

LAW AND STAGNATION IN AFRICA

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The dual economies of Africa during the colonial era funnelled its riches into the coffers of the metropolitan countries. They still do. The “Development Decade” of the sixties ended as it began. Practically all Africans remain desperately poor.

Societies are as they are because of the ways in which the people within them engage in repetitive patterns of behaviour. These repetitive patterns of behaviour constitute the institutions of the society. What makes Africa poor is that the established patterns of behaviour do not result in a high level of productivity in the countryside, and permit the surpluses generated in the export enclave to be siphoned off to the rich nations of the world.

Repetitive patterns of behaviour are defined by rules or norms. They state the way in which we expect people in particular roles to behave. I act as a father, a professor, or a citizen because there are rules, supported by sanctions of various sorts, that induce me to act more or less in the prescribed way.

Because the state has under its control the largest body of organized agents (the bureaucracy in all its ramifications) and the largest body of armed men (the police, the army, goalers and bailiffs and sheriffs) and because through constitutions and legislatures and courts it has acquired a legitimate sovereignty, better than any other body, it can consciously change the institutions of the society. Laws are norms. They state how people are supposed to behave on pain of sanction. By changing the laws, the government can change the institutions of the society.

To say that the institutional structure of Africa has not changed, since independence save incrementally, is to say that government has not availed itself of its reserved power to change the laws in such a way as to change the institutions of the society. In consequence, Africans, in the main, remain afflicted by all the ills of mankind: poverty, sickness, starvation, early death.

These deplorable consequences have not occurred for want of radical rhetoric. Every African government proclaims its desire to bring about development. The distance in most countries between word and deed is immense.

There are, of course, almost innumerable constraints on development. Nevertheless the world changes. At any instant, the direction of its movement will be determined in part by how people act. The alternatives available are structured by reality, but some choice is always possible. Choice is thrust upon law-makers. That choice may be sharply limited by matters over which they have small control: Physical and financial resources, available man-power, international affairs, internal power configurations, and the like. But still there is choice. That countries seemingly equally endowed have developed such different societies—China and India, Sweden and Greece, Tanzania and Kenya—is evidence of the existence of choice. Harsh reality poses the difficulties to be solved.

The appropriate question to ask, therefore, is not why Africa remains poor. Rather, it is to ask why in the face of such radical rhetoric institutions remain as they are. Why have not the law-makers in Africa sought to induce fundamental change in the institutions received at independence?

Every discipline advances explanations looking to its parochial variables. Lawyers march with the rest. One of the variables that help to explain the failure to change the law lies in received notions of the ways laws ought to be changed.

Two dominant and consistent notions pervade the common understanding of how laws ought to be changed. The one argues that good law in one place is good law any place else. It advises the law-maker to copy the law of developed countries in order to be developed. The other advises that in any event laws do not make any difference in how people behave. It is their "values" or ideologies that control. Good men make good government. We argue here that both of these notions dominated colonial thinking about law: that they continue to do so; and that as a result either (a) laws are mechanically copied from other contexts and simply do not work; or (b) nothing is done to change the laws and everyone instead "explains" the poverty of nations by the "innate character" of the poor. We examine the consequences of the first notion with respect of the reception of English law in Anglo-phonic sub-Saharan Africa; and of the second, with respect to the reception by the newly independent states of the law of the colonial period.

The law of non-transferability of law and the reception of law in Africa

Starting in the Gold Coast in 1874, the English overlords imposed a variety of English law upon their subject territories—a narrow, truncated version of English law, with a broad exception for customary law. Customary law applied to Africans, who almost entirely lived and worked in the subsistence sector of the economy. It was an appropriate law for that sector, growing as it did out of the emergent needs of African societies that were still dominated by low technologies and consequent low levels of production, specialization and exchange. English law in the main applied to Europeans, and provided an appropriate legal framework for the development of export-oriented, relatively modernized extractive industries and plantation farming, or for the purchase of African grown crops (as in the Gold Coast, Nigeria and Uganda) and the sale of manufactured goods imported from Europe and the United States. The criminal law supposedly provided the overall framework for law and order. A variety of devices—the poll tax, licensing regulations that prevented Africans from entering the cash sector, restrictive land tenure rules that crowded them onto unproductive reserves, and the like—drove Africans into European employment.

Whatever else the imposition of English law on Africa did, it plainly did not recreate Africa in England's image. In every way colonial Africa was characterized by a special sort of dualism. Economically, the continent was firmly bound in a system of dependence upon the metropole, the internal economies sharply divided into two sectors mirroring the dependency in the international market.

Everywhere an export enclave using black workers with incomes at or below the poverty datum line produced raw materials for export—minerals and agricultural

products. Most Blacks lived in the vast hinterlands, farming for subsistence with very low levels of technology and production.

Within the export enclave, expatriates (and, as independence approached, a few Africans), the managers and captains of both private and public sectors, lived on a scale as high as, or exceeding that of their appropriate opposite numbers in England. In Kenya in 1962 the per capita income of non-Africans was £400. Most Africans however, lived in dreadful poverty. In the same year in Kenya, their average income (including an estimate for subsistence farming) was only £14.9.0¹

The dual economy, however, was not, as is sometimes supposed, one in which Africans lived as they had always lived with a unidirectional flow from the "backward" hinterland into the "modernity" of the export enclave. The consequences of colonialism was a massive destruction of traditional economies. Sometimes this was done by savaging the countryside by armed might. In "pacifying" an area, punitive raids, and the burning of huts and villages were not unknown. In the main, however, a variety of legal compulsions were used to drive Africans out of the hinterland into wage employment for European entrepreneurs in the export enclave. This was done by making the hinterland unlivable for these prospective workers in a variety of ways: by imposing a poll tax, to be paid only in cash; by restricting the land which Africans might own; by prohibiting Africans from cash crop markets, and so forth.²

The result was that the hinterland came to be dependent on the export sector, just as the country as a whole was dependent on the world system of international trade. This dependency was reinforced by the invasion of the markets of Africa by imported manufactured goods. There were almost no manufacturing establishments in tropical Africa fabricating goods for the local market.

This funnel-shaped economy ensured that the economies of Africa would be dependent upon the economies of the metropolitan countries and in a larger sense the world capitalist system. The economic surpluses earned from African productive enterprise, rather than being invested in Africa, were shipped overseas to enrich investors in the home countries. The profits from the sale of goods to Africans were likewise earned not by African firms, but by the overseas factories. The financial institutions which managed the economies—to the extent that they could be denoted "managed"—kept their surpluses invested in the home countries, bolstering not the economies of Africa but the economies of England and France. The surpluses earned by marketing boards, too, were invested in such a way as to stabilize the pound, not the African monetary system.³ Additional sums were drained off through "invisibles"—insurance, shipping costs, and the like. All these far exceeded any money flows into Africa from 1880 until the end of the empire. England always had a trade deficit, but a balance of payments surplus with her dependencies.

The economic decisions—especially the investment decisions—of the foreign firms who dominated the African economies were made in the light of their own economic interests, not those of their African hosts. The principal result was that practically no local processing or manufacturing was developed. The Gold Coast, the largest cocoa producer in the world, did not process cocoa. A consumer there who wanted to purchase cocoa for domestic use had to purchase processed cocoa from Europe or the United States. Northern Rhodesia, a principal supplier of copper for world markets, had no

processing plant to make manufactured goods from copper. Countries that supplied sugar, cotton, sisal, coffee, vegetable oil and a dozen other commodities engaged at most in primary stage processing. Logs of rare tropical timber were not even squared off for shipment in Africa, but were shipped overseas in their raw form.

