the summer workshops, the foreign consultants did discuss, not only the social impact of particular laws in other countries' circumstances, but also the research techniques employed to assess

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[151]. Small groups of people with relevant knowledge of the problems of concern (see).

those experiences. The 1993 BU program included some sessions of the legislative drafting techniques seminar to sensitizing trainers to the importance of appropriate social science research; and in 1994, a sociologist will teach a two-hour a week course on the subject.

C. SUMMARY: THE LEARNING PROCESS

The project sought to remedy the perceived causes of China's felt needs for faster and better drafting. First, it addressed the problem of the drafters' misconceptualization of the drafting task and the absence of an adequate legislative theory by teaching a legislative theory that rested at every point on reason informed by experience. Second, it sought to remedy the lack of knowledge about foreign law and experience by using foreign consultants at the summer workshop, extensive reading for the trainers during the four-month sojourn at BU, and by the drafters' two-week study tours. Third, it sought to remedy the weaknesses in the drafting regulations by institutionalizing the requirement of an adequate research report. Fourth, it sought to address the issue of insufficient knowledge of legislative techniques by seeing to the writing and eventual publication of a text on drafting in Chinese. Finally, somewhat belatedly, it sought to remedy deficiencies in drafters' behavioral science research skills. It did all this using a pedagogical method that stressed "learning by doing". Every drafter engaged in the project had an assignment in connection with drafting one of the 22 priority laws. That requirement's success as a pedagogical tool for teaching the

drafters (not to speak of accomplishing the drafting of the 22 priority bills) constituted an important project lesson.

The annual tripartite evaluation sessions in Beijing concluded the UNDP/BLA project had successfully broken the legislative drafting log jam. By the end of 1994, five of the priority bills had been enacted, and six had been submitted for enactment. With one exception, all the rest seemed well on their way towards completion.[152] The 1994 tripartite review agreed in principle that, based on the project's legislative theory, drafting techniques and pedagogical methods, the BLA should establish a Center for Implementation Research and Training in Legislative Drafting.

IV. LEARNING FROM THE PROJECT

The project's learning process proved a two-way street. Not only the drafters, but the foreign consultants -- especially ourselves as CTAs -- learned many lessons about law and social change in the developing world. Some we have already discussed, for example, the pedagogical utility of requiring trainee drafters to learn by writing and critiquing not an hypothetical, but a real bill, or the sorts of social science a drafter needs to know. Some concern the substance of the laws on which the drafters worked.

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[152] The exception -- a bill to foster groups of enterprises in the belief that high degrees of concentration would promote more vigorous industrialization -- came aground precisely because of the research accomplished by the trainers in foreign law and experience. As a result of that research, the authorities in charge of the bill laid it on a back burner. It seems doubtful that they will revive it, at least as originally conceived.

Here we discuss mainly the project's lessons for legislative drafting and the uses of law as an instrument for social engineering in conditions of radical social transformation.

Like every social intervention, the project generated data to test the hypotheses that underpinned it. The ultimate test of the project will come only after evaluation of the laws that emerge from drafts written in the course of the project, and of the competence of the drafters and drafting system the project's learning process produces. It may take years before all that information comes in.

In the interim, a surrogate indicator consists of the Chinese drafters' and drafting authorities' acceptance of the underlying legislative theory. BLA has institutionalized it in their draft legislative drafting regulations, which include the requirement of a structured research report. At a 1993 meeting on China's evolving legal structure, not only the Director of BLA, but even the Prime Minister, Li Peng, spoke in terms consonant with that theory as a guide to social engineering through law. At a meeting in July, 1994, the Secretary General of the State Council indicated the State Council's continuing support for the project and for its extension. BLA, together with the Ministry of Labor, have added to the project the three bills earlier mentioned.[153] It will add an additional five to ten bills for 1995; if funding can be found, BLA plans to add still more. Perhaps most important, BLA plans to start a Center for Legislative Drafting Research and Training. As

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[153] See footnote xx.

its name implies, in addition to training drafters in general, it will particularly focus on the research required to ensure the law's effective implementation.

The people directly involved -- the drafters and especially the trainers -- seem to have seized upon the project's foundtional theory with real enthusiasm. Some of their ministries have employed the returned trainers to teach their personnel, some in workshops far removed from Beijing. A number of the foreign consultants and the supervising professors at BU have also reacted favorably to that theory.

