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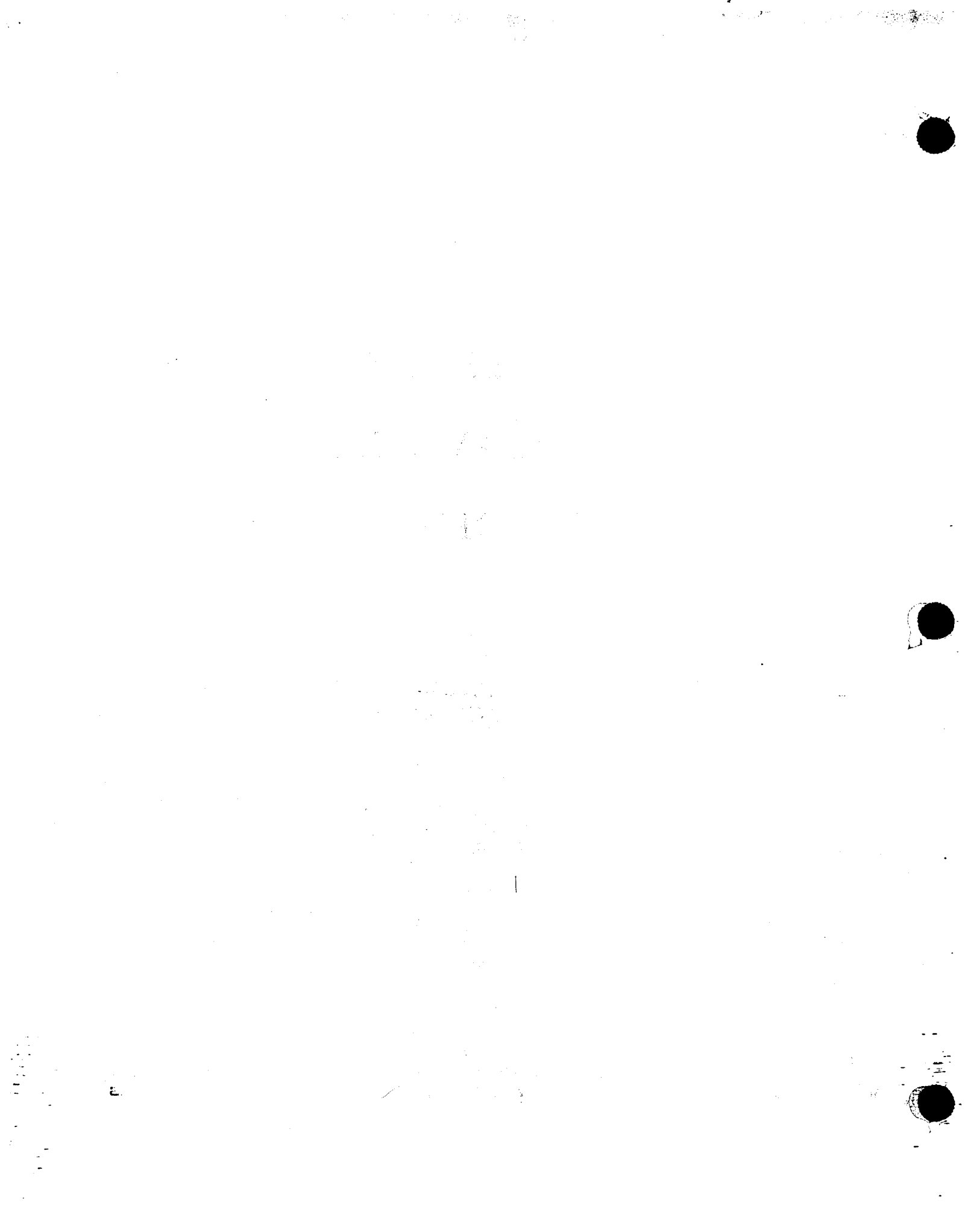
READINGS IN
COMPARATIVE SOCIOLOGY OF
LAW/LAW AND
DEVELOPMENT

Edited by

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Draft

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CHAPTER I.

INTRODUCTION TO THE SOCIOLOGY OF LAW AND LAW AND DEVELOPMENT

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This Chapter introduces the reader to the subject-matter of Sociology of Law and Law and Development. It begins with the Resolution of the Standing Committee of the National People's Congress on Acquainting Citizens with Basic Knowledge of Law. Putting the reader in the role of a lawyer-drafter, we ask the reader to critique that law and make recommendations for improvement. Most readers will not have an organized way of doing that. As its purpose, these readings aim to develop the reader's ability to critique legislation. In the process, the reader will learn to create good legislative programs -- and that lies at the basis of competent law-making.

In the excerpt from Law, Order and Power, the authors argue that the legal order, broadly conceived, constitutes organized society's principal tool for solving social problems. When China decided to embark upon its reform program, it had to draft and enact a great number of new laws -- for example, the Law on Foreign Joint Enterprise, the various laws on the Special Economic Zones, the Law on Public Enterprise, the Income Tax Law, and the Patent Law. To accomplish its broad goals of law-making, over the next several decades China must write thousands and thousands of new laws and regulations, on the national,

provincial, county, autonomous region and municipal levels. For that, it will need thousands of law-trained experts to participate in the task of writing laws that solve the problems they address. These readings aim to help readers learn that skill.

Most law students study the law-in-the-books. They study law mainly in law libraries. To practice law in courts, most law teachers believe that knowing the law-in-the-books constitutes the core of the necessary knowledge. To practice law in the courts, typically the lawyer takes as given the laws as they presently stand. If every law were a tree in a forest, his job becomes to guide the client safely through the forest. The lawyer has little concern with what the law ought to be. He mainly concerns himself with what the law is. That the lawyer discovers in the first instance by reading law-books. Most students learn law the same way.

Some lawyers -- in China, in the years to come, many lawyers -- have jobs in the law-making process. They must concern themselves not merely with what the law is, but also with what the law ought to be.

Law aims to solve social problems. Social problems do not exist between the pages of books. They exist "out there" in the world of people working, playing, loving, making, writing,

singing, running, governing, judging, fighting -- doing. Social problems exist when some people behave in particular ways that someone identifies as a difficulty. If government wants to change that behaviour, it first drafts a new law. Unless the legislative drafter, usually a law-trained person, adequately understands how law will affect behaviour, however, the new law may add to the problem, rather than solve it. Unless the drafter adequately understands the social problem itself and its root causes, the new law may only plaster over the symptoms, not cure the disease. To write competent new laws, the drafter must study not only the law-in-the-books, but also the law-in-action. The law student must learn how to make investigations not only in libraries, about the law in-the-books, but also, in the great world outside libraries, about human behaviour in response to law, that is, about the law-in-action.

As did China, in the period following World War II most of the Third World emerged from First World domination. Third World countries proposed to use law and state power to solve the social problems of underdevelopment inherited from the past -- mainly, the masses' poverty and powerlessness. The study of how they did this, and their relative successes and failures constitutes the study of Law and Development. So viewed, Law and Development constitutes only a special instance of the Sociology of Law.

In the last selection, ^{the} Seidman, argues that Law and

Development studies the use of law to bring about social, political and economic development in Third World countries. In this view, the subject has a practical, not merely an academic thrust. Focussing on a case study from Tanzania, in Africa, they shows how the drafters actually contributed substantively to framing the contents of the new law. Drafters' roles everywhere require them, inevitably, to determine how laws will actually affect the behaviour of the law's addressees. That requires that drafters understand how law and society interact -- that is, that they study the Sociology of Law.