Geographically, patterns of land use matched the dual economies. In general, Africans lived in the countryside. In the settler colonies, they were sharply separated physically from the Whites engaged in the export enclave. In Kenya, for example, the highlands—the best agricultural land in the country—were reserved for White settlement. Africans were condemned to live in terribly overpopulated reserves with very low agricultural potential. In the nonsettler colonies of West Africa, and in Uganda, many Africans were engaged in cash cropping as independent farmers. Their produce was, however, bought by expatriate firms who managed to keep prices for raw materials extremely low. Within the urban areas, even sharper divisions were made between White and non-White areas. Every city in Africa had its exclusively White residential areas, off-limits to Africans: Ikoyi in Lagos, Oyster Bay in Dar-es-salaam. In many countries, various sorts of pass laws were used to prevent African influx into White areas. In Northern Rhodesia, Africans were not allowed on the main street of Lusaka, its capital city, without a pass.

The government of each of these areas, too, differed. The Whites in the export enclaves were governed directly by the colonial administration. In the main, Blacks in the hinterland were governed, so far as possible, nominally by their traditional institutions, controlled by colonial officials, under the rubric of "indirect rule". The local traditional authority continued to rule as before, but now charged with the responsibility of maintaining law and order and collecting taxes not in its own right, but in the right of the imperial government.

Socially, the split between African and White communities was all but total. Segregated clubs, schools, social organizations, and the like were the implacable rule. Whites and Africans rubbed elbows in productive enterprises but lived a world apart.

The legal order buttressed this strangely divided world. Whites in the export enclave, and a few Africans, were subject to English law. Blacks in the hinterland were subject to customary law. Each sort of law was reasonably appropriate to the economy and the peoples to which it applied. Overriding all of these were the various legal compulsions designed or having the consequence of forcing Africans to work for White enterprise, and maintaining law and order on terms acceptable to the colonial government.

English law in Africa plainly did not induce behaviour which reshaped Africa to the English pattern. Why the English introduced English law, and why it did not result in reproducing English institutions, is the burden of the remainder of this section.

Colonial theories of law and society: the impact of analytical positivism

The colonial decision to impose English law on Africa found its roots in a variety of conditions. Underlying it was an explanation of the relationship between law and society implicit in the dominant jurisprudence theory of the era, analytical positivism.

Analytical positivism

Theories that purport to explain the world inevitably become the basis of efforts to change it (or to leave it alone). Peter Dorner draws a distinction between two sorts of such explanations. "Organized systems of thought are results of man's efforts to cope with experienced difficulties. The configurations of such a system of thought will be different if establishment of basic institutions is a key issue, in contrast to the system of thought that emerges from inquiry into policy issues that arise within an established and accepted institutional framework".⁴ Analytical positivism arose to guide investigations into policy issues arising within the legal framework of nineteenth century England. It became, however, the philosophical guide for structuring the legal institutions of tropical Africa.

As capitalism rolled across England, the nineteenth century lawyer became newly occupied. Increasingly, he became "the craftsman, the technical expert essentially detached from the policy-making role of the social-reformer and legislator".⁵ Analytical positivism arose in response to this new technocratic role.

This new role responded to the demands of nineteenth century capitalism. As the society became one with a high degree of specialization and exchange, dependent upon private entrepreneurs to supply commodities and services, increasingly the interchanges of economic life were defined by contracts. The rules of property and tort law supported the market economy. The complexity of the capitalist state produced an explosion in the amount and complexity of the law.

The entrepreneur requires certainty above all else before making an investment. He makes his business decisions in the light of all available information about the economic environment. The constraints and rewards offered by the law loom large among them. Lawyers were required to advise businessmen about the legal consequences of various business alternatives, and to put business decisions into forms maximizing returns and minimizing risk.

In that more innocent age, before the development of massive administrative and bureaucratic forms of government, courts were the principal, almost the only, sanctioning agency. To the practising lawyer, the law is what the courts do.⁶

To meet the demands of their clients, lawyers had to be able to ensure the calculability of the law. If the lawyer was to calculate in advance how a court would decide on a particular act of his client, he had to know in advance the rules which the court would apply in coming to a decision.⁷

The lawyer cannot calculate in advance how a court will rule unless he can reliably duplicate the process through which a court will likely reach a decision. This he can hardly do, it was thought, if the judge can decide the case in terms of his ethical notions of a just result. Rather, the law becomes calculable in this sense when it matches what Max Weber called "logically formal rationality". "Legal thought is rational to the extent that it relies on some justification that transcends the particular case, and is based on existing, unambiguous rules or principles that are consciously constructed by specialized modes of legal thought which rely on a highly logical systemization, and to the extent that decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles".⁸ The function of courts was

thus limited to law-finding, not law-making, since its sources were limited to the legal order itself.

This system, demanded by lawyers to service their clients, implies a model which David Trubek denotes as "legalism". In that model of society, the primary source of normative ordering is a "logically consistent set of rules constructed in a specialized fashion." Only those rules are to be used in settling disputes between members of the society. For the system to function, there must be "a clear differentiation of law from other sources of normative ordering. Law must become both autonomous and supreme".⁹ A system of law whose most visible element is the courts appears par excellence to meet this requirement of autonomy.

These demands by lawyers, and the legalistic model they imply, found powerful support in philosophical positivism, the dominant philosophy of the middle classes of the nineteenth century. In its formative years in the eighteenth century, philosophical positivism based itself on the heady assumption that the problems of the human condition were capable of rational solutions by rational men—a plain consequence of the scientific confidence of the times. Its later expression by its sociological high priest, Augustus Comte, and its altar boy, Herbert Spencer, tended to emphasize not man's ability to change the world but the primacy of empirical statements over propositions about matters of value. It was characterized by "its contempt for and hostility towards metaphysics, by its exclusive emphasis on experience, observation of facts and experiments, by its restriction of the scientific method to that of the natural sciences and its repudiation of all metaphysical speculations as unscientific".¹⁰

What was required was a superhuman effort to shed law, of all disciplines, of its value-content. The technocratic rule, the relative importance of courts, and philosophical positivism, however, readily united. Jurisprudence found in John Austin the hero to make the attempt. He succeeded in a single thundering proposition: "All law", he said, "was the command of the sovereign. The function of the lawyer, therefore, is to determine not what the law ought to be, but what it is".¹¹ The function of the study of law is to examine the universe of legal rules, to harmonize and elucidate them, so that in detail they would form a gapless web.

As an empirically grounded hypothesis, Austin's major affirmation is nonsense. As an intellectual construct, it matched all the demands made upon the lawyer. It explained to him why he directed his attention not to how the rules worked in society, but to the rules as guides to judicial decisions.¹² Law became not the norms ordering social life, but the rules of the litigation game.

Most important of all for our purposes, what Austin called "the province of jurisprudence, properly so called" looks to the generation of normative rules—the concrete expression of policy—exclusively from sources within the most highly articulated, most sophisticated and unbending institutional framework in the culture. It explained, and, explaining, reinforced it.

Analytical positivism gives no explicit response to the question what the law ought to be. Not speaking, it shouts its answer. It directs attention to the internal elegance and logical consistency of the rules themselves, not to the relative desirability of the behaviour they prescribe. It implies that good new law can be derived from existing law.

To say that new law can be derived from existing law is a tenable if tendentious proposition with respect to the law of an ongoing society with an existing legal order. What instruction did it give the imperial lawmaker in his newly acquired territory, which he perceived as being virtually without law, *tabula rasa*?

