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READINGS IN LAW AND DEVELOPMENT
CHAPTER II
THE LAWS OF NON-TRANSFERABILITY OF LAW AND OF THE
REPRODUCTION OF INSTITUTIONS

INTRODUCTION

Every society faces social problems, and invokes the law to try to solve them. A social problem exists when some people behave in a way that other people define as undesirable. Everywhere, governments try to use the law, directly or indirectly, to change the undesirable behavior. How to go about using the law for that purpose.

Many people give one of two answers to that question. Some argue that one should search out some other jurisdiction that has faced the same difficulty, and copy its law. For example, China faces the problem, of underdevelopment -- that is, widespread poverty and powerlessness of its people. These people argue that China should copy the law of a developed country. Developed country laws served as the legal basis for to developed country prosperity. Those same laws can also serve as the basis for China's prosperity. In this view, the debate concerns the appropriate "model" to follow -- Taiwan? Japan? Hong Kong?

A second viewpoint argues that the law makes no difference. Good personnel, not good law, make good government. "Good personnel" means people with an appropriate ideology or morality, and appropriately skilled. The only question concerns choosing "good" people.

This Chapter addresses these notions of the appropriate legal response to social problems. As a case study we examine one response to China's central social problem, that is, underdevelopment. We first examine the viewpoint that urges that China ought to find a foreign "model" of a developed country whose law China should copy. These Readings argue that in fact, law transferred from one country to another will not (save accidentally) induce in its new home behaviour similar to that it induced in its original site. That we call The Law of Non-Transferability of Law. Second, we examine the notion that the law does not matter. Good personnel, not good law or good institutions, make good government. These Readings argue that that does not hold. Good government requires both good people and good institutions; and institutions, not people, determine which people bubble into positions of leadership. Unless law changes, institutions change accidentally, not intentionally. That we call the Law of the Reproduction of Institutions.
I.
THE LAW OF NON-TRANSFERABILITY OF LAW

A. THE PROBLEM STATED

"ON COPYING HONGKONG ECONOMIC REGULATIONS AND ITS MANAGEMENT SYSTEM INTO SHENZHEN"
A Report to the Commission on Structural Reform (1988)

INTRODUCTION

Pursuant to Deng Xiaoping's (China's 'senior statesman') dictum to "build several mainland Hong Kongs", and the tenor of Zhou Ziyang's [CPC General Secretary] comments on the proposal to copy Hong Kong economic regulations and management system into Shenzhen, we spent June 8 to June 15 in Shenzhen. It is our opinion that it is most important and feasible to copy the Hong Kong experience into Shenzhen.

In the past nine years, the Shenzhen Special Economic Zone [SEZ] has achieved great successes...

Deng Xiaoping's instruction to create several Hong Kongs indicates the proper direction for Shenzhen. Copying Hong Kong's economic regulations and management system: this is the key for Shenzhen to expand the open policy, deepen the reform and solve various problems and contradictions. It is also the necessary path to create in Shenzhen the first mainland Hong Kong, as well as to develop the reform and the open policy throughout the country, speed the building of the new commodity economy, strengthen the ability to participate in the international economy, realize the strategy of developing the coastal areas first and the plan for "one country, two systems", and ensure the stability and prosperity of Hong Kong.
Copying Hong Kong experience to create the first mainland Hong Kong in Shenzhen is feasible. First, Shenzhen borders on Hong Kong. It has the same language and similar customs, making exchange convenient and the relationship close. The Hong Kong and Shenzhen economies and cultures have grown very close in the past eight years. Second, Shenzhen's basic facilities have improved, its commodity economy has developed rapidly, it has begun to create a market system, its economy is approaching foreign standards, and Shenzhen's relationship with the international market gets closer and closer. Third, Shenzhen's cadres and masses are strongly committed to the reform and the open policy, they have open minds and have developed some ability to understand and to act pursuant to international practice. New model managers and businessmen have developed. Fourth, Shenzhen has studied Hong Kong's practice over the years. They are prepared to use the experience of capitalism to construct a "socialist Hong Kong".

A. THE MAJOR CONTENTS AND BASIC METHODS OF COPYING HONG KONG'S ECONOMIC REGULATIONS AND MANAGEMENT SYSTEM

1. On Copying Economic Laws and Regulations. [The memorandum described in very broad (and sometimes inaccurate) terms the existing legal structure of Hong Kong].

Based on the needs of the SEZ, we can presently consider copying the economic regulations in the following areas:

(1) Financial law, including financial organization, currency system, insurance system, etc.;

(2) The tax laws, including tax management and rules fo
every sort of tax;

(3) The law of business organization, including corporation and enterprise law and bankruptcy law;

(4) The law of contract, including agency law, the law of sales, the law of futures contracts, etc.;

(5) Real estate law, including land management law, landlord-tenant law, town planning, etc.;

(6) Negotiable instruments law, and the law of corporate securities;

(7) The Building Code;

(8) Customs law, including the law of foreign trade and foreign exchange control;

(9) Industrial relations law, workmen's compensation, the law giving to wages priority in bankruptcy, labour arbitration law, etc.;

(10) Traffic law, transportation law, the law of tourism, public utility law, agricultural law, fisheries law, etc.

2. On copying the system of governmental administration.

According to Shenzhen's actual situation, three points require attention:

(1) Following Hong Kong's experience, Shenzhen will make a complete change in its leadership system. This is to create a relatively centralized government in the SEZ, directly responsible to the central authority [in Beijing], that is, to practice the management responsibility by the chief of administration. . . .
[This the Report states will copy the British coloni.

government of Hong Kong].

Hong Kong's capitalism has important differences from Shenzhen's socialism. However, in essence, Hong Kong is a British special management area, with policies different from those adopted in the metropolitan territories. That Hong Kong lies far removed from the central British government, and faces an international free market economy, is quite similar to Shenzhen's circumstances. So we may use Hong Kong's experience as a guide to get rid of Shenzhen's present system thoroughly, establish a special zone government, responsible directly to the central commission and has its own legislative and administrative power. The People's Congress will not exist in the Shenzhen SEZ. The State Council will nominate the Chairman of the SEZ government, the Standing Committee of the NPC will approve him, and the President will appoint him. [No officials will be elected]. The special zone government will operate on the principle of the one man leadership system, in which the supreme administrative chief of the government is responsible directly to the Central Committee and the State Council. . . . As soon as possible, we should copy the Hong Kong Civil Service law to create in Shenzhen a public service.

[Shenzhen should copy Hong Kong's five principal systems of government]:

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(1). The policy making system (the most important system in Hong Kong): This is an intelligent and competent high-level policy-making system consisting of the governor-general, the Administrative Bureau, and the legislative drafting section.

(2). The consultative system: At present, the departments of the Hong Kong government have in all more than 370 committees, which form a large consultative network. For example, the main function of the administrative bureau is to provide an advisory service about policy-making to the Governor General. All the non-official representatives in this bureau are academics and leaders in finance, banking, industry and commerce, law, labour, and other circles in Hong Kong. The Governor-General must consult the Administrative Bureau on all important policies.

(3) The executive system:

(4) The supervisory system:

(5) The service system:

B. THE HONG KONG "POSITIVE NO INTERVENTION" POLICY

Hong Kong has for a long time followed classical, liberal economic policies, permitting the market to adjust the economy by its "invisible hand". This is called the "positive no intervention" policy, in which government does not intervene in the economy. This permits the market to adjust the economy without administrative intervention. The government simply sets the individual enterprises completely free, and does not intervene at all in the decisions of enterprise management about
managerial direction, content, labour policies, wages, prices and markets. All these issues the enterprises themselves decide. This policy includes the free port policy of free investment, free competition, free foreign exchange convertability and free import and export of goods and free entry and exit for citizens. The Hong Kong government only supplies basic installations, structures the investment environment, perfects the legal system, strengthens high-level manpower training, and handles international trade negotiations. It does not have an economic plan nor does it intervene in the capital market, nor does it favor or subsidize special businesses or professions. Only when the market functions inefficiently or the economy faces a crisis or in order to guarantee investor or labour benefits does the Hong Kong government take measures of economic intervention.

The Shenzhen SEZ should follow Hong Kong’s experience and institute "positive no intervention", putting into effect policies permitting free investment, free export or import of capital, free import or export of goods, freedom of entry or exit of persons, and basic exemptions from tariff. The government should change completely the policies of no separation between administration and enterprise and extreme administrative intervention. But because our country has a planned commodity economy, the SEZ must still fulfill the State Plan. Following the State Plan, Shenzhen will itself formulate an economic strategy for macroeconomic control of the market.

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Shenzhen's basic practice should pay attention to the following three points:

First, we should have clear ideas about transplanting law and administration.

We should liberate people's ideology with the spirit of transformation, boldly smashing the bonds of the traditional ideology and system. We may boldly import and transplant everything that will improve the SEZ's productivity, its commodity economy, and its exports, or will help in creating the commodity economy's new order. The emphasis lies in importing and transplanting Hong Kong's legal rules and administrative system. During that transplanting, however, we cannot simply copy Hong Kong's rules and institutions; we must relate them to Shenzhen's situation and reforms, and develop new ideas. Step by step, by comparative test, we should establish a legal system and an administrative system for a commodity economy with Chinese characteristics as well as in accord with international practice.

Second, we should have a clear purpose and a plan. Hong Kong spent nearly a hundred years in establishing its economic legal system and its administrative system. Its enacted laws on economic matters alone have two hundred chapters. By contrast, during the eight years from 1980, Shenzhen SEZ adopted only 23 economic laws (an average of three per year), enacted for it by the NPC, the State Council and the Provincial People's Congress. The Shenzhen Municipal Government also enacted 209 various specific policy regulations (26 per year), but they lack legal
effect. So we conceive that it will take the full eight years before Hong Kong returns to China to establish basic economic laws and regulations and an administrative system suitable for a new socialist commodity economic system connected to Hong Kong’s economy.

