

LAW, GOVERNANCE,  
AND DEVELOPMENT  
RESEARCH

# LAWMAKING FOR DEVELOPMENT

Explorations into the Theory and  
Practice of International Legislative Projects

Edited by  
J. ARNSCHEIDT  
B. VAN ROOIJ  
J.M. OTTO



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## Lawmaking for Development

## Law, Governance, and Development

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## Abbreviations

AALCC	Asian-African Legal Consultative Committee
ACTAL	Dutch Advisory Board on Administrative Burdens
ADB	Asian Development Bank
ALADIN	Association for Law and Administration in Developing and Transition Nations
ASEAN	Association of Southeast Asian Nations
BCLR	Butterworths Constitutional Law Reports
BGB	German Civil Code
CC	Constitutional Court
CCP	Chinese Communist Party
CEPLA	Commission on Environmental Policy, Law and Administration
CIDA	Canadian International Development Agency
CIS	Commonwealth of Independent States
CM	Critical Moment
CONTRALESA	Congress of the Traditional Leaders of South Africa
EBRD	European Bank for Reconstruction and Development
EC	European Community
EIA	Environmental Impact Assessment
EMA	Environmental Management Act
EMDI	Environmental Management Development in Indonesia
EPA	Environmental Protection Agency
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
FAO	Food and Agricultural Organisation
GTZ	German Association for Technical Co-operation
HPAE	High Performing Asian Economy
IADB	Inter-American Development Bank
ICEL	Indonesian Centre for Environmental Law
ICEL	International Council of Environmental Law
ICER	Interdepartmental Commission for European Law
IDASA	Institute for Democracy in South Africa
IFI	International Financial Institutions
ILO	International Labour Organisation



IM	Inaugural Moment
IMCO	Inter-Governmental Maritime Consultative Organisation
IMF	International Monetary Fund
IOC	International Oceanographic Commission
IUNC	International Union for Nature Conservation
L&D	Law and Development
LAC	National People's Congress Standing Committee Legal Affairs Committee
Legal TA	Legal Technical Assistance
LMA	Land Management Act
LMECT	Legal Mandate Enforcement and Compliance Team
MITI	Japanese Ministry of Trade and Industry
NGOs	Non-governmental organisations
NPC	National People's Congress
NPC-SC	National People's Congress Standing Committee
NT	New Text of the Constitution
ODA	Official Development Assistance
PM	Post Moment
RF-CCP	Russian Code of Commercial Procedure
RM	Revivalist Moment
ROCCIPI	Rules, Opportunity, Capacity, Communication, Interests, Process, Ideology
ROL	Rule of Law
RSFSR	Russian Soviet Federative Socialist Republic
SAJHR	South African Journal of Human Rights
SANCO	South African Civic Organisation
SASF	Semi-Autonomous Social Field
SCA	Supreme Court of Appeal
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
TVE	Township and Village Enterprise
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
US	United States (of America)
USAID	US Agency for International Development
USSR	Union of Soviet Socialist Republics
VC	Village Council
WHO	World Health Organisation
WMO	World Meteorological Organisation

WRR	Netherlands Scientific Council for Government Policy
WTO	World Trade Organisation
ZIMCO	Zambia Mining and Industrial Corporation



# Lawmaking for development: An introduction

*B. van Rooij, J. Arnscheidt, and J.M. Otto*

## **Lawmaking, law, governance, and development, and the Seidmans**

Over the last decades there has been increased recognition that law and governance matter for development, be it macro-economic growth (Cross 2002; North 1990; World Bank 2002; Pistor and Wellons 1999) or the improvement of micro-level basic needs and freedoms (Manning 1999; Anderson 2003; Asian Development Bank 2001). Accordingly, strengthening law and governance has become a major focus of international development organisations, national governments, and non-governmental organisations (Carothers 1998; Lindsey 2007; Newton 2006; Trubek and Santos 2006). However, their attempts at improving the functioning of law and governance in order to aid development have achieved different levels of success.

The field of law, governance, and development studies (LGD studies) offers insights into understanding the factors that cause the success or failure of international and national legal and governance reforms. Its scholars are devoted to studying the functioning of legal systems in developing countries in order to understand how they contribute to governance and development and what needs to be done to improve their effects. Since the publication of Hyden et al.'s 'Making Sense of Governance', the intimate connections and overlaps between law and governance have become common knowledge (Hyden 2004). The field of LGD studies seeks to understand what happens to law and policy when legal institutions and stakeholders operate in local reality, in their socio-political contexts. It recognises that individual countries are unique and seeks to translate the experiences with the myriad of law and governance programmes and projects into knowledge about how law and governance reform promotes development. Within LGD studies, lawmaking has always been an important topic. Legislation is a central part of state legal systems, and often, when seeking improvement of the legal system as a whole, the written legal norms are starting points, or are at least specific aspects that are useful to consider. Moreover, legal development co-operation has included legal technical assistance on legislative drafting.

For almost three decades, the most important scholars focusing on lawmaking for development have been Bob and Ann Seidman. In their work, which ranges from an overall model for understanding and improving legal systems in developing countries (Seidman and Seidman 1994; Seidman 1978a) to a manual for drafters working in developing contexts (Seidman et al. 2001), the Seidmans have addressed many important legislative issues, about many of which there have been wider scholarly debates. Examples include their ideas on the linkages between legislation and implementation, understanding the behaviour of targeted actors as a basis for making legislation, the possibilities of legal transplantation, preventing miscommunication between drafters and policymakers, engaging drafters in social scientific research, and a methodology for increasing the drafting quality itself by focusing on clarity and specificity. Their work has moved beyond mere scholarly debate and aims at directly involving practitioners, in particular, through a specially designed training course for drafters in developing countries.

It was on the occasion of their coming to Leiden University that the original conference this volume is based on was organised. In line with their work in which a broad range of themes and different actors come forward, papers were invited from both scholars and practitioners about diverse topics including law and development theory, lawmaking theory, and the practice of lawmaking in developing countries. The resulting volume combines insights from scholars, based on conceptual analysis and empirical research, with those of practitioners involved in lawmaking in legal technical assistance projects. Doing so, this volume aims to be useful for both scholars and practitioners. Its central theme is how lawmaking (the process) and legislation (the product) function in developing countries, how legislation contributes to development and how lawmaking and legislation can be improved either by the country itself or by donor assisted projects.

### **Outline of the book chapters**

Several chapters in the book (Chapters 1-5) deal with theories concerning lawmaking and its wider contexts of law, governance, and development. These chapters outline ideas about the quality of legislation, how the process of lawmaking can be conceptualised and analysed, the effectiveness of legal transplantation, and the ways in which the field of LGD studies has emerged and developed over the last decades. Apart from legislative theory, most chapters (Chapters 1, 4, 6-11) contain case studies about how lawmaking takes place within contexts of development, from Zambia, South Africa, China, Indonesia, Sri Lanka, Russia, and Central Asia. The cases include both national and international law-

making projects. In the remainder of this section, the book's chapters will be summarised in more detail.

In his contribution, Newton (Chapter 1) discusses the history of legal development co-operation. He elaborates five periods of law and development and legal technical assistance. First came the pre-history (until the 1960s) of colonial legal development. This was followed by the Inaugural Moment (1965-1974) of US legal development co-operation aimed at modernising developing countries. During the Critical Moment (1974-1989) legal assistance was attacked for being neo-colonial and not in line with local contexts. Legal development co-operation returned to prominence during the Revivalist Moment (1989-1998) when law came to be seen as an important element of economic restructuring and a stimulus for economic growth. Finally, there is at present the Post Moment (1998-date), in which there has been another critical re-evaluation of legal development co-operation. Here the original doubts of the Critical Moment have been expanded to also include problems related to the political nature of the reforms, the lack of empirical foundations, and the dominant influence of market fundamentalism. Newton's contribution explains how the Revivalist Moment has been informed by major ideas and premises of the field of law and economics, discussing the influences of the Chicago School of law and economics, law, institutional economics, and public choice. Newton discusses how in the Post Moment a different set of non-economistic socio-legal ideas and premises have become influential in informing critical views of legal development co-operation, including legal realism, institutionalism, and critical legal studies. Using examples from Kazakhstan and Sri Lanka, Newton's chapter discusses the various types of legal technical assistance that were organised as a result of the law and development revival, distinguishing substantive law reform (legislative drafting), judicialism, legal education and professional support, the reform of public administration, and alternative dispute resolution. Here the chapter elaborates on legislative drafting of commercial law. The author remarks that in the Revivalist Moment, lawmaking became prominent and was seen as the first and most important step in legal development. In addition, legislative co-operation was seen as a mere matter of technical choice, obscuring the politics involved. In the Post Moment, lawmaking is less prominent, and attention has moved from the law-in-the-books to making law work in actual practice. Here Newton notes that economists have been critical, pointing out that their ideal laws were misapplied in practice, defending legislation, and blaming failure on suboptimum implementation. Critical socio-legal scholars, meanwhile, have indicated that legislation is often adapted to the interests of the powerful. Newton makes several suggestions on how to deal with the critiques on legal development co-operation. First, he argues for more and better empirical

research on the effects of legal technical assistance, and second, that assistance should be broadened to include more bottom-up legal empowerment type of activities, while also working on state institutions and top-down processes.

Otto, Stoter, and Arnscheidt discuss lawmaking theories and relate them to developing countries (Chapter 2). Using the concept of real legal certainty (RLC), the authors demonstrate the importance of RLC for development and the central place legislation has in RLC. The chapter then outlines the problems that exist in how laws are made and the effect they have in reality. In order to deepen the understanding of these problems this contribution discusses theories on the process of lawmaking, the effects of legislation, and legal transplantation. Discussing the process of lawmaking, the chapter introduces five types of ideas from public administration on the ways in which the process of lawmaking takes place in practice. In these ideas there are different conceptions of the lawmaking process, distinguishing its direction (top-down or bottom-up), major actors (interest groups, elites or bureaucrats), and rationalities of the actors involved (political, legal, economic and scientific rationalities). Otto et al. further introduce different approaches and ideas about the effectiveness of legislation. The approaches include legislative evaluation, sociology of law approaches, and legal anthropological approaches. Within these approaches different ideas exist over whether law can have an effect on reality. There is a difference first of all between those that seek to understand the direct effects of law on reality (direct instrumentality) and those that believe that law can also have indirect effects because of its communicative function. Second, some hold that law's effects are limited due to the existence of so-called semi-autonomous social fields with their own norms that can obstruct the local effects of external legislative norms. Third, other views question whether the lawmaker originally intended to make laws that would have an effect or rather to take issues off the political agenda. Otto et al. further provide an overview of the different theories related to legal transplantation. They question whether the ideas of those that believe that legal transplantation is possible and positive, and the ideas of those who oppose it and hold that legal transplantation is naïve, ethnocentric and ineffective, are truly incompatible, or whether they can be combined, since they touch upon different legislative issues.