Readers should read this (like all books) critically. They should approach every reading, every editorial comment, every note, with a strong suspicion that what the writer states constitutes useless nonsense. In this book, this arises for two reasons, First, many of these readings concern experience and put forward theories based on experience elsewhere in the world. Like the rest of the Third World, China must use the legal order to accomplish the broad social, political and economic changes that it has set for itself under the label of the Reforms. To do that efficiently and well requires that Chinese lawyers make use of experience everywhere -- for we learn only from experience, as refined by reason informed by theory. A great deal of the relevant experience comes from China itself. Like every other nation, however, China can learn a good deal from the experience of other nations. Many of the readings in this book derive from

the experience elsewhere. Like many of the social theories that people study everywhere in the world, most of the theories about law and development advanced in these readings find their source not in indigenous, local experience, but in experience elsewhere. The reader must constantly question these theories, asking to what extent do they have relevance in the Chinese situation? Senior Statesman Deng Xiaoping has said that one should not reject a theory merely because of its source in another country - a black cat as well as a white cat can catch mice. That does not say, however, that foreign theories that seem to work well elsewhere will work well here. So Premier Li Peng meant when he said that when China opens the window to the world, it must take care to ensure that along with the fresh air, flies and mosquitoes do not swarm in.

The second reason why the reader must examine this book critically arises because the editors have included at many points readings espousing theories that contradict each other. They do this in the belief that the reader should have an understanding of the range of theories in the field, not merely read about the theory that the editors believe the best. The reader must therefore decide which of these make sense in the Chinese context, and which do not.

PROBLEM

[Throughout this book, we intersperse problems of this sort. We strongly urge the reader to read the Problem quickly, then read the Notes and Questions that usually follow the Problem, and then re-read the Problem with those Notes and Questions in mind. Usually, we really have very little concern with the particular subject-matter of the law involved in the Problem. We have a deep concern with other matters than that, but use the particular law only by way of illustration.

For example, the following Problem concerns a Resolution of the Standing Committee of the National People's Congress on Acquainting Citizens with Basic Knowledge of Law. As the Notes that follow suggest, our interest is not in how to acquaint citizens with a basic knowledge of law. In this case, our interest lies in inducing the reader to consider the general problem of how one might go about doing research on the law-in-action, that is, on how a given law affects behaviour. We use the Resolution on Acquainting Citizens with Basic Knowledge of Law only as a specific, concrete case to help students think about that more general topic.]

To: Mr Student
From: Senior Lawyer, Drafting Office

I enclose a copy of the Resolution of the Standing Committee of the National People's Congress on Acquainting Citizens with Basic Knowledge of Law. Although enacted in 1985, we believe that it has not succeeded in educating our citizens with knowledge about the Constitution and our basic legal structure. Would you kindly prepare a memorandum advising us what we should do to amend the law to make sure that its objectives are achieved?

**Resolution of the Standing Committee of the National
People's Congress on Acquainting Citizens with
Basic Knowledge of Law**

*(Adopted at the 13th Meeting of the Standing Committee of the Sixth
National People's Congress on November 22, 1985)*

In the interest of developing socialist democracy and improving the socialist legal system, it is necessary to place the law in the hands of the masses of people so that they will know what the law is, abide by the law, acquire a sense of legality and learn to use the law as a weapon against all acts committed in violation of the Constitution and the law. This will contribute towards safeguarding the lawful rights and interests of citizens and ensuring the enforcement of the Constitution and the law. A major effort to publicize the legal system and popularize basic knowledge of law among citizens is of great significance to the consolidation of the socialist legal system, the ensurance of long-term stability in the country, the promotion of material and cultural progress in our socialist society, and the realization of our country's objectives and general task in the new period. The 13th Meeting of the Standing Committee of the Sixth National People's Congress takes the view that the draft resolution submitted by the State Council concerning the popularization of basic knowledge of law among citizens is very important and timely, and resolves as follows:

1. Beginning in 1986, a programme of education aimed at popularizing basic knowledge of law among all citizens capable of understanding it shall be carried out in well-planned steps over a period of about five years. Such education shall gradually be institutionalized and regularized.
2. The popularization of basic knowledge of law is intended, first and foremost, for cadres at all levels and for young people. In particular, leading cadres at all levels shall set examples for studying the laws, understanding them and acting by them.
3. The popularization of basic knowledge of law shall focus on the Constitution and cover the essentials of the basic laws, such as those of civil and criminal law and the law concerning the structure of the state, as well as basic knowledge of laws which have much to do with the vast numbers

various regions pertinent laws may be chosen for study according to the needs.

4. Schools are important places for popularizing basic knowledge of law. Universities, secondary schools, primary schools and schools belonging to various other categories shall all offer courses for legal education or incorporate such education in related courses, include both in the curriculum, and combine legal education with moral and ideological-political education.

5. It is necessary to write or compile concise and popular readers on basic knowledge of law and to conduct publicity and education for the popularization of such knowledge by closely linking it with reality and employing a variety of forms. Such education shall be conducted in an accurate, popular, vivid and wholesome way. Solid work must be stressed in order to achieve good results and avoid a formalistic way of doing things.

6. The popularization of basic knowledge of law shall be conducted under the leadership of the Communist Party of China and by setting in motion and relying upon the forces of society as a whole. All state organs, armed forces, political parties and public organizations, enterprises and institutions shall earnestly educate the citizens in their respective organizations and establishments for the popularization of basic knowledge of law. Newspapers and periodicals, news agencies, radio and television stations, publishing houses and institutions in the field of literature and art shall all take up the publicity and education on legality and popularization of basic knowledge of law as an important regular task. The standing committees of the local people's congresses and the local people's governments at all levels shall provide competent leadership for the implementation of this resolution by working out a realistic and feasible plan and taking effective measures to carry it out earnestly.

NOTES AND QUESTIONS

1. State the steps you would take to prepare yourself to answer the Senior Lawyer's memorandum. Which of them could you do in a law library, in your own office or study, and in the outside world?
2. What questions would you pose to yourself in preparing to answer the Senior Lawyer's memorandum?
3. Why would you ask these questions and not other questions? How could you assure yourself or the Senior Lawyer that you had posed all the correct questions, and only the correct questions?

4. Obviously, what we need is an agenda of steps to take to critique proposed legislation. Having an agenda of that sort, we can use the same agenda when necessary to create legislation to solve emergent problems.

5. How does the task involved in analyzing proposed legislation differ from the task involved in determining how the law would deal with a particular set of facts? John Austin (1790-1859) became the founder of the English "analytical" or imperative school of jurisprudence, still dominant in much of the English-speaking world. He distinguished sharply between the "province of jurisprudence" and the "province of legislation":

"...general jurisprudence, or the philosophy of positive law, is concerned with law as it necessarily is, rather than law as it ought to be: with law as it must be, be it good or bad, rather than law as it must be, if it be good."

J. Austin, Lectures on Jurisprudence (4th ed; R.C. Campbell, ed. 1873), I, 33; also II, 1107-8."

Very few lawyers today would agree with Austin that so bright a line separates the law that is from the law that ought to be, although plainly these do occupy opposite ends of a continuum.¹ [what do you think?]