Third, we must strengthen the leadership and actively develop the work of importing and transplanting. Because this task involves a tremendous project in social engineering, with many aspects and requiring an enormous amount of very difficult work, leading to a transformation of the SEZ’s economic and administrative system, that will influence every aspect of the SEZ’s economy, we suggest that Shenzhen set up a small leadership group with special responsibility to supervise the transplanting. The Commission on State Reform will take part in guiding the work, and will liase with the Hong Kong agent of Xinhua News Agency to strive for their support and help.

C. PROBLEMS THAT THE CENTRAL GOVERNMENT MUST STUDY AND DECIDE

(1) Clarify the legal status of the Shenzhen SEZ. [In order to fulfil Comrade Deng Xiaoping’s strategic vision of several “mainland Hong Kongs”, Shenzhen should receive special power to legislate for itself, permitting it to change completely existing laws and regulations].

(2) Give the Shenzhen SEZ the power of complete self-government.

(3) Define direct leadership from the Center for Shenzhen: [Shenzhen must be freed of control by the Provincial Government].
The Shenzhen Investigation Group of the Commission on State Reform.

QUESTIONS

1. Critique this proposal.

2. What does experience teach about the consequences of copying the law of one place in another country? How does theory explain these consequences?

In this connection we have a remarkable body of experience to study. Britain copied Hong Kong law into all its African colonies. In the next section we examine the consequences of that transfer of law.

B. THE CONSEQUENCES OF COPYING ENGLISH LAW INTO AFRICA

The Hong Kong reception statute of 1865 "received" English law into Hong Kong. Copying that Ordinance in Africa likewise "received" English law into Africa. In effect, Hong Kong and Africa alike copied English law. In Africa, what consequences ensued?

1. The Reception

Upon asserting sovereignty over a new colony or dependent territory, the imperialist power had to decide what law to

1 The word "reception", however, seems somewhat inaccurate. The reception statutes in fact imposed English law on the dependent territories -- Hong Kong in 1865, and Africa in the succeeding decades.
introduce in order to govern its new dependency. In 1874, shortly after the British Privy Council provided for a Supreme Court for the Gold Coast (now called Ghana), that colony's principal legal officer requested that the Colonial officer supply him some textbooks and other legal materials so that he might draft a suitable statute defining the laws for the new court to apply. That Office responded by promulgating the Gold Coast reception statute. Copied from the Hong Kong ordinance of 1865, it provided that the courts of the Colony should apply the common law of England, the doctrines of equity and "statutes of general application" of England, reserving, however, to Africans rights they might have under customary law. That Gold Coast reception statute became the model for the reception statutes of all the other English African colonies.
Thus, by way of Hong Kong, did Africa "receive" English law. At that time, that body of law in England constituted the working rules for a capitalist economy. Contract law, property law, sales law, insurance law, corporation law, and a host of others: for England's economy, perhaps the most dynamic capitalist economy the world has every known, these provided the formal rules -- the law-in-the-books. By the 1960s (when the former British African colonies finally became independent), however, their economies did not resemble in the least either Britain or Hong Kong. Instead, those economies had emerged as colonial economies, like those described in Chapter III. Their hinterlands consisted mainly of old folk, women and children, scratching a bare subsistence with the most backward technologies. In their export enclaves great plantations and mines churned out raw materials for the factories and tea, cocoa and coffee for the dining rooms of the colonial powers. Banks, wholesale firms and great trading companies provided the services that made possible the trade between the colonies and the imperialist countries, and the channels through which poured the profits from the colonial enterprises into the pockets of the rich and powerful in England, France, Portugal and the United States. In the export enclave, white colonialists lived luxuriously, while, in the mines and plantations, migrant male labour, living in uni-sex hostels far from home and family, worked for some of the lowest wages in the world. How this came to pass constitutes the burden of the next sections.
2. THE LAW OF THE EXPORT ENCLAVE

Africa received a sharply truncated version of English law. In commercial matters, the English law applied constituted a form of commercial law that England itself discarded; and in any event, the colonial courts tended to apply it without much regard for particular local circumstances. The restrictions upon entrepreneurial activity emplièd by the Welfare state, rather than (as they did in England) bringing about at least a limited redistribution of wealth, had the consequence merely of maintaining the physical life of African employees. On the political side, the democratic elements of English law were equally absent. What law was received was applied with remarkable rigidity and judicial conservatism.

In the British African dependencies, two patterns of law emerged. In one (we take Kenya as archetype) the colonial rulers imposed laws that prescribed a corporatist, command economy. In the other, (we take Ghana, then the Gold Coast, as archetype) the British imposed laws consonant with laissez faire. We examine here the laws of the export enclave in those two dependencies.

A. KENYA

The highlands of Kenya were the locus of British colonialism in East Africa. During the long period of colonial control, political participation by Africans was effectively nil. The state systematically intervened into the economy with a series of overt steps to organize it in a way comfortable to settler interests.

First land, then labor, then the corporate organization of the economy were affected; the progression was toward ever-increasing direct intervention.
With respect to the land, the government by "administrative orders" reserved the Kenya Highlands -- some say the most beautiful land in the world -- for white settlers, evicting its former African inhabitants, permitting them to return only as agricultural labourers for the new, white settlers.

To scratch up a labour force, Kenya levied a tax upon every male inhabitant. To pay the tax required cash -- and that Africans could only acquire by working for the white settlers' plantations (in South Africa, Zambia and Zimbabwe, their mines). Not the market, but the imperatives of earning the tax served as a goad. The colonialists enacted additional laws that made wage labour a preferred alternative for many Africans. Unless an African worked at least three months in twelve for Europeans, a law made him liable for forced labour on roads and other works, almost entirely for the benefit of the European community. Many Africans preferred working for private European employers than on the roads. Exclusions of Africans from the fertile Highlands increased overcrowding in the African Reserves. By 1930, Africans had only enough land to produce 1471 calories a day per person--soldiers, by contrast, received 2,873 calories a day. The population density in the White Highlands was 16 people per square mile; in South Nyeri, an African Reserve, 542 per square mile. The State enacted a Employment of Servants Ordinance that made it a crime for a worker to leave working for his (white) employer before the end of his contract -- thus invoking the criminal law system to enforce what in most countries constitute
civil contracts of employment.

Finally, the government organized the economy so as to exclude a free market in most product lines. It did this by creating Industry Boards of settlers and officials to make rules for the industry -- tea, coffee, pig production, maize, and so forth. These Boards manipulated the markets for most crops so as to exclude Africans from the cash market, thus driving them to European employment, and, by allocating production quotas and eliminating price competition, to eliminate competition even among white producers.

All these systematic coercions of Africans resulted in an extremely low-cost wage force for colonial farms and enterprise. By 1938, the average European in Kenya received 612 shillings a month; the average African employee, 11.65 shilling a month. Average per capita income for Europeans in Kenya in 1962 was 400 pounds a year; for Africans, 14.9 pounds a year.
B. THE GOLD COAST

The situation in the nonsettler territories of West Africa and of Uganda superficially was completely different. There, for reasons that need not detain us, indigenous African production of cash crops for export flourished: cocoa in the Gold Coast; oil palm, cocoa, and groundnuts in Nigeria; cotton in Uganda. There were few economic pressures to allocate land to settler agriculture or to generate a labor force for settlers (except for some relatively small mining enterprises). How did the government respond to this situation? We trace, first, the history of the cocoa industry in the Gold Coast, and second, government response to the emergent problems of the industry.

THE COCOA INDUSTRY.

Cocoa seedlings first were imported into the Gold Coast in 1857.

The industry grew at an amazing rate, entirely on the initiative of African growers, with very little overt government help.

Marketing, however, was controlled by a handful of European factors. Almost the entire crop was purchased during the period after 1920 by only thirteen firms, of which four dominated the field: United Africa Company, a subsidiary of Unilever, one of England's greatest corporations; G.B. Ollivant, Ltd.; CFAO, a Swiss firm; and Cadbury and Frye, the great chocolate house.
These firms also served as importers of manufactures for the Gold Coast. Their activities touched every aspect of life in the cocoa belt: They financed crops, purchased and shipped the cocoa, and imported and sold manufactured goods to the farmers....

These firms from time to time entered upon agreements concerning the price to be paid to the farmers and a division of the market...

The producers found themselves at the mercy of the factors. Cocoa can be stored only in costly, atmospherically controlled warehouses, none of which existed on the Gold Coast. There were few buyers, and, during the various periods when a price-fixing agreement was in effect, producers were faced, in effect, by a single buyer. The farmers had two choices: Sell to the factors or let their cocoa rot.

The farmers responded at various times by attempts at boycott, banding together to refuse to sell to the buyers except at a stipulated price....

GOVERNMENT RESPONSE. The explicit, visible government response to all this economic activity was seemingly very little. Despite the serious difficulties engendered by the problem of land title, there was no legislation to solve the manifold problems. There were no programs for agricultural credit. Instead, the government simply permitted the large factors and local moneylenders to keep the peasant in their debt. There were only miniscule efforts at research or at agricultural extension. Serious cocoa tree diseases appeared, but nothing was done....

Almost the only affirmative governmental activity was the construction of a railroad from Kumasi, in the center of the main cocoa producing area, to an artificial port constructed in Takoradi. The government did not build feeder roads, however, to help farmers bring their cocoa to a collecting point.

Beyond these slight efforts, the state in the Gold Coast until the outbreak of World War II followed the model of the noninterventionist state. In 1930, when the cocoa farmers held up deliveries to the companies, Governor Slater refused to interfere....

The government took the same position at the time of the 1937 cocoa agreement and the subsequent hold-up by the farmers. Governor Sir Arnold Hodson again declined to do anything....
Although the government seemingly did not intervene, its strong hand nevertheless shaped the Gold Coast economy. The common law, the doctrines of equity, and the so-called statutes of general application were received in the Gold Coast in 1874. Together they comprised the "general" law of the country. Africans retained certain rights arising under customary law, most important, land rights, but their relationships with non-Africans were controlled by English law. Supporting that law were the familiar coercive institutions of modern government: prisons, army, and police.

The law defined the property rights of the various economic actors and their consequent power. As a result of those rights, farmers had certain powers to grow cocoa on their land and to sell it. The factors were protected in their property rights to critical storage yards, transport facilities, docks, warehouses, and shipping. It was these rights of ownership, protected by property and criminal law and enforced ultimately by courts, police, army, and prisons, which clothed the factors with the power to structure the very limited freedom of the cocoa producers: Sell to us, or do not sell at all.