Here, in no particular order, we sketch some of the lessons the project seems to suggest the effective employment of law for transformation andde development.

A. THE NEXUS BETWEEN LAW, BEHAVIOR AND INSTITUTIONS

The project reaffirmed the institutionalist thesis that institutions constitute society's building blocks and that the legal order comprises a polity's principal manipulable variable in creating and changing them.[154] The Chinese prioritized the laws that experience taught them their Reforms required. Resonating with neo-classical economics, and following suyggestions by Max Weber, some academic lawyers -- mainly in the US -- hold that the critical laws for a market economy include those that an earlier generation called 'private' law[155] -- contract, property, and tort

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[154]. See pp. xx above; cf. John R. Commns....; Thorstein Veblen....; [ohter?]

[155] But see ....Cohen [on contract as a form of public law].

in all their elaborate variations -- enforced principally by private litigation in the ordinary law courts.

Weber was wrong. To create a socialist market economy, the Chinese drafting program identified almost none of these private laws as high priorities. Instead, their proposed priority laws focused mainly on the organization and processes of the institutions without which a market economy functions perversely: To ensure appropriate controls over the money supply and credit, the banks; to ensure government fiscal respnsibility, the processes of budget formation and budget discipline; to ensure an educated workforce, the educational system; to ensure a mobile work force, old age and disability pensions not tied to the workplace (as in China in 1994 most social insurance still was); to ensure a progressive agricultural sector, the agricultural extension service; to protect the environment against the ravages of private greed, a whole set of environmental laws; and a host of others.

That the Chinese identified these as their priority laws suggests that their experience confirmed the institutionalist propostion that markets do not operate in vacuo, but in the context of myriad institutions -- governmental, private and in between. Their experience surely carries what lawyers call persuasive authority in support of the institutionalist thesis. If that thesis holds, then institutions do not constitute a 'black box', but the very core of economic analysis and economic and legal policy-making. Law-making and drafting must meet that thesis's implicit challenge: How to employ the legal order to build appropriate institutions. That

requires a theory of legislation.

B. THE POSSIBILITY OF GROUNDING LEGISLATION IN REASON INFORMED BY EXPERIENCE

The project rested upon an explanation for the felt insufficiencies of Chinese drafting: That its drafters had no theory to guide guide them in developing legislative programs based on reason informed by experience. In the positivist tradition, some contest the possibility of such a theory. The Chinese project supports the contrary claim.

Potentially, that possibility has wide-ranging consequences. If it holds, it refutes analytical positivism That jurisprudential philosophy holds that law's formal legitimacy depends only on the will of the law-maker (and not on God, reason or the facts). From that unexceptional proposition, and the more contentious one that facts and values abide in discontinuous worlds, analytical positivism infers that the only possible justification for a law consists in the law-maker' will. That mistaken notion nourishes an ends-means methodology and a set of categories that neglects the requirements of implementation. At the end of that road lie laws that constitute mere normative visions, too often supported by increasingly draconian criminal penalties.

The UNDP/BLA project demonstrated the possibility of a more fruitful way of using law in the development enterprise. An adequate legislative theory must guide drafters in formulating laws that not merely describe desired end results, but will actually engender the necessary changedf behaviors. Rather than ignoring implementation problems, competent drafting must take account and

deal with them.

The formulation of an adequate legislative theory has consequences for comparative law.

C. THE USES OF COMPARATIVE LAW IN LAW-MAKING

The world around, drafters copy foreign law, usually pretty blindly. As a drowning person in desparation grabs a life-ring, so an harassed drafter, scrambling as usual to devise a legislative program and to write it into precise and if possible elegant language before next Monday, too often grabs a close enough foreign law.