¹ Austin elsewhere recognized that no bright line separates the law that is and the law that ought to be: "It is impossible to consider Jurisprudence quite apart from Legislation: since the inducements or considerations of expediency which lead to the establishment of laws, must be adverted to in explaining their origin and mechanism. If the causes of laws and the rights and obligations which they create be not assigned, the laws themselves are unintelligible." Lectures supra, 1107.

b. . In this course we concern ourselves entirely with the issues surrounding the question, what ought the law to be? All decision-making arises in an institutional context. Here, we do not consider the question posed as it appears to appellate judges in deciding an issue of law, although of course they face the question in every case they decide. We consider the problem only as it appears to legislatures and administrative agencies in their rule-making function.

"Thinking like a lawyer" about decision-making of any sort obviously ^{involves} ~~involves~~ at least two strands of thought. One has an

institutional framework--courts, legislatures, ministries. Because decisions take place within institutions, with all their varying constraints and resources, decision-makers must take them into account. In designing legislation, for example, of course one must take into account the political realities of the Party, the People's Assembly, and its standing Committee, and the bureaucracy, and what will likely win support, and what will likely lose. The very form of the legislation (statute? administrative regulation? Resolution of the Standing Committee?) may well depend upon institutional considerations.

For reasons of space and time, in this course we do not study how these institutions and their processes shape decisions. Instead, we concentrate on the normative aspects of that task. Of course law constitutes an exercise of power; of course it reflects power relationships; of course it reflects the interests of the groups with the power to affect its content. Those issues of power one might study advantageously under the rubric of the decision-making institutions, for the relative power of different groups depends in part upon the structure and the process of the decision-making institution. (For example, the power of a group in government to affect the content of pending legislation may well depend upon the rules permitting amendment.)

Legislation does more than express mere power relationships. It contains an important ideal and intellectual content. If nothing more, one can say a great deal about the relative effectiveness of legislation. (Consider the questions asked here about the Resolution Concerning Basic Knowledge of Law. Lawyers in the legislative process frequently have a position that permits and indeed requires them to make normative arguments in ideal terms-- how serious has become the social problem that the bill addresses; its probable effectiveness; its possible unwanted consequences; its costs; and so forth. It is those

questions with which we concern ourselves in this course. For our purposes, here, we take the institutional questions involved in legislation as given--in the economists' phrase *ceteris paribus* ("other things being equal"). Obviously, we must never let that become *ceteris incognitis* ("other things being unknown"). That we do not focus on institutional considerations here does not denigrate their importance. In the same way, that a course on contracts does not focus on trial process does not deny that trial procedures may well affect the outcomes of a contract case, frequently more significantly than does the substantive law of contract.

From Chamliss and Seidman, Law, Order and Power (1981), p. 1-8:

Substitute
Ch. 1 of
China book
pp. 1-13?
or add
this?

1
The study of law and society

We live on the edge of the abyss. Rarely in recent memory has society seemed to teeter so close to disaster. The economy roars out of control; international affairs threaten to overwhelm us; bureaucracy clasps us in its clammy embrace; politics becomes a theater of the absurd, and politicians, clowns.

In our era, organized political communities look not to church or clan or community for respite against social ills, but to government. We expect government to improve economic affairs, to solve international puzzles, to ride herd on bureaucracy, to improve the political climate. That era began in the Enlightenment. Then, as now, the liberal faith held that rational people, organized in political communities and exercising state power through the legal order, could instantly erase the cruelty and irrationality of social life.

It does not work that way. Just as feudal barons grew fat on the labor of serfs, so did the rural gentry grow fat on agricultural laborers, robber barons on impoverished immigrants, and multinational corporations on the people in the Third World. Those who have owned the world have run it and have kept in force legal orders to facilitate their continued rule and privilege.

They did this despite constitutions and legal orders that on their faces aimed at equality and representative democracy. The high school civics textbook blueprint tells

us that the people democratically elect the legislature, which enacts laws reflecting the majority interest. The administration enforces the laws, and the courts adjudicate disputes about them. The laws, expressed in general rules, affect everyone equally. Guarantees of minority rights ensure against the majority's unrestricted tyranny.

Long ago, de Tocqueville expressed the great paradox of Western democracies. The mass, it seems, has all the power, and the rich all the money. The legal order itself supposedly ensures democratic power in the mass of the population. That we live in a sadly troubled world characterized by inequality, not equality, and authoritarianism, not democracy, expresses a failure of the legal order. In a society that looks to the legal order as the principal tool to solve our social ills, that we teeter so close to disaster expresses either our failure to use the legal order intelligently or deep-seated weaknesses in the legal order itself.

In either case, part of the explanation for our social malaise must lie in the legal order. It becomes government's principal instrument of social control. We rely upon it to maintain order in the streets, minimal harmony in the family, regularity and predictability in the marketplace, safety in the workplace, and nondiscrimination in work and places of public accommodation. We also rely upon it as an instrument of social change. If government proposes to improve economic conditions, it enacts a tax law, wage and price controls, a planning law, or laws concerning the money supply; if it strives to solve international puzzles, it operates through organs of international law like the United Nations; if it proposes to weaken bureaucracy's power, it passes new laws or enforces old ones concerning administrative accountability and decision-making power; to improve the quality of our political life, it passes laws about election finances, primary elections, and the like. The legal order becomes government's scalpel in operating on the body politic.

To do that adequately, government must have a great deal of knowledge about the uses and limits of the scalpel, what it can do and what it cannot do. That knowledge, by and large, however, hardly exists. No phenomenon other than law can claim to have received such intensive study generating so little knowledge. Even those most intimately involved with it—judges, law professors, attorneys, prosecutors, and law-enforcement agents—frequently become proficient in one or another of the legal order's many facets without understanding its broad expanse. In this work, we hope to introduce readers to the systematic study of the legal order. In this chapter, we first define the domain of study. We then suggest in broad outline the sort of knowledge we can expect to generate and how we propose to go about the study.

1.1 THE DOMAIN OF STUDY

We take as the domain of study ~~the legal order~~ ^{the legal order}. For some words, the culture supplies a common definition. All native ~~English~~ ^{English} speakers know that the word "elephant" means that large moving gray mass out there. A definition of the word "elephant" need only describe the large gray mass in detail. Other words, like "truth" and "beauty" and "god," have only the vaguest agreed-upon meaning. For these, a *stipulative* definition

I. 13.

serves; one says what one means by the word. "Law" is such a word, which means we must first define what we mean when we use it.

"Law" and "The Legal Order" Distinguished

The word *law* sometimes means an individual rule that has certain characteristics; at other times it means the whole complex of the legal system, involving not only the rules themselves, but the various institutions, processes, and roles that occupy themselves with those rules—legislatures, courts, administrative agencies, and lawyers, judges, police officers, legislators, administrators, jailors, bureaucrats, and so forth. To avoid that confusion, we use the word *law* in the sense of *a law*—that is, a particular rule that has the characteristics that define it as a law and not as some other sort of norm. We use the words *the legal order* to mean people doing things: Judges judging, lawmakers making law, bureaucrats administering the law, police officers making arrests and finding lost babies and sometimes beating up people illegally, and many others. The legal order, in our definition, constitutes a set of social relations governed by rules set down by the state. Its principal actors include state employees, but others participate as lawyers, litigants, and the addressees of law. Some institutions exhibit a rather tightly sealed exterior to the rest of the world, like prisons and hospitals, for example. The legal order, however, exists in large part to affect the behavior of people who often seem to be only tangentially connected with it. To study the legal order, we must of course study the actors who constitute its movers and shakers—judges and legislators and prosecutors and police officers and administrators. We must, however, also study the behavior of the law's addressees. We must cast our net wide.