If the criteria for good law are elegance and consistency, rather than its consequences for society, the law that is good law in one time and place is also necessarily good law in other times and places. How the law will affect social relationships is irrelevant. The issue is how will the courts decide disputes. The imposition of English law on Africa, made under the intellectual sway of analytical positivism, was made without considering what sort of society the new law would mould.

The *laissez faire* ideology that lurked behind analytical positivism was apt for the exploitation of the colonial world. The myth of empire was forthrightly stated by Joseph Chamberlain in a quotation placed in the frontispiece of Lord Lugard's Dual Mandate: "We develop new territory as Trustees for Civilization, for the Commerce of the World".¹³ Lugard himself spelled out his understanding of the phrase in a speech made in 1926:

The nations in control [of the tropical colonies] are . . . 'Trustees for civilizations', . . . In carrying out this trust they exercise a 'dual mandate'—as trustees on the one hand for the development of the resources of these lands on behalf of the congested populations whose lives and industries depended on a share of the bounties with which nature has so abundantly endowed the tropics. On the other hand, they exercise a 'sacred trust' on behalf of the people who inhabit the tropics and who are so pathetically dependent on their guidance.¹⁴

Harry Johnstone, one of the great British pro-consuls in East Africa, explained how this exploitation of Africa's resources for the benefit of the "congested populations" of the metropolitan countries was to be accomplished. "All . . . things are possible," he wrote in 1918, "if the European capitalist can be induced by proper security to invest his money in Africa and if native labour can be obtained by the requisite guarantees of fairplay towards native rights".¹⁵ Lugard concurred. The imperative of the first part of the Dual Mandate "is for the most part undertaken with avidity by private enterprise, and the function of the power in control is limited to providing the main essentials, such as railways and harbours, to seeing that the natives have their fair share and that material development does not injuriously affect the fulfilment of the second mandate".¹⁶

Capitalists can be induced to invest if there is an attractive investment climate. The government can supply law and order, and a judicial system to protect property and enforce contracts. The world around, the colonial powers imposed a centralized bureaucracy and courts upon their dependent territories. The mere existence of courts and law became one hallmark of "development".

Courts have been introduced, the question arose, what law ought to be applied? To this question analytical positivism shouted its answer: Copy "good" law. Every lawyer is socialized into a particular form of law. What is good law for any lawyer is the law in which he was educated.

As a consequence, the world around the colonial powers introduced the metropolitan law as the "basic" or "general" law of the dependent territory, with exceptions concerning litigation among the indigenous population. The influence of positivism upon

notions of what the law ought to be is clearly seen in the history of the reception of English law in the Gold Coast in 1876.¹⁷

The question of what substantive law was to apply in Africa was originally raised in correspondence concerning the Gold Coast between Lord Carnarvon, then secretary of state for the colonies, and Mr. Fitzjames Stephens and Sir Henry Holland. Stephen's advice was that the judges in the Gold Coast ought to administer, as substantive law, such principles of natural equity as they thought applicable to the cases coming before them. Sir Henry Holland did not respond directly, but raised the question of the scope of the jurisdiction.

The matter was again raised in 1874 by an innocuous letter from Mr. Chalmer, then the chief legal officer in the Gold Coast, asking for various legal materials which he might use to draft a suitable statute defining the laws to be applied by the courts of the Gold Coast Colony and Protectorate.¹⁸ The colonial office legal officer to whom the matter was first entrusted, Mr. Fairchild, rejected the Indian solution of substantive, codes for perfectly sound bureaucratic reasons: "We have not the means," he wrote, "to command the ability and labour which would be involved in compiling the simplest code of substantive law".¹⁹ What was needed, he thought, was, "some simple rules as to the particular systems or principles of jurisprudence which the courts are to apply in the difficult classes of cases coming before them".²⁰ He summarized the rules which he thought desirable:

1. In criminal cases of all kinds, apply the law of England for the time being as near as may be — pending the possible adoption of Jamaica Code. . . . [In fact, the Gold Coast did adopt the Criminal Code originally drafted for Jamaica, but actually adopted in Santa Lucia].
2. In civil cases between native and native involving questions of family relations, the devolution of property upon death, and marriage, tenure and other such matters, apply native law.
3. In cases of civil wrong and contract between native and native or civilized persons and mere [sic] Natives, apply the natural principles of equity and good conscience, having due regard to any reasonable native customs affecting the case.
4. In all commercial and shipping cases arising out of commerce carried on upon the principle of civilized nations apply the mercantile law of England.

Mr. Fairfield's proposals nicely met the perceptions of the functions of law held by the colonial office. His proposal was, however, overruled as to form by Sir Julian Pauncefote, apparently his superior in the legal hierarchy of the colonial office bureaucracy. Sir Julian adopted the language of the Order-in-Council for China and Japan, 1865, modified by language imported from the Hong Kong Ordinance, No. 12 of 1873. He minuted upon Mr. Fairfield's proposal:

I think it is practically a necessity to provide by a local enactment that all civil jurisdiction in the colony shall be exercised upon the principles of and in conformity with the common law of England, the rules of equity, the statute law and other law in force in England on the 24th day of July 1874 (being the day of the colonial charter) except so far as the same shall be inapplicable to the local circumstances of the colony or inconsistent with any Acts of the colonial legislature.²¹

Sir Julian agreed, however, that the juridical relationships of Africans ought to be governed by customary law in civil suits, "and as regards marriage, wills, the transfer of

property and its devolution on intestacy", so far as the customary law was not repugnant to "natural equity". In fact, the ordinance as finally drafted did include the familiar exception for rights arising under customary law.

In the event, the more general form of language suggested by Sir Julian was ultimately adopted, rather than the more specific sets of rules urged by Mr. Fairfield. The Gold Coast Supreme Court Ordinance, 1876, became the prototype of all the African reception statutes.

The same document that embodied the reception statutes usually provided as well for the establishment of a supreme court. The question of what the law in each territory ought to be arose, therefore, precisely in the context to which analytical positivism was directed: What were to be the rules of the litigation game?

Where positive law already existed, positivism requires lawyers to consider only that law. Where, as in Africa, the question was what the law ought to be, however, it gives no explicit directions. In all the detailed discussions of what law was to be applied in the Gold Coast, there is no mention of the sort of society that was expected to emerge there, or what sorts of behaviour it was expected the new law would induce, or even any consideration of the sort of society that then existed there. Instead, the colonial office lawyers merely introduced the law with which they were familiar. So far as the evidence reveals, English law came to Africa, with all its dire consequences for the future of Africa, not as the result of deep-laid plots by imperialists with well-laid plans for its exploitation, but out of a pervasive insularity fostered by analytical positivism.

The consequences, however, would not have been different had the colonial office lawyers in fact plotted to restructure Africa in the interests of the metropole. English law in Africa nicely served the interests of British entrepreneurs, not of African peasants. Where the received law was insufficient, the colonial powers changed it to further yet more the imperial interests. That English law in its larger outlines remained largely unchanged during the colonial era demonstrates its effectiveness in serving English rather than African concerns.

Positivism and the law in contemporary Africa

Analytical positivism, although powerfully challenged, remains the dominant jurisprudence for practising lawyers in the Western world. It remains concerned with the elegance of the law, not its social content.