These laws and a host of others were necessarily perceived by the economic actors in the Gold Coast as relatively fixed constraints on their decisions. No doubt they were "free" to bargain within these limitations, but the constraints, in fact, determined the relative power of the participants and preformed the range of decisions.

Consequences. The principal consequences of the way in which the market was constrained in West Africa can be defined in terms of power and price. Prior to the creation of the Cocoa Control Board during World War II, decision-making power about the cocoa industry was largely lodged with the great English firms. It was more or less equalized only momentarily when farmers organized their vast, disparate masses into unified action in 1937. The average per capita income in the Gold Coast, for all its "free market" form, was not significantly different from that of Kenya. In 1936-1937 the average per capita income for cocoa farmers was about £5/16 sh. per year (32, p. 653)—much less than a shilling per day. The profits of the cocoa industry, like the profits of Kenya industry, went not to the Africans who worked, but to the expatriate firms which bought and sold.
3. Conclusion

When the imperialists brought English law via Hong Kong to Africa, they imposed it on territories under the sway of a regime of customary law adapted to the then-existing social formations. English law defined a market economy. For a variety of reasons, the Kenyan and Ghanaian economies grew in different directions, each of them different from Hong Kong's. In Kenya, colonial law shaped a manipulated, highly interventionist, corporatist economy. In Ghana, by contrast, aggressive European trading companies took advantage of the English contract and property law in what superficially appeared as a non-interventionist, "free market" economy. In Kenya, customary law became the law of the labour reserve, where the women, children and old people stayed while the young males migrated to work for very low wages for white export enclave enterprise. In both cases, as in every former British African dependency, the reception of English law contributed to the impoverishment of the African population and the enrichment of the ruling classes in the imperialist power.

As we noted in Chapter III, after Independence the Africans produced not radical legal change, but rather legal stagnation. They mainly retained the laws they had at Independence. Hong Kong's reception statute still controls the main thrust of Hong Kong law. Kenya's and Ghana's reception statutes still dominate their legal landscapes.

In Hong Kong, the reception of English law led to a long period of commercial activity that in the 1950s and 1960s flowered into a prosperity that earned Hong Kong a leading place...
among Asia's four "little dragons" of development. In Africa, it led to poverty and degradation. The next section examines the explanations for this difference.

C. THE LAW OF NON-TRANSFERABILITY OF LAW

The reception of English law failed to reproduce in Africa the institutions that defined the economy and society of the law's original home.

Insofar as we measure success in a transplant by the way in which the operation of the transplant in its new home mirrors its operation in the home country, institutional transfers almost never work. Insofar as we measure legal transplants by the extent to which they induce institutions similar to those of the law's home country, legal transplants almost never work. An institution constitutes a repetitive pattern of behavior. To say that legal transplants rarely work says only that in their new environments legal transplants rarely induce the same patterns of behavior that they induced in their old ones.

In this respect, colonial English-speaking Africa's experience matched that of other times and places. Turkey copies French law. Ethiopia copies Swiss law. The French-speaking African colonies copied French law. Indonesia copied Dutch law. Universally, these laws in their new habitats failed to induce behaviour similar to that which they induced in their birthplaces. Here we attempt an explanation for that phenomenon. From that explanation, we derive not only a Law of Non-Transferability of Law, but (in Section D) its mirror image, the Law of Reproduction of Institutions.

The anthropologist Fredric Barth has suggested that "The most simple and general model [of man in society] is one of an aggregate of people exercising choice while influenced by certain constraints and incentives...Our central problem becomes what are the constraints and incentives that canalize choice." Patterns of social form - i.e. of the repetitive actions of people can't be explained through the assumption that they are "generated through processes of interaction and in their form reflect the constraints and incentives under which people act." (See Fig. 4-1)
Law affects the choices of individuals because it forms a part but only a part of those constraints and incentives. Each actor perceives the commands of the law as constraints or incentives which he must take into account, either because he believes that it is right and proper that he obey them or, like Holmes's 'bad man', he obeys the law only because of its threats. To each actor, 'the law appears as a factor which affects his decisions but over which he has no control'. The actor, however, also regards a legion of other, social, physical and subjective constraints and resources.

Most of the constraints and resources within which individuals choose, however, are of course not in function of the law. Custom, geography, history, technology and a host of other no-legal factors affect my behavior directly and indirectly by structuring the choice and thus channelling the behavior of others. These other, non-legal constraints and resources are the reason for the failure of legal transplants. It is as though the hikers were making their way through forests, each with thickly set underbrush, rocks, swamps, streams, lakes and ravines, and also glades of soft grass, flat places with easy walking, and frequently a well-defined path. The course that each takes through the woods results from his constantly choosing the easiest way to go. Were a forester to transport some of the trees from one forest into the other, the path taken by the hiker in that forest might change somewhat, even radically, to avoid the new trees. It could never, however, resemble the path in that other forest from which the trees were transplanted. The rocks, swamps, streams, and other determinants of the hikers' routes are too different.

So with the transplantation of law. In acting, individuals take
some account of the constraints and incentives offered by the law. They also take into account a host of non-legal factors. A particular law in two places with different social, political, economic and other circumstances can therefore only by coincidence induce similar behavior in both places.

English law failed to recreate in Africa anything resembling English society and the English economy because of the vast difference between all the other no-legal institutions of England and of Africa. English law's principal economic institution was contract. Contract law assumes that each actor seeks his individual advantage. Nineteenth-century English society as a whole embodied such constraints and resources that its entrepreneurs made choices that produced history's most rapid economic development. In Africa, British entrepreneurs faced quite different institutions, posing a different set of constraints and rewards. When England was undergoing development, the local English market offered the greatest rewards for the entrepreneur. When Africa was being developed, England, not the local, African market, offered the greatest rewards. The export-oriented, dual economies of tropical Africa resulted from the English entrepreneurs seizing that advantage.

To summarize:

1. Laws are addressed to addressees (here called 'role-occupants-'), prescribing their behavior.
2. How a role-occupant acts in response to rules of law is a function not only of their prescriptions but also of his physical environment and of the complex of social, political, economic and other institutions within which he makes his choices about how to behave.
3. The physical and institutional environments of different sets of role-occupants differ from time to time and place to place.
4. Therefore, the activity induced by rules of law is usually specific to time and place.
5. Therefore, the same rules of law and their sanctions in different times and places, with different physical and institutional environments will not induce the same behavior in role occupants in different times and places.
This we denote the Law of Non-Transferability of Law.

NOTES AND QUESTIONS?

1. Review your critique of the memorandum recommending that Shenzhen copy Hong Kong law.

2. The dominant 19th Century capitalist school of jurisprudence, analytical positivism, held that law constituted the "command" of the sovereign. Lawyers found that "command" between the covers of lawbooks. For them, the behavioural consequences of the law became irrelevant. Their only task became to apply the sovereign's command. Does the prevalence to this day of analytical positivism among lawyers help explain why some lawyers advocate copying law from one place to another?

3. To explain the failure of transplanted law in Turkey, English-speaking Africa, French-speaking Africa, the Indonesia and Ethiopia from making the societies of the recipient countries much like the home countries of whose law they copied, what data would you think relevant to examine?

4. Can you construct a theory to justify copying law from one country to another? What data would you think relevant to warrant such a theory?

5. What is the significance of Barth's model for the possibility of copying law from one country to another?
d. SHENZHEN AND HONGKONG REVISTED
ON THE PROPOSAL FOR SHENZHEN TO COPY HONG KONG LAW
Ann Seidman and Robert B. Seidman

What are the likely consequences of the Research Group's recommendation that Shenzhen should copy large segments of Hong Kong law and Hong Kong administrative structures? That proposal?

We argue that: (1) the question of adopting Hong Kong law does not raise merely technical issues concerning the sort of law to adopt, but far-reaching value-choices concerning the future political economy of Shenzhen; (2) world-wide experience with copying law from one place into another demonstrates that, because the behaviour that law induces is highly time-and-place specific, a transplanted law usually does not succeed in reproducing in its new home the behaviour it induced in its place of origin, (The "Law of Non-Transferability of Law"); (3) Shenzhen and Hong Kong have such different institutions and histories that it seems unlikely that Hong Kong economic or administrative law will produce the same behaviour in Shenzhen that it produces in Hong Kong; (4) copying Hong Kong law into Shenzhen as a practical matter seems impossible; and (5) the likely political and economic consequences of the proposal seem potentially disastrous for China, especially in light of the expected sharp decline in the world economy. Finally, (6) we discuss briefly the methodology used in the Report.

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I. ADOPTING HONG KONG LAW AND THE GRAND STRATEGY OF DEVELOPMENT

The memorandum of the Shenzhen Research Group treats the adoption of Hong Kong law as though it concerned a technical matter only. Here we argue that this does not involve a simple technical question of the form of law, but the general strategy of development for Shezhen (Socialism or capitalism? Democracy or autocracy?); and, second, the sort of class structure that will emerge under these laws.

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A. THEORY; LAW, BEHAVIOUR, INSTITUTIONS AND SOCIETY

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2. Behaviour and Institutions. Law affects behaviour. Because law states its prescriptions in general terms, it affects more than individual acts. It induces repetitive patterns of behaviour.

By definition, a repetitive pattern of behaviour constitutes an institution. A marble building with a polished brass plate on the door does not make a bank. A bank consists of the repetitive patterns of behaviour of the people involved with it -- the managing director, the vice presidents, the tellers, the secretaries, the clerks, the sweepers, the guards, the customers. Because all these people behave in relatively consistent and repetitive ways, we can define the collectivity they comprise as a bank. Repetitive patterns of behaviour constitute an institution.

3. Institutions and Society. Institutions constitute
society. A rural society differs from an urban one because the repetitive patterns of farmers' behaviour differ from the repetitive patterns of urban dwellers' behaviour. The institutions of rural and urban life differ -- and hence the societies differ.

The difference between socialist and capitalist institutions define the differences between socialist and capitalist societies. The differences between democratic and authoritarian institutions define the differences between democratic and authoritarian societies.