Taking as our domain of study the legal order as we have described it places us in the tradition of American legal realism, a school of jurisprudence that began in 1881 when Oliver Wendell Holmes, Jr. (later a great Supreme Court justice) wrote that "the life of the law has not been logic; it has been experience."¹ The realists insisted that we must study the law-in-action as well as the law-in-the-books, the behavior that takes place in the face of the prescriptions of the law as well as those prescriptions themselves. Their case nominally won out; American legal scholars by and large accepted the proposition that to understand the legal order we must investigate the law-in-action. Lawrence Friedman expresses the realists' view as follows:

Structures [courts, police, the legal profession] and rules [laws] look one way on paper, while acting quite differently in life. Almost everyone concedes that law is to some degree a social product, and that law on the books and law in action are not inevitably the same. Rules and structures alone do not tell us how the machine really works. These provide no way to sort out dead law from living law. They do not tell us how and why rules are made and what effect they have on people's lives.²

The study of how laws are made, how they are implemented, and what effect they have on people's lives is called the study of law and society.

Other Definitions of "The Legal Order," "The Legal System," and "The Law"

Other writers suggest their ways of looking at law. Sometimes they have used a linguistic cover to smuggle a substantive judgment about what we ought to study. William B. Harvey adopted perhaps the most common definition of law when he suggested that the legal order (he uses the word *law*, but in the sense that we use *the legal order*) entails "a technique of social ordering deriving its essential characteristic from its ultimate reliance on the reserved monopoly of systematically threatened or applied force in politically organized society."³ This definition implies that we misuse the words *legal order* and *law* if we apply them to systems of social control in societies that lack a centralized monopoly of force and a bureaucratic structure to determine when a violation of law occurs and to apply sanction for its breach. It limits the concept of *the legal order* to societies that have a state structure. In this view, the sorts of societies many anthropologists study do not have a *legal order* and, by definition, therefore, these societies have no law.

In an effort to find institutions common to both simple and complex societies susceptible of comparative study the American anthropologist E. A. Hoebel stipulated a broader definition of "law."⁴ He saw as the "fundamental *sine qua non*" of law in any society, simple or complex, "the legitimate use of physical coercion by a socially organized agent."⁵ He then defined *law* as follows: "A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."⁶

Hoebel made a selection among the many potential attributes of what one might call *law* in a modern centralized society—the aspect of forceful sanctions—and masked his choice under a definitional guise. He did this by asserting that law *necessarily* contains force. Force becomes the *sine qua non* of law only if the concept of law exists as an essence in some unreal world of absolute, Platonic Ideas or if general agreement exists about the phenomenon to which the word *law* refers. Neither holds. In sum, by his definition Hoebel said that he had an interest in studying the use of socially approved force to sanction norms of conduct. That seems a valid area of study, but why the *sine qua non* or *essence* of law? Many other aspects of the institutions of social control can serve as the focus of study, without necessarily constituting the "essence" of the legal order: the dispute-settlement mechanism, the adjudicative mechanism, the systems of decision-making, the fact-finding mechanism, the content of the norms, the interrelationship of the norms, and a host of others.

Another tack comes from systems analysis. That discipline teaches us the difference between the system and the environment. For the systems engineer, the question of where the system and the environment separate usually appears as a factual matter. The environment consists of the unalterable conditions that affect us. The system consists of whatever appears under our control.⁷ The aircraft engineer cannot change the characteristics of the ambient air; he can only do something about the design of the aircraft. The interface between the aircraft's skin and the atmosphere becomes the interface between the system and the environment.

For engineers, that seems a factual issue. For governments, it becomes a

normative question. Should the Department of Agriculture accept low rainfall as part of the environment and concentrate on helping farmers in arid regions grow crops appropriate to dry lands? Or should it accept that as part of the system and concentrate on creating irrigation systems? These decisions involve normative judgments: on what *ought* government expend resources, and in what priority?

We too easily fall into the trap of asking only the factual question: what "legal" institutions seem discontinuous with society? In our society, among the various "legal" systems on first glance only courts seem discrete from society. To identify the legal system with the courts poses the problem of law and society as one of interaction between courts and society. Courts become the legal order. Many lawyers and sociologists have adopted precisely that domain of study and exclude from consideration legislatures, administrative agencies, and other aspects of state power. We think such narrowness of vision is a mistake.

Even to suggest that the words *the legal system* have no real content seems to many heretical. Language, however, poses its own tyranny.⁸ Because we have a phrase, *legal system*, we assume that such a system exists. After all, we have a word, *chair*, and chairs exist, so why not legal systems too? By using that phrase, we make a value-laden decision: we mark a division between the legal system and its environment. Our own expertise misleads us into assuming that there is a discontinuity between "the legal system" and the rest of society. Some of us are lawyers. We have successfully surrounded the law with a mystique, unknowable, we assume, to those not of the guild. Others accept our claim for expertise—after all, lawyers must learn something in the three-year initiation rite we call law school. Words and expertise combine to assure us of a separate and discrete legal system. In fact, of course, government acts not only through legislatures and courts, but in a complex panoply of other institutions as well; People's Assemblies and governments, Standing Committees, Departments, Courts, the police, prisons, state universities and public schools and public enterprises.

If we propose understanding now to use the tools that government has available to attack social difficulties, our domain must include the rules, norms, and actions of these institutions, as well as those of courts and legislatures.

By contrast, Professor Fuller (among others) excludes the rules concerning such institutions from the very definition of "law," and hence from our purview of study. It is "obfuscation," he says, to confuse "law" with "every conceivable kind of official act," so much so that "when one finds an author about to discuss, in Pound's famous phrase, 'the limits of effective legal action,' one is not sure whether the subject will be the attempted legal suppression of homosexuality or the failure of the government to convert the power of the tides into electricity at Passamaquoddy."⁹

Why Our Definition?

We prefer to stipulate our meaning of *the legal order* and *law*, and for that the test becomes utility. As we have stated, our concern has an explicitly policy-oriented thrust. We aim to develop a theory that will explain the relationship between law, the

legal order, and society and that will help in solving emergent social difficulties. Organized political communities in this era invariably employ the functionaries of the state for this purpose. Typically, they do so by enacting legislation or promulgating decrees or administrative regulations—that is, normative rules for the conduct of both state functionaries and ordinary citizens. As we said earlier, therefore, we concern ourselves with the normative order in which the state and its functionaries are involved, as lawmakers, law implementors, or merely as the addressees of rules. That normative system constitutes the legal order and differs from other normative systems because it rests, ultimately, on the state's monopoly over the legitimate use of force.

This definition ranges far more broadly than some others, for it denies any sharp distinction between the legal order and the state, between legal institutions and processes and political ones. The ~~federal~~ ^{national} government's annual budget is law (indeed, the ~~Congress~~ ^{President} enacts it and the president signs it, just as any legislation); a proposal to make homosexuality a crime involves a proposal for a law (the norm), just as does a proposal that the Department of Energy generate electricity out of ~~heat~~ ^{solar} power. No narrower definition will serve our purposes.