The project's legislative theory underscores the argument that copying foreign law works at best by accident and that rarely. (Call that "the law of non-transferability of law."[156]) That does not imply that foreign law and experience do not deserve the closest study. The world around, policy makers' efforts to use law to resolve social problems have contributed to the accumulation of an extensive body of experience, a rich body of ore from which Chinese (as well as others) may mine hypotheses relevant to each of problem-solving's four steps. The project's theory girded Chinese drafters to search foreign experience for difficulties which, though not yet apparent in China, might yet arise, and for which, therefore, their draft would do well to provide. For example, if in other countries private schools helped engender the emergence of a ruling class, in drafting its new education law surely the drafters should consider that possible consequence. The theory

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[156] See Seidman and Seidman....

also guided them to explore foreign law and experience for possible hypotheses to explain problematic behaviors. Although every country's circumstances remain unique, an explanation for foreign behaviors analogous to those that the proposed Chinese law will address may find a warrant also in China. Insider trading, for example, has arisen in almost every country's security markets. China's drafters learned much by reviewing the investigations that those country's researchers had made over the years, both in terms of probable causes, and research techniques for capturing the required data. Obviously, foreign law and experience can offer ideas about solutions, too, that elsewhere address the causes similar to those in China, and provide some evidence as to possible social costs and benefits. Finally, the theory urges that drafters study foreign law for inspiration concerning alternative ways of monitoring the implementation of the law, to provide a trip-wire of feedback to the law-makers. Above all, that theory taught that Chinese drafters can learn literally nothing from the black-letter texts of foreign law; they could only learn from studying the law and its social consequences.

D. LEGISLATIVE TECHNIQUES

The project experience also reinforced several practical propositions about drafting bills of the broad scope initially envisaged for China's 22 priority laws. Here we discuss only two of these: The dangers of 'stuffing' bills and the potential advantages of intransitive legislation.

1. **'Stuffing' bills**. At the 1992 workshop, foreign consultants

observed that some of the proposed bills seemed great grab-bags containing subject-matters only tenuously held together by a common thread. For example, the first draft of the Chinese banking bill included not only provisions creating and defining the central, commercial, development and agricultural banks, but also provisions ordaining the establishment and operations of stock exchanges and insurance companies. This multiplied the numbers of disputable issues that before the bill's enactment the drafters, and ultimately the law-makers had to resolve. As elsewhere, supporters of one provision of China's draft bills often jibbed at other provisions. It proved an unending task to win a consensus for an entire bill; the debates had already persisted for years. Not surprisingly this constituted a major reason for China's inordinate delays in enacting priority legislation. Drafting separate bills for the central bank, and subsequently for the other banks, stock exchanges and insurance companies facilitated the necessary research and reaching agreement on the complex issues each bill involved.

2. **Intransitive legislation**. Repeatedly, the project participants found themselves grappling with priority legislation that proposed to resolve extremely broad and intransigeant issues: revamping the entire budget system; restructuring the educational program from kindergarten through university; or even the somewhat 'simpler' questions of establishing a national agricultural technology extension education agency or a national parks system -- all in an increasingly decentralized political system that had to

meet the diverse claims and demands of well-nigh a quarter of the human race. The task of conducting the necessary research seemed overwhelming. Confronting conditions as different as the bustling urban commercial centers of Guanzhou, Shanghai, and Beijing, the desert wastes of the old silk route across Xinjiang and the remote mountain vastnesses of Tibet, law-makers understandably hesitated to enact detailed laws. In addition to these cultural and geographical discontinuities, China's rapidly-changing economy made it impossible for bills to prescribe the details of expected future behaviors. Those issues will remain with China long after it enacts bills addressing them. Dtrafters had to write, not bills that for a reasonable period of time might settle the issues involved, but bills creating institutions capable of continuously dealing with those issues in their constantly changing aspects.

That called for the increased use of intransitive law, a trend already well marked elsewhere.[157] An intransitive law endows an appropriate governmental agency with broad powers (preferably bounded by stated criteria and procedures) to promulgate subsidiary regulations that will take account of regional and temporal variations.