Florijn's contribution (Chapter 3) discusses the quality of legislation. This chapter relates how in the Netherlands the following list of six criteria for good legislation has been formulated: 1) legality, 2) effectiveness and efficiency, 3) subsidiarity and proportionality, 4) practicability and enforceability, 5) harmonisation, 6) simplicity, clarity, and accessibility. Florijn traces the development of the Dutch legislative quality policy, noting that increased professionalism, ideas about legislation by in-

fluent actors, and ‘cataclysmic events’ have further helped the development of quality criteria. The author recognises the complexity of locating the requirements of good legislation. Due to the different opinions of the many different users of laws, it may often be hard to find a consensus on what good law is. He states that, although generally accepted in the Netherlands, the Dutch list of six criteria is inherently vague and that, as they may be mutually conflicting, legislators must find an optimal balance of these requirements. Different actors involved in lawmaking processes, including drafters, ministers, and members of parliament, have different aims, interests, and rationalities, and this affects how in practice the Dutch list is applied in the lawmaking process. While ministers may argue that there are good reasons for deviating from the list of six requirements, members of parliament do not see maintaining the quality of legislation as their responsibility. Florijn’s contribution thus details how the process of lawmaking affects the possibilities for maintaining legislative quality. An attempt to increase attention for quality in the legislative process has been the ‘depoliticisation’ of the legislative process, letting legal professionals draft laws based on quality standards with as little political interference as possible. Florijn finally addresses the possibilities for international co-operation on legislative quality. He states that such work should concentrate on finding or creating the right institution to develop and implement legislative quality control. It should also enlist political support, create tools and instruments to attain the goals set, provide education for the various legislators involved, install monitoring and evaluation mechanisms, and only expand the policies implemented when the first goals are met.

Seidman and Seidman’s chapter (Chapter 4) discusses the process of lawmaking, advocating a problem-solving methodology. In this normative methodology, lawmakers are to describe and explain the behaviours that block good governance and development, i.e. the behaviours that are targeted in development oriented legislation. Based on this, drafters who should be engaged in the process of fact-finding and analysis can design proposals and norms likely to induce a positive change of behaviour. After a bill made based on this has been enacted into law, the law’s progress should be monitored and evaluated. The Seidmans contrast their problem-solving lawmaking process with two earlier models: the ends-means methodology that defines an end and looks for the most efficient means to achieve such end, and incrementalism, which tries to stay closest to the current situation at hand and recognises the difficulty of large changes. Seidman and Seidman’s contribution also explores the question of how law can induce the desired social change necessary for development. Successful change only occurs if a set of seven interrelated causal factors facilitate it, expressed as the acronym



ROCCIPI: Rules (prescribing how actors should behave), Opportunity (the environmental circumstances which facilitate or thwart the specified problematic behaviour), Capacity (the actor's ability to behave as prescribed in the law or contrary to it), Communication (whether the actor knows the rules), Interest (factors which the actors view as incentives for behaving as they do), Process (the procedures by which the actor decides whether or not to obey the rule), and Ideology (the actors' own values beliefs, attitudes that influence their behaviour). In order to create the desired social change, rules should be able to alter or eliminate all other factors in accordance with their own aims. The quality of rules is related to the extent to which the law is able to affect these factors. In an effort to show how their theories work in practice, the Seidmans' contribution contains a case study of how a problem-solving methodology was used in Zambia to do research preparation for a new law proposing to establish a Commission on Law and Integrated National Development. This commission was to 'perform the essential country-level research and design detailed legislation for transforming the institutions in ways likely to foster more balanced integrated employment of resources in each major sector of the Zambian economy'. Such a commission, it was hoped, might end arbitrary lawmaking of the past. By providing some of the actual findings of the research report made by the Zambian research team, the chapter demonstrates how such preparatory research implementing the ROCCIPI research agenda from the problem-solving methodology may be applied in practice. By doing so, the chapter demonstrates how Zambian lawmaking was characterised by arbitrary and non-public lawmaking without a good system of rules to guide it, with only limited participation and little detail on implementation, and with legislators following their own ideologies and interests instead of those of the public, often disregarding actual local realities. The report also came up with a legislative solution, while also considering alternatives. The main solution proposed was to adopt a law establishing a Law and Development Commission with the duty to conduct research and draft legislation. This commission is to employ well qualified experts, basing themselves on a set of criteria for each sector for which laws are made, following a certain set of legislative procedures that are transparent, accountable, and that allow for participation and realistic empirically researched lawmaking. Sketching the contents of the report, the Seidmans argue that if such a report is well made and well founded, it ought to persuade the 'rational sceptical reader' and lead to the adoption of the actual law and enhance the chances of its implementation.

Van der Vlies's contribution (Chapter 5) asks how responsive legislation – laws that respond to values, interests, needs, and demands in society – can be made given the fragmentation of such societies, especially

now that legislation is supposed to operate on a larger, even global, scale. In her answer to this question, she warns against legislative processes that are too inward-looking. Here she is critical of the approach adopted by the Seidmans, which stresses the importance of drafting laws based on research on 'the perception of the people'. She states that another step is necessary: placing new laws within the international context. This is done and can be done through four steps: exchange of knowledge by legislators in different countries, comparison of rules in different countries, legislative transplantation, and the preparation of treaties. In Van der Vlies's contribution the desirability of legal transplantation is central. She argues, from a global perspective, that even though imported laws may lack effectiveness, as has been argued by scholars such as the Seidmans, the challenges of global participation mean that developing countries cannot have purely domestically bred legislation, and as such legal transplantations should 'not be scrapped as a "failed strategy"'.

Van Rooij's contribution (Chapter 6) highlights the changes that have occurred in China's lawmaking process since the second half of the 1990s. In his study, Van Rooij looks at the legislative debates about the amendment to the Land Management Act in 1998. The study demonstrates that in this case lawmaking in China is not characterised by bargaining and incrementalism, which would have led to a vague and weak law. Instead, the influential Law Commission of the National People's Congress ignored local concerns about the law's local feasibility. It did so in order to maintain the draft's strict and specific norms to protect the country's declining arable land quality and thus to procure food security. As a result, the final bill seemed, on paper, well geared to protect the country's arable land, as it was not watered down to appeal to local interests. However, the law had a questionable implementability because it was likely to conflict with local interests, particularly the financial benefit that many locals could obtain in the short run from building on arable land. In his analysis Van Rooij uses a new framework about the implementability of legislation in terms of compliance and law enforcement. He concludes his study by describing the challenges of making implementable laws in a country with complex and conflicting interests, as it may be difficult to reconcile the goals of the laws with the goals of the people or organisations the laws are targeted at, whether local citizens or local governments set to enforce the laws.

Bedner's contribution (Chapter 7) traces the historical development of the Environmental Management Act in Indonesia through the New-Order period (1967-1997). He shows how over time different foreign models were studied and adopted. As such Indonesia did not import entire foreign laws but only selected aspects of different foreign systems suitable to its needs. The relative success of such legal amalgamation

depended on the considerable knowledge of foreign environmental laws available among the country's legislative drafters. In addition, their knowledge was well used, as it was backed up by considerable political support helping proposals against the strong opposition of certain departments. In the last years of the process (between 1982-1997), environmental legal experts played an increasingly important role through their feedback and discussion of draft legislation. However, success in implementation has been limited. Although this could lead one to think that the lawmaking process has thus failed, Bedner holds that the new Environmental Management Act has had and will have a continued effect over time. Here he highlights especially the law's symbolic effects, the institutes it has created, and its invocation of the new law by civil society organisations following the post-Suharto reformation period. In his final analysis, Bedner's contribution provides an account of the experiences with legal transplantation of environmental law in Indonesia. He concludes that there are two particular features that may hamper legal transplantation in general. First, the history of a law: laws with only a short history, such as environmental laws, are less culturally and locally imbedded and may be relatively easy to transplant from one country to another. A second important feature is the amount of law that is transplanted, ranging from the transplantation of an entire law to the import of certain elements of different legal systems, selected for their suitability. The last form, 'legal amalgamation' as Bedner calls it, may, when properly performed by well-informed lawmakers helped by foreign experts, lead to a better body of law than importing an entire foreign act.

Mqeke's contribution (Chapter 8) analyses the legal framework of lawmaking and participation in post-Apartheid South Africa. In the new South Africa constitutional values of accountability, responsiveness, and openness led to an 'inclusive approach to lawmaking' with public hearings and invited comments. Although participation in the lawmaking process was thus enlarged, traditional authorities lost influence, as their consultative role in lawmaking was decreased. However, for rural matters, the government has left room for the involvement of chiefs, hoping that this will boost local legitimacies of such laws. Mqeke's chapter argues that for land administration tribal consultation has proved to be resilient and chiefs have taken a larger role than would have been expected given the overall reforms made. Mqeke attributes several factors to the continued influence of chiefs on lawmaking, including their constitutional status, widespread grassroots support, political patronage, resurgence of traditional religion, mobilisation abilities, and negotiating techniques employed.

Deppe's contribution (Chapter 9), based on the author's own experience in GTZ projects, discusses legal reform in Central Asia. The

author traces the history of legal reform in this area by contrasting earlier efforts aimed at lawmaking with current problems in the implementation of such laws. He demonstrates that, at first, legal reform meant making new laws, often even the direct copying of laws, from Western countries. By doing so, Western donors wanted to strengthen Central Asia's commercial ties with the West, focusing on the reform of civil and trade laws. Success was measured by the number of laws passed or by polling the opinions of the business community. However, the results of such legislative reform were disappointing. As Deppe argues, this was largely due to the fact that the original reforms lacked realism, patience, and local suitability. In addition, there was too little attention paid to implementation, which the author holds does not come automatically. He concludes that successful legal reform first of all needs time, which many of the current projects with their two to five year time span do not have. Second, reforms need to be holistic, combining legislative assistance with legal training, dissemination, public information, institution building, harmonisation, and monitoring.

In his contribution (Chapter 10), Feldbrugge traces the development of civil law in the Russian federation, looking both at its historical roots and the involvement of Dutch legal experts in the final drafting process. The Russian team involved in the drafting of a new civil code faced several challenges, including time pressure, political unrest, and the limited availability of translated foreign literature coupled with limited foreign reading skills. Partly because of these problems the Russian team sought assistance from foreign countries including the US, Germany, and the Netherlands. Feldbrugge analyses the Dutch involvement in the civil code drafting, combining his own inside information with his expertise on Soviet and Russian law. He argues that a combination of 'sheer luck and management of the agenda by both the Russians and the Dutch' led to a working method that proved successful. This method consisted of the Russian team making a first draft, sending this draft with a list of specific questions to the Dutch, including W. Snijders, the leading drafter for the last stages of the new Dutch Civil Code, and then organising a series of meetings in order to exchange ideas on both the draft and the questions. This way of working allowed the Russians to get input on the issues they felt were necessary and for the Dutch to apply their expertise to the complexity of the Russian situation. Feldbrugge emphasises several notable points, including the open nature of the questions asked, the exclusion of political motives within the Dutch team, the environment of trust this created, and the appreciation by the Dutch of Russia's own complexity and of the limited use the Dutch civil code itself had within this context.