In Africa, positivists are inevitably repelled by the seemingly messy state of the law. A dualistic legal system hardly meets abstract demands for logical consistency. H.H. Marshall puts the choice as he sees it:

Will indigenous peoples therefore wish to inherit and take over the law of the expatriates and abandon their own on emerging into Westernized and independent status? The answer . . . depends on a variety of factors. In the case of countries inhabited by a people with an advanced civilization of their own there will be a reluctance to abandon the old ways and values and adopt the new culture of the West except to the extent that the latter can be utilized without disrupting the former. I have in mind in this connection particularly the Moslem civilization. In the case of countries inhabited by persons recently emerged from primitive conditions, there is a quite understandable ambivalence or even a conflict of feelings among those who have been placed in a position to adopt a Western way of life. . . .²²

Implicit in Marshall's statement is that if Africans want to adopt the "Western way of life", all they need do is to copy "Western" law. That was tried at the time of the reception. It failed.

Other legal theorists look to unification as an amalgam of some sort, usually in terms of "moulding" customary law to the "principles" of English or Western law—whatever that might be.²³ The notion that new law might be adapted specifically to these countries' problems is not considered.

An excellent example of the modern positivist approach to law and development is found in Ethiopia. There, Professor Rene David prepared a civil code. He has written about the considerations he had in mind, and the methodology used.²⁴ He wrote that "the development and modernization of Ethiopia necessitated the adoption of a 'ready made' system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations.... A code is, in the Ethiopian conception as well as in our own traditional conception, and likewise in the Soviet conception, a model of social organization. It aims at the perfection of society and not only to a static statement of behaviour observed by a sociologist".²⁵ His methodology of formulating the code, like those of the nineteenth century Latin America codifiers, was eclectic, but limited to the question posed by positivism: What law is most logical? This he found mainly in the Swiss codes, with some French admixtures. In particular, he denied the importance of custom. To the question, "To what degree is it fitting to take into account customs actually followed in Ethiopia"? His answer was clearly stated if hardly clear: "It was necessary to take customs into account in order that the code not be an abstract, theoretical work without ties to the profound sentiments of the Ethiopian people. But it is necessary to account for customs only to the extent that they correspond to a profound sentiment of the Ethiopian people, and conform to that which is felt by them as being just."

"Practical" lawyers in Africa today are dominated, usually without being aware of it, by the ghosts of positivism. When put to the task of drafting a new law for a particular purpose, they all but invariably copy the laws of some metropolitan country, not infrequently with sad or ludicrous results, as the following examples suggest.

Lesotho recently copied the Highway Traffic Act of South Africa.²⁶ It includes a provision that lorries above a specified weight are prohibited from travelling on Lesotho's roads. There is no weigh-bridge in Lesotho.

The colonial powers, acting for their colonies, signed double-taxation treaties with the metropolitan countries. These treaties are based on the assumption that income is properly taxed by the country of domicile of the tax-payer, rather than the country of the origin of the income.²⁷ As a result, a transnational corporation earning income in an African country pays more tax on that income to the metropolitan country than to the African country in which it is earned. Since independence, the lawyers of Africa have continued to sign similar treaties, without even raising the question of their inequities.

The Acts creating public corporations in Africa have been copied from British models. In Britain, the public corporation is merely a government monopoly in a particular branch of industry, adrift, as it were, in a sea of private enterprise. Its principal function is to earn sufficient profits so that it does not become a burden to the tax payers. Public corporations in Africa are created for very different purposes. They are

supposed to take a host of special considerations into account in decision-making (especially about new investment), beyond short-term profit. The statutes creating them, however, following the British model, impose only the duty of profit-making upon the directors.

The list of anomalous laws copied from the metropolitan power could be lengthened *ad infinitum*.

Since the colonial laws were, in the main, likewise copied from English models, analytical positivism counsels against radical change. The penal codes of the Gambia, Uganda, Tanzania, Kenya, Rhodesia, Malawi, Zambia, and Seychelles, Cyprus, Aden and Papua-New Guinea, for example, are practically identical, all having been imposed by the colonial office in the 1930s. They are mainly based on the Queensland, Australia, Code, which in turn is based on the English common law, with engraftings from—of all odd places—the Penal Code of New York and the Italian Penal Code.²⁸ They all contain a provision, modelled upon an eighteenth century English statute aimed at highwaymen and foot-pads, making it a crime to be found wandering about at night with intent to commit a felony with one's face blackened.²⁹ These statutes, and many like them, remain substantially unchanged in the statute-books of Africa.

Analytical positivism arose to provide an intellectual construct to guide lawyers operating as technicians within an on-going legal order. It does not purport explicitly to provide a guide for changing the legal order. Its implied prescriptions lead to the notion that "good" law is applicable at all times and places without change. As a guide to social change through law it is an unmitigated disaster.

The law of non-transferability of law

If there is any validated proposition in the history of law, it is that the institutional transfer does not work. Attaturk introduced the French Civil Code into Turkey: Turkey does not resemble France. Anglophonic Africa, despite the reception of English law, did not develop as did England. Ethiopia is still Ethiopia, Professor David's code notwithstanding. What explanation can be given for this uniform failure of transferred law to induce behaviour in its new home even remotely similar to that which it induced in its original site?

The anthropologist Fredrik 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 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".³⁰

Law affects the choices of individuals in two ways. In the first place, to each actor the commands of the law which are addressed directly to him appear as constraints or incentives which he must take into account. Why he takes them into account is no doubt infinitely various, ranging all the way from the perfectly socialized actor who believes that it is right and proper that he obey the law, to Holmes' "bad man" who obeys the law only in so far as it threatens him with its sanctions. To each actor, "the

law appears as a factor which affects his decisions but over which he has no control".³¹

The law also affects the choices of individuals more indirectly. The most significant set of constraints and incentives in life are the expectations we all have of how others will behave. The most important subset of these expectations arises out of the repetitive patterns of behaviour of others—i.e., out of the institutions of the society. I drive on the left hand side of the road not only because the law commands me to do so, but because I know that others will drive on the left. I would, therefore, for my own safety, drive on the left whether or not the law commanded me to do so. Much of the institutionalized behaviour of others occurs because of the law's commands to them, just as much as my own behaviour is a function of the law's commands to me.

Many, perhaps most, of the constraints and incentives within which individuals choose, however, are not at all a function of the law. Patterns of behaviour exist through custom at least as frequently as through law. Geographical and physical characteristics of the land must be taken into account. Technological considerations frequently dominate decisions.

It is as though two hikers were making their way through different 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 to 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 taken by the hiker in that other forest from which the trees were transplanted.

So with the transplantation of law. How the individual in society acts must take account of the constraints and incentives offered by the law, but it must also take into account a host of other factors, most of which are not controlled by law at all. The behaviour induced by a particular law in one set of social, political, economic and other circumstances will resemble only by accident the behaviour induced by the same law in another set of such circumstances.

The failure of English law to recreate in Africa anything resembling English society and the English economy can now be explained. English law depended on contract as the principal institution of the economy. Contract law assumes that each actor will try to achieve whatever best serves his individual economic advantage. In England, the total set of institutions in the society induced entrepreneurs to make the most rapid economic development that the world had ever known. In Africa, the British entrepreneurs faced a different set of institutions, posing a different set of constraints and rewards. The most important difference was that when England was undergoing development, the local English market offered the greatest rewards for the entrepreneur. When Africa was being developed, not the local, African market, but the far-off market of the metropole offered the entrepreneur the greatest rewards. The export-oriented, dual economies of tropical Africa were the consequence of English entrepreneurs seizing their advantage.