For example, no single law could adequately prescribe the detailed behaviors of the million or more agricultural technology extension agents required to assist China's 200-odd million small farmers increase productivity in their widely-differing climatic, geographic, and provincial government circumstances. Instead, the

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[157]. Colin Diver (Yale); Edward Rubin (Columbia)

Chinese drafted a bill that delineated the criteria and procedures by which the Ministry of Agriculture would consult with the extension agency, provincial and local governments, and the farmers. Drawing on the results of that participatory process ministerial drafters could then formulate appropriate subsidiary regulations adapted to specific locales and time period. To ensure timely revision as circumstances change, the bill also prescribes ways by which the ministry should involve the relevant actors in monitoring and evaluating the regulation's implementation.[158]

Seemingly by-passing democratically-elected legislatures, in most of the world administrative law-making has a bad name. Because legislatures cannot readily adapt rules to local circumstance and the changes that time erodes in them, however, no alternative lies at hand. The problem becomes one of ensuring that administrative law-making becomes transparent, accountable and participatory[159] -- a matter for an adequate Administrative Procedures Act. The advantages of devoting bills to but a single topic, and, where appropriate, drafting intransitive bills constituted two important lessons of the project.

E. LAW AND THE PROCESS OF CHANGE

Commentators have frequently remarked upon the differences between China's remarkable economic successes and Eastern Europe's equally remarkable failures in making a transformation from

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[158] That bill, too, has been enacted.

[159]

centrally planned to more or less 'market' economies. In these accounts, Eastern Europe attempted to move from one to the other in a "big bang", that is, by relaxing all state controls at once, trusting to market forces to forge new institutions de novo. By contrast, China moved incrementally, in principle creating new institutions deliberately, step by step as needed, to implement an on-going transformation process. [160]

The project's legislative theory suggests an explanation for these quite different experiences. The 'big bang' strategy seems to stem from neoclassical economic's explicit premise that the market works basically the same way everywhere, and that institutions constitute a 'black box'without significance for analysis.[161] In principle, therefore, to legislate for a big bang transformation does not require careful examination of specific country circumstances or specific country institutions. The same laws can work in any market economy. A country seeking to transform itself into a market economy need only drop all laws regulating economic affairs and enact laws that track those of some other, successful market economy.

The legislative theory that underpins the UNDP/BLA project denies that strategy. The law of non-transferability of law[162] holds that, save accidentally, a country cannot successfully copy law.

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[160] Cf. Shahid Yusey, "China's Moacroeconomic Performance and Management during Transition", 8 J. Ec. Perspectives 71 (1994).

[161] Samuelson

[162] Supra, text at n.

All institutions -- i.e., the repetitive patterns of behavior emerge historically in country-specific circumstances as various actors respond, not only to the law's commands, but also to the constraints and resources in their unique environments. The most important element in those environments consists of other institutions, the repetitive patterns of behaviors of other social actors.

Like neoclassical economic theory, law and economics teaches that if everyone pursues their own interests, mirabile dictu there will emerge the optimal social allocation of goods and resources. If the existing country-specific environment makes it in each actor's interest to make socially perverse choices, that optimistic outcome seems unlikely.[163] Simply to eliminate the institutional structures of a planned economy cannot automatically ensure the relevant economic actors will chose to behave in ways likely to produce the goods promised by neoclassical economics. Indeed, contemporary history suggests that, instead of choosing to behave in economically productive and socially useful ways, many newly-rich millionaires in the formerly socialist states of Europe have reaped huge profits at the expense of a drastic drop in the majority's living standards.

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[163] Even in neoclassical economics, that does not always hold, as the classical cases of the tragedy of the commons and the Prisoner's Dilemma suggest. (If everyone, pursuing their self-interest, pastures as many beasts as they choose on a village common, they will inevitably degrade the common grazing ground. In the case of a planned prison uprising, each prisoner's interest lies in secret betrayal -- thus making almost *inevitable* the uprising's failure.)

That only underscores the reality on which an institutionalist legislative theory rests: the economy, like all of society, consists of a complex web of institutions, each interlocked with the others. The successful accomplishment of one institution's tasks constitutes the necessary condition for another's. (If the steel mill does not supply steel, the automaker closes down). Law-makers cannot simply abolish all the existing rules that define these interrelated institutional behaviors, and expect that new and better behaviors will automatically appear. Unless, in a period of transition, law-makers carefully study how to keep integrated social and political institutions, they court economic and social disaster. If the legislative theory that underpins the UNDP/BLA project holds, the big bang theory of social change cannot stand.

F. LAW AND DEMOCRACY

While the issues of the Rule of Law and democracy remain far too large to consider adequately here, it seems worth considering two aspects of their relationship to the UNDP/BLA legislative drafting project: Why China undertook its legislative initiative at this time, and whether its implications for the Rule of Law in China.