The final chapter of this volume with Snijders' contribution (Chapter 11), discusses the author's ideas about legislative development co-

operation. The chapter is based on his experience in advising the drafting of the Russian civil code in 1993, the creation of a model civil code for the Commonwealth of Independent States (CIS) countries in 1994 and the revision of the Russian code of commercial procedure, which came into effect in 2002. Snijders explains his different experiences within these three projects. In the first project, the drafting of the Russian civil code, the consultants reacted to questions from the Russian drafting team, allowing the Russians to use Dutch experience as options for ways of dealing with problems within their own legal system, flexibly applying the Dutch knowledge to fit their own circumstances. In the CIS model civil code project, the Dutch experts played a different role, with less open brainstorming on questions and much more explanation of the texts to be adopted, trying to convince drafters not to adopt unrealistic rules. Here the author admits that because of the advisors' limited knowledge of the local situation, which was mainly provided to them by the national authorities, their advice may not suit local circumstances. In the third project on the Russian code of commercial procedure, Snijders states, the consultative work was again different. Here, it was much more focused on existing problems and preventing future problems, all highly practical in nature. The author stresses the importance of finding a balance between continuity and innovation in legislative projects. In this, he warns against an unnecessary overburdening with new rules. A second general point he stresses is that because foreign experts rely on expertise from national authorities, mutual trust is necessary. Third, Snijders concludes that fundamental legal principals in drafts are essential and should be subjects for discussion amongst foreign experts and national lawmakers. Finally, he stresses that although there should be the possibility of amending laws if they fail in practice, this should only be done after the actual users and implementers of such laws themselves have had the opportunity to solve such problems.

## Conclusion

This volume has brought together papers by different types of authors working on different issues in different countries, but all with a common theme: lawmaking for development. These contributions show how much knowledge, both theoretical and empirical, already exists. When combined, as within this volume, such knowledge furthers our understanding of law and development, and decreases the knowledge gaps that have been identified in the recent literature on this topic (Carothers 2006; Golub 2006; Trubek 2006). The papers presented here are of course only a first step. Still, they highlight the major issues

that currently exist in the field of developmental lawmaking and signify the existence of both positive experiences as well as challenges that need to be dealt with.

An important theme has been the question of the extent to which lawmaking should involve international legal transplantation. In this volume, most contributions warn against full transplantations of laws. While some remain critical of any form of legal transplantation and argue for lawmaking based on local research, others have emphasised that legal amalgamation, as Bedner calls it (Chapter 7), the adoption of norms from those foreign models that fit a local situation best, may actually be a good solution. Ideally such amalgamation should take into account the results of local research and stakeholder participation.

The connection between lawmaking and implementation is a second general theme in this volume. While often seen as two distinct processes, this volume echoes insights from public administration and earlier work by the Seidmans (1978; 1994; 2001) that lawmaking and its implementation are inseparable. Good legislation can be implemented, and therefore linking it with implementation is essential. This implies two things: first, implementation should be made a core part of the lawmaking process by involving the implementers. Second, assistance on lawmaking should be combined with other projects aimed at the implementation of legislation.

This volume further discusses the timeframe in which the effects of new laws are evaluated and the manner in which such results are thought to occur. The dominant underlying idea has been direct instrumentality, in which a law is deemed successful if it is able to create a direct result favourable to development. However, a competing notion is also discussed, in which the law's communicative effects may be less visible and more indirect, allowing for a longer time to realise social changes. Following notions of the communicative effects of the law, perhaps actors involved in lawmaking could be more patient and accept the fact that the law may, even if it is not directly successful, be able to achieve change through its role as a forum for public debate or its role as a new framework for problem analysis.

The volume further provides insights about what legal development co-operation has accomplished in the field of legislation and what it should aim for. It discusses, on the one hand, the direct substantive advice on legislative drafts, and on the other, the possibilities for setting up quality systems for improving the lawmaking process in general. Even if substantive legal advice is conceived and presented in a modest and feasible manner, the actual different circumstances that relate to specific laws may still complicate the ability of foreign experts to advise on substantive legal content. Aiding the establishment of a quality control system for lawmaking is an important step to improving future

laws. It should be noted, however, that as experience from the Netherlands has taught us, this so far has been difficult to carry out.

Finally there is the question of politics. Authors engaged in lawmaking practice have stressed the importance of retaining political neutrality when engaging in legislative development co-operation. Others, including Newton (Chapter 1), have warned that any form of legal technical assistance means engaging in politics and that even the task of legal drafting about seemingly non-political commercial matters will always involve a certain level of politics. As a consequence, lawmaking will remain without effect if politics are not addressed and incorporated in the process. In any case, politics will be influential, and often limits the possibilities for purely legal, economic, or social scientific reasoning when designing new laws. Instead of criticising or ignoring this limitation, lawmaking and its academic study should embrace it as a fact to be dealt with.

This volume has attempted to bring together such pockets of knowledge in order to strengthen the basic infrastructure of information about lawmaking for development. Of the many studies and many practical experiences, the papers here only present a modest representation. It is hoped therefore that others will follow this volume's call, and in the near future make more of the existing knowledge accessible, aiding lawmaking around the world.

# 1 Law and development, law and economics and the fate of legal technical assistance

*S. Newton*

## **Introduction: The law boom in economic development**

Legal technical assistance (Legal TA) over the last ten years or so has become an integral part of economic development and transition programmes the world over. From Peru to Vietnam, from Tajikistan to Rwanda, donors have queued up to fund a host of discrete projects designed to benefit various aspects of legal systems. Providing judicial training as well as other forms of legal education for students and professions, assisting in commercial law drafting, promoting professional development such as helping to establish or bolster bar associations, helping to streamline the legal regulation of businesses, and alternative dispute resolution, access to justice and legal clinics are among the standard items on the menu of interventions which characterise contemporary Legal TA.

The case for the value of law in facilitating development has been so vigorously pressed and emphatically defended in recent years that it has become almost axiomatic. For example, The World Bank created a legal and judicial reforms unit, and other development banks – the European Bank (EBRD), the Inter-American Bank (IADB), the Asian Bank (ADB) – have similarly developed legal and judicial assistance administrative units and/or operational foci. Funding levels reflect the unprecedented value attached to legal and institutional reform among development donors (Carothers 1998; DeLisle 1999). Lawyers have at last come in to their own in the field of development assistance; economists and policymakers have finally come to accept and appreciate the significance of law to economic development; and the future as well as the foundation of Legal TA is secure and certain. Well, or so one might suppose...

To someone coming fresh upon this phenomenon, it may be surprising and perhaps enlightening to learn that Legal TA has a lengthy history as a practical endeavour, stretching back to the development decade of the 1960s and even earlier than that to the era of colonial administration. This practical history reveals, like the history of development assis-



tance more generally, a succession of dominant ideas or paradigms. Legal TA thus has a theoretical underpinning as well as a history, a set of justifications about the relationships between law and economic development, transition, or growth. Like the field of development economics from which Legal TA arose in some sense as an adjunct, the theory of law and development (L&D) has also undergone changes and paradigm shifts.

What gets done (that is: Legal TA) and the way people understand what gets done (that is: L&D) have evolved over the course of the last 50 years. For the most part, L&D and Legal TA have developed in tandem. L&D was very much an applied science which arose in the first place as an adjunct of official development assistance (ODA), of government-funded intervention in development. From the 1960s through the 1990s, the programmes and projects that governments, the International Financial Institutions, and other donors funded in the field tracked fairly closely and indeed were for the most part directly based on the reigning ideas in L&D about the way in which legal change affects economic and social change.

However, L&D and Legal TA have begun to diverge rather dramatically in recent years. This essay concentrates on these developments. Although Legal TA has not changed significantly since the early 1990s, L&D has emphatically done so! This latest set of changes in what has been a series of paradigm shifts might even be characterised as a paradigm collapse. But donors do not seem to have caught up or to have processed the new thinking sufficiently to adequately adapt their approaches to Legal TA.

As a result, Legal TA as it is typically formulated and practised today by nearly all parties (from the bilateral development agencies such as the UK Department for International Development, the German Gesellschaft für Technische Zusammenarbeit (GTZ), and the US Agency for International Development (USAID), to the multilateral institutions such as the development banks, the philanthropists, and the NGOs) rests on a set of questionable assumptions and reflects merely a very narrow band of a broad spectrum of theory about the relationship between legal and economic processes and functions. Those who have been contemplating the incorporation of a formal Legal-Institutional TA dimension in the Netherlands development assistance strategy would be well advised to broaden considerably the standard approach to Legal TA as well as to tighten the existing and unfortunately loose and partial connection between contemporary theory and practice – between L&D and Legal TA. This gap or lag should not be underappreciated.

## A brief history of Law and Development and legal technical assistance

### *Pre-history*

An understanding of the origins and history of L&D and Legal TA helps to explain how the gap developed between them. The Law and Development movement began in the United States in the 1960s. This was a fateful origin because North America did not have a notable history of colonial administration and, therefore, had not had much occasion to ponder the role of law in development. By comparison, European nations were far more experienced by necessity in dealing with such matters due to their colonial pasts. This does not mean that their thinking reflected a strong theoretical basis. Nonetheless, the colonial administrations of the British Empire, the French colonies, and of course the Dutch Indies, East and West had for years dealt with a variety of legal challenges where, although the colonial-era lawyers in Batavia, British East Africa, Afrique Occidentale Française and Afrique Equatoriale Française did not worry about the use of law in colonial development, they certainly exercised it. In particular, these lawyers used law to organise and structure the colonial economies which were underpinned by legal rules and institutions transplanted from the home countries and adapted as required. In many places they effectively created and institutionalised capitalist market economies *ex nihil*, putting in place systems of title, formalised procedures for transactions, mechanisms of financing and credit, and forums for the resolution of disputes by a trained professional class of legal officials.

Thus, long before the pioneers of the L&D movement began to theorise on the relationship between L&D and Legal TA, legal staffs of colonial governments and the numerous successor ministries of the economy, industrialisation, planning or development of the decolonised states were very much involved in the relationship on a practical level. For example, a great deal of legal work had been expended when the tea industry was organised in British Ceylon in the early 19<sup>th</sup> century and when Nasser nationalised cotton marketing as a development strategy in the mid twentieth century and when Japan launched itself on the road to conquering export markets by growing National Champions under the stewardship of the Japanese Ministry of Trade and Industry (MITI). This early history should not be ignored in that many of the problems and issues with which we grapple today were foreshadowed long ago.

This essay draws particular attention to four main phases, or moments, from the 1960s to the present: the Inaugural Moment (1965-74), the Critical Moment (1974-1989), the Revivalist Moment (1989-1998), and the Post Moment (1998-date).<sup>1</sup>

### *Inaugural Moment (IM) 1965-1974*

The contemporary history (as opposed to the pre-history discussed above) of L&D as a legal subdiscipline and Legal TA as a project began in the 1960s as a result of Cold War politics. John F. Kennedy launched the Alliance for Progress in the wake of the Cuban Revolution to counter Soviet influence in the hemisphere. Lavish development funding flowed south from the US, and part of it – a very modest part – ended up financing the first initiatives in targeted legal reform assistance, thanks to lobbying by a group of sociologically sophisticated and progressive academic lawyers. What did these programmes consist of, and what was the thinking behind them?

These early efforts focused on improvements to legal education and on raising the prestige and profile of the legal profession in Bolivia and Brazil among other countries. They did not aim at comprehensive substantive law reform. They reflected the proclivities and preoccupations of the activist scholars who championed them, who believed in the utility of law as an instrument of social change as in the cardinal case of the US civil rights movement.