We can restate this as an explanation for the pervasive failure of transplanted law to replicate behaviour:³²

1. Laws are addressed to role-occupants, prescribing their behaviour.

2. How a role-occupant acts in response to the norms of law is a function not only of the rules and sanctions prescribed in the law, but of the activity of enforcement institutions, and the entire complex of social, political, economic and other forces acting upon him.
3. The activity of enforcement institutions, and the complex of political, social, economic and other forces acting upon role-occupants is specific to a particular time and place.
4. Therefore, the activity induced by rules of law is specific to a particular time and place.
5. Therefore the invocation of the same rules of law and their sanctions in different times and places, with different sanctioning institutions and a different complex of social, political, economic and other forces acting upon the role-occupant cannot be expected to induce the same behaviour in the role occupant in different times and places.

This we denote as the law of non-transferability of law.

The law of the reproduction of institutions

Analytical positivism offers no proposition to explain how law induces social change. On the contrary: it in effect denies any connection between them. The law of post-independence Africa, on the whole, has not consciously been used to induce change. Why this has occurred, and the explanation for the consequences, is the subject of this section. We examine, first, the legal order of post-independence Africa and its consequences; secondly, the colonial service explanation for the failure of social change, and third, an alternative explanation that argues that, *ceteris paribus*, unless the laws are changed institutions will not change.

The legal order of post-independence Africa

The constitutional documents of every African country at independence, or its earliest statute, provided that, until amended, all existing laws would remain in effect. Save for constitutional provisions the legal order remained as it had been.

In most countries, the new rulers have not changed the laws received from departing imperial overlords, except on their fringes. To this day, in most African countries, the principal laws remain, to a very great extent, those that existed during the colonial regime. Blatantly discriminatory statutes have, of course, been repealed. Vast areas of law, however, remain as they were. The courts of Africa as of course still defer to English precedents in most private law areas: Torts, property, contracts, insurance, commercial law. The penal codes remain all but untouched. More statutes by far remain unchanged, than have been amended. The Price Control Ordinance of Zambia,³³ for example, remains unchanged, save in details from that enacted by the legislature of the unlamented federation.

Plainly, of course, the generalization suggested above is not entirely true of every country, nor is it descriptive of the central tendency in at least one country (Tanzania). Every country has some particular programme in which the law has sought quite radically

to change some particular institution. The million-acre scheme in Kenya, a programme for the distribution to some 35,000 relatively small African farmers of more than a million acres of the best agricultural land in Kenya in the former "White Highlands", is an example. Alongside the million acre scheme however must be placed the fact that most of the large farms in the Kenya Highlands remain in White ownership, or have been transferred intact to wealthy Kenyans. By 1964, when the government had already taken over about three-fourths of all the acreage it intended to take over from the Europeans, "2,958 of the large farms remain holding a total of 6,798,000 acres, or an average of 2,298 acres each; this compared to 3,609 large farms with an average of 2,142 acres each which had existed in 1960".³⁴ 249 of the largest of these had an average size of 25.7 square miles. These transfers have occurred under property laws that are the same as those of the colonial era. The new owners retain their land under the same laws.

The political, social and economic structures of Independent Africa continue to bear a close resemblance to the colonial situation. A small handful live very well in the urban centres, closely connected with the foreign firms that still dominate the economy. The majority of the population still live in poverty in the countryside. Some governments have notably increased social services. The roads in Zambia today are vastly better than they were in colonial times. Strong educational programmes have brought primary school education to most young Zambians, and a national university for a very few. Hospitals and clinics abound. But the basic structure of the society, divided between an export enclave and a rural, largely subsistence economy, remains.

The major difference arising in the structure of the economy and society in most of Africa since colonial times is that black faces are increasingly substituted for white in the seats of power. Black, not White officials in most of Anglophonic Africa make the great political decisions. (Even this statement must be tempered in those former colonies, such as Zambia, which had a very low educational base at independence. In 1973 it was still difficult to discover a black face in the ministries between permanent secretary and stenographer). There is an African who sits as a director of Anglo-American, the great mining complex that is one of two dominating the Zambian copper industry. African lawyers and doctors increasingly fill roles that were occupied, if at all, by expatriates only a few years ago. Black politicians and civil servants are slowly but inexorably buying out the large line-of-rail farms, once almost exclusively White.

A change in the colour of the faces of those on top, without significant change in institutions: That is the central tendency. That alone, however, has not significantly improved the standard of living in the countryside, nor that of the labourers in the mines and plantations of Africa. In the main, government has not succeeded in inducing development, no matter how defined. How is this to be explained?

Good government and good men

Two explanations, poles apart, are typically offered to explain why some governments succeed in inducing change, and others do not. One explanation looks to the character of the governors. The other looks to the institutions.

The process by which power was transferred from the colonial service to Africans possibly provides as useful a body of data as can be obtained to test the first of these

propositions. We examine, first, why the colonial service adopted their explanations for good government; and, second, the failure of the policy they built on that explanation.

The colonial service

Systems of thought arise to explain phenomena as perceived by those who offer the explanation. The conditions of the colonial service made it inevitable that the critical factor in their explanation was men, not institutions.

The colonial system of government was thoroughly authoritarian. There were no representative institutions. The Administration not only implemented policy: They made it as well:

Two perennial preoccupations kept the coloured empire within the purview of the watchdogs of Whitehall: Firstly, the maintenance of conditions of internal security so as to give economic enterprise a permanent right of way and assured elbow room; and secondly, the avoidance of expenditure which might lead to demands on the British taxpayer. Continuous invigilation rather than continuous interference was the main concern of the home government, while economic development progressed, stagnated or retrogressed in accordance with the prevailing practice of *laissez faire*.

Such conditions, on the face of it, were not propitious for anything but an authoritarian form of government. In the coloured empire representative government of the crown colony variety was only authoritarian government in disguise. It involved no surrender of imperial control.³⁵

The authoritarian principle of colonial government was matched by its dominant 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".³⁶

Authoritarian government everywhere expresses its character in giving relatively unbounded discretion to "the man on the spot". Stigand, writing in 1914, expressed a philosophy which continued long after:

... In first taking over a new district the official should be allowed the broadest hand possible. A single White official has often to get the country in hand and the natives under control with miserably inadequate means at his disposal. Such summary judiciary methods as may be employed would not for a moment be passed by legal men, but the ends accomplished fully justify the means.³⁷

This philosophy of government was expressed in law principally by rules giving almost unlimited discretion to officials, and the absence of formal controls over its exercise. The grants of discretion were extraordinarily broad at every level. To the governors they were virtually unbounded. 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 this grant were almost as broad. The Wheat Industry Ordinance, 1952, in Kenya provided that a licence was required before adding machinery to a mill.³⁸ The statute said only that, "The minister... after obtaining the advice of the Wheat Board, shall in his discretion either grant or refuse

permission." The Pools Ordinance, 1960, of Northern Rhodesia³⁹ provided that betting pools required a licence, and that:

2(1) The governor in council may in his discretion issue a licence to any person to promote a pool within the territory...

(2) The governor in council may in his discretion attach conditions to any licence issued under this section and without prejudice to the generality of the foregoing such conditions may require the payment to the government by the licensee of fees and other moneys.

Examples could be multiplied *ad infinitum*.