That definition, of course entails a value-choice. Sawyer makes a distinction between "lawyers' law" and "the law of social administration."¹⁰ The former denotes the rules of the private sector—contract, property, tort. The latter denotes the law concerning "collective industries, and services, collective marketing of farm products, welfare services for the masses (health, pensions, unemployment, etc.), regulation of the activities of the private sector of the economy, and the conduct of defense and foreign relations."¹¹ Our ideal-type of court deals with "lawyers' law" almost exclusively; the law of social administration falls before administrative agencies and sometimes never actually enters the courtroom doors. Sawyer suggests that "in a nation which gave effect to the social theories of Herbert Spencer, social administration would hardly exist."¹² Most law would be lawyers' law, occasionally amended as social change necessitated. Whatever its dominant ideology, no polity in the world subscribes to *Social Statics*. Most rules that they enact to solve emergent problems involve rules of social administration.

Our definition of *the legal order* therefore expresses our concern with the law of social administration as well as with lawyers' law. To study only the latter involves a value-choice in favor of an unreal vision of laissez-faire that today claims the adherence only of ideologies of the far right. We prefer a definition of *the legal order* that permits the study of what all governments today do, not what some laissez-faire idealists think they should be doing.

1.2 SOME MYTHS ABOUT LAW

Three myths about "the law" mislead us into thinking that the legal order serves the public interest. These myths frequently put blinders over our eyes when we try to examine the legal order. We examine these myths at length in the chapters that follow; here we only identify them.

I.17

The *consensus* myth holds that the law codifies society's value-consensus. Both the law-in-the-books and the law-in-action mirror society's "moral basis" and its "most important" values, with no gap between the law and every sound citizen's ideology.

The *normative* myth holds that what the law prescribes also describes the actual behavior of the lawyers, judges, courts, prisons, ~~schools~~^{police}, social workers, administrators, bureaucrats, legislators, and others who play roles in the legal order.

The *computer* myth argues that the law transmutes every social problem into a case, to which the various actors merely apply the law, acting as it were like impersonal computers: insert the facts, insert the rules of law, and they grind out "correct" decisions. In the computer myth, discretion, bias, power, and corruption do not exist or constitute at most temporary aberrations. A common aphorism catches all these: "Ours is a government of laws, not men."

A corollary to these myths, less articulated but widely prevalent, argues that despite the existence of sharp conflicts among social classes and interest groups the state (the courts, the police, the civil servants, and so forth) provides a value-neutral framework that fairly contains and resolves conflicts. Even the legislature, which is the clearest example of value-bias in the legal order with its dependence on lobbyists and institutionalized links to established interests, mouths shiboleths of value-neutrality. On rare occasions when biases are admitted the framework of elections is singled out as the ultimate neutralizing force. The legislature in this view becomes an arena within which groups reflecting society's power configurations can peacefully resolve policy disputes. That view perceives the police as enforcing the laws that the legislature enacts, and the courts as deciding on which side of a dispute truth lies, fairly and impartially applying the law to the facts, and meting out the sanction that the law itself requires. [in the United States]

The world contradicts these myths. We all know that [in the United States] the police do not treat blacks and the poor equitably; that judges have great discretion and in fact make policy in the course of "applying" the rules of law; that electoral laws in the past favored rural elements, and today still favor the rich; that most presidential candidates have great wealth; that 20 percent of U.S. senators own more than a million dollars worth of assets; that winning elections requires the expenditure of vast sums of money contributed to political campaigns by special interest groups; and that the political candidate with the most money to spend stands a far greater chance of winning than his or her poorer opponent.¹³ In short:

Law discriminates. . . . First, the rules themselves . . . are by no means totally impartial even when impartially applied. They come out of the struggle for power. . . . Segregation is the law of the land in the Union of South Africa—it was the law of the land in the American South until very recently. Penal codes declare "unnatural" sex a crime. The laws punish draft dodgers, seditionists, and drug addicts. American immigration laws excluded the Chinese; public land law ruthlessly exploited the native Indians; welfare law was harsh to the poor. . . . The regulatory code, the tax laws—economic legislation in general—are geared to the needs and interests of

people who own property. Rules of contract and commercial law are innocent on the surface and seem to the average person to be mere justice and common sense, but it is the justice and common sense of Western society, its economy, its dominant populations. Imperial Rome, the Cheyenne, and the China of Chairman Mao used different rules. Indeed, every area of law—land law, family law, tort law—supports the society which framed the rules and put them to work.¹⁴

Despite the fact that law and the legal order represent a highly selective and biased set of rules and institutionalized processes, the consensual, normative, computer, and value-neutrality myths persist. Exceptions to the exceptions of neutrality, unilinear norm enforcement, consensus, and computerized justice are dismissed as simply "aberrations" or "temporary biases" which will ultimately be resolved through the inevitable progress of law and civilization.

These myths tell lies. Far from a value-neutral framework within which conflict finds peaceful resolution, state power itself rewards the successful in the endless social conflict. The legal order in fact constitutes a self-serving system to maintain power and privilege. The black-letter texts of the law do not describe how officials behave; the law-in-action and the law-in-the-books systematically contradict each other. Far from resembling a computer, the legal order has as its main decision-making principle official discretion. We cannot study the legal order wearing blinders. To see it whole, we must shed ourselves of these myths.

1.3 WHY STUDY LAW AND SOCIETY?

Long ago Robert Lynd posed a question for academia: knowledge for what?¹⁵ We conceive that the domain of law and society studies lies in the legal order. We do not study it for its sake alone. We study it because the organized political community necessarily implicates law in all its attempts to solve social problems.

We enact laws to solve perceived difficulties. Laws embody policies. The study of law and society ought to teach us how to generate sensible statements about how, by using the legal order, we can go about solving existential difficulties.

[For example, in 1979 China adopted the Environmental Protection Law. Article 2 stated in part that "the function of the Environmental Protection Law is to ensure . . . prevention and elimination of environmental pollution. . . ." Article 19 said that "effective measures shall be taken to remove the smoke and dust from all smoke-discharge devices. . . ." In 1988, a traveller in Changchun in Jilin Province saw snow on the streets and open places that had become black with dust and smoke. Clearly, the law has not succeeded in giving Changchun clean air.]

How to solve problems of this sort? The study of law and society should give us a disciplined agenda to follow, whose probable outcome will advise us how to solve these difficulties through the legal order. We cannot manufacture solutions to problems out of gossamer and dreams. We must use past experience to solve new difficulties.

If courts and presidents are so fallible, how do we know what the law is? If we cannot know what the law is, how can it help us? Why do we so often turn to it for answers? Why, for example, would people actually try to pass laws defining when life begins or banning the sale of handguns? What good can such laws do? What good can any law do if people are determined to resist or corrupt it?

If you recognize these sentiments, even if you do not share them, then you can understand something of the origins of studies in law and sociology. Some people react to an air of crisis by denying its existence. Some bemoan crisis, hoping a champion will come along and set everything right. Some suddenly discover the comfort to be found in a new religious movement which claims to offer salvation, a way out. But others start looking more closely at the wounded beast to try to understand how it has worked in the past and to try to cure it of its ills.

It is this last reaction which initially motivates many, though not all, of those who study the sociology of law. Some enter from outside the law's ranks, because they see some critical social problem and wonder why law has been either unable to solve it or involved in creating it in the first place. Others come from within the system, having seen firsthand some gap between the professed objectives of lawmakers and the practical, everyday effect of their work. From both sides come people wondering whether the law can be used to bring about a significant degree of social progress, a real increase in social justice, a decrease in tyranny.