The thinking behind these programmes was not especially concerned with any specifically economic functions of law. It reflected rather a broader and more socially than economically inflected conception of the importance of law in the modernisation processes. Such thinking postulated that a developed legal system staffed by competent and well trained legal professionals was a *sine qua non* for social progress, ultimately of socially progressive legislation, and of a modern society. The thinking did not really address, except in a very incidental and general way, the legal dimensions of the statist development programmes of the day – import substitution or export-led growth. It confined itself for the most part to the social flatlands, leaving the commanding heights to the economists (Trubek and Galanter 1974; Merryman 1977; Snyder 1982; Tamanaha 1995).

### *Critical Moment (CM) (1974-1989)*

These first efforts to provide focused assistance to foreign legal systems came under attack in the turbulent 1970s. This period witnessed the vicissitudes in the developing world of economic nationalism (the failure of import substitution industrialisation, the capture of the developmental state by self-interested elites<sup>2</sup> and the rise of the debt crisis at decade's end), opposition to so-called neo-colonialism (manifest in the rise of *tiermondisme* and the non-aligned movement), and the concomitant rejection of many of the tenets of interventionist developmentalism. A vigorous challenge from the left was mounted in the name of structur-

alism, dependency and world systems theory. The ideas behind L&D and the practice of Legal TA came under attack as well. These critiques of L&D fall into two main categories.

One category can be called the family of contextual critiques with social, cultural, and historical elements. These critiques drew attention to the very wide geographic variation of legal traditions and forms and to the impracticality of importing alien legal approaches and techniques from one context and transplanting them into another. Contextual critiques are grounded in comparisons, and, although comparative lawyers were not common among the L&D pioneers of the IM, two pioneers actually did apply contextual critiques to Legal TA. In 1974, David Trubek and Marc Galanter published 'Scholars in Self-Estrangement' (1974) which faulted the very enterprise which they had helped to launch and develop premised on the US-derived model of 'liberal legalism'. They claimed that this concept of the relation of law to society, which was based on individualism, legal positivism, equal protection and the centrality of courts, was ethnocentric and inaccurate even as to its description of the US legal system. Drawing on the insights from the US Legal Realist school of the 1920s, they argued that Legal TA, as then practised, served to privilege legal experts and those with access to legal resources, i.e. societal elites. In addition, other L&D studies flourished during this period with much emphasis on legal anthropology, legal pluralism, socio-legal studies.

The other category of critique can be called the critique of the political economy of development in its legal dimensions. It had a decidedly Marxist, *tiermondiste* tenor and represented the application of ideas generated by the structuralists and dependency theorists to L&D. For such critics, Legal TA was a species of neo-colonial domination, continuous with the legal imperialism of the colonial era. They insisted on the world economic system predicated on the basis of a division into industrialised core and underdeveloped periphery as the proper subject of analysis, rather than the national economy of the developing state in isolation. L&D studies of this ilk addressed issues of international inequality (notably the 'right to development') but did not as a rule grapple with the legal mechanics of particular aspects of the capitalist market economy (Snyder 1980).

The connection between L&D and Legal TA during this period was all but severed; Legal TA as such languished during the CM. There were very few donor-funded programmes designed to support the legal system per se in developing countries, apart from USAID-funded 'administration of justice' programmes in Latin America (which were controversial in the context of support for authoritarian governments).

*Revivalist Moment (RM) (1989-1998)*

The RM followed the ascendancy of neoliberal ideas about the proper thrust of economic policies to promote growth and development. These ideas crystallised in the thinking of development economists and the practice of the IFIs over the course of the 1980s were reflected in the so-called Washington consensus. State-led development (or growth) was eschewed in favour of market-led development: liberalisation and privatisation were the prescription of choice, and planning and regulatory intervention came to be regarded as a *bête noire*.<sup>3</sup> With the quickening pace of globalisation in the 1990s, what was viewed as the only sensible policy of unencumbered markets became the imperative of global economic integration. Although neoliberal policies were first applied to African and Latin American economies (through Structural Adjustment Programmes mandated by new policy-based lending in the IFIs), it was the fall of the Berlin Wall and the ensuing post-communist transition in Eastern and Central Europe and the CIS that provided them with the opportunity to open a new chief testing ground.

Initially in the heyday of ‘shock therapy’ (sudden freeing of prices and state economic controls) as treatment of choice for transition economies like Poland, the role of law and institutions was neglected. But the turn to law and institutions in the early 1990s as part of the new paradigm of ‘good governance’<sup>4</sup> marks a formidable revival, renewal, and expansion of Legal TA, on a scale not dreamed of twenty years earlier in the IM. L&D for the first time acquired an explicitly economic theory of law, not just a social theory one (as was the case previously in the IM) or a political (or political economy) theory of law (as was the case during the CM). This is a theory with its roots in Max Weber’s concern with legal-formal rationality in the rise of capitalism, but as refined by neo-classical economics concepts filtered through the Chicago School of law and economics. As will be clarified later in this essay, this theory recognises the primary function of law as underwriting the efficiency of market exchange and hence stresses the virtues of a formal legal order (the so-called economic Rule of Law [ROL]) and the priority of private law over public law (legitimate enabling law as opposed to illegitimate interventionist regulation). Law must be purified of politics if it is to function as it should, neutrally and impartially. One of the hallmarks of the reign of an Economic Theory of Law in the RM and beyond, however, has been the repeated and emphatic assertion of theoretical causal vectors in the absence of empirical studies, a point to which this essay shall return.<sup>5</sup>

From the outset of the RM, the theory (L&D) was but the handmaiden to the practice (Legal TA). It was the so-called ‘ROL Revival’ or ‘New L&D’ – the newly-proclaimed indispensability of a suitable legal-

institutional framework for flourishing market relations – that led to the explosion of Legal TA in the RM (Carothers 1998). The standard menu of modern Legal TA had been worked out by the early 1990s, and was organised around the facilitation of markets, emphasising in particular:

- Judicial administration and training;
- Substantive commercial law reform;
- Alternative dispute resolution; and
- Procedural reform of public administration (regulatory agencies).

### *Post Moment (PM) (1998-present)*

The author names the final era ‘the Post Moment’ because it seems to be some sort of *morning after* – when big ideas and grand solutions have been abandoned. The PM begins after the mid-1990s, when the first signs of disillusion with the claims made for the value of law in transition appeared. Like the CM before it, the PM is a moment of critical re-examination and questioning of dominant ideas. The PM is, rather more than the CM before it, a Protestant moment, a Reformation of sorts, which witnesses a proliferation of sects: many small denominations challenging the One Church from divergent points of view. In the PM, there are High Anglicans who accept ecclesiastical *auctoritas*; there are also radical dissenters.

The disaffected and the excluded in the PM recapitulate and reinvigorate both critiques of the CM: the critique from context and the critique from political economy. They remind the academic legal community of lessons learned and then forgotten and of insights won and then discarded, and they also bring those lessons and insights to the attention of policymakers in other fields. In addition, they significantly deepen and extend and augment the critiques of the CM. They bring to bear new modes of analysis – critiques of globalisation, of gender and other biases, of efficiency logic as a guide for policymaking, of the public/private distinction, and of the political content of ostensibly technical approaches. They reassert the necessity of empirical findings to support theoretical claims. They counter the dominant economistic approaches to the law/economics nexus, predicated on micro-economic rationality and efficiency, with non-economistic approaches. Ultimately, they open up the discourse of L&D to a fuller spectrum of ideas, approaches, schools of thought, lines of research in the field of Law and Economics.<sup>6</sup>

The critique emerging from within L&D parallels the more general critique of market fundamentalism in development economics – another reminder of the earlier era of the CM. Apostates like Joseph Stiglitz (2000; 2002), former chief economist of the World Bank, arguably

represent an emerging alternative in development thinking. The donors, IFIs, bilaterals and others ostensibly begin to accept the importance of recovering the social dimension in development assistance and of addressing issues of equity and redistribution, rather than simply those of efficiency and allocation. They queue up to endorse Amartya Sen's definition of development as a freedom and his promotion of a human capabilities approach.<sup>7</sup> But they have not come to grips yet with the specific critiques of Legal TA in the L&D thinking of the PM. The face of Legal TA remains virtually unaltered. Virtually the same menu of interventions in Legal TA programmes exists as it had 10 years earlier.

After this all-too-schematic historical digression, this essay returns to a more detailed consideration of the relationship between the RM and the PM, which is yet struggling to gain ascendancy. The world is still in a time of paradigm shift, at the moment of a Reformation. And, it is precisely because the import and the force of the critiques emerging from the PM have not been taken onboard by the funders and practitioners of Legal TA that one needs to examine this shift more closely and to delve more deeply into the nexus between legal and economic change.

### **L&D meets Law and Economics: One church or many?**

What exactly do the Legal TA revivalists understand to be the nature of the relationship between legal rules and institutions on the one hand and capitalist dynamics on the other? The renaissance of Legal TA in the 1990s stems from a set of ideas about the place of law and institutions within the larger agenda of 'good governance'. It is with regard to an aspect of 'governance' that the importance of legal institutions to successful post-communist transition was first articulated. Governance came into development parlance in the late 1980s (with the publication of the World Bank's influential report on the 'Crisis of Governance' in sub-Saharan Africa [World Bank (The International Bank for Reconstruction and Development) et al. 1989]). Governance is ultimately understood as a matter of sound economic management – that is, the insistence on: allocative efficiency as the criterion for political decision-making with respect to matters of economic policy; autonomous and endogenous mechanisms for the regulation of market activities; and, hence, the effective separation of the economic and political domains so as to minimise the degree of intervention and interference in the former by the latter. Governance and government might almost be said to stand in inverse proportion to one another: the more of one, the less of the other.

Ibrahim Shihata, late General Counsel of the World Bank, was among the first to endorse the importance of Legal TA as a critical component of governance reform. Indeed, his expansive interpretation of the World Bank charter (which restricts lending activities to those directed toward the improvement of a borrower's economy) permitted the Bank for the first time in its history to fund Legal TA programmes. Shihata enunciated what the present author would call 'the Shihata doctrine': law is essential to good governance which is in turn essential to economic performance. Shihata, much like Dicey one hundred years before, enumerated a table of necessary elements which would constitute an economic 'Rule of Law' (Shihata 1999):

- Rules, known in advance
- Actually in force
- Mechanisms for proper application
- Judicial/arbitral conflict resolution
- Amendment procedures

The 'Shihata doctrine', one or another version of which is invariably invoked by funders and practitioners of Legal TA programmes is, in fact, a rather simplified and selective account of but one of the family of theories relating legal and institutional change to economic performance. This family of theories, known as Law and Economics, encompasses a spectrum of approaches and schools. The Shihata doctrine is representative of the so-called Chicago School, which has established virtual hegemony over the philosophy of contemporary Legal TA and operates to exclude alternative (and even well-established) ideas about the law/economics nexus.<sup>8</sup> This set of ideas, with roots in Weber (concepts of formal-legal rationality, predictability and calculability), the Austrian school of political economy (concepts of radical economic liberalism and a market immunised against political interference), and neoclassical microeconomics (allocative efficiency in the context of utility-maximising consumers and profit-maximising producers) has been vigorously challenged and qualified by other, competing theories concerning the law/development nexus. Although they are well represented in legal scholarship from the 1970s onwards (indeed, arguably from the 1920s onward), these competing theories are for the most part absent from L&D writings of the RM (which, as has been suggested before, are very much driven by donor-agendas) and only come to the fore in the PM.