If a socialist country proposes to copy a single law from another country, in most cases whether the law originates in a capitalist or a socialist system will by itself hardly determine whether the host country becomes capitalist or socialist in character. China's Patent Law is drawn from capitalist models; that of itself will not turn China into a capitalist state. When Shenzhen proposes to copy Hong Kong law on the scale proposed in the Shezhen Research Group's memorandum, however, the resulting laws may have so massive an effect on Shenzhen's institutions as to raise serious questions about what sort of a society will emerge.

B. HONG KONG'S LAWS: CAPITALIST AND AUTHORITARIAN

Hong Kong's laws define a capitalist, authoritarian, non-democratic, colonial city-state. If adopted by Shenzhen, they will likely create a capitalist, non-democratic colonial city-state, just as Hong Kong is today. We consider, first, economic
and, second, political aspects.

1. Economic Consequences. Hong Kong's laws plainly define a capitalist society. The purpose of adopting them consists largely in attracting foreign finance capital to settle in Shenzhen, as in the past it has settled in Hong Kong. Capital will come to Shenzhen only if it can operate there in a way that gives it command over its own movements, without government controls—that is, in a basically capitalist economic environment. That requires a variety of economic institutions: banks, free trade, free foreign exchange, private property, and so forth. The Draft Hong Kong Basic Law demonstrates this point. It states the underlying post-1997 economic strategy that the Hong Kong government shall adopt:

"Article 108. The Government of Hong Kong shall create an appropriate economic and social and legal environment for the maintenance of the status of Hong Kong as an international financial centre."

It goes on to identify specifically a number of economic institutions. Presumably these seemed so important to create the desired economic environment, that they merited mention in the Basic Law:

1. The capitalist system to remain in Hong Kong for fifty years (Articles 5).
2. Right to private property to be protected (Article 6, 104).
4. Free exchange of foreign currency (Article 111).

5. Free flows of capital within, into and out of the Region. Article 111.

The Basic Law therefore specifically provides that the present law of Hong Kong shall remain as the basic law of the territory. Article 18. The same laws applied in Shezhen will necessarily define a capitalist, not a socialist commodity society -- although the exact contours of that capitalist society may hardly resemble those of Hong Kong.

The Chinese Reforms aimed at creating a socialist commodity economy. Copying Hong Kong law to the extent suggested may create a commodity society; it will likely have no socialist characteristics.

2. Political Consequences. The Shenzhen Research Group proposes to copy not only the economic laws of Hong Kong, but also its political structure. That colonial structure had few elements of representative democracy. Instead, Hong Kong had an authoritarian Governor appointed by London, who ruled by a system of regular consultation of various "interests" in the Colony. In those consultations, the representatives of the capitalist class had overwhelming weight. It constituted a system of what some have called corporate governance. Nobody ever accused the British Empire of having a democratic component.

The authoritarian, corporate character of the Empire's-- and Hong Kong's -- system of governance resembled the governments of fascist Italy, Nazi Germany, and Imperial Japan. It is that
system of government that Shezhen proposes to copy when it proposes to copy Hong Kong administrative law. The Shenzhen Research Committee concedes this. It states that it proposes that Shezhen abolish the local People's Congress, and institute government by a Leader responsible directly to the Central Government, ruling by consultation with corporate bodies. In short, it abandons democracy in favour of dictatorship.

C. INSTITUTIONS, LAW AND CLASS POWER

Hong Kong's laws define a capitalist and authoritarian society. In a capitalist, authoritarian society, inevitably the capitalist class become the ruling class; like all ruling classes, it rules for its own benefit, not for the benefit of the masses. Experience in the rest of the Third World teaches that that new capitalist class will come mainly from the ranks of the cadre themselves -- a "bureaucratic bourgeoisie".

Class power exists because of institutions that form its instruments. A capitalist class has economic power because economic institutions give them power: Banks and corporations and property and contract and so forth. It has political power because the political institutions give the members of that class power to affect the careers of political figures, and special access to those political figures in the decision-making process: For example, election institutions, or the institutions for consultation before making governmental decisions.

Law, institutions and class power: These form a trinity, each dependent upon the other. Of course a ruling class in most
cases determines what laws the law-makers will enact: Class power determines the law. The contrary, however, is also true: The law defines class power.

History demonstrates that just as law can and does create new institutions, so law can and does create new classes. Before Independence in sub-Saharan Africa, practically no black capitalists existed. Now in every independent African country, such a class exists. They came into existence because the institutions of those countries created opportunities for strategically-located individuals to seize their opportunity to become capitalists. Banks, corporations, property, contract and political institutions: All of those institutions rested upon laws. The laws of sub-Saharan Africa in a real sense created its new ruling class.

Hong Kong’s economic laws define a capitalist economic system; its administrative laws define a corporatist government dominated by economic and professional elites. Copied into Shenzhen, those laws will inevitably create institutions that while different from the institutions those laws create in Hong Kong, will likely retain their capitalist and corporatist essence. Inevitably, however, given the introduction of Hong Kong economic and political law into Shenzhen, a new capitalist, ruling class must arise.

Who will constitute that class? As capitalist theory and myths tell us, will it consist of hard-driving, creative entrepreneurs whose risk-taking activity contributes to China’s
development? Or will it consist of those favorably positioned by office, steady income, and political power -- that is, the cadre -- by lawful and unlawful means to turn greed into money, without producing anything very useful to China's development? (Elsewhere in the Third World people call that the "bureaucratic bourgeoisie"). Whatever capitalism's myths, bitter Third World experience teaches that rule by a bureaucratic bourgeoisie leads ultimately to crisis, poverty and disaster. Whether Hong Kong law in Shenzhen will create a bureaucratic bourgeoisie (as similar laws have elsewhere in the Third World) calls for research on Hong Kong law and the Shenzhen reality.

Economic laws similar to Hong Kong's exist in many Third World cities: Lagos, Nigeria; Calcutta; Kampala, Uganda; Sao Paolo, Brazil. By practically every account (and in some cases our own experience), these cities constitute horror stories: Extremes of wealth and poverty, constant shortages amid plenty, glut and famine, uncontrolled inflation, theft and robbery rampant, a city dominated by elegant clubs and mansions for the rich, and favellas and cardboard slums for the poor, with a culture not of art and opera, but of pornography, brothels and massage parlors. Can the Shenzhen Research Group assure China that in Shenzhen's future lies Hong Kong, and not the more usual Third World urban horror story?

Hong Kong, some say, despite all this, remains a reasonably civilised place in which to live. Capitalism in the Hong Kong style, they say, has a benign face. There, they say, the
capitalist class consists of entrepreneurs, not a bureaucratic bourgeoisie, the working class is rich, happy and content, and it does not object to the lack of democracy. Why will that not happen in Shenzhen? To explicate that requires that we discuss the Law of Non-Transferability of Law.

II

THE LAW OF NON-TRANSFERABILITY OF LAW IN SHENZHEN

World-wide, legal transplants have occurred with remarkable frequency. Here we examine these experiences very briefly, and suggest a theoretical explanation for their relative lack of success. That explanation we denote the Law of Non-Transferability of Law.

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The Law of Non-transferability of Law does not tell us that copying Hong Kong law cannot reproduce the same economic behaviour in Shenzhen that it does in Hong Kong. It does tell us that in principle Hong Kong laws will only accidentally reproduce in Shenzhen the same economic behaviour as they produced in Hong Kong, unless the economic environment of the one bears a close resemblance to the other. It therefore instructs us to look very hard at the relevant non-legal constraints and resources in Hong

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1 Whether this constitutes a true picture of Hong Kong itself calls for research. See, e.g. the Far Eastern Economic Review, 4 May, 1989 (Hong Kong construction industry pays very low wages for seven-day-a-week, no-vacation jobs without medical insurance or other fringe benefits).

2 See Seidman. The State, Law and Development (1978), Chapter II ("The Law of Non-Transferability of Law")
Kong and Shenzhen, to determine if enough similarities exist to make it likely that in the face of the same law in Shenzhen as in Hong Kong, economic actors will make the same choices. Our theory (like all theory) constitutes only an agenda for research, not an answer to a problem.

III
A COMPARISON OF THE SOCIAL, POLITICAL AND ECONOMIC CONSTRAINTS AND RESOURCES OF HONG KONG AND SHENZHEN

We reiterate that, like the Shenzhen Research Group, we have not made the relevant empirical investigations in either Hong Kong or Shenzhen. We suggest here not answers, but more research. What specific areas ought we examine?

The Law of Non-Transferability of Law teaches that unless the non-legal environment of the host country resembles in relevant respects the non-legal environment of the law's home country, the behaviour the law induces in its new environment will not resemble the behaviour it induced in its home environment. That raises the question, What constitutes the relevant characteristics of the two environments?

* * * *

The Shenzhen Research Group identifies four sets of reasons why Shenzhen is uniquely positioned to copy Hong Kong's laws. That catalogue touches a few matters that ought to concern a researcher investigating the probable consequences of transplanting Hong Kong law to Shenzhen, but it also omits a great many. Here we suggest a few differences in the environments of the two places that seem to us to indicate the need for
further research: (A) the consequences of history in general; (B) economic institutions, and (C) legal institutions.

A. THE CONSEQUENCES OF HISTORY

Societies do not spring into being fully developed. Hong Kong's development depended upon the specific, unique, historically-determined set of constraints and resources within which Hong Kong's economic and political actors acted. We consider first its economic history.

During the nineteenth and first part of the Twentieth Century, Hong Kong served British and American capital as a launching-pad for the exploitation of China. Since World War II, Hong Kong benefitted from massive U.S. expenditures in the Korean and the Vietnam wars. It developed as a center for international finance because of the large profits that accumulated there as the consequences of this history.

The development of its export trade also depended upon a fortuitous history. In the 1950s and 1960s, world trade expanded at about 8% per year. Hong Kong at that time had a favorable location and the capital to take advantage of that trade. Today, world trade is expanding at less than 3% a year. 