Over these broad grants of discretion there were in fact precious few controls, despite the nominal reception of English administrative law and the doctrine of judicial review.⁴⁰ In the first place, the grants of power were so broad that there was very little for a court to review. In a case asking for judicial review of an order by the minister denying a petitioner the right to add machinery to his mill under the Kenyan Wheat Industry Ordinance,⁴¹ the court denied the application. It stated:

The court is called upon to entertain appeals from an administrative authority upon questions with which it is that authority's particular province to be familiar. This, in itself, presents the court with a difficult task. It is rendered none the less difficult by the absence of a guidance as to procedure, of any intimation of the matters to be considered and of any specific limitation on the scope of the appeal. The matter is further complicated by the fact that decisions to be taken under some of the sections from which appeal lies are to be taken at the minister's discretion, which he must exercise after receiving the advice of the Wheat Board, and, no doubt, in the light of economic circumstances affecting the three East African territories.⁴²

Secondly, so far as the African population were concerned, there were rarely lawyers available to represent them. Only occasionally Africans have either funds or knowledge sufficient to challenge administrative authority.

Finally, most of the controls by the administration over Africans were exercised through the criminal law. What in England were administrative orders with civil penalties in Africa were translated into crimes. These offences were tried before the local magistrate. The Catch 22 was that the local magistrate was almost invariably also the local district officer wearing a different hat. Judicial independence did not exist.

The colonial service developed an explanation for the absence of rules. Good government, it was said, depends not upon good rules and institutions, but upon good men. An official colonial service bulletin⁴³ said:

The service imposes its own discipline on its members through the very qualities which the life and work demand. . . . There are few detailed regulations. . . . You are not fettered in the detail of your conduct, either at work or in your kind is implicit and based on the assumption that you are proud of the service and its traditions and will not betray them. . . . You will very soon discover that you are subject to the finest, most demanding and, on that account, the most ruthless of disciplines, self-discipline.

The colonial service explanation for what they perceived as "good government" arose from the condition of the service. Recruitment had a distinct class bias. Lugard wrote:⁴⁴

The district officer comes of the class which has made and maintained the British Empire. That Britain has never lacked a super-abundance of such men is in part due to the national character, in part perhaps to our law of primogeniture, which compels the younger son to carve out his career. His assets are usually a public school, and probably a university education,

neither of which have hitherto furnished him with an appreciable amount of positive knowledge especially adapted to his work. But they have produced an English gentleman with an almost passionate conception of fair play, of protection for the weak, and of 'playing the game'. They have taught him personal initiative and resource, and how to command and obey. There is no danger of such men falling prey to the subtle moral deterioration which the exercise of power over inferior races produces in men of a different type, and which finds its expression in cruelty.

It was a service built upon the public school. Their ethic dominated it. Bradley, himself long a member of the service and at the end of his career its chief publicity officer, wrote:

The public schools, created by the middle class a hundred years ago, more than made their contributions to our country. They succeeded in equipping England with several generations of men who, if no cleverer than the general run of people, were fortified by the moral certainties of the 'code' and an easy assumption of authority. Many of them thought of their lives in terms of service, and a pension rather than profit. They played a great part in helping to build the old Empire and to create a modern commonwealth out of it.⁴⁵

The selection system was one that ensured that practically every member of the colonial service would come from a public school—Oxbridge background, usually with an impeccable family tree as well (and probably with a blue in athletics—although how that was related to the job of a colonial bureaucrat was never precisely explained). It was accomplished through the agency of Sir Ralph Furse, who for more than thirty of the fifty years of the life of the colonial service handpicked every recruit—there were no examinations.⁴⁶ He developed "a secret list of Oxford and Cambridge tutors in order of reliability of their reports on undergraduates, and a close connection with headmasters of [public] schools... Our methods were mole-like quiet, persistent and indirect".⁴⁷ Family, public school, senior prefectship, university, and a "cut of the jib" that Furse liked: these were the requirements for employment in the colonial service.

The rigid selection system had a dual effect. In the first place, it produced a set of officials who had internalized the public school ethic to a remarkable degree. Authoritarian, paternalistic, formally incorruptible, with an underlying spirit of duty coupled with a calm assumption of superiority, it was an ethos which was a kind of surrogate for detailed rules. It was a remarkable demonstration of two hypotheses advanced by Etzioni: The more effective the selection, the less need for socialization, and the more effective the socialization, the less need for supervision.⁴⁸

In the second place, the homogeneity of the service produced a remarkable amount of in-service camaraderie. When Lugard arrived in Lagos to assume the governor-generalship of Nigeria an official held aloft a hand-painted sign, *floreat Rossalli* (Lugard was an Old Boy of Rossall School). Heussler writes that 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 D.C. were all alike, like oneself, products of the same system. By the age of 21 the basic assumption 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".⁴⁹

It was an ethos strongly supported by the romantic conditions of the service, a "thin red line" holding together the far-flung marches of the Empire. In every organiza-

tion, "functionaries have a sense of common destiny".⁵⁰ Inevitably, so did colonial civil servants.

Every condition of the colonial service strengthened the conviction that they were an unusual breed of men. The positivist legal philosophy which dominated colonial jurisprudential thinking had its obverse. Institutions and rules do not make good government. Good men do—and the colonial service had no doubt 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".⁵¹

Explanations identify causes. Inevitably, they become the basis of policy, for policy always attempts to address itself to the causes of problems. When times changed, and the colonial service faced up to the necessity of vacating the seats of power, they acted upon their explanation of why colonial government had, as they believed, succeeded.

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. The colonial service in Africa was charged with preparing the colonies for self-government.

Sir Alan Burns, a long-serving colonial official with experience at the highest levels, in 1957 laid down four conditions for self-government. The territory must be large enough at least in population to stand alone. Second, it must have sufficient financial resources to pay its way and to attract overseas capital, "the latter being an essential factor in the development of all present colonial territories." Thirdly, "there must be a sufficient number of trustworthy and well-educated inhabitants capable of assuming the responsibilities of administration; and fourthly, a reasonable level of general education and understanding to ensure that 'self-government' does not merely mean the exploitation of masses by the few; behind the facade of a colony there must be some acceptable method of protecting those minorities."⁵² Notably he omitted any reference to the institutional status of the society.

Of these four, the third was obviously the condition most amenable to change through efforts by the departing British. Statements by the colonial office indicated four pillars on which progress to good government was to rest. "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".⁵³ The British were diligent in moving ahead on all four fronts. Local government experiments were tried everywhere. Cooperatives became the order of the day. Government officials helped in organizing trade unions along "suitable" lines, at least in those countries in which the Black labour force in industry was not the basis of the economy (as in the Rhodesias).

Perhaps most important of all, the British made considerable efforts to educate a governing elite. The governing principle was that the educational system should produce "good men". By "good men", of course, was meant men as much like the colonial administrators as possible.

Achimota School in the Gold Coast was initiated in 1924, taking its first intake in 1929. Governor Guggisberg, its progenitor, was an exceptionally able and devoted governor. He began the school, rather ahead of its time, specifically to train a Ghanaian ruling elite. The school had (and has) all the trappings of an English public school: masters, prefects, hazing, high table, cricket. It was remarkably successful. At one time during the Nkrumah regime, every member of the Cabinet was an Achimota Old Boy—including of course, President Nkrumah himself. The colonial-service-old-boy network replicated itself. Kings College in Nigeria, Tabora Boys School in Tanzania: Every territory followed suit.

University education in Africa was even more clearly a product of the colonial service's preoccupation with training "good men". There had been persistent efforts by Africans to initiate higher education on the continent for many years. Earlier commissions had considered the problem at length.⁵⁴ Nothing happened until the Asquith Commission report of 1954.

The terms of reference of that commission *inter alia* were "to consider the principles which should guide the promotion of higher education, learning and research and the development of universities in the colonies. . . ."⁵⁵ It stated that principle forth-rightly: "The main consideration in our minds in 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 fulfil 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 indispensable. 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".

