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MIT. Fellows in Law Program

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INCREASING THE VALUE OF GOVERNMENT
LAWYERS IN A DEVELOPING COUNTRY:
A PROPOSAL

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INTRODUCTION

The MIT Fellows in Africa have met together during a fortnight each summer since 1961 to exchange papers and to discuss their experiences as employees of African Governments. Since its inception in 1960, 26 American graduates from the MIT School of Industrial Management or the Harvard Business School, have performed duties as a part of the regular establishment of their African governments. The breakdown according to organizations is as follows:

Economic Planning Ministry or Commission	7
Ministry of Finance or Treasury	6
Development Bank	6
Ministry of Commerce and Industry	5
Public Utility - Railway	1
- Posts and Telegraphs	1

Nine Law Fellows, graduates of Harvard or Yale Law Schools have similarly served in legal offices, as follows:

Ministry of Justice - Attorney General	3
Office of the Chief Justice	2
Ministry of External Affairs	2
Ministry of Finance	1
Director of Public Prosecution	1

Their unusual positions have made the annual two week summer conference a time of lively and enriching discussion.

Last August, 25 Fellows and wives, along with African guests from the ministries and offices in which Fellows work, MIT faculty and a small number of governmental and international civil servants met at the Mont Parnes Hotel outside Athens. The theme which served as the departure point for discussion was the need for innovators and innovation. After opening presentations and discussions of issues, the Fellows separated into four groups: the external aid specialists, the planners and administrators, those concerned with financing and assisting private entrepreneurs, and the lawyers. For two days, these working groups met to examine the meaning of innovation in the context of their experience. Because of the almost unique position from which the Fellows approached this task, we are reprinting as School of Industrial Management Working Papers the report which issued after these two days. What follows is the working report of the Lawyers. The reports of our other working groups are being published separately.

Carroll L. Wilson
Professor of Industrial Management
Director, Fellows in Africa Program

INCREASING THE VALUE OF GOVERNMENT

LAWYERS IN A DEVELOPING COUNTRY:

A PROPOSAL

Group C: Armstrong, Brewster, Cotter,
Mallamud, Phillips, Verbit.

FIA Athens Conference

August 10 - 24, 1963

Lawyers in the governments of independent African states are generally concentrated in one central legal office such as the Ministry of Justice. Traditionally work has flowed from other ministries to Justice for a legal "check" and then flowed back again to the various ministries. Our working group believes that government operations would be greatly improved if lawyers were posted to ministries other than Justice, to serve as legal advisors to the respective ministries. This proposal springs from the belief that sound legal work is most likely to be forthcoming when the lawyer has a good knowledge of the subject matter with which he is dealing.

Working within what might be termed the substantive ministries a lawyer would fulfill the three following functions.

1. Drafting - Transformation of policy decisions into action formulas:

In order for any decision taken in a ministry to be formally circulated beyond the covers of the subject matter file, it must be written down in the form of a law, rule, or regulation. It has always been one of the primary functions of the lawyer to put down in clear language the substance of what course of conduct the government requires or desires, and what procedures need to be followed

to achieve a desired end. While it is true that the products of lawyers performing this function are sometimes incomprehensible, this is so because the lawyer has done a poor job of drafting and not because all legal drafting is necessarily incomprehensible. Moreover, legal drafting makes use of words and combinations of words which have through the course of time come to stand as abbreviations for relatively complex ideas. By utilizing these words, the meaning of which is comparatively certain, the draftsman is able to give the law the precision which any regulation prescribing or proscribing conduct must have.

Drafting as carried on in most African countries with which we are familiar consists of the following process. A draft of what Ministry X would like to see included in a new law is sent to the central legal draftsman in the Ministry of Justice. These drafting instructions are more often than not sketchy outlines of broad goals and the draftsman is asked to fill in the details. But the draftsman usually views his job in terms of translating other peoples' ideas about legislation into a universally understood terminology; he rarely knows anything about the subject matter of the legislation. This, it can be seen at once, severely limits his ability to draft a clear and complete legislative scheme. What the draftsman usually does in the first instance is to turn to legislation in other jurisdictions covering the same subject matter. He usually finds that many items covered in that legislation have not been dealt with in his drafting instructions. Therefore he consults, either orally or in writing, with the officer in the substantive ministry desiring the legislation. The consultation process is lengthy and complicated, the more so because the central draftsman knows little about the substance of the legislation, whereas the officer knows little and cares less about the problems of drafting.

Placing a legal advisor in the substantive ministry would cut short this

unproductive dialogue and save the valuable time of both the draftsman and the line officer. The legal advisor would ideally have been a participant in the process leading up to the adoption of the policy which is now to be incorporated in the legislation, (see below), and would thus be thoroughly familiar with the substantive problems involved. Moreover, in his role as legal advisor he would have seen how this issue has been dealt with in other countries. He would then present the central draftsman with a complete draft leaving the central draftsman to ensure that legislation from all ministries follows a consistent form. The legal advisor would thus facilitate the conversion of policy decisions into action formulas by his familiarity with the problems facing both the policy makers and the draftsman and his ability to communicate with each of them in their own language.