Unlike the economic environment within which Hong Kong developed, Shenzhen's environment now includes Hong Kong. Why should a finance house choose to leave Hong Kong for Shenzhen? Why should a new, developing finance house looking for an East

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Asian location choose Shenzhen and not Hong Kong, with its long developed financial institutions and favorable investment climate? Hong Kong developed when no competing site for an East Asian financial center existed. Shenzhen has not so favorable an opportunity.

History has also shaped Hong Kong’s political institutions. The Research Groups’ report makes some mistakes in interpreting Hong Kong’s political institutions :4:. In reality they constitute an authoritarian, colonial, corporatist government with no elements of democracy.

In general, authoritarian governments rule in favour of the rulers, not the ruled. British colonial governments everywhere existed for the benefit of the British imperialists, to make possible the exploitation of the colony and its people for the benefit of Britain.

Different imperialisms, however, rule with different bases for legitimacy. The British Colonial Service followed in the tradition of the British Civil Service. The British Civil Service developed in the 19th Century as the central weapon in the middle-class assault on corruption in British government. It built upon employing members of the upper- and upper-middle

4 Particularly, it misunderstands the nature of the Crown in British constitutional law. The Governor was, of course, the servant of the Crown, but only in a highly technical sense. He was actually an officer of the British government. The British Prime Minister, not the Empress, in fact was his superior. Moreover, the British Constitution is not a written constitution. It operates by a vast number of unwritten conventions. These unwritten conventions the Shenzhen Research group seems to have missed altogether.
class, educated in the British Public School (which of course are not "public" at all, but despite their names, very elite, very restricted and very expensive private schools), and (until recently), in the two elite British universities, Oxford and Cambridge. The leading scholar of the Colonial Service has written that everyone in the Colonial Service came from the same class and cultural background. For the new recruit, "there would be no jarring surprises in learning what one was expected to do. One's superiors from the Governor down to the DC [District Commissioner] were all alike, like oneself, products of the same system... Few written rules were necessary... The level of consensus among officials was an essential ingredient of stability in the colonies..." 5

Shenzhen cannot copy those all-important "unwritten rules", precisely because they are unwritten. Without those unwritten rules, however, the Hong Kong system of governance becomes sheer, unbridled authoritarianism, under which nobody would choose to live. 6

Shenzhen may copy Hong Kong's laws, but it cannot copy the historical circumstances that led to Hong Kong becoming Hong


6 See Far East Economic Review, 20 April, 1989 p. 24 ("...there are many outdated and some draconian laws on Hong Kong's statute books. ...Some of Hong Kong's existing laws give wide powers to the police and other law enforcement agencies. ...There are also legal restraints on the freedom of association, of assembly, on TV broadcasting, on filming and on the freedom to teach political subjects in schools.")
B. ECONOMIC INSTITUTIONS

The Research Group obviously hopes that by enacting Hong Kong law, a whole tribe of international financiers will choose to operate out of Shenzhen, not Hong Kong or Singapore or elsewhere -- that is what it must mean when hopes that Shenzhen will become a "mainland Hong Kong". As the Basic Law of Hong Kong suggests, however, Hong Kong's success as a financial center depends not only on its laws, but the existence of a separate, fully convertible currency (Articles 109, 110, 111). Without that, the financiers that Shenzhen so much wants to attract will not have the capacity to act as they do in Hong Kong. Without that, they will never settle in Shenzhen. Does China seriously propose to permit Shenzhen to create its own currency?

Second, the great financial centers of the world -- New York, London, Paris, Singapore, Zurich, Tokyo, Hong Kong -- have over the decades and indeed the centuries developed institutionalized channels for doing business that defy easy penetration by outsiders. What channels of international financial dealings does Shenzhen offer new financiers?

A final example: Industrialists require a cheap and docile labour force, willing to work (as Hong Kong workers do) for a very long work week and for long hours, without holidays, and kept under control by State power. Can -- and should -- a "socialist Hong Kong" located in Shenzhen offer that to industrialists?
Research ought to examine these (and many more analogous issues), and seek to discover what relevant institutions really do determine the behaviour of the several actors in Hong Kong's economy. It ought to investigate, whether those institutions also exist in Shenzhen. Unless they do, even if Shenzhen copies Hong Kong law, the behaviour of the relevant economic actors in Shenzhen's "socialist Hong Kong" cannot be expected to resemble their Hong Kong counterparts. The same applies to the legal institutions that underpin Hong Kong law.

C. LEGAL INSTITUTIONS.

A legal system consists of more than the rules of law alone. It includes a whole set of people -- lawyers, judges, bureaucrats, legislators, politicians, and law-makers -- engaged in the processes of implementing and making the law. Can Shenzhen import not only the rules, but the implementing and law-making institutions as well? We have already considered the question of the bureaucracy; here we consider the question of the courts.

Hong Kong law rests upon the British common law. That legal system includes a variety of law-making and law-implementing institutions, especially the courts. Those courts work in ways very different from Chinese courts. They involve not only different institutional structures, but completely different ways of thinking about law than presently exist in Chinese legal culture. (Even Hong Kong must frequently go outside the island to find its judges -- a practice guaranteed in the Basic law, Article 91). Ought Shenzhen transform its courts to resemble
British common law courts? And if so, how should Shenzhen go about that task? How will it get common law-trained lawyers and judges? What language will they speak? The common law rests upon about 5000 --we repeat, 5000 -- volumes of British case law, plus additional thousands from other common law jurisdictions (in the United States alone, perhaps 20,000 volumes of cases). Common law, as all the world knows, is a case law. Without these thousands and thousands of cases, the common law has no meaning. If Shenzhen "copies" Hong Kong law without copying the cases, it does not really copy Hong Kong law. Should Shenzhen translate all these volumes of cases into Chinese?

Without having done any specific research in Shenzhen, one can nevertheless assert that it seems probable that many of the historically-shaped institutions that make Hong Kong what it is do not exist in Shenzhen, and seem beyond Shenzhen's power to duplicate.

IV. PRACTICAL DIFFICULTIES

The Shezhen Research Group has not addressed the practical difficulties of copying Hong Kong law into Shenzhen. Here we merely advert briefly to some of these, indicating the amount of research required before attempting that task. Some we have already mentioned; these we merely list.

1. Translating the statutory law itself.
2. Translating thousands of volumes of case law.
3. Creating and training a civil service that understands and follows the unwritten rules that made the British Colonial
Service operate effectively.

4. Creating a new currency, and a means of regulating its supply.

5. Creating the many institutions necessary to make a banking system function as a world international financial center (for example, developing the informal channels required to deal in international currency, to put together consortia of international banks to underwrite loans, and so forth).

6. Developing sufficient lawyers, accountants, business experts and other high-level manpower necessary to operate a developed financial center.

7. The Hong Kong government operates at a relatively low level of corruption. Without that low level of corruption, however, Shenzhen can never really hope to become an international financial center. In Hong Kong, that relatively low level of corruption results in large part not from the formal rules of law or the institutions that guard against corruption, but from the intangible but real ethos and spirit of the Civil Service. How does Shenzhen propose to develop that esprit?

8. Hong Kong developed its export trade when world trade was expanding at 8% per year. It now is expanding at 3% per year. How does Shenzhen propose to become a new "mainland Hong Kong" in this very different economic climate?

9. As the Shenzhen Research Group itself states, Hong Kong has developed by a completely open market in which government refrains from interfering in economic decisions. The Research
Group, however, proposes that while maintaining a free market, Shenzhen will nevertheless meet its obligations under China's economic plans. These seem inconsistent proposals. To meet the Plan will require governmental interferences in economic decisions. How does Shenzhen propose to resolve that contradiction?

We could continue at length, but perhaps we have suggested enough problems that require further research. We turn now to the probable economic consequences of the proposal.

V

ECONOMIC CONSEQUENCES

As we have seen, copying the bulk of Hong Kong laws into Shenzhen means introducing a capitalist system there. Drawing on Third World experiences as documented by the Symposium on Strategies for Third World Development, held by CAFIU in Beijing, April 18-22, 1989, this brief commentary will deal with the likely internal and external economic impact of such a strategy.

A. INTERNAL ECONOMIC IMPACT

Capitalist law turns over to capitalists the major power for deciding about economic affairs. Capitalist property law permits the capitalist to make decisions about the use of capital, where to build factories, what to manufacture, what technology to use, what rates to pay the workers, etc. In most of the rest of the Third World, turning over to private firms (including transnational corporate affiliates and banks) the critical decisions relating to investment, accumulation and
reinvestment has led to a variety of negative consequences. It has aggravated those countries' internal dualism, and accelerated unequal geographic growth and income distribution. Private investors, seeking the most profitable investments, have invested in production of luxury and semi-luxury goods in coastal areas (eg., hotels, speculative real estate, expensive consumer durables and electronic gadgets). They have diverted investable surplus away from critical sectors like energy, transportation, and raw materials produced in the less developed hinterlands for domestic use. As the private sector's unplanned investments expanded, growing shortages of raw materials and energy fostered greater speculation and inflationary tendencies. The relatively import-dependent, capital intensive nature of these investments, however, did little to provide increasingly productive employment opportunities for the growing numbers of rural people migrating to the cities to escape the still impoverished hinterlands; and mounting unemployment aggravated urban social tensions. Efforts to induce private investment in a more satisfactory pattern through tax credits reduced government revenues, desperately needed for social infrastructure, particularly improved educational facilities; but they contributed little to offset the attraction of these kinds of short-run more profitable investments opportunities.

This Third World experience suggests that China as a whole ought not adopt free-market capitalist solutions to its economic
careful empirical study of their likely consequences. Unless shown to be irrelevant to China, Third World experience warns against that course.

What will constitute the likely consequences for China if Shenzhen uniquely develops a capitalist economy, so that it becomes a small enclave of capitalism on China's southern coast? Two possibilities exist. If in 1997 Shenzhen were in effect to secede from China and simply become part of what will then become the Hong Kong Special Administrative Region, the net effect probably would not constitute more of a problem for China than Hong Kong will become in the years ahead. Under the terms of the draft Basic Law of Hong Kong, Hong Kong becomes in effect a colony of China, ruled by officials sent from Beijing, but with its own separate currency, legal and economic system, etc. In that case, it would contribute to the central government no more than Hong Kong will after 1997. Shenzhen could, of course, join it in that largely independent status. If it does so, however, whatever prosperity Shenzhen has acquired will never serve to help the rest of China. For example, it would not have to pay taxes to the central government, cf. Hong Kong Basic Law, Article 105, or contribute to the economic plan, Hong Kong Basic Law, Article 104. That would make a mockery of the slogan that "some must get rich now so that others can get rich later".