A brief walkthrough of the major ideas and premises of Law and Economics can be of great value to reaching an understanding of the present author's point.<sup>9</sup> It is first useful to group them into two principal categories: economistic (employing efficiency logic and an economic rationality model of behaviour) and non-economistic (employing wider or different logics and multidimensional models of behaviour).



*Economistic theories of Law and Economics: Chicago Law and Economics, Law and New Institutional Economics, Public Choice*

The Chicago School began with the observation by Max Weber of a connection between capitalist development, on the one hand, and the formal-legal rationality embodied in modern systems of private law – that is, the law regulating horizontal affairs among private actors. The virtue of private law rules that are general, prospective, and stable is that they permit market actors to make reliable calculations of risk and benefit upon entering into transactions, even involving parties remote in space and contemplating events remote in time. Hence those transactions can multiply, extend and grow more complex.<sup>10</sup>

But the Chicago School merely starts with this idea. Then they carry the argument further to the point: the primary function of law in capitalist economies is and should be (for this is both a descriptive and normative approach) the achievement of economic efficiency. Private law rules ought to function in such a way that they conduce to ‘market clearing’, that they facilitate the striking of myriad bargains to mutual advantage. When faced with a choice between competing rules or proposed rules, judges or legislators should select the one calculated to yield the most efficient result. Law is, in effect, a mechanism to ensure proper (‘undistorted’) pricing. Criteria of equity or distribution should not be brought to bear at this level of analysis inasmuch as their application is bound to impede efficiency. Such criteria may figure in the after-market division of spoils, but they need to be kept out of the legal refereeing of market operations, lest society fail to maximise wealth in general and in any given instance.<sup>11</sup>

The scholars of the Chicago School on this basis claimed that they could distinguish proper law, which underwrote efficiency and market clearing, from improper regulation, which distorted prices and impaired efficiency. Private law, granting autonomous economic agents the liberty and stability requisite to concluding mutually beneficial transactions, was estimable and legitimate. Regulation (sometimes identified with public law more generally, i.e. all the rules affecting relations between states and citizens), substituting the judgment of politicians for that of the market and imposing (direct or indirect) restraints or conditions on those transactions (like minimum wage or tariffs), was (at least presumptively) damnable and illegitimate. Whereas private law, or simply ‘law’, was seen as the tool of the invisible hand of the market, regulation was the tool of the overt fist of the state (Rittich 2002a: Chapter 2).

It is through the work of the Law and New Institutional Economics (Law/NIE) school that the Chicago School’s tenets of the efficiency-promoting functions of the law are married to a nuanced analysis of the

history and comparative viability of institutions (institutions being defined as the formalised sets of rules developed for various forms of complex human interaction over time and across space, from systems of exchange markets to modes of government) (North 1989). The proponents of a new institutionalist view of the law/economic nexus emphasised the importance of particular institutional solutions that had survived and thrived and, thereby, demonstrated a kind of Darwinian economic fitness. The criterion of fitness here was the *minimisation of transaction costs*. Examples would be such institutions as the limited liability company form, permitting individuals to pool capital for the purpose of undertaking large-scale entrepreneurial risks with the promise of similarly large-scale benefits. It was the Law/NIE concern with institutional design that enabled Law and Economics to buttress the growing attention in policy circles to the role of law in 'good governance' with an elaborate theoretical justification.

Public choice theory imputes economically rational motivations and choices to actors in non-market contexts (most particularly to government) in order to account for observed inefficient outcomes of political processes. By applying principles derived from neoclassical microeconomics, it seeks to analyse the behaviour of bureaucrats in government and others dealing with government in terms of material and other incentives. It has perhaps gained greatest notoriety as a theory concerning the effects of rent-seeking – that is, the wasteful pursuit by business interests of advantages deriving from conditions of putatively artificial (i.e. non-market, politically-created) scarcity of resources – for instance, an industrial licensing scheme or a government procurement contract.

As taken up by the relentlessly applied thinking of L&D in the RM, the ideas of the economicist Law and Economics schools tend to get flattened or schematised, only then to be translated into a series of off-the-shelf legal reform prescriptions. This essay has already tried to demonstrate how the Chicago School's complex concept of law as the efficiency-attuned guarantor of pricing has been reduced to a sort of vulgar Weberianism in the Shihata doctrine. Similarly, the Law/NIE idea of the competitively selected legal-institutional form has been vulgarised as 'best practice', a term borrowed from business management to denote a proven successful approach to a recurrent business challenge. In the writings of the IFIs in particular, the idea of best practice has been employed to restrict the universe of possible legal/institutional forms to a very limited subset. For a market legal framework in general (as well as for particular aspects of that framework such as capital markets and security for transactions), there is held to be a preferred form or model, a 'best practice'. The idea of 'best practice' has been significantly reinforced by the processes of global economic integration: the requirements of competitiveness in global markets, it is claimed, are bound

eventually to trump local variants of market regulatory frameworks and force their convergence on ‘best practices’ (Rittich 2002a: Chapter 2). Not altogether unsurprisingly, the favoured models for everything from insolvency to corporate governance often turn out to be those of American provenance (DeLisle 1999). This tendency has received explicit theoretical justification in an argument which has gained some currency in Chicago-inflected L&D circles in recent years, that common law doctrines and forms are demonstrably preferable *from the perspective of allocative efficiency* to civilian doctrines and forms, that is that the common law is economically superior to the civil law<sup>12</sup> (of course it is not the common law *tout court* for which superiority is claimed, but rather the American variant thereof).

The Public Choice theory pre-occupation with rent-seeking and the incentive structure of the public sector is absorbed by the L&D of the RM as well. Public Choice theory can be argued to underlie much of the Legal TA directed at anti-corruption, reform of the administrative system, and identification and reduction of rents. Specific programmatic foci include the reform/regularisation of administrative procedure and the streamlining/rationalisation of business regulation in particular. There is a ‘vulgarising’ tendency here as well on the part of L&D in the RM, to simplify and overextend the theory in applying it, such that corruption, rents, and inefficient regulation are diagnosed everywhere.<sup>13</sup>

*Non-economistic theories of law and economics: Legal realism, institutionalism, critical legal studies*

The Legal Realists in the 1920s challenged prevailing ideas of the autonomy of the legal system and legal logic as well as their ostensible neutrality or impartiality in the regulation of economic relations. Realists contended that there could be no such thing as a ‘level playing field’, that any set of market rules necessarily already favoured some players as against others before play could even commence. That is, the vaunted ‘legal framework for the market economy’ already and necessarily embodied, encoded, and institutionalised as the baseline a particular configuration of social and economic power relations in society. Any legal order, the realists argued, strikes a balance among competing groups in the way it defines and assigns rights in the first place, e.g. property rights: if you allow some people the right to employ other people, you privilege the owners of capital. Thus, there is no ‘natural market’, the legal rights and rules which condition it having themselves been the outcome of political contestation and choice (Rittich 2002b: chapter 4; Kennedy 1991). The institutionalists and critical legal scholars deepened and extended these concepts in service to refuting the assumptions and assertions of neoclassical economics with respect to law.

They challenged the basis of the efficiency criterion. Since the market is socially and legally constructed, any notion of economic efficiency must necessarily be predicated on the particular set of rights underlying the structure and the function of the market in the first place. Efficiency, as any economist will readily concede, is always a function of the initial conditions, the initial assignment of rights. Rights, of course, may be redefined and reassigned over the course of economic history, thereby yielding different efficiency solutions. Efficiency, like the market form itself, is not pre-political and static. CLS has challenged the set of binary distinctions which authorise the efficiency claim and the other standard arguments of the Chicago School as, in all, ultimately not logically defensible or coherent and, therefore, ideological in nature: private/public, legal/economic, economic/political, law/regulation. Thus, e.g. the distinction between 'law' and 'regulation' breaks down when submitted to critique: the state is just as present in the sale of a house between two private parties (since it has established and enforced the particular system of rights in real property, of contractual obligations, of financing via mortgage etc.) as it is in setting a minimum wage or imposing a tariff or emission controls on the automotive industry.

The critics of the PM have pointed to the institutional variety of market architectures and the corresponding variety of their legal-institutional forms. There is no single, agreed upon canonical 'legal framework for the market economy' because there is no one single market economy. There are multiple legal frameworks for the multiple versions of market economies. German companies are very different sorts of things from American companies – and Germans and Americans are probably grateful that is the case – because German company law is very distinct from, say, the Delaware Corporations Code. In the former case, stakeholders such as trade union officials and community leaders sit on boards of directors and companies are accountable to them. In the latter case, it is shareholders before whom the company is exclusively accountable. It makes a big difference to a jurisdiction contemplating the adoption of a reform of its company law whether it moves in the one direction or the other. And it is not simply a technical difference, a matter of adopting 'best practice'. It is a matter of the fundamental political choice of institutional design, of the vision of company organisation that a given society in the exercise of its political will decides to adopt.

The same point can be made for all variety of things: for pension law (defined benefit, or state-provided versus defined contribution, or investment-based), for insolvency law (creditor-friendly versus debtor-friendly, liquidation-preferring versus reorganisation-preferring) for delicts (strict liability versus negligence). The examples could be easily multiplied.

Although the alternatives are presented as binary for simplicity's sake, they are in fact multiple and more complex. And, each choice among alternatives strikes a different balance and favours some people at the expense of others. Under such a view, certain conclusions are inescapable: one can conceal political decision-making and call it technical expertise, but call it what you like, it is still politics.

PM L&D studies examining the distributional consequences of standard Legal TA approaches promoting maximally 'unregulated' markets have appeared, as first steps towards correcting, qualifying, and disputing the standard legal 'case for growth' of the RM. They show, for instance, that the burdens of market transition fall disproportionately on women, whose reproductive work was more highly valued (and therefore compensated by society, through a variety of subsidies) in planned economies (Rittich 2002a). Thrown on the market, they are deprived of the benefits (child care, maternity leave) which formerly had enabled them to participate in the labour market, often in circumstances of poverty which have dramatically increased their need for productive work.<sup>14</sup> Another such study has pointed out the adverse distributional consequences of unregulated markets on ethnically divided developing societies, in which historically 'market-dominant' minorities (e.g. Straits Chinese in Southeast Asia) stand to reap disproportionate benefits, thereby stoking pernicious ethno-nationalist tensions on the part of the relatively disadvantaged majority (Chua 2000).