The movement toward a sociological approach to law began with the crisis of industrialization in the nineteenth century. Out of the turmoil of urbanization, industrialization, and the collapse of older social orders came a small but prolific series of observers who tried to make sense of the momentous changes taking place. Men like Karl Marx, Georg Simmel, Max Weber, Alexis de Tocqueville, Sir Henry Maine, and Émile Durkheim looked carefully at law as one of several institutions which they needed to understand if they were to explain what the old order had been, why and how it was changing, and what the new order was likely to be. To them, modern law, like the steam engine, the factory, and the industrial city, was both symbolic of, and a vital element in, modern society.

Among early social scientists, then, law occupied a spot at the center of their concerns. Among legal scholars of that period, there was considerably less interest in the problems of the "real world." Their research and debate was primarily concerned with ensuring that all laws were logical, consistent with each other, and "sensible" from the narrow perspective of the elite which ran the legal profession. Their concern with the philosophical rigor of legal reasoning is sometimes called *legal formalism*.

However, the growing influence of social science began to make itself felt even within the insular circles of legal scholarship. One example came to be known as *sociological jurisprudence* (Pound, 1921, 1943). It was a critique of conventional legal scholarship on the grounds that good law could not be made without knowing the *social context* in which it was to operate. Advocates of this position argued that legal formalism, without sociological information, would produce distortions and social disruption, no matter how logical and integrated the laws might be with each other. They were aware of sociological evidence that industrial societies were changing rapidly, that major institutions such as the family, religion, politics, and the economy were experiencing crises which were destroying established standards and producing major new patterns of relationships. They argued that the law should be made into an instrument which could deal effectively with those new patterns.

Another group known as legal realists, took a different approach. To them, the major question was: "How are the laws actually being applied?" (Frank, 1950; Llewellyn, 1960, 1962; Holmes, 1968). Antitrust laws (in the United States) may be written with the tightest possible logic in order to curb "big-business" abuses. But how are they applied "realistically?" If lawyers and judges act in such a way that anti-trust laws are only invoked against union organizers, and their only effect is to break up unions, then the real law is antilabor rather than antibusiness. Similarly, if capital punishment is used only on black convicts, then the real law is biased even if the lawbooks say there must be no discrimination. Legal realism thus differed from sociological jurisprudence in that it focused on the implication of laws,

while sociological jurisprudence operated on the assumption that the *content* of laws could help improve social reality. Realists held that the content of laws was insignificant compared to the actual decisions made by enforcers and judges. To them, law could only be used to help society if reformers worked to improve the processes by which laws become "real" in the hands of legal administrators. Law, to them, would be of no use in dealing with the crises of industrialism unless the entire legal process could be understood.

Despite their differences, both sociological jurisprudence and legal realism represented a significant movement away from legal formalism toward a more practical approach to law. It was a start, from within the legal community, toward seeing legal issues as sociological questions demanding factual research. It was a constructive rejection of legal formalism's ostrichlike "head in the sand" attitude toward rapid social change and the imperfections of legal administration.

As these movements were developing among legal scholars, anthropologists were beginning to bring back from distant cultures the message that there are many other viable ways to organize law in society besides our lawyer, judge, and legislator system. Their broadening perspectives on the potential for legal variation fed into the thinking of legal realists, while legal realism stimulated anthropologists to abandon narrow Western notions about law. People began to see in these alternatives some hope that the "craziness" of twentieth-century social upheaval—world wars, drastic depressions, new and unpredictable political orders—might have some order in it which could be harnessed to the desire for reform and social progress.

Following a lull during and after the Second World War, the pace of legal sociology began to pick up. A new generation of both scholars and activists turned their eyes to law as both a source of social problems (for example, laws enforcing racial segregation or sexual inequality) and a resource for eliminating those problems. The Warren Supreme Court stirred up both controversy and research, with decisions aimed at (1) ending public school prayer and segregation, (2) insuring that police practices protect Constitutional rights to a fair and speedy trial, and (3) guaranteeing rights against self-incrimination, unreasonable searches, and unjustified imprisonment. Such decisions raised hopes for greater equality of opportunity among some and fears of greater chaos among others. Consequently, there arose a movement to see what effect all those "radical" court

At the same time, the nation's political climate encouraged policy analysis. Government in general was developing New Deal policies under such progressive names as "The New Frontier" and "The Great Society." ^{For the U.S.} Legislation created protection for the voting rights of blacks, increased welfare protection for the poor and aged, programs to cool off the overheated racial passions of the great cities, assistance for people paying medical bills, legal advice and counsel for poor people, and a host of other measures to eliminate serious social problems. Regulation of business and industry increased, as people looked to government to guarantee safe working conditions, clean air and water, safe travel, honest business prac-

tices, and other conditions for the good life. The Law was being treated as a major instrument for social change. With each such program, there was strong incentive among both proponents and opponents to evaluate its effectiveness. Some researchers were just curious. Others wanted to prove either the value or the futility of such programs.

But the process of researching these very practical, "realistic" questions repeatedly reinforced the conclusion that broader issues were involved, issues which had been raised by the earlier pioneers of social science but which needed new answers in view of new evidence and changed social realities. Hence while some still ask very particular problems, others have become involved in trying to understand how law as a social institution works. They want to know what legal systems in general accomplish, given that their official pronouncements often do not match the reality of their effects. From such questions, it is not a very large step to the more general question of why societies have legal systems, what conditions lead to the development of law in a society, and why societies differ so greatly in the ways they handle what we call "legal" questions.

NOTES AND QUESTIONS

Seidman & Payne and from

The excerpts from Chambliss and Seidman, Kidder all rest upon a perception of what we ought to study when we study the legal order.

1. How would you state that perception?

2. In what ways does that perception differ from the way most law students usually study the law?

3. In the usual perception, sociology of law constitutes an academic discipline appropriately studied in courses on Jurisprudence or Philosophy of Law. In light of these readings, can you support the claim that sociology of law constitutes a professional subject -- that is, that some lawyers have jobs which require them to know sociology of law in order properly to perform their duties. Do you agree? What roles do some lawyers play that require a knowledge of sociology of law?

4. Economic development concerns things like peasant productivity, systems of foreign exchange control, the processes of central banking, the system of enterprise organization, and so forth. Social development concerns matters like the appropriate role of women in the family, population control, and how to ensure that minority peoples get their fair share of national development. Political development includes such matters as the appropriate role of the Party, the relationship between elected and appointed officials, and desirable structures for decision-making institutions.

C. ON LAW AND DEVELOPMENT

Why ask lawyers to concern themselves with social issues like desegregation, economic issues like industrialization or agriculture, political issues like civil liberties and electoral regularity, social welfare issues like roads and water and education and health. That depends upon the actual role that lawyers and the law play in development.

B. LAW IN THE SERVICE OF DEVELOPMENT

How are lawyers and the law engaged with these troubles? The answer to that question defines our domain of study. We examine first, the function of law in development and, second the role of lawyers in that process.

[Seidman, State, Law and Development (1978)]

A. The Function of Law in Development

Modern social science conceives that each society is defined by the repetitive interactions between its members. Nigeria differs from the United States because its members interact differently than do Americans. To say that a society changes is to say that these repetitive interactions change. Social change can therefore be defined as a change in repetitive patterns of behaviour. Development is a form of social change.