Shenzhen would simply separate itself from China, and go its separate way in tandem with Hong Kong. That may be in the interests of Shenzhen, but hardly in the interests of the rest of
China.

A second possibility exists. Shenzhen could adopt Hong Kong law, but remain in all other respects a Special Economic Zone within China. What results might flow from that arrangement? We discuss five potential adverse consequences.

First, Third World experience teaches that such an enclave will not likely help the inland regions to find additional job opportunities or hasten the processes of their development. Instead, they will likely remain poor suppliers of raw materials extracted from fields, forests and mines, and of cheap migrant labour for the export enclave in Shenzhen. In the Third World, "trickle down" has practically never worked.

Second, as the Hong Kong Basic Law makes clear, complete convertability of currency constitutes an essential aspect of the "Hong Kong system". By enacting Hong Kong law for Shenzhen, China will formally endow Shenzhen with power to do whatever seems most profitable with foreign exchange. Usually, the most profitable use of foreign exchange consists of the importation not of required food, spare parts, and technology, but luxury consumer goodies -- cars, electronic playthings, cameras, jewelry. None of those will advance China's economic development; it will only deepen, not the Reforms, but the inflation and distorted development.

Third, the essence of the economic law that Shenzhen proposes to import consists of governmental non-interference. To import Hong Kong law into Shenzhen means that China will
effectively lose all economic controls over the Shenzhen economy -- indeed, even Shenzhen's government proposes to abandon practically all control. Has not China yet discovered the disaster that lurks in abandoning control over the economy in favour of a non-existent free market?

Fourth, As the Hong Kong Basic Law makes clear, low taxation constitutes an essential aspect of "the Hong Kong story". Adopting Hong Kong law in Shenzhen will necessarily insulate Shenzhen from paying taxes to the center.

Finally, if Third World experience holds, instead of the industries necessary to further China's development of a socialist commodity system, a free market Shenzhen will more likely develop the speculative real estate and import trade in luxury goodies that we have mentioned.

B. EXTERNAL ECONOMIC IMPACT

Introduction of Hong Kong law in Shenzhen will likely eliminate legal protections against transnational corporate penetration of China's markets. Transnational corporate industries and banks are not charitable institutions. Seeking to maximize their profits, they have everywhere taken advantage of Hong Kong-type laws to secure access to markets, raw materials and very low cost labor reserves. They used patent laws and copyright law to restrict Third World countries' access to the technology that would facilitate effective competition against their own products at home and abroad. In the form of profits, interest, dividends, and licencing and management fees, they have
sent home as much of the investable surplus generated by their Third World business as host country law permitted. They have frequently evaded restrictive tax and foreign exchange legislation through transfer pricing that every year sent an additional 10 to 15% of the host country's foreign exchange earnings to their corporate headquarters.

To earn the foreign exchange needed to finance their increasingly import-dependent domestic investment and consumption pattern, coupled with the drain of investable surpluses by transnational corporations and banks, Third World countries all sought to expand their exports. Pursuing the conventional western wisdom that exports provide an engine for growth, practically all of them compete with each other -- a competition with many losers and only a tiny handful of winners: the "little dragons."

We have already mentioned the drop in the expansion of world trade from 8% in the 1960s when the "little dragons" began to flourish, to under 3% today. Factors contributing to this decline included substitution of synthetics and recycled materials for the crude materials that constitute a major share of Third World exports (including China's); introduction of labor-saving technological innovations in developed countries; a general slowdown of developed countries' economic growth accompanied by protectionist trends; and the Third World debt crisis that inevitably arose from export-oriented strategies of
previous decades.

At Beijing's Third World Symposium, Latin American and African participants stressed the disastrous consequences of Third World nations' competitive expansion of exports in the face of worsening terms of trade. Falling foreign exchange earnings reduced their capacity to pay for the imports on which their economies depended, and reduced government revenues. Their governments' resulting increased borrowing at home and abroad culminated in the financial crisis that has engulfed most of the Third World. Government domestic borrowing, combined with competitive currency devaluations in an effort to expand exports, aggravated inflationary pressures. Government austerity programs -- high interest rates, the layoff of government workers, and reduced social expenditures for health and education -- imposed the burden of the crisis on their countries' poor majorities. The Latin American and African participants at the Beijing Symposium reported substantial declines in living standards as average per capita incomes fell in some cases by as much as 15 to

7. That Asia seemed likely to experience similar difficulties was suggested by the United Nations Economic and Social Commission for Asia and the Pacific, Economic and Social Survey of Asia and the Pacific, 1987 (Bangkok, 1987). That report notes that, although the decline in net resource flows to developing countries tended to decelerate the rate of growth of their debt, the fall of the US dollar vis-à-vis other key currencies boosted the dollar value of non-dollar debt stocks. In 1985, only $32 billion of the increased developing countries' debt was due to increased new borrowing; the rest represented the "exchange rate effect." In 1986, that effect accounted for more than three fourths of the $95 billion total estimated increase of developing country debt. (p. 18) Competitive devaluation of Third World countries seeking to expand their exports in Third World countries, of course, has a similar "exchange rate effect."
20 percent.

Forecasts suggest that this prospect may well worsen, with negative consequences for export-strategies adopted in Asia. The United States, with its over-extended domestic and international debt, seems headed for a recession which will inevitably adversely impact world trade. An economist for the United States-based Futures Group explained, "The underlying growth rate in the economy is much below last year and the risks of a recession certainly are higher." The consensus of 50 analysts surveyed by the Blue Chip Economic Indicators newsletter projects 1989's growth rate at 2.7 percent, with a pace slipping to 1.2 percent by the fourth quarter. 8: The Asian Development Bank warns of a slowdown in economic growth among its members countries (now including China) due to downward trends in the developed countries' demand (especially the United States and Japan) for their manufactured goods and declining prices for non-oil products. 9:

The inadequacy of the Shenzhen Research Group's conclusions reflect upon the idealist, even romantic ends-means methodology upon which it rests. . . .

VI. METHODOLOGY

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SUMMARY AND CONCLUSION

The Shenzhen Research Group has proposed that Shenzhen copy Hong Kong law extensively. We argue to the contrary, for the following reasons:

1. Adopting Hong Kong law into Shenzhen raises not merely technical questions about the form of law, but value choices: socialist or capitalist economic system? Democratic or authoritarian political system? These in turn raise a further question: To adopt Hong Kong law in Shenzhen seems very likely to create there a new ruling class, a bureaucratic bourgeoisie.

2. A law copied in one place from another place will not likely induce the same sort of behaviour that it induced in its original home (the Law of Non-transferability of Law).

3. Shenzhen and Hong Kong have such different economic, legal and political histories and institutions that it seems unlikely that Shenzhen will reproduce the economic, legal and political institutions that make Hong Kong what it is.

4. As a practical matter, it seems impossible successfully to copy Hong Kong law into Shenzhen.

5. Especially in light of a probable world-wide recession in the near future, even if theoretically possible it does not seem likely that an export-oriented, capitalist economy in Shenzhen can ensure desired economic growth for itself, much less the rest of China.

In short, Third World experiences suggests that China's lawmakers should carefully examine the adverse consequences that
will likely ensue. Only if convinced by a thorough study of the facts that copying Hong Kong law into Shenzhen will lead to beneficent results should China ignore that Third World experience.

NOTES AND QUESTIONS

1. Debate the following proposition: "Shenzhen should copy Hong Kong economic law and administrative system".

2. Hainan, also an SEZ, also proposes to copy Hong Kong law. It has already adopted what the Study Group’s memorandum called the "positive no intervention" policy. Consider the following article. Does that article provide arguments for one side or the other in the debate suggested in the preceding question?
China's newest SEZ needs development funds

No treasure island

By Elizabeth Cheng in Haikou

A year after Hainan Island in South China became a province and special economic zone (SEZ), a little headway has been made on improving its infrastructure. But a lot more needs to be done to meet investor demands and cope with the many new problems.

Prices have doubled or even tripled — a foreign visitor pays almost twice as much to hire a car in Haikou as in Peking. Wages, though, have risen slowly — while urban per capita income is reported to have increased nearly 4%, real income after inflation declined 19%. The provincial government, too, is at a loss over how to deal with the thousands of jobseekers from other provinces who have been drawn to the island, lured by promises of job opportunities.

Not being able to find a job, many of these immigrants have turned to hawking on the streets of Haikou: as moneychangers, fruit sellers and cooked-food vendors. In the latest wave, more than 100,000 jobseekers are reported to have arrived since February, twice the number for all of last year. Vice-Governor Meng Qingping told the REVIEW that the government was swamped with more than 180,000 job applications last year — only 3,020 were hired. Without an effectively policed border, Meng said efforts to stem the flow were hopeless, though some are expelled with navy and army help.

Hainan's problems largely stem from inadequate funds and poor management. "Hainan has more than its fair share of cliques and factions," said a foreign businessman. "You have to deal with homegrown cadres, mainland cadres, cadres from the local minorities, power struggles between central government departments and local authorities and so on." Shenzhen, China's first SEZ next to Hongkong, had an easier time because it was originally a rural backwater without cadres and powerful vested interests, he added.

Making problems worse is Peking's indesirability of giving Hainan the flexibility it had been promised — an attitude that reflects in part the central government's lack of confidence in the local leadership. Although Hainan has many preferential policies to encourage its growth (REVIEW, 26 May '88), local businessmen say most remain on paper only. Moreover, Peking is even withdrawing some privileges already granted, such as Hainan's autonomy in car imports and instead fixed this year's vehicle imports for the province at below 1988 levels.