Still other critics have drawn attention to issues of cultural/social incompatibility. This line of attack is a renewal of the critique of 'legal imperialism' or legal transplantation from an earlier day – the critique from context. Certainly, the (relative) failure of market-orientated legal reform efforts in areas like Central Asia is in part attributable to the neglect by proponents of legal models of local values and practices in a part of the world which has no prior experience with a capitalist market economy. But contextual critique need not be classically 'anthropological' to be most trenchant or apposite – i.e. it need not proceed from a concept of culture with a capital C. Joseph Stiglitz in a very influential address castigated first generation reformers in the transition zone for importing elaborate forms of structuring business premised on extended agency chains: shareholder → investment fund → director → manager → worker (Stiglitz 2000). The reliability of these agency chains – the enforceable expectation of the shareholder that the people in charge of the company will not take the money and run – depends on a host of supporting institutions (from capital markets to criminal prosecution), as well as patterns of socialisation, values, social capital, etc. Such a system is entirely too sophisticated to be calculated to work effectively in the quasi-anarchic post-Soviet business world.

Finally, some theorists of the PM have challenged the utility of emphasising private law at all if one's interests lie in promoting economic development in light of actual experiences in regions experiencing recent industrialisation. The rise of the Asian dragons – the HPAEs, High Performing Asian economies, in World Bank parlance – stands as at least as powerful a grand empirical refutation of market fundamentalism and the economic Rule of Law as does the incomplete and unsuccessful transition in large parts of the former Eastern bloc. Taiwan, Korea, and other HPAEs owed their spectacular economic performance – the only developing economies to have accomplished the trick of full-on industrialisation from an agrarian base in the post-war period – to anything but a neo-liberal market. Rather, it was a comprehensive industrial policy premised on close and careful nurturing of national champions by state economic stewards (Amsden 2001). And such a strategy dictated not 'Rule of Law', but virtual 'rule by law' (Jayasuriya 1999), with the state leaving very little to the vagaries of market exchange on the basis of the untrammelled exercise of property and contractual rights by private actors.

### **Legal TA under scrutiny**

This essay next examines how the standard menu of interventions found under Legal TA programmes have been put into practice and evaluates them in the light of our now broadened understanding of the law/economics nexus. Can Legal TA projects be counted on to do what they are designed to do, and are there perhaps problems in their very design? The World Bank Legal TA schemes for Kazakhstan (World Bank 1999) and Sri Lanka (World Bank 2000) furnish two both examples of late RM Legal TA. The project components and their funding allocations are tabulated immediately following:

#### *Kazakhstan (1999):*

- Legal and Regulatory Drafting Component (\$4m): a) Legal Drafting Fund (\$3m) for legal and regulatory drafting technical assistance, to be provided by local and international consultants; b) capacity-building for Legal Drafting Institute (\$.5m); c) institutional strengthening of the Ministry of Justice (\$.1m); d) training of government lawyers in legal drafting (\$.4m).
- Judicial Strengthening Component (\$6.7m): (a) judicial education programme (\$ 2.1m); (b) reform of Court Administration (\$ 4.6m): court administration/case management (\$1.1m, including court management \$.214m, case management \$.22m, evaluation and

other activities \$.225m, component management and orientation training \$.42m) and automation and information (\$3.5m).

- Legal Education and Public Awareness (\$3.5m): (a) law schools grants programme (\$3m): legal education capacity, law school admission and accreditation criteria, and development of legal public awareness; (b) funding of training programmes for government officials in economic and financial areas, including economic crimes and anti-corruption (\$.5m).
- Legal Information (\$5m): (a) electronic legal information system (\$4.9m): strengthening of capacity of National Centre of Legal Information to enlarge scope of information, improve system function, and expand outreach; (b) design of national classification and codification system (\$.1m).
- Project Management and Implementation (\$ 1.6m).

*Sri Lanka (2000):*

*Legal reform component*

- Commercial law reform: legislative drafting of key commercial laws via a technical group of leading legal scholars and commercial law specialists which will in turn organise drafting by specialised working groups.
- Professional development: a) commercial law training for legal staff of the attorney general's department; b) assistance to bar associations in developing continuing legal education programming; c) modernisation of teaching methodology and development of new curricula for commercial law in legal educational institutions.
- Legal information: development of a comprehensive system for the storage, analysis, retrieval and distribution of legal information, including statutes, case law, commentaries and decisions.

*Company registry*

- Administrative reorganisation and automation of regulatory systems: to transform the Companies Registry Office into a market- and service-oriented administrative unit adequate to the demands of the burgeoning commercial sector.

*Judicial reform*

- Judicial training function: establishment of a formal programme of post-graduate professional study for newly appointed and potential judges and a programme of continuing professional judicial education for sitting judges, as well as inaugural and on-going training for judicial support personnel;

- Court administration: strengthening of the Judicial Services Commission, particularly its capacity to plan and budget, manage personnel, control case-flow, maintain records, compile statistics;
- Model courts (25): critical improvements to infrastructure and automation of manual systems, in order to reduce delay, increase efficiency, and improve the quality of services to litigants;
- Mediation: development of mediation service for commercial disputes under auspices of the Chamber of Commerce; provision of training in mediation to core contingent of mediators in order to relieve judicial overload and promote out-of-court settlement of commercial disputes.

*Substantive law reform (legislative drafting)*

In the early days of the Legal TA boom, legislative drafting assistance (that is, the reform of substantive commercial law) loomed much larger than in recent projects. Donors channelled significant resources into the ‘framing of legal substance’, which was held to be conceptually and practically a prerequisite for all other steps in law reform. Law had to be in place before one could execute a contract, form a business, bring a lawsuit, train a judge or educate a law student. The image was that of a transition zone for jurisdictions emerging from communism and entering into the command economy, but the same model was applied as well to developing states emerging from developmentalist dirigism (economic control and planning by the state). This view reflected a false sense of urgency and crisis (even in extreme cases there was hardly a commercial legal vacuum, and people somehow coped with the shift with the existing law in force, however much was left to be desired). The approach was also excessively formalist, with a largely unrealistic sense of the virtues of the black letter. The high-point of black-letter fetishism may have been reached with the endorsement by the World Bank of a checklist of indispensable commercial legislation for transition and developing countries (furnishing an example of private law fundamentalism on par with market fundamentalism).<sup>15</sup>

During the era of ‘revolutionary drafting’ of the early 1990s in Eastern and Central Europe (to be distinguished from the ordinary sort, the way Thomas Kuhn distinguished ‘revolutionary science’, characteristic of paradigm shifts, from ‘ordinary science’, pursuit of routine research under a reigning paradigm [Kuhn 1996]), armies of technical advisors and drafting experts funded by the major donors flogged one or another example of commercial legislative ‘best practice’. And the effort was not invariably misguided or unproductive.<sup>16</sup> But the point by and large not appreciated (or at least not articulated) by the Legal TA practitioners of the RM, and brought out only subsequently by the L&D critical studies



of the PM, was that all such exercises in drafting assistance necessarily raised political and not merely technical choices. And those critical political choices were concealed or obscured (Newton 2003).

But the heyday of legislative drafting assistance and capacity-building has passed, and attention has shifted from the legislative coal-face to the boilers and locomotives of law application and implementation – to what happens in actual practice, when the law is put to work. The value of the Legal TA drafting campaign should be assessed by the results. And the results have been decidedly mixed. In many cases, the L&D adherents of Chicago School Law and Economics, or even of the more classically Weberian Shihata doctrine, have wrung their hands and wagged their heads at the spectacle of good law misconstrued or misapplied, or compromised or confused by bad law simultaneously in force. They see once-in-a-lifetime opportunities to adopt ideal rules underwriting efficient transactions squandered. And they retrospectively defend the Legal TA drafting crusade by maintaining that their recommendations were not followed or were diluted by extraneous political considerations or, even where followed, were frustrated by improper application – *Look what they've done to my song!*

But the L&D realists and post-realists of the PM are hardly surprised at the disappointments of Legal TA drafting projects, for they have always understood that background rules are fashioned in the first place to the advantage of powerful interests and with a view toward their routine manipulation by mandarins in the course of application. That's what clever lawyers representing those (and other) interests have always done. Especially across the CIS, but also elsewhere in the transition zone and the developing world, the messy, chaotic, 'unrationalised' state of legislation, the susceptibility of legal processes to various sorts of manipulation and instrumentalisation prevails. Realists and post-realists do not simply view this set of circumstances as a failure to follow prescriptions or an index of continuing legal underdevelopment. For the critically minded analysts of the PM, it rather looks like a *preferred state of affairs*, which serves the interest of dominant economic and social interests and which has subtended the emergence of an oligarchic political economy (especially in Russia).

### *Judicialism*

Legal TA, as worked out in the RM, pays special attention to judges and the function of adjudication. Assistance typically takes the form of comprehensive administrative reform (court management and case management) and enhancement of judicial training. Commercial adjudication has been at the heart of judicial assistance programming due to what seems to be a mix of ideological reasons and unfounded assertions about

the importance of adjudication to market functioning. Also, commercial adjudication is deemed more amenable to externally mediated reform as well as inherently less culture-bound than other areas of law, e.g. family law. So, both the role of the commercial judge and the function of commercial adjudication are believed to be if not universal, then at least potentially *universalisable*.<sup>17</sup> Judges are the umpires in the game of capitalist market exchange: they police the rules, resolve disputes among the players, assign penalties for infractions, and ensure a fair outcome. But a 'fair outcome' has a very specific meaning under the Chicago School Law and Economics paradigm and has (in part) served as a justification for channelling Legal TA toward judicial reform: it means an economically efficient outcome, the outcome that market forces would have arrived at had they not been in one way or another thwarted or perturbed by a violation or misapplication of the rules of the game.

Even when not rooted strictly in the ideas of the Chicago School, the image of the judicial function behind many judicial reform efforts remains parochial and inaccurate. Even in the US, judges do not serve as neutral arbiters of economic efficiency. As socio-legal and Critical Legal Studies work has persuasively argued, judges rather bring a host of other factors – social concerns such as distributional consequences, personal and ideological biases – to bear in making decisions (Kennedy 1997). A poor and thin account of adjudication is pressed upon judges in developing or transition jurisdictions which not only fails to describe what judges do in developed or donor jurisdictions, but which would even be regarded as unacceptable in them. Moreover, as is by now well-established in legal sociology in developed market jurisdictions, the influence of judicial decisions on contractual parties can be indirect, remote, and indeterminate. Parties far more often 'bargain in the shadow of the law', where they invoke it at all, than themselves resort to courts for the adjudication of disputes (e.g. Macauley 1963; Mnookin 1979).

Even when not premised on the problematic relationship between better courts and economic performance, but rather on better courts as an end in themselves, Legal TA projects focused on judges have been disappointing. Here again, L&D of the PM might have something to offer Legal TA if the connection between them were made more rigorously. A good deal of resources and effort has been invested by donors in programmes designed to combat corruption among judges in developing and transition jurisdictions. Such programmes aim to reform the judicial service in an effort to professionalise judicial personnel through modernised training, exacting recruitment and promotion procedures and supply them with the appropriate material and status incentives to resist bribery and perform competently. In some cases these efforts have gone awry because those sponsoring them have not understood the organisation of the judiciary as a branch of the civil service and have

promoted inappropriate judicial governance models (such as the US federal judiciary). In other cases, the problem has been the attempt to reform precisely this one branch of the civil service while leaving untouched and unreformed the rest of the administrative service.<sup>18</sup> Indeed, one problem with such projects is that they often are not based on sound theory at all; this is one area where the potential contribution of law and public choice approaches has not been sufficiently exploited.