Repetitive patterns of human behaviour are defined by norms, supported by sanctions, expressing how the members of society are expected to behave. State officials promulgate, communicate and sanction a few of these norms. I shall use the words 'law' and 'the legal order' interchangeably to mean all or any part of the normative system in which the State has a finger. It includes the rules themselves, and the processes by which they are promulgated, communicated or sanctioned by officials. D.J. Black similarly defines the law as 'governmental social control'.⁹

Law enters into the processes of development in two ways. First, today the state usually has the burden of trying purposely to induce social change. Only the state ordinarily has sufficient capacity, resources or legitimacy to undertake such a formidable task. Typically, the state tries to induce development by changing the rules defining repetitive patterns of behaviour, and by directing its officials to act in new ways — that is, by changing the legal order. Demands for development therefore appear as demands for new law: new rules of land tenure, marketing boards, planning machinery, electoral politics, educational institutions, monetary systems, taxation. The International Congress of Jurists in 1959 modified its definition of 'The Rule of Law'. That concept, they said, 'should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, political, educational and cultural conditions under which his legitimate aspirations and dignity may be realized'.¹⁰

Circumstances thrust this function of the legal order upon the governors. The patterns of behaviour that define society are in constant flux. Society ever changes. However little a government changes its law, vast upheavals inevitably erupt: wars, revolutions, famines, new philosophies, cash cropping, industrialization, foreign or domestic investment. The romantic vision of a never-changing tropical society — poor, to be sure, but in the unhurried idyll of its days blessedly free of future shock — is a lie. Since societies change even within the constraints of their legal order, a decision to induce new patterns of behaviour by changing the law is not, as is frequently thought, a decision to introduce change into an otherwise static world. Rather, it is an attempt to deflect existing processes of change into channels thought more desirable. To maintain existing law is a decision to accept whatever changes social processes themselves induce.

These changes become merely symbolic unless the law effectively changes behaviour. The nation-state today mainly determines the course of social change, rather than church, family or village. That reflects the great transformation from kin-oriented, village, agricultural subsistence communities into societies with a high degree of specialization and exchange. In such societies, the shoemaker must know not only that others will supply him with leather, but that some will keep a monetary system going, and others will create and maintain markets where he can purchase food and sell his shoes. 'Modernization requires a whole range of new, specialized roles. This can only succeed if the persons who occupy them mesh their activities with each other. This requires a high degree of co-ordination.'¹¹ Hence the long-term trend in Western Europe was 'toward the perfection of systems of obligations and their transformation from a network of individual relationships into obligations to the community.'¹² Law is the most available instrument to define, create, enforce and co-ordinate these obligations. In conditions of development, the problem posed for social control is not merely to restrain deviance from the old order and to restore the status quo ante, but to induce change. Most

non-governmental social control agencies are not designed as exchange mechanisms. They function to meliorate conflict. Law had significance for development not because law influences behavior significantly--in many, perhaps most cases its actual influence on behavior is peripheral--but because in spite of its manifest limitations it is government's most available instrument for accomplishing directed, purposeful change.

It is a common dirge the world around, however, that too frequently law fails to induce the prescribed behaviour. Development programmes remain on paper, plans die in parturition, policies remain unimplemented. Myrdal has denoted the consequences 'soft development'; that is,

a general lack of social discipline in underdeveloped countries, signified by many weaknesses: deficiencies in their legislation and, in particular, in law observance and enforcement; lack of obedience to rules and directives handed down to public officials on various levels; frequent collusion of these officials with powerful persons or groups of persons whose conduct they should regulate; and, at bottom, a general inclination of people in all strata to resist public controls and their implementation. Also within the concept of the soft state is corruption, a phenomenon which seems to be generally on the increase in underdeveloped countries.¹³

Africa's disastrous experience since Independence exemplifies the soft state. To explain the soft state is to discover the limits on law as a tool of social change in conditions of development.

B. *The Roles at the Interface of Means and Ends*

It is sometimes argued that all this does not concern lawyers. The content of law comes from policy-makers – politicians, Cabinet, Revolutionary Councils. While of course lawyers draft the rules relating to development, some (frequently lawyers) argue that they are mere scribes who translate programmes of others into the obscurantist language of the law. Similarly, some argue that the policy-makers have nothing to do with the law itself – that is the concern of the lawyers, civil servants, bureaucrats and other technicians who draft and implement the rules. So do we all: when asked what we do, we respond with only an idealized part of what we are *supposed* to do. 'It is as if a policeman were to describe his role by saying that he catches criminals; as if a businessman were to say, he makes soap; . . . a priest . . . [that] he celebrates mass; . . . a congressman, [that] he passes laws.'¹⁴ Separating 'technical' from 'policy' roles insulates both technicians and policy-makers from moral and political responsibility for their actions. 'To limit judgment solely to "autonomous" technical criteria is in effect not only to permit but to require men to be moral cretins in their technical roles.'¹⁵ To formulate 'policy' while disregarding implementation effectively assumes that the chosen ends will justify any means – a proposition no less morally cretinous.

Every government includes some actors whose roles place them at the interface between ends and means, between policy formulation and implementation. There are many actors at that interface, drafting legislation, structuring options, raising questions and reviewing drafts, as well as some who finally decide yea or nay. Their titles vary: Permanent Secretary, Ministerial Counsel, consultant, Civil Servant, Parliamentary Draftsman, Solicitor General, and so on. In every country that I know, some of those actors are lawyers.

Policy creeps interstitially into their drafts. Unless these lawyers and the other actors at the interface, fully understand the policy implications of their actions, the ultimate policy may be pragmatically and morally indefensible.

The history of Tanzania's Range Management and Development Act exemplifies the way decisions about the details of legislation affect the substance of policy. The Act created a programme to introduce a new way of life to the Masai, who drift with their herds across vast arid plains in northern Tanzania. It purported to transform their nomadic, cattle-centred economy and culture, organized in clan and family, into a society of permanent villages, producing cattle for the cash market. That programme was born out of a concern for conservation. The present revolutionary thrust of the statute came about mainly during its drafting. The continual exhaustion of the Masai ranges concerned the colonial rulers. The Ministry of Agriculture in independent Tanzania inherited the problem. Typically the initiative for the new legislation came not from the Cabinet, who in constitutional myth are the policy-makers, but from ministerial bureaucrats. A memorandum in 1963¹⁶ defined its objectives as a phased plan covering control over stock movements and members, the prevention of further indiscriminate and unprofitable land use, and the development of a selected area of Masailand. The authors suggested doing this by (1) dividing the district into zones based so far as possible on traditional Masai social patterns; (2) declaring the maximum number of stock that might use each zone; (3) branding or marking all stock with at least a zonal identification mark; and (4) prohibiting cultivation without permission. Legislation would create an Authority, charged with defining the various areas, branding stock, setting stock limits, and enforcement. In special Development Areas, the statute would establish an appropriate system of land tenure, control water supplies and determine the location of buildings, roads and other works. The plan would cover all Masailand, but intensive development would occur only in the Development Areas. An inter-ministerial Co-ordinating Committee received instructions to pursue the matter. Following the usual procedure, the Committee submitted the memorandum to the Law Officers. 'This is necessary to ensure, first, that the proposed legislation is in line with Government policy; second, whether the new activity can be undertaken administratively, without requiring new legislation; and last, to determine whether it is mere tidying up of existing legislation, or involves a change in policy.'¹⁷

I. 31

Obviously when a Law Officer decides whether a proposal is 'in line' with government policy, he must interpret that policy. Policy is usually vague. In many cases, the decision that a programme conforms to existing policy, itself defines the policy. In Tanzania, the Law Officers asked only two questions: whether the legislation would permit growing food crops (it would) and whether the proposed restraints on the movement of cattle followed Ministerial policy (it did). Even as early as 1963, the Government — or at least President Nyerere — had expressed a strong policy against class stratification,¹⁸ and a socialist rhetoric. The Law Officers did not mention any issues concerning those policies. The matter then went to a meeting of the Legislation Committee of the Cabinet, which requested a paper for Cabinet consideration, 'stating the policy which the Bill is to implement'.¹⁹ It took a year to shake that memorandum out of the Ministry.