Foreign trade skyrocketed last year — up five-fold on 1987 figures — to a record US$770 million. Imports accounted for 63% of the trade, consisting largely of consumer goods — cars, TV sets and components, and refrigerators — machinery, fertiliser, timber and some rice, said Chen Yinghao, director-general of Hainan's Trade and Industries Department.

Chen admitted that 50% of last year's so-called exports were actually imports sold to the mainland mostly by subsidiaries of mainland companies in Hainan. These companies were also quick to take advantage of the island's special privileges, such as import and export flexibility and the right to retain all foreign-exchange earnings (which has been reduced to 80% since January).

Peking is particularly sensitive about speculation in cars and other consumer imports in Hainan because of the island's notorious reputation, gained in 1984-85 when speculators took advantage of the open policies to enrich themselves. A lot of last year's imports are believed to have been bought for speculation and now lie idle in warehouses as mainland customs tighten control over goods from Hainan.

Hainan desperately need funds for infrastructure development but the central government cannot supply substantial aid as it has done for other SEZs. The national austerity programme could not have come at a worse time, though Hainan is expected to escape the worst of retrenchment measures. For instance, though Hainan now has to surrender 20% of its foreign-exchange earnings to Peking as do other SEZs, Meng says that this can be circumvented. "The central government could be persuaded to offset this by increasing its contribution to our development fund," he said.

Peking last year invested more than US$13 million in Hainan's electricity genera-

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### Hainan trade and economic growth

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<tbody>
<tr>
<td>Gross industrial output (¥m)</td>
<td>697.4</td>
<td>751.5</td>
<td>860.2</td>
<td>1,110.0</td>
<td>1,457.0</td>
<td>1,548.0</td>
<td>1,924.0</td>
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<tr>
<td>Gross agricultural output (¥m)</td>
<td>1,363.0</td>
<td>1,754.0</td>
<td>1,876.0</td>
<td>2,184.0</td>
<td>2,222.0</td>
<td>2,457.0</td>
<td>2,638.0</td>
<td>2,950.0</td>
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<tr>
<td>Foreign trade (US$ million)</td>
<td>45.7</td>
<td>20.2</td>
<td>15.7</td>
<td>41.1</td>
<td>81.1</td>
<td>38.4</td>
<td>115.4</td>
<td>770.0</td>
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<tr>
<td>Foreign investment realised (US$ million)</td>
<td>1.0</td>
<td>0.8</td>
<td>4.3</td>
<td>17.6</td>
<td>26.4</td>
<td>2.5</td>
<td>8.9</td>
<td>114.2</td>
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*At 1980 constant prices

Source: State Statistics Bureau
tion, and generation capacity is nearly sufficient for the island’s present needs. Still, there are frequent blackouts outside Haikou because of inadequate supply lines and Haikou factories one day a week cannot take power from the main supply.

Red tape has also increased enormously since the island became a province. Y. F. Chan, the Hongkong manager of an electronics joint venture in Haikou, said that increasingly complicated customs procedures meant that it now takes much longer to clear through customs every consignment of components from Hongkong. His company has also run into unforeseen snags on a new factory. The application to obtain a land lease has been screened by various government departments, but he is unable to get the approval of the necessary vice-governor who is often out of town.

But transport is his biggest headache. Road transport from Hainan to Hongkong for trans-shipment of his products is the most economical — Haikou port is inefficient and unreliable, and airfreight is too expensive for regular use, he says. But Hainan is paying for its new autonomy. Chan bought a van but found to his dismay that Guangdong authorities refused to issue road permits to Hainan-registered vehicles, forcing Hainan traders to use the more expensive Guangdong transport.

Official corruption is rife, and getting worse. A local driver told the REVIEW that customs got a cut on every imported car on the pretext that the new car had failed to pass quality or safety tests. “Perhaps their testing equipment is superior to those of the Japanese,” he laughed. Another driver found his car had disappeared during the night after he refused to pay a “watching” fee to a Public Security Bureau official. Governor Liang Xiang has openly confessed that corruption is endemic among cadres who exploit their position to speculate in land and commodities, take bribes, embezzle funds, and pay bonuses indiscriminately.

Not surprisingly, many local residents long for the return of Canton’s able vice-mayor Lei Yu. Lei was sacked from his job as Hainan chief in 1985 for allowing massive speculation in cars and other commodities. Lei has since been cleared of reaping any personal gains from the scandal but to allow him to return would amount to Peking admitting to having erred and the central government is not prepared to do that. Lei has a reputation as an efficient administrator and good organiser. “He would know how to prevent factional infighting and get people to work together,” said a Hainanese businessman. “We badly need a person like him at this time.”

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Foreign investments and soft loans offer the only real source of funds for Hainan, yet few investors are willing to risk their money on large-scale infrastructure projects for which returns may be 20 years off. Of about US$400 million of foreign funds pledged so far, only about US$100 million has been committed, say local officials. No foreign loans have been made yet.

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The deal is seen as a test of how much autonomy Hainan will really have. Under the terms negotiated with the Japanese, the local government will retain control of policing, customs and border control of the zone, while the Japanese will control construction, production, management and export. The infrastructural investment is projected at around Rmb 5 billion. It is unclear how control over port facilities will be arranged. The first phase of the port’s development is already nearing completion and local authorities are unsure how to continue.

Hainan officials hope that tourism will take off. Contracts have been signed with West German and French firms to build an international airport at the southern tourist resort of Sanya, about five hours’ drive from Haikou. The highway connecting the two cities is being widened, which will halve travelling time. A number of new international hotels are being built in both cities.
II

THE LAW OF REPRODUCTION OF INSTITUTIONS

A. THE AFRICAN EXPERIENCE

A second viewpoint argues that what law a country adopts does not matter. In any event, not good laws or institutions, but good men make good government. This section reviews the African experience to suggest that this view, too, errs. Unless lawmakers act consciously to change institutions through law, no matter what men and women run them, those institutions will likely produce much the same outcomes.

In most African countries to this day most of the received law remains unchanged. Many aspects of African society continued to resemble the colonial situation. A small handful lived very well in the urban centers, mainly employed either by Government or by the firms that still dominated the economy. The majority of the population still lived in poverty in the countryside. Some governments notably increased social services. By 1974, Zambian roads were much better than in colonial times. Educational programmes brought primary school education to most young Zambians, and a national university to a very few. Hospitals and clinics abounded. But the basic structures of the colonial situation remained: Society and economy bifurcated between export enclave and labor reserve hinterland, both subject to the vagaries of world markets and the interest of multinational corporations.

The major change after independence in most of Africa substituted black faces for white in the seats of power. Black, not white, officials in most of Anglophonic Africa made the great political decisions.
A change in the color of the faces of those on top, without significant change in institutions did not improve the standard of living in the hinterland, the mines or the plantations. In the main, governments failed to alleviate poverty and oppression, despite their rhetoric.

A. GOOD GOVERNMENT AND GOOD MEN

Why do some governments succeed in inducing desirable change, and others do not? The two most common explanations are poles apart. One looks to the character of the governors. The other looks to the character of the institutions.

The process of transfer of power from the Colonial Service to Africans is a useful body of data to test the first of these propositions. I examine, first, the Colonial Service explanations for good government; and, second, the policy they built on that explanation.

1. The Colonial Service. Systems of thought explain phenomena as perceived by their proponents. The conditions of the Colonial Service led to explanations for social change that depended on men, not institutions.

Like Hong Kong, the colonial system of government was thoroughly authoritarian. It had no representative institutions. The Administration not only implemented policy, but made it as well. The authoritarian principle of colonial government matched its
Theory of the exercise of power: trust 'the man on the spot.' The Colonial Service was dominated by a conviction that affairs of state were handled in a more efficient manner if standards of administration were set by the collective wisdom of those responsible, not by a legal code or a court of judges. The kind of men who were recruited from Britain for service in the colonies appeared to believe that the official class constituted the state.

Authoritarian government everywhere expresses its character in giving broad discretion to 'the man on the spot.' The colonial governors received grants of virtually unbounded discretion. The East Africa Order in Council, 1902, gave the Commissioner power 'to make Ordinances for the administration of justice, the raising of revenue, and generally for the peace, good order and good government of all persons in East Africa.' The Ordinances issued under these grants in turn granted great discretion to lower officials. Few controls limited these broad grants of discretion, despite the nominal reception of English administrative law and the doctrine of judicial review. The Colonial Service developed an explanation for the absence of rules. Good government, it said, depends not upon good rules and institutions, but upon good men.

The selection system ensured that practically every member of the Colonial Service would come from a public school -- Oxbridge background, with an impeccable family tree (and probably with a Blue in athletics although how that was related to the job of a colonial bureaucrat was never precisely explained).
For the new recruit to the Colonial Service, "there would be no jarring surprises in learning what one was expected to do. One's superiors from the Governor down to the DC were all alike, like oneself, products of the same system. By the age of 21 the basic assumptions were so deeply engrained that everyone knew what to expect. Few written rules were necessary. Everyone was an Old Boy -- The level of consensus among officials was an essential ingredient of stability in the colonies and of such uniformity as there was."15

Every condition of the Colonial Service strengthened the officers' conviction that they were an unusual breed of men. Positivist legal philosophy had its corollary: institutions and rules do not make good government; good men do. The Colonial Service had no doubt about who were the good men. A colonial under-secretary, the Duke of Devonshire, said in 1923, 'The code which must guide the [colonial] administrator is to be found in no book of regulations. It demands that in every circumstance and under all conditions, he shall act in accordance with the traditions of an English gentleman.'17

Explanations identify causes. Inevitably, they become the basis of policy, for policy always attempts to address the causes of problems. When times change, and the Colonial Service had to vacate the seats of power, they based their policies in preparing their successors upon their explanation for what they believed were their own unbounded successes.

2. Creating the 'Good Men'. Following the Second World War, the inexorable dictate of history plainly put self-government and independence on the agenda. France and Portugal, aided by the United
States, chose to oppose the tide, and reaped the bonfires of Algeria, Angola, Mozambique and Vietnam. Britain accepted the inevitable, and charged the Colonial Service with preparing the African dependencies for self-government.