The universities created during the waning years of the Empire—Ibadan in Nigeria, Legon in Ghana, and Makerere in Uganda—were structured 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".⁵⁶ With it went all the trappings of Oxbridge: student gowns; grace before meals; high table, with Fellows solemnly filing in wearing their gowns while the student body stood for their attention as the Fellows sat down at table set on a platform six inches above the common clay. At Legon as late as 1963, during the "socialist" Nkrumah regime, students' rooms were cleaned by stewards, servants waited on table, a "young gentleman" who wanted his shoes shined left them outside his door at night for a steward to black. The University caterer was called the Manciple, in the Oxbridge style. The university grocery store was called the Buttery, for in Oxford that is where the butts of wine were kept during the middle ages. To receive a degree in law in the first graduating class in the university College in Dar es Salaam in Tanzania, the student had to attend classes in horsemanship.

The curriculum was also aimed at producing "leaders". The Asquith Commission explicitly denigrated "professional" studies in favour of "liberal" ones. All three of the

early universities had a chair in Classics but not in engineering. The universities were designed for what Ashby, perhaps satirically, suggests was the British ideal: "The flower of the English universities was . . . of two kinds: one, the Oxford Greats man with a rowing blue who governed a province or silently controlled the treasury, or sat on a front bench in the House of Commons; the other, the man with a 'first' in natural science who became a professor and, in the German tradition, assembled disciplines around him and made his laboratory in Cambridge or Manchester a world-centre for research."⁵⁷

It is of course difficult to assess whether the British succeeded in their aims. How does one measure success in producing "good" men? They did succeed in producing a number of Africans who match the qualifications of their forerunners. Anyone who has met African permanent secretaries in Ghana or in Nigeria educated under this system must be impressed by how successfully the colonial service achieved its objective.

Following Sir Alan Burns' prescriptions, however, the colonial service did not undertake to build institutions which would lead towards democracy and 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".⁵⁸

That the colonial service policy in preparing for self-government conformed to long-standing imperial interests is obvious. To leave a legacy of authoritarian institutions in charge of men moulded as well as could be to the image of the departing rulers ensured that the levers of power would be guarded against social radicals. It ensured that the institutions would not be changed. Not to change its institutions ensured that Africa would continue to grind out surpluses for the benefit of owners in the former metropole, continue to supply the raw materials for the factories of England, and guarantee a market for her manufactured goods.

Summary

The explanation for the impact of government on society underpinning these efforts by the colonial service was the same as they used to justify 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.

It is an explanation wholly consistent with analytical positivism. Both deny the efficacy of law to change society. The critical variable lies elsewhere.

As a statement of the causes of social change, it is, in one sense, a non-starter. A purported explanation that is incapable of being falsified by data cannot point to causes. It is too easy to say that if a government is unsuccessful, the governors were simply not good enough. The measure of the "goodness" of the governors is the sort of society they produce. The independent variable (the character of the governors) is measured by the dependent variable (the goodness of the society). The explanation, so understood, is circular.

Assuming that one could define an independent measure of the competence and morality of the governors, it would seem that the colonial service did everything that was possible to train competent successors. That they failed may not be empirical evidence that the explanation offered is wrong. It may only prove that the problems of government in Africa are insuperable by men no matter how "good".

Rejecting that give-it-up philosophy, the failure of development in most of Africa is inconsistent with the explanation offered. The massive effort made by the British to train good men is probably as good a case-study of a policy built upon that explanation that one is apt to discover.

The reproduction of institutions

An alternative explanation that is sometimes suggested is that so long as institutions remain unchanged, society does not change. This explanation, too, is circular. Society, is defined by the repetitive patterns of behaviour of its members—i.e., by its institutions. To say that society does not change unless its institutions change, is only a long way of saying that society does not change unless it changes.

In fact, of course, societies are always in process of change. Institutions in consequence, are always changing. The sources of change are as manifold as life itself: changing climate, changing technologies, changing populations, individual innovation, war, pestilence, disease, natural disaster: the list is endless.

For purposes of law and development, however, the question is what those who *pro tempore* control state power can do to induce change in desirable directions. The colonial service, true to their authoritarian traditions, saw the character of the future governors as the critical variable over which government had some control. They took steps in accordance with this explanation to produce "good" men. That approach alone failed to induce desirable change.

An alternative explanation focuses on law as the independent variable over which the governors have control. To recall our earlier image of the hikers passing through the forest, no forester has the capacity to raze the forest flat and plant new trees and shrubs to induce the hiker to follow the path predetermined by the forester. He can, however, plant a few trees here and there at critical points, or cut down trees already growing, so as to make it likely that the hiker will follow a new path, determined by all of the trees and shrubs in the forest—those that pre-exist the replanting, and the few ones planted by the foresters, or those that remain after removing obstacles. In this way the forester does not determine the new path absolutely. He does, however, induce desirable change within the constraints imposed by existing growth.

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 behaviour, in effect, choice governing the range of alternatives which one will choose." "Volitional freedom" is the "circumstantially limited exercise of choice between alternatives or behaviour".⁵⁹ Obviously, these are ideal types at either end of a continuum. All choice is constrained, more or less, by circumstances. The victim of a robbery who is told, "Your money or your life" has a very narrow volitional freedom. Robinson Crusoe comes as close as anyone to "voluntary freedom". Our hiker in the woods has only

"volitional freedom". At any point, his choice of path is limited to those few alternatives that the various obstacles in his path permit.

If one takes the various constraints and resources of a society as made up of the existing institutions, geographical and natural characteristics, the international economic and state system, the law, the available technology, and so forth, it is evident that the choices made by well trained, technically competent and dedicated leaders will be likely better than the choices made by stupid, incompetent crooks. A trained mountaineer or woodsman will make better choices of a path than a neophyte. In that sense, the "good man" theory is undoubtedly valid. Because it takes as given the existing institutions, however—and they are among the principal constraints in any society—it, like analytical positivism, is a theory which concerns policy-making within the given institutional structure.⁶⁰

To continue the existing institutions of society limits the choices which can be made to the same set that existed before. The choices made within those limits before is precisely what created the colonial situation. The very definition of society that we have proposed demands a theory for changing institutions, rather than a theory of choice within the existing framework.

Theories of change begin with the explication of causes—i.e., with explanations. The task is to articulate an explanation for the continuation of the colonial situation which we have earlier described, focusing upon the variable over which governments have the most control i.e., the law. We suggest the following:

1. Societies are defined by their respective sets of repetitive behaviour patterns of their members, i.e., their institutions.
2. Unless the law that defines the principal institutions of the society is changed, institutions change, but not through affirmative governmental action.
3. Conversely, *ceteris paribus*, unless the law is changed, institutions will continue as they are.

Conclusion

Neo-colonialism continues because the institutions of exploitation in favour of the developed metropolitan countries, the dread legacy of colonialism, continue. The basic structure of the law, which buttresses and defines these institutions, likewise continues. One factor which contributes to this institutional stagnation in Africa is the continuing dominance of analytical positivism. On the one hand, it persuades law-makers either not to change the received law, or to borrow laws uncritically from developed countries. On the other hand, it argues that at any rate laws are not effective in changing society. Good men, not good laws, make good government.

Two general propositions have been proposed in opposition to these central notions of positivism in law. The first we denoted the law of non-transferability of law: The invocation of the same rules sanctioning institutions in different times and places, with different sanctioning institutions and a different complex of social, political, economic and other forces acting upon the role-occupant cannot be expected to induce the same behaviour in the role-occupant in different times and places. The second we denote the

law of the reproduction of institutions: *Ceteris paribus*, unless the law is changed, institutions will continue as they are.