First, Max Weber offered two propositions that may help to explain why the Chinese initiatives towards establishing a legal order emerged at this time in Chinese history. He held that, to create a framework of predictability of state action, market actors require adherence to law and 'legal-rational thought.' Further, he suggested that all revolutionary regimes achieve their initial legitimacy because of the charisma of a great leader -- George

Washington, Lenin, Ghandi. Charisma has no real content; literally, it means a gift of God. Weber used the term to mean that indefinable something that great leaders have. With the death of the great leader, the successor rulers almost invariably search for legal-rational legitimacy. Legal-rational legitimacy implies the rule of law. China's search for a rational legal framework for government fits both Weber's propositions.

Second, what implications might the UNDP/BLA project have for the democratic project in China? Some argue that law used instrumentally inevitably becomes a mere tool in service of authoritarianism.[164] In the UNDP/BLA project, China used law as an instrument of policy on a grand scale. Did that lead inevitably to authoritarian practices? Or did the fact that it used law instrumentally in the particular way that it did tend to favor, not authoritarianism, but its opposite? We believe that the project tended towards empowering the disinherited, and to that extent, favored the democratic project, both procedurally and substantively.

Procedurally, the project rested on a legislative theory that underscores democratic participation in all aspects of the law-making, implementing and evaluation process. Outside of a few rare specimens of countries, despite our myths, popular participation in the law-making process does not take place even where a

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democratically-elected legislature exists.[165] Until a bill comes before the legislature for its vote, law-making usually takes place under a cloak of deepest secrecy. That cloak covers the entire law-making process: from the monitoring of existing law, through the spark of an idea for new legislation, through drafting, through presentation to and vote in Cabinet, all the way to the draft's presentation to the legislature as a Government bill. Without participation in that lengthy bill-formulating process, however, for democratic law-making popular elections serve a symbolic, not an instrumental function.

Better than some other, nominally democratic countries, China ventilates the bill-creating process. At its discretion, BLA publishes some bills, asking public comment, before consideration by the State Council. The pending regulations on legislative drafting will define the criteria as to whom BLA and the DLAs must give notice of a pending bill, asking for comment. In the UNDP/BLA project, China's drafters wrestled with other issues of

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[165] China does not have competitive party elections; if that constitutes the touchstone of democracy, it has none. Its national legislature, the National People's Congress, rarely divides over a proposed law. The State Council -- that is, what in the British system would constitute the cabinet -- seldom debates issues in public. In most nominally democratic states, however, by and large from the legislature the government gets what government wants. (With elected represenatives responsible primarily to their home communities and precious little party discipline, the United States stands as a striking exception). In a Parliamentary system, in which the majority in Parliament elects Cabinet, of course Parliament remains subservient to Government. To challenge a Government bill requires back-benchers willing to risk their political future. See generally R.Kent Weaner and Bert A. Rockman, eds., Do Institutions Matter? Government Capabilities in the United States and Abroad. (Washington: Brookings, 1992) 12 et seq.

participation, not only in the bill creating, but also the bill implementation and monitoring process. In drafting research reports and bills dealing with particular areas, ranging from managing national parks and agricultural technology extension education, to budget-making and coordinated planning, they diligently explored foreign law and experience for additional measures likely to ensure openness, accountability and, where possible, various forms of community participation.

The project's legislative theory implicitly fostered greater participation, for three reasons:

> (1) The theory requires research to discover the scope of the difficulty and to generate and provide evidence for hypotheses explaining role occupants' behaviours. In that enterprise, the role occupants -- both the primary actors and those in the existing implementing agencies -- constitute the greatest reservoir of knowledge about their own behaviors and the constraints and resources of their own environments. Engaging their participation in the research not only satisfies an ideal of participation, but serves to ensure essential inputs.
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> (2) Participation in the research empowers those affected to help solve their own problems. They come to understand better the nature and causes of the difficulties they confront, thus acquiring the capacity to participate effectively in finding solutions.[166] Studies[167] suggest, furthermore, that participation in this kind of process tends to sensitize implementing agents to the their 'clients'' difficulties, as well as stimulating them to improve their own work in helping to solve them.
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> (3) If democracy really means one person, one vote, then one's influence ought to depend not on power but the worth of one's arguments and data. The requirement that the justification of

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[166] The PRA methodology operates on this principle by engaging local communities in assessing their own resource use; the methodology here proposed extends that process to examination and improvement of the institutions that shape resource allocation patterns.