In 1957, Sir Alan Burns, a long-serving high-level colonial official laid down the conditions for self-government. He did not mention political or social institutions. He did specify, however, 'there must be a sufficient number of trustworthy and well educated inhabitants capable of assuming the responsibilities of administration; and a reasonable level of general education and understanding to ensure that "self-government" does not merely mean the exploitation of the masses by the few behind the facade of a democracy'. The Colonial Office suggested a programme to create these 'good men.' 'First, local government institutions gave training in administration; second, educational institutions were charged with the modernization of the traditional culture; third, cooperatives provided experience in community living and fourth, trade unions were the basis of a craft apprenticeship into the complexities of modern society'. The British diligently moved ahead on all four fronts.

They made considerable efforts to educate a governing elite. The governing principle was that the educational system should produce men as much like the colonial administrators as possible. The colonial administrators therefore created out of whole cloth an educational system that aped that which they had attended. Secondary schools sprouted, surrounded by all the trappings of the English public school: boarding pupils, masters, prefects, hazing, high-table,
cricket. In Ghana, Achimota old boys dominated the senior civil service. The colonial old boy network replicated itself.

University education, too, followed the English upper-class model. After repeated study commissions the Asquith Commission reported in 1954 that:

"The main consideration in our minds is that His Majesty's Government has entered upon a programme of social and economic development for the Colonies which is not merely the outcome of a desire to fulfill our moral obligations as trustees of the welfare of Colonial peoples, but is also designed to lead to the exercise of self-government by them. In the stage preparatory to self-government, universities have an important part to play; indeed they may be said to be indispensible. To them we must look for the production of men and women with the standards of public service and capacity for leadership which self-rule requires."21

These new Universities, Ibadan in Nigeria, Legon in Ghana and Makerere in Uganda -- attempted to accomplish this ideal. They were residential universities, for 'a university which has as its prime function education for leadership has an easier task if it is a residential society.'22 With it went all the paraphernalia of Oxbridge: student gowns; grace before meals; high table, with Fellows solemnly filing in wearing their gowns while the student body stood at attention as the Fellows sat down at a table set on a platform six inches above the common clay.

The curriculum also aimed to produce 'leaders'. The Asquith Commission explicitly denigrated 'professional' studies in favor of 'liberal' ones. All three early African universities had a chair in Classics but not engineering.
The British succeeded in producing successors in their own image. Anyone who has met African Permanent Secretaries in Ghana or Nigeria educated under this system cannot but marvel at the Colonial Service's success. It did not, however, build institutions apt to bring about democracy or development. "The gift of England to her former dependencies was a mixture of authoritarian spirit and machinery plus democratic ideals, not as is sometimes imagined, a set of democratic ideals and institutions." 24

The Colonial Service policy in preparing for self-government conformed to long-standing imperial interests. To leave a legacy of authoritarian institutions in charge of men mounded as closely as possible to the image of the departing rulers ensures that social radicals would not likely grasp the levers of power. It ensured that the new rulers would not likely change institutions. Just to change its institutions ensured that Africa would continue to grind out surpluses for the benefit of owners in the former metropolis, continue to supply the raw materials for the factories of England and guarantee a market for her manufactured goods.

SUMMARY. The Colonial Service used as a basis for their policies in preparing Africa for independence an explanation derived from their own authoritarian rule:

1. Societies consist in governors and governed.
2. The character of the governors (rather than the institutions of the society) determine the choices made by the governors.
3. Therefore, the sort of social change that ensues depends upon the character of the governors.

This explanation, like analytical positivism, denied the efficacy of law to change society. The critical variable law elsewhere.
That explanation is non-falsifiable. If a government is unsuccessful, one can always say that the governors were simply not good enough. The sort of society they produce measures the 'goodness' of the governors although the sort of society they produce is precisely the phenomenon the 'goodness' of the governors is supposed to explain. The explanation is circular.

Assuming that one can define an independent measure of the competence and morality of the governors, the Colonial Service did everything possible to train competent successors. Their failure, of course, may not prove that their theory was false. It may only prove that the problems of government in Africa were insuperable, no matter how 'good' the governors. Rejecting that give-it-up philosophy, the failure of development in most of Africa is inconsistent with the positivist explanation. The massive effort made by the British to train good men is probably as good a case study of policy stemming from that explanation as any.

B. The Reproduction of Institutions

An alternative explanation suggests that so long as institutions do not change, society does not change. This explanation, too, runs in circles. The repetitive patterns of behavior of its members, i.e. its institutions define society. The proposition says only that society does not change unless it changes.

In fact, of course, societies constantly change. Institutions in consequence constantly change. Change comes from sources as manifold as life itself; changing climate, technologies, populations, ideologies and individual innovation, war, pestilence, disease and natural disaster. Developing nations must guide that inevitable change into desired channels.
What can those in control of state power do to induce desirable social change? If 'good' men, inserted into existing institutions, cannot succeed, what alternatives are there? The obvious alternative invokes the legal order and the state to change behavior and hence to change institutions. No forester can raze the forest flat, and create a new forest and new paths. He can at most plant new trees here and there at critical points, or cut down old trees, to induce the hiker to follow a new path, determined by all of the trees and shrubs in the forest, those older ones that remain and the few new ones planted by the foresters. The forester cannot determine the new path absolutely. He can, however, induce desirable change within existing constraints.

Following Robert Lee Hale, Warren J. Samuels has proposed a distinction between 'voluntary freedom' and 'volitional freedom'. 'Voluntary freedom' implies 'complete autonomy with the absence of constrained choice or limits to choice or behavior, in effect, choice governing the range of alternatives which one will choose.' 'Volitional freedom' is the 'circumstantially limited exercise of choice between alternatives or behavior. Obviously, these ideal types occupy the ends of a continuum. Circumstances constrain all choice. Asked by a robber, 'Your money or your life', the victim has a very narrow volitional freedom. Robinson Crusoe comes as close as anyone to 'voluntary freedom'. At any point, one must choose the path from among those few alternatives that the various obstacles permit.

In any given set of social, economic and political circumstances, no doubt the social choices of well trained, technically competent
and dedicated leaders will serve society better than those of stupid, incompetent crooks. To that extent, the 'good man' theory is valid. Because it accepts existing institutions, however, it, like analytical positivism, at best explains policy-choice within a given institutional structure. Continuing existing social institutions limit the possible choices to those already in existence in Africa, to those that maintained the colonial situation. Our domain of study demands a theory for changing institutions, rather than a theory of choice within existing ones.

Theories of change begin by explicating causes. What are the causes for the continuation of the colonial situation in Africa, in terms of the legal order? I suggest that:

1. Societies consist of sets of repetitive behavior by their members, i.e. their institutions.

2. Unless the legal order that defines the principal institutions of the society changes, institutions change, but not through affirmative governmental action.

3. Conversely, other things remaining the same, unless the legal order changes, institutions remain the same.

SUMMARY:

Neo-colonialism continued because the colonial legacy continued. Institutions continued to perpetuate dependency. The basic structure of the legal order, which buttressed and defined these institutions, likewise continued. In Africa the continuing dominance of the notion that good men, not good laws, make good government, and its corollary, that the legal order and the state cannot change society, contributed to prevalent stagnation.

Two general propositions oppose these notions. The first I denoted the law of non-transferability of law: the same rules of law and sanctions in different times and places, cannot induce the same
behavior by the role occupant as they did in their time and place of origin. The second I denoted the law of the reproduction of institutions: other things remaining the same, unless the legal order is changed, institutions will continue as they are.

These two 'laws' say that unless policy-makers initiate change through the legal order, change will nevertheless take place, but it will arise through other agencies than the conscious action of government. If he does not desire that change, the law-maker must intervene to deflect the processes of history. He cannot merely seek out laws which seem to induce desirable activity elsewhere, and copy them blindly in his own polity. He must identify the specific problems that confront him, and seek out appropriate solutions for them in his country's concrete historical situation. That self-reliant imperative is not imposed by demands of nationalist ideology, of philosophical notions of the sacredness of the indigenous Volksgeist, of negritude or of the African personality, but by the nature of societies and social change.

Changing institutions requires a theory about how to acquire knowledge relevant to that task, and institutions capable of making decisions related to those changes, and implementing them. That is to say, development requires a theory of how to change institutions, and a state structure efficient to do so.
NOTES AND QUESTIONS

In light of the readings concerning the African and Hong Kong experience, and your own knowledge of China, discuss the following:

1. For a period, China's polity held that the ideology of officials with power (the cadre) would adequately control their behaviour -- "better red than expert."

   a. Is that any different from the claim that "good men make good government?"

   b. Does ideology affect behaviour? If it does, what difference do the institutions of the society make? Will not the "good men" (that is, the officials motivated by the appropriate ideology) produce good government whatever the institutions -- democratic or authoritarian, capitalist or socialist, legally accountable or independent of controls?

   c. In fact, did the "red not expert" slogan produce good government: --

      (i) with respect to corruption?
      (ii) with respect to the productivity of the economy?
      (iii) with respect to the predictability of government action towards individuals?
      (iv) with respect to the factual bases for official decisions?
      (v) with respect to the central government's capacity to enforce national policy in the provinces?

2. "China's present emphasis on the use of law as a tool to accomplish the Reforms in part reflects a rejection of the notion that good personnel, not good institutions, make good government." Discuss.

3. How would Buchanan critique the Law of Reproduction of Institutions?

4. Do the two propositions about which this Chapter revolves -- that is, non-transferability of law and reproduction of institutions -- hold for the United States as well as China? In what sense can one say that one can "learn" something useful for a United States lawyer from the Chinese experience?
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The Colonial Office suggested a programme to create these 'good men.' 'First, local government institutions gave training in administration; second, educational institutions were charged with the modernization of the traditional culture; third, cooperatives provided experience in community living and fourth, trade unions were the basis of a craft apprenticeship into the complexities of modern society'.

The British diligently moved ahead on all four fronts.

They made considerable efforts to educate a governing elite. The governing principle was that the educational system should produce men as much like the colonial administrators as possible. The colonial administrators therefore created out of whole cloth an educational system that aped that which they had attended. Secondary schools sprouted, surrounded by all the trappings of the English public school: boarding pupils, masters, prefects, hazing, high-table,