2. Advising - the legal ramifications of the substantive issues within the ministry:

The lawyer posted to a substantive ministry brings into the process of decision-making with that ministry a variety of insights from his specialized education. The inclusion of these insights during the process of policy formation will insure that they are not neglected completely, and will conserve the time of policy-makers by avoiding the necessity of repeating the entire decision-making process because of the original failure to consider factors not immediately the concern of the ministry. First, the lawyer brings to the decision-making process a special knowledge of the constitutional and legal framework in which the ministry's policy must operate. He has a special knowledge of the limitations of the powers of the ministry and of possible conflicts between the proposed policies and existing laws. In short, a lawyer alerts the administrator to the legal ramifications of proposed actions. Second, he is specially trained

to consider the effects of proposed laws outside the immediate situation which gave rise to them. He is apt to consider the effect of the proposed laws over areas of activity other than those in which they were intended to operate. Third, his training specially equips him to perceive contradictions or omissions in proposed laws. He is apt to discover unanswered and unconsidered questions to which proposed laws will give rise; this means that these questions of policy may be considered and answered at the political level as they should be, rather than at the judicial level. Fourth, the lawyer has knowledge of the way in which the same areas have been regulated in other countries. He broadens the alternatives before the policy-makers by showing the solutions of other legal systems to problems similar to those confronting his ministry. His role is not the negative one of saying that the means to a goal are illegal; his is the positive role of discovering alternative means which do not suffer the same deficiencies as those earlier proposed.

Most important, the lawyer is apt to be the sole spokesman in the decision-making process for a range of considerations not in conflict with, and very likely fostering, the goal of economic development. The lawyer has a basic commitment to the rule of law. He is committed to the proposition that the first task of a society is to provide law to govern the affairs of men and to institute courts in order that disputes be settled by law and not by violence. Without law there is no order, no freedom and no development. One aspect of this commitment requires that law govern the dealings between men and their governments, that governments not reward or penalize individuals by whim, but rather according to the laws. The lawyer is committed to the preservation of civil liberties -- the rights of individuals against governments. Ministries of the government are apt to conceive of these liberties as obstacles to the attainment of their particular goals. This

may be less a matter of principle or dogma than of the administrator's personal distrust of the independent activities of persons not subject to his authority and control. However, even if the wellspring of the attitude is psychological, the attitude is a fact which a lawyer in a developing nation will probably confront. The lawyer, taking a broader view of the workings of a society, is in a position to educate policy-makers to the view that the goals of civil liberties and democratic institutions are not in essential conflict with the goal of development sought by the government. The free flow of information, safeguarded by the right of free speech, is essential to the innovative process. Preventive detention, when used to silence political opposition, likewise engenders a fear to criticize, which dampens the innovative processes. Furthermore, the lawyer must be the spokesman for democratic institutions; he knows that development not taking account of the wishes of enough people is constantly endangered by ensuing political instability. He recognizes the fact that the stability of institutions rests on the adequacy of channels by which dissent may be expressed. He recognizes the need for orderly methods for the transfer of political power. He recognizes that the innovative attitudes necessary to economic development are fostered by a free and democratic society. The particular role of the government lawyer, when advising on the adoption of laws abridging civil liberties, is to ensure that the law be as narrow as possible to accomplish the felt need of the policy-makers. He must act as a restraining influence on inroads into civil liberties.

3. Negotiating

Placing lawyers in specialized ministries has the further advantage of providing an on-the-spot legal consultant who can participate in every stage of bargaining when contracts and treaties are being negotiated. The experience of some MEF Fellows has been that many important contracts are negotiated by laymen in the ministry involved and sent to the Ministry of Justice for legal scrutiny only when it is too late. These draft contracts often omit such essential features as a definite contract price or a terminal date for the completion of the work involved. In almost every case there was insufficient time for the Ministry of Justice lawyer to reopen negotiations and correct this kind of fault. The parties are usually in too great a hurry to get the job under way to renegotiate these deficiencies and the Ministry, as a result, must be content with the good faith performance of the other party. Sometimes, when contracts or treaties involve foreign firms or governments, the other party has already left the country when the Ministry of Justice lawyer first sees the contract. Still worse, some contracts are never sent to the Ministry of Justice for checking.

A lawyer placed directly in the ministry negotiating a contract or treaty would have foreseen these types of pitfalls and omissions and the resulting agreement would have given the government the necessary legal protection. Lawyers are more apt to foresee such problems because they are trained to anticipate failures in contract performance and to provide safeguards in the agreement against such defaults. Such a lawyer should be intimately connected with all phases of negotiations from the first time an agreement is contemplated. The lawyer's participation from the beginning will eliminate the need for last minute checking of the legal and practical implications of every clause. The presence of such a government lawyer protecting the interests of the African government is particularly essential since the foreign party, more than likely, will have had legal

advice certainly before and perhaps during the negotiations.

Although a lawyer in the Ministry of Justice might be usefully consulted at all these stages even under the present centralized legal organization in African governments, it is the experience of FIA lawyers that they are usually not. And, even if they were, this would not be a wholly adequate substitute for the substantive as well as legal expertise a lawyer posted in a particular ministry can bring to bear.

Manpower difficulties of rapid implementation

Where adequately trained lawyers are available in sufficient numbers, it will be relatively easy to implement this proposal. It is recognized that since in many countries the government has available only a few lawyers, it will not now be possible to give ministries their own legal advisers. Until enough lawyers are available it might be possible to assign lawyers within the central law office primary responsibility for particular ministries, so that a lawyer can begin to build up some knowledge of the affairs of a ministry, although he will still be available to perform duties not necessarily connected with the ministry for which he has primary responsibility. As more lawyers become available they should be assigned to work part time in the substantive ministry itself while still doing general work in the central law office. Eventually, as the work increases further and justifies it, the lawyer should be assigned full time in the substantive ministry.

However, lawyers should be placed in substantive ministries by the director of the central legal office and should remain under his control. This is desirable to ensure the coordination of major legal policy throughout the government by the principal legal officer -- the Attorney General, Minister of Justice, or similar

person. To this end, lawyers should be first trained in the central legal office before they are placed in a substantive ministry. After placement, they must remain in close contact with the central legal officers, since discussion among lawyers on an informal and continuing basis is essential to professional work and to uniform substantive policy development.

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