In the meantime, however, Ministerial thinking about the proposed new legislation underwent re-examination. In the first place, the United States Agency for International Development agreed to supply technical assistance. Its report²⁰ developed a method of measuring the num-

ber of cattle using a range, equating one bull with two heifers or five goats, etc. It suggested that the Masai be organized into 'Ranching Associations Ltd', with whom the Government could deal and in whom title to land could be vested. This was the earliest mention of plans for the radical transformation of Masai society. Secondly, an intra-ministerial memorandum suggested that the legislation's emphasis shift from conservation to increased productivity. An essential object of the new legislation was to form new ranching organizations, probably co-operative in form, based upon the traditional Masai social unit, the extended family.

After a year, a cabinet paper emerged. The minute asking for it had required that it concern itself 'with principles, not with legislative detail'. The cabinet paper²¹ obliged. It returned to the earlier definition of the problem, that is, overstocking and poor animal husbandry. It did not discuss the broader issues of incorporating the Masai in the money economy. It viewed the proposed ranching corporations only as handy title-holders to the range, so that their members' cattle could be restricted to it. If a majority of family heads in a proposed range wished to join a corporation they could form one in which 'all the heads of families would be eligible to join subject to their limiting their herds to an *appropriate proportion* of the assessed capacity' [emphasis added].

The cabinet memorandum said nothing specific about the form of the Ranching Associations, nor about the formula for reducing the size of the permissible herd. These questions, however, were critical. Masai society today contains gross inequities. The family herd varies from two thousand or more down to a handful. The new 'Ranching Associations Ltd' might become mere forms through which traditional practices would continue and the existing wide disparities in cattle holding remain. They might instead move Masai society toward egalitarian producer co-operatives, increasingly involved in the money economy. On these issues, however, the cabinet paper was silent.

No one faced them until the bill's drafting. The drafting procedure, common in Anglophonic Africa, only crudely resembled British practice. In Britain, each department had its own solicitor, who reduced departmental policy into detailed Instructions for Parliamentary Counsel. The administrators of the department concerned scrutinized these before sending them to the draftsmen. The Treasury Centre for Administrative Studies in London even had a training programme, to train young administrators in the drafting process.²² In Africa, this detailed departmental consideration of the instructions usually did not occur. Instead, in Tanzania the very general cabinet memorandum went

directly to the Parliamentary draftsman.

I. 33

The draft Bill that emerged in Tanzania decided the form of the Ranching Associations, and the method for reducing the number of cattle. It endowed the Minister with power through subsidiary legislation to write the constitutions and by-laws of the Associations. By so doing, the Bill abdicated that decision to future Ministry officials. By stipulating a pro rata reduction of cattle, it continued existing Masai stratification, and reinforced individual ownership.²³

These decisions developed in the course of the drafting process. They did not come from politicians or 'policy-makers', but from 'mere technicians', concerned with 'legislative details'. These discretionary choices, however, in fact defined the central thrust of the programmes under the Act. The 1972 Development Plan proposed to establish some seventy-two of these ranching associations, thus profoundly and probably irrevocably changing the course of Masai society. If implemented these changes will follow a course plainly contrary to Tanzania's egalitarian and socialist orientation.

Conclusion

John Dewey distinguishes the 'end' of policy, and the 'end-in-view'. If I want to build a house, the house is the 'end'. The actual house plans are the 'end-in-view'. Until detailed plans are drawn, it is impossible to discern what concrete meaning to give to the word 'house'. In the same way, no one could define Tanzanian policy concerning the Masai until the detailed legislation and rules emerged which concretely defined that policy. It is immaterial whether the lawyers made these decisions on their own, or in conjunction with Ministry officials. The lawyer's specific contribution to any bill, of course, varies with circumstance. Bills that directly touch elite interests undoubtedly receive sharper scrutiny by politicians than do other bills. Zambia's Leadership Code, which cut very close to elite bone, endured four successive detailed amendments.²⁴ As time presses, so do the temptations to draftsmen to decide policy themselves, rather than referring back to the initiating Ministry. The more complex the legal issues, the more technical the legal jargon and the greater the draftsman's policy-making power.

Detailing specific rules is a complex process, in which many different people with different titles participate. Until these details emerge, however, it is impossible to specify the actual content of 'policy'. When lawyer or civil servant insists upon a sharp division between 'policy' and 'law', he ensures that nobody raises those crucial questions which are indispensable if the end-in-view is to be effective, and consistent

with broader perspectives.

I. 34

Lawyers in the developing world increasingly deal with 'the scope and formulation of policies . . . the exercise of legal powers constructively establishing or altering the relations between private legal parties inter se, between public authorities and private parties, between government and foreign investors, and the like'.²⁵ Such lawyers must understand the uses and limits of governmental power to influence the direction and intensity of social change, because they are involved in devising the appropriate structures of government and the state to induce the sorts of change denoted as developmental.

Scholars have not addressed these issues extensively. 'The view that government is an integral part of the social structure, but may have the capacity of altering it significantly, is not in the mainstream of social theory. The opposite view is more common: that the formal government and its actions are epiphenomena, the product of forces arising from the social and economic structure of society.'²⁶

'Mainstream' social science lags behind. Every government today perceives one of its functions to be the channelling of on-going change into desirable directions. The study of 'soft' development ought to lead to knowledge likely to improve that function. Such studies should lead to considering the proper uses for state power — that is, into the nature and meaning of development, and the interests it does and should serve. It is a study at once pragmatic and theoretical, specific and general, professional and academic. It aims at discovering the sorts of knowledge that professionals need at the interface between policy and implementation. Their tasks require them to understand the uses and limits of the legal order in initiating and regulating change. Instead of law being a brake on change, the actors at the interface invoke it as change's very engine. A brake specialist is not necessarily knowledgeable about engines.

The study of the legal order as the initiator of development, therefore, will lead us far from our usual ideas about law. This monograph focuses on how the legal order affects behaviour. As I have defined it, the legal order constitutes one side of the coin whose reverse is the state.²⁷ The study of the legal order in development requires that we examine how state power is

and how it ought to be organized to alleviate the twin horrors of poverty and oppression. Because that domain of study is relatively unploughed, conventional methodologies, perspectives and categories of legal or social science research frequently do not work well. I discuss these in Part II. In Part III, I begin developing some general propositions explaining why people respond as

as they do to rules of law. In Part IV, I discuss implementing, and Part V, law-making institutions. That is to say, in Parts II and III, I propose a paradigm how to go about studying law and development; in Parts IV and V, I attempt to use that paradigm to study the structure of the state in conditions of development in Africa.

Before we embark on that study, however, I must first examine two positions that deprecate its utility. One asserts that good law in one place is good law anyplace; the other asserts that good men (and not good institutions) make good government.

Notes

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NOTES AND QUESTIONS

1. These materials suggest that law constitutes a mode by which the government attempts to exercise control over social behaviour. That perception itself embodies a particular view of the role of government in society? How would you articulate that view?

2. What views of the world can you articulate that would deny that role to government?

3. When China announces that it proposes to introduce a whole legal system in support of the Reforms, which of these views is it adopting?