When all else fails, there remain buildings and computers. Many judicial reform efforts (for instance, the Kazakhstan and Sri Lanka projects, both of which the author has extensive direct project experience) ultimately seem to provide little more than courthouse construction and court automation. Ministers of Justice and Supreme Court Chiefs may remain sceptical and unconvinced about the rationales advanced behind Legal TA without even going through the exercise of examining the relevant L&D theory, but they are true believers in the value of dry roofs and technology.<sup>19</sup>

This essay has focused almost exclusively on the supply side but obviously if Legal TA interventions are to enjoy any prospects for success at all, they must respond to the demand side as well. Indeed, such interventions must be demanded, but that is the subject of another study entirely.<sup>20</sup>

#### *Legal education and professional support*

In many ways these modes of intervention, the most venerable in the forty-year history of Legal TA, remain the least problematic and contestable. Reform of curriculum and teaching methods is for the most part a praiseworthy enterprise. But obviously the content of lectures and of textbooks is not always or necessarily without controversy. Both within developed market economies and across regional and national boundaries, legal texts and course syllabi may represent a range of views. For instance, a course in international trade law (WTO, TRIPS) might well be taught differently in the National Law School in Bangalore on the one hand and the London School of Economics on the other. For that matter, the approaches to trade law can vary significantly within a single institution, depending on the priorities, concerns, and politics of the instructor. But the variety of available scholarly perspectives on trade law (a topic which is particularly contentious in L&D circles of the PM) sometimes seems to be collapsed and narrowed in the legal education support programmes funded by major donors.<sup>21</sup> Indeed, the whole area of reform of legal curricula is one on which particular vigilance ought to be exercised, given the general phenomenon of the paradigm shift in L&D from the RM to the PM which this essay stresses. In light of the emerging critiques of the PM and the decay of neoliberalist orthodoxy,

the most modern and up-to-date approach to commercial law subjects in legal education is likely not one which reflects the Shihata doctrine or a ringing endorsement of private legal ordering and the suspicion of state 'regulation'.

The promotion of the lawyer's role in commercial affairs generally might be held to be unobjectionable and a matter of common sense. Like so much else in Legal TA, though, on closer inspection and application of critical tools of analysis of the PM, the situation appears to be more complicated. Creating a sense of professional identity among business or commercial lawyers and strengthening their lobbying capacities may have all sorts of consequences which one might or might not favour but which one should at least anticipate and evaluate. Trubek and Galanter warned 30 years ago about the perils of unwittingly entrenching legal elites. Indeed, it is somewhat curious to be channelling limited external resources (donor funding) toward professionals who are in a superior position relative to other legal colleagues to garner resources to begin with. Then, too, the commercial lawyer's role varies across market economies; in some jurisdictions business transactions could well be regarded as over-lawyered, a state of affairs not necessarily desirable for import and transplantation.

#### *Reform of public administration*

Reform of the legal underpinnings of the public sector has only emerged as a focus of Legal TA toward the end of the 1990s and has betokened a move away from the exclusive private law concern of the Shihata doctrine. This is an aspect of Legal TA which is likely to be of particularly keen interest to ALADIN. This type of assistance is more commonly encountered as part of a sectoral governance assistance project than in the context of a full-blown stand-alone Legal Reform Project, such as the Kazakhstan and Sri Lanka projects. For instance, a project addressed to the reform of the Customs Agency might include a component directed to streamlining of the customs regulations and procedures (or indeed of the organisational structure of the agency itself, which is after all as much a matter of law as the regulations it promulgates). Another category of project is framed to examine and address the web of regulations affecting the formation and conduct of businesses with a view toward reducing red tape and undue administrative involvement and influence. Such a project might work with multiple ministries and agencies and address such issues as registration, licensing, inspection, and other regulatory compliance requirements. In a few recent cases which may indicate a trend, Legal TA has been directed toward reform of the Administrative Law system per se: Regularising or standardising procedures for agency rulemaking (promulgation of

regulations) and adjudication of disputes (e.g. over social welfare benefits) across various involved agencies. This essay next briefly examines the 'regulatory environment' as well as the 'administrative law' prongs of this category of Legal TA in turn.

In one sense, Legal TA directed at the business regulatory environment can be understood as the correlate of strengthening private law: 'regulation' must be weeded out if 'law' is to flourish and perform its proper function. Legal TA pursues the streamlining or rationalisation of agency rules in order to achieve the goal of deregulation and, as a corollary, to relieve a putatively crushing compliance burden on business. The same sorts of objections (examined earlier) to forcing the choice of private law rules (that distributional consequences are not confronted and the politics are disguised) can be made to 'streamlining' public regulations. This is not a claim that businesses are not routinely over-regulated or that the reduction of red tape is not often extremely desirable, but rather an insistence that the critical analyses of the PM concerning distributional effects be applied to standard 'business-enabling' Legal TA programmes.

At present, Administrative Law is a highly developed and specialised domain which across jurisdictions, moreover, displays very significant variations in basic structure and functions, in history and traditions, in concepts and principles, and in operations and procedures. One might even claim that the 'cultural complexion' of Administrative Law is no less evident than it is for Family Law. French *Droit Administratif* has little in common with US Administrative Procedure. The role of the courts, the degree of formalism, the scope of review over agency decisions, the extent of participation in rulemaking are just some of the axes along which different administrative legal systems can be plotted.

Even when Public Choice theory has (explicitly or implicitly) served as a guide to Legal TA of this sort, problems exist because that theory is not usually comparative and, hence, not necessarily equipped to accommodate the observable variations in Administrative Law. Additionally, the sophistication of Public Choice approaches to problems of the incentive systems of public agencies (which often reach decisions on the basis of narrow agency interests rather than the public good, defined in terms of efficiency) makes it difficult to effectively implement Legal TA for administrative reform. Legal TA programmes often have sought to promote 'transparency' and 'accountability' as if they were all-purpose proxies for real reform objectives. While no one would dispute their importance, they are not well defined and cannot substitute for detailed analyses of the legal enabling/constraining conditions of particular institutional environments and policy processes.

### *Alternative Dispute Resolution (ADR)*

Business mediation and commercial arbitration have been widely promoted in Legal TA as an alternative to unreliable, overburdened, or incompetent local court systems. Arbitration can particularly serve well as an incentive to foreign direct investment. With respect to foreign parties, beneficiary jurisdictions are advised to adopt Arbitration Laws (encouraging and enabling business parties to have recourse to arbitration), develop model arbitration clauses and model arbitration rules, establish arbitral bodies, and enforce arbitration clauses in contract disputes brought to the courts. With respect to domestic parties, they are encouraged to facilitate commercial mediation, for instance under the auspices of local chambers of commerce, as in the Sri Lanka project.

To critical analysts, the virtues of ADR, and commercial arbitration particularly, are not altogether self-evident. Critical L&D studies of the PM have pointed to the embrace of arbitration as another instance of the 'privatisation' of all sorts of previously public functions (Scheuerman 1999). The privileging of arbitration over adjudication is an ideological echo of the privileging of private over public legal ordering, indeed is a kind of intensification of private legal ordering (the resolution of disputes in private law itself being privatised). When disputes involving major economic actors in any society are removed categorically from the purview of public tribunals, the issues that such cases present and the rule interpretations they trigger also cease to become generally known to the public. The greater efficiency and convenience of party-selected dispute resolution processes are not the only interests at stake.

### **Conclusions and suggestions: Outside the Legal TA box**

The immediate objection to the typical interventions examined above for the Kazakhstan and Sri Lanka projects is that they in part rest on conclusory assertions lacking empirical justification – i.e. they are (potentially if not probably) wrong-headed. A second, equally serious objection is that they are unimaginative and constraining, by force of both ideology and resource limitations. That is, they represent foregone opportunity costs. They foreclose other opportunities and even prevent them from being considered in the first place. There might be other sorts of approaches to legal-institutional support which would be more interesting and more beneficial from the standpoint of one or another goal of development, that would make a greater difference in citizens' lives and opportunities, and that would strike a different balance between sets of opposing or divergent interests (labour and capital, poor and wealthy, women and men, city dwellers and villagers, big corpora-

tions and small businesses). Part of the difficulty with Legal TA programmes today is that those who design them are unfamiliar with the variety of sophisticated analytic tools which have come to the fore in the PM and are now available for studying these relationships.

This essay concludes by briefly exploring ways which might remedy each of these defects. The following suggestions are intended principally for practitioners and funders of Legal TA and are premised on the defensibility of this sort of interventionism in the first place – a point which some critics might not be prepared to concede!

### *Looking before leaping*

The first problem, that of insufficient empirical evidence, is obviously remedied by mounting further and different sorts of studies with proper levels of funding, studies which could guide the modification of existing programmes as well as shape new ones which are more attuned to their contexts and thus have a better chance of success. Programmes are needed which are more intelligently fashioned and better informed by a greater awareness of specific political and social trade-offs in terms of which parties stand to gain and to lose as well as to what degree.

Some have suggested that Law and Economics needs to be developed in a comparative direction with an application of the analytic approaches developed primarily for the US legal system and economy to a broader set of legal contexts (Mattei 1994). One might make a similar plea for the development of a comparative Public Choice theory, and the funding of further studies to examine incentive structures in the public sector across many jurisdictions.<sup>22</sup> One might also call for a comparative CLS which would examine, e.g. the legal processing of social differences in market structure and function (class, race, gender, sexual preference etc.). Another avenue of studies which donors might promote is the social and economic consequences of mainstream Legal TA programmes of the RM to determine what are the effects of particular approaches to property law reform and privatisation across jurisdictions (CIS, Central and Eastern Europe, Anglophone and Francophone Africa, etc.). Although few in number at present and generally not funded by the major Legal TA donors, such studies might further the successful reconstruction of Legal TA in the future.

### *Leaping with flourish*

Some might assume that the antidote or alternative to a market fundamentalist or 'rightist' approach to Legal TA would self-evidently be a 'leftist' programme of progressive lawyering. There already exists an

army of development lawyers working on social programmes as well as a multitude of legal advocacy NGOs, all doing virtuous legal reform work which could certainly be styled Alternative Legal TA. Increasingly these sorts of undertakings are funded by major donors and are making their way into the menu of interventions. Indeed, broadening Legal TA menus to include grass-roots work, advocacy for vulnerable groups, legal access campaigns and similar activities has emerged as a theme in recent years – as part of the incorporation of the social in so-called second-generation reforms.

This essay may have somewhat overstated the case by claiming earlier that Legal TA has not changed at all in the last decade. But there is more to thinking outside the Legal TA box than applying the critiques of standard approaches. Meeting the challenges involves more than undertaking ‘alternative’ actions, of spreading the benefits of Legal TA more widely, of working bottom-up and not just top-down, of extending the benefits of Legal TA from gentry to the peasantry. These avenues are indisputably essential, but they will not in and of themselves lead to the answer.

It is, instead, as much a matter of varying the approaches and the perspectives of already defined lines of attack and modes of intervention. Rather than simply shunning the centres of power or decision-making, abandoning the state and industry in favour of society and channelling efforts to the ‘third sector’, Legal TA as informed by the analyses of the PM might be better advised to maintain its established positions and footholds but also to use them differently. Act in a different manner but do not abandon those people with experience and expertise. Work with legal system policymakers but with a view toward influencing them to make other and better policies.