These two laws instruct the lawmaker that unless he initiates change through law, change will nevertheless take place, but it will be change arising through other agencies than the direct action of government. If that change is not one that he desires, the lawmaker must intervene to deflect the processes of history. It also instructs him that he cannot merely seek out laws which seem to induce desirable activity elsewhere, and copy them blindly in his own policy.

In short, these two laws instruct the lawmaker that if he desires to use stage power directly to induce social change, he must identify the particular, specific problems with which he is faced, and seek out appropriate solutions for them based upon the concrete historical situation in his own country. It imposes upon him an implacable demand for self-reliance in the largest sense of the word; an imperative imposed not by demands of nationalist ideology, of philosophical notions of the sacredness of the indigenous *volksgeist*, of negritude, or of the African personality. It is imposed by the nature of societies and of social change.

Absent, such an independent, problem-solving approach to the troubles of Africa, government cannot change society in any fundamental way. Absent fundamental institutional change, Africa will remain dependent upon the metropolitan powers, economically, politically, socially, culturally and intellectually, despite the forms and rhetoric of independence. Neo-colonialism is expressed in the fundamental institutional structures of so-called independent Africa. It will continue so long as new institutions, specifically designed to solve African problems, are not created to replace them.

Notes

1. A. Seidman, *Comparative Development strategies in East Africa*, East African Publishing House, Nairobi 1972.
2. R. Seidman, "Contract Law and the Free Market: A Jurisprudential View", *Journal of Economic issues*, 1974.
3. B. Finch and M. Oppenheimer, *Ghana: End of an Illusion*, Monthly Review Press, New York, 1966.
4. P. Dorner, "Needed Redirections in Economic Analysis for Agricultural Development Policy", in P. Dorner (ed.), *Land Reform in Latin America 1972-5*, Madsons Land Tenure Centre, 1975.
5. W. Friedmann, "The Role of Law and the Function of the Lawyer in Developing Countries", *17 Vand. L. Rev.* 181, 186.
6. O.W. Holmes, "The Path of the Law", *Harv. L. Rev.* (1897); see H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1962.
7. Hart, *supra*, n. 6.
8. D. Trubek, "Max Weber on Law and the Rise of Capitalism", [1972] *Wis. L. Rev.* 720, 730.
9. *Id.* at 736.

10. J.L. Kunz, "Latin American Philosophy of Law in the Twentieth Century", 25 *N.Y.U.L.Q.* 292 (1949).
11. A.J. Austin, "The Province of Jurisprudence, Determined", H.L.A. Hart, Weldenfeld and Nicolson, London, 1965.
12. R. Pound, "The Limits of Effective Legal Action", 3 *A.B.A.J.* 55 (1917).
13. F. Lugard, *The Dual Mandate in British Tropical Africa*, Edinburgh, Williams & Blackwood, 1922.
14. F. Lugard, "The White Man's Task in Tropical Africa" reprinted in W. Quigg (ed.), *Africa, A Foreign Affairs Reader*, 1964.
15. H. Johnstone, "The Importance of Africa", 17 *J. African Society* 179, 1918.
16. Lugard, *supra*, n. 14.
17. See generally R.B. Seidman, "A Note on the Gold Coast Reception Statute, 13 *J. Afr. L.* 45 (1969).
18. Attached to Despatch No. 55, Carnovan to Stratton C.O. 06/112.
19. *Id.* (Minute initialled "E. F. [airfield] 6-11-74").
20. *ibid.*
21. *Id.*, minute initialled "J[ulian] P[arcefote] 17[12]"
22. H.H. Marshall, "The Changes and Adjustments which should be made to the Present Systems of Africa to Permit them to Respond More Effectively to the Requirements of the Development of Such Countries," in H. Tunc (ed.), *Legal Aspects of Economic Development*, Berkeley, California University Press, 1966.
23. A. Allot, "Legal Development and Economic Growth in Africa", in Anderson (ed.), *Changing Law in Developing Countries*, London G. Allen & Unwin, 1963 194; A. Allot, "The Future of African Law", in L. Kuper and H. Kuper, *African Law: Adaptation and Development*, Berkeley, California University Press, 1965, 216.
24. R. David, "A Civil Code for Ethiopia", 37 *Tulane L. Rev.* 187 (1966).
25. *Id.* at 195.
26. Highway Traffic Act, 1972 (Lesotho).
27. C. Irish, "Double Taxation Treaties" (forthcoming, *J.C.L.Q.*).
28. J. Read, "Criminal Law in Africa of Today and Tomorrow" (1963) *J. Afr. L.*
29. See, e.g., Penal Code, Zambia, (Cap. 146) Sec. 305 (c).
30. F. Barth, "Models of Social Organization", Royal Anthropological Institute Occasional Paper No. 23 1966; see also F.S. Nadel, "Social Control and Self-Regulation", 31 *Social Forces* 265/1953/.
31. M. Tashnet, "Lumbar and the Legal Process", [1972] *W.L. Rev.* 114, 116-117.
32. J.J. Spengler says the same thing in the vocabulary peculiar to economics. D. Lerner, "The Transformation of Institutions", in W.B. Hamilton, (ed.) *The Transfer of institutions*, London, Cambridge University Press, 1964, at 9 n. 7.
33. Cap. 690.
34. A. Seidman, *supra*, n. 1 at 166.
35. E.W. Evans, "Principles and Methods of Administration in the British Colonial Empire", in *Principles and Methods of Colonial Administration*, London, Hodge, 1950, 9, 13.
36. R. Lee, *Colonial Government and Good Government*, London, Oxford University Press, 1967, 39.

37. C.H. Stigand, *Administration in Tropical Africa*, London, Constable, 1914, 45.
38. Sec. 9.
39. Cap. 51.
40. R.B. Seidman, "Administrative Law and Legitimacy on Anglophonic Africa. A Problem in the Reception of Foreign Law", [1970] *Law and Society Review* 161.
41. *Supra*, text at n. 38.
42. *Attorney General v M.R. Shah*, [1959] E.A. 375
43. *The Colonial Service as a Career*, London, H.M. Stationery Office, 1950, 24.
44. *Supra*, note 10, at 131-32.
45. A.K. Bradley, *Once a District Officer*, Macmillan, London, 1966, 31.
46. R. Heussler, *Yesterday's Rulers: The Making of the British Colonial Service*, New York, Syracuse University Press, 1963.
47. R. Furse, *Acuparius: Recollections of a Recruiting Officer*, 1962, 223.
48. A. Etzioni, "Organizational Control and Structure", in J.G. March (ed). *Handbook for Organizations*, New York J. Wiley, 1965, 650, 657.
49. Heussler, *supra*, n. 46, at 102-03.
50. R.K. Merton, *Social Theory and Social Structure*, Glencoe, Free Press, 1957, 195-206.
51. Heussler, *supra*, n. 46, at 60.
52. A. Burns, *In Defence of Colonies: British Colonial Territories in International Affairs*, London, Allen & Unwin, 1957, 190 et seq.
53. Lee, *supra*, n. 36, at 148.
54. Ashby, *Universities: British, Indian, Africa; A Study in the Ecology of Higher Education*, London, Welding and Nicolson 1966, 190 et seq.
55. Report of the Commission on Higher Education in the Colonies [The Asquith Report], London: H.M. Stationers, 1945 10.
56. Ashby, *supra*, n. 54, at 217.
57. *Id.* at 277.
58. Heussler, *supra*, n. 46, at 237.
59. W.J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 1974, Unpublished.
60. Dorner, *supra*, n. 4, at 6.