[167] Cf Klitgaard

> a proposed bill rest, not on power but on reason informed by experience holds the possibility that anyone, regardless of status, can challenge a bill in terms of reason and evidence. Only if that latter proposition holds can participation genuinely and not merely symbolically empower the powerless.

These propositions, of course, fundamentally contradict approaches that teach that decisions about what the law ought to be depends solely or even mainly upon the 'values and attitudes,' the interests or the ideologies of the decision-makers -- in fine, not on the persuasive power of their justifications, but their power to impose their solutions. Those approaches ineluctably make relevant only inputs from those whose power the decision-makers respect, not arguments based on data or reason. It does no good for people, either directly or through representatives, to participate in the input and feedback processes if those who staff the conversion processes adhere to a theory that instructs them not to listen.

In contrast, a legislative theory that holds that competent policy decisions must rest on reason informed by experience requires opening the door to meaningful participation by anybody with new data (i.e., experience) or a new way of reasoning about that data. Such a theory opens the way for the politically powerless to challenge authority. A legislative theory that rests on reason and experience becomes a sine qua non for a democratic law-making process.

Substantively, the project paid special attention to the poor and powerless. The project document (technically a conjtract between UNDP and the Chinese Centre for Economic and Technical Interchanges

(the Chinese government agency for dealing with foreign aid agencies) fell under UNDP guidelines that required special attention to issues involving women, children, the poor, minorities and the environment. That document therefore stipulated that each bill drafted in the project specifically note the estimated impact of the bill on these too-often overlooked interests. That requirement will likely also have the force of law when included in China's new legislative drafting regulations. To the extent that democracy concerns enhancing the position and power of the majority, like the process issues first mentioned, that requirement must count as tending to further the democratic project.

SUMMARY AND CONCLUSIONS

The UNDP/BLA project used the occasion of drafting 22 priority economic laws to strengthen China's legislative drafting capacity. For that purpose, it brought together over 150 drafters, including 44 trainers, with carefully-selected foreign consultants, in a five-year learning process. Working together, they learned to use and deepen legislative theory as a guide to learning from foreign law and experience and analyzing the causes of, and proposing legislative measures to overcome, the social behaviors that threatened to block China's Reforms and Open Policy.

The theory put forward in this paper and that underpinned the UNDP/BLA project teaches that we hold all knowledge contingently, subject to refutation at any instant by better reason or the experiences of the morrow. In effect, all knowledge consist of hypotheses, educated guesses, born of fallible reason informed by

incomplete experience. Nevertheless, governments have no exit but to make policy and legislation on that ineluctably infirm foundation. Many other countries presently pursue transformations analogous to the Chinese ones; the movement towards market-like systems seems ubiquitous. Do their experiences confirm or refut the lessons we draw from our experiences in China? The project experience provided evidence for a variety of propositions, some more technical, others of a broader philosophical nature:

(1) Pedagogically, one cannot teach drafting except in the context of learning-by-doing, that is, actually drafting bills.

(2) Drafters need specialized skills in social science research, mainly as educated consumers of social science findings, particularly with respect, not to quantitative data, but qualitative evidence relating to social behavior trends.

(3) Drafting law in conditions of social change requires relatively narrow bills, often granting implementing agencies powers, within the framework of carefully designed criteria and procedures, to formulate implementating regulations.

(4) Institutions constitute society's building blocks, and the legal order comprises government's primary tool for creating and changing them.

(5) The UNDP/BLA project's underlying legislative theory opens the possibility for drafting legislation based not merely on the dictates of power, but reason informed by experience, an essential premise for democratic participatory law-making processes.

(6) Drafters cannot copy foreign law and experience, but they

can utilize its teachings at every stage of the problem-solving methodology.

(7) The project's legislative theory suggests the 'big bang' transformation strategy cannot succeed because it assumes away the problems of restructuring the complex web of institutions that comprise any society's unique social structure.

(8) The project's requirement that drafters explicitl;y assess the impact of the bill on women, children, the poor, minorities and the environment can only serve to further the democratic project.