What this requires is an attitude that is neither deferential to nor dismissive of what has been done before. Moving and thinking outside the Legal TA box requires one to be informed but not reverential. For example: study what the development banks have done but do not necessarily rely on their conclusions. The Legal TA menu as formulated by the development banks is Legal TA at its most doctrinaire and least imaginative, despite its having been expanded by what Kerry Rittich has termed the ‘incorporation of the social’ in recent years – that is, society-relative issues in law (access to legal services for the poor, human rights, gender, to cite but several). The possibility of redesigning Legal TA from within even such powerful institutions as development banks, as if they were architectural renovation projects, may well be possible and productive – like an old factory or warehouse converted to post-industrial office suites.



In conclusion, this essay sets out in a brief and (hopefully) provocative form some of the ways that Legal TA might be made more effective by considering each of the major departments of Legal TA:

- Legislative drafting and substantive law reform: expand the range of laws beyond the narrowly-conceived 'building blocks of a market economy', expand the range of models used, and above all, make explicit the political and social consequences of choosing one as opposed to another: re-politicise the drafting exercise. Do not abandon 'commercial laws' by any means and surrender the ground to economists and technocrats, or to economistically- and technocratically-inclined lawyers. Rather, approach them from a different direction, or from multiple directions. Of course this will call for some deftness and dexterity on the part of donors, and may exclude some donors and even some categories of donors altogether, but it also leaves donors free to select their clients more carefully and with a different set of criteria. Provide assistance in labour law, or environmental regulation, or social welfare systems (pensions, health, unemployment insurance). Draw on a broader range of technical advisors, not just those subscribing to a narrow Chicago-style, best practice, one-size-fits-all philosophy. Instead of dispatching champions of the status quo in the donor jurisdiction, look for reformers and challengers. Send labour lawyers and poverty lawyers to make assessments and propose avenues for Legal TA, not just corporate lawyers. And do not simply send poverty lawyers to work with NGOs and poor communities, send them as advisors to central ministries.
- Judicialism: do not give up on courts, but do not magnify their role and significance either, and above all, do not make assumptions about them before examining them in situ. Assess the role of judges and judicial institutions in a particular beneficiary country before determining that support to the judiciary is advisable or desirable. In some instances, attention is better concentrated on ADR but in others on particular divisions of the court system (e.g. family courts). Be sensitive to the nuances of local legal culture. In considering models of reform, consider the diversity of judicial styles, judicial cultures, and modes of judicial administration. Do not make the mistake of assuming that 'judicial autonomy' is a clearly defined notion (either psychologically or professionally) which can be determined according to a universal standard of measure. Ask: autonomy from whom? From other agencies of government? From particular politicians, especially regional authorities? From concentrations of social or economic power? From clan or affective ties? From ideological or personal biases? How does one usefully distinguish between undue influence from outside or above and a given

judge's weighing and weighting of the multiple legitimate factors bearing on a dispute?

- Reform of public administration: continue by all means to work with Customs Agencies and the Business Registration Departments of Ministries of Justice. But do not do so in the hope of imposing ideal corruption-proof and minimally-regulated systems, in the interests of sniffing out all the hiding places of putative rents and eliminating anything that looks like regulatory distortion of the market price. Apply the techniques of Public Choice theory to understand the various incentive structures in bureaucracies, but do not suppose that 'rationalising' and 're-incentivising' those bureaucracies in the interests of promoting efficiency can address the hard questions (due to their political, not technical, nature) of exactly where and how and how much to regulate the market. Do not imagine that what the 'public good' and 'social welfare' require (or even what they mean or how they are defined) can be determined by universal principles of rationality and efficiency, and are not instead deeply political matters to be hammered out the hard way. Use the legal tools available to help make bureaucracies more effective and professional, particularly the retooling of agency rules and administrative procedure. But do so with an understanding tutored by the approaches and analyses of the PM, adequate to the existing complexity and variety of market institutions and modes of regulation. Approaches and analyses must be sensitive to the existing complexity and variety of political choices. Do not refrain from intervening on the administrative side, but craft interventions which reflect political priorities of the beneficiary, not the donor. Do not suppose that 'accountability' and 'transparency' have a fixed and univocal significance in every context, or that they may not be charged with tensions and contradictions, or that they can do duty for a politically sophisticated vision of the desiderata of public administration.
- Legal education and legal profession: the PM is a moment of varying approaches and paradigm change. Instead of denying that heterogeneity and diversity, employ Legal TA to proclaim it and exploit it, in law schools and legal training more generally. Instead of using Legal TA as a filter to allow in only some ideas circulating in the classrooms and the publications of L&D in the PM, use it as a conduit. Open the sluices. Expose law students, lawyers, and other legal professionals to the ferment of the PM. Do not propagate received or 'mainstream' ideas, approaches, and texts as though they constituted an L&D canon. Publish and propagate the apocrypha as well. Or (and perhaps especially) the works of the heretics: works which do not present contemporary trade law as an unqualified good or the summit of human achievement, or which present a more criti-

cal perspective on private law fetishism, or which address the distributive implications of company law or land law frontally and not obliquely. Apply the same recipe (liberalism of education rather than merely of the economy) to professional development and continuing legal education. Use donor resources not to strengthen the dominant position in many beneficiary countries of lawyers representing a narrow segment of society (they can usually fend for themselves, thank you), but to build the capacity of other lawyers and legal professionals to reform and apply commercial law in more socially responsive and responsible directions. As a donor, do not always imagine the private bar as a David pitted against the Goliath of state power; worry as well about the bar's susceptibility to capture by the Goliath of social power.

- Alternative Dispute Resolution/Arbitration: broaden the perspective on dispute resolution to include both courts and ADR as one system with different parts. Within Legal TA, treat ADR and court reform as mutually interrelated, but do not assume the relationship, analyse it in the given instance. Recognise the utility of arbitration where courts are overburdened and struggling, but recognise as well the peril of allowing powerful actors to contract out of the rules which ordinary mortals must accept, and which were formulated for good and cogent reasons in the first place. Understand that there are social trade-offs to be calculated and made explicit as factors in Legal TA decisions not only between litigation and arbitration, but among different varieties of ADR – between arbitration and mediation, say. Mediation may provide for a greater degree of public involvement and control, as courts have a larger scope for action (judicial referral, judicial backstopping) than in arbitration.

These suggestions are intentionally schematic and general, and offered in the hope of provoking discussion, expansion and specification. Nonetheless, at their core is the belief that although the variety of ideas in contemporary L&D about the law/economic nexus is not yet reflected in Legal TA, the situation can change. Over the course of the succession of L&D paradigms, the significance of legal institutions, rules, and forms in economic development has come to be understood in multiple dimensions and in its due complexity. It is now up to the funders and the decisionmakers. Open Legal TA to the full range of ideas and analytic approaches of L&D in the PM. Raise the windows and let in the air.

## Notes

- 1 This chronicle has been presented in an elaborated form in Newton 2006.
- 2 Duncan Kennedy speaks of the 'descent of one African state after another from import substitution into kelpocracy.' Kennedy 2006:61.
- 3 For a general description of the impact of these new ideas on development thinking, see Salacuse 1999.
- 4 See discussion below in Section 3.
- 5 Vastly more was claimed for the role of law in development/transition in the RM than had in fact been substantiated in any way by empirical studies. The disparity was striking, given the prominence of Legal TA in development assistance programmes and its share of funding. Those studies actually undertaken exhibited a bias toward the Chicago School or New Institutional Economics (i.e. broadly neoclassical) paradigm (see discussion below in Section 3); there were virtually no studies until the PM which adopted a critical or distributionist perspective. Empirical studies conducted by or under the auspices of donors themselves have often been problematic in that the questions they pose *a priori* delimit or exclude a range of important issues (distributional consequences in particular) and/or demonstrate correlation rather than prove causation.
- 6 Examples of studies from this last phase might include: Chua 2000; Gathii 2000; Holmes 1999; Jayasuriya 1999; Jayasuriya and Scheuerman 2001; Kennedy 2003; Newton 2003; Orford 2000; Rittich 2002b; Rittich 2000; Thomas 1999.
- 7 This is not to claim that the IFIs have surrendered the fundamental belief in the supremacy of markets or that in the reincorporation of the social dimension in development assistance they are prepared to dilute the accepted formula for growth or to accept a renewed role for state intervention. The recovery of the social appears to unfold according to a resolutely market-premised logic, on this side of the private/public line. 'Social development' is a function of growth and efficiency, either as consequence or prerequisite. See Rittich 2004.
- 8 In general, the L&D 'grey literature' (applied and often donor-generated) in the RM does not cite the classic Chicago School articles and studies, though clearly informed by it.
- 9 Much of what follows has been adapted from the superbly comprehensive account of Law and Economics theories in Mercurio and Medema 1997.
- 10 In Leiden, it is perhaps especially fitting to note that it was the development of enforceable modern property rights and contractual rules and forms that first engendered globe- and era-spanning enterprises and brought about De Vereenigde Oostindische Compagnie and Holland's Golden Age.
- 11 The Chicago School defines efficiency in Kaldor-Hicks terms: The gains to the winners in a transaction or some aggregate of transactions (depending on the level of analysis) are greater than the losses to the losers, such that society overall realises an increase in wealth. Efficiency in these terms is thus a matter of wealth-maximisation.
- 12 See discussion and references in Ohnesorge 2003a. Although the Chicago School presented its theory originally as a theory of the economic efficiency of the common law, it for the most part ignored code jurisdictions, and did not purport to draw comparative conclusions – at least, until this latest endeavour.
- 13 For a critique of standard denunciatory approaches to corruption and an analysis of the difficulty of evaluating the multiple phenomena encountered under the label, see Kennedy 1999.
- 14 The result can be argued to constitute not only a net loss in economic position (since a significant portion of income was represented by in-kind rather than case pay-

- ments), but a net loss in legal position, since the notional right to contract freely in the labour market must be balanced against the loss of pre-existing entitlements.
- 15 It also reflects a version of what has been termed 'economic constitutionalism': the aspiration to entrench some set of basic market laws beyond political contestation, to establish them as foundational, the legal bedrock of a market economy. See Jayasuriya and Scheuerman 2001.
  - 16 The author notes here that Leiden scholars played an invaluable role in very usefully conveying the lessons of almost five decades of drafting experience of the Netherlands Civil Code to the Commonwealth of Independent States (CIS) Inter-Parliamentary Working Group preparing the Model Civil Code for the former Soviet states, with justly admired results.
  - 17 A related tendency has been the direction of Legal TA support to separate commercial court systems, where these exist (as they do in e.g. Russia and a number of former Soviet republics). Commercial courts as a rule tend to be better funded and more professional than regular courts in any case (why? The short answer is Willy Sutton's when asked by a reporter why he robbed banks, 'Because that's where the money is.'). Allocating Legal TA resources preferentially to such courts may (arguably) improve the quality of the adjudication of commercial disputes. It also might contribute to a two-tiered system of civil justice: one for the relatively prosperous, the other for ordinary citizens.
  - 18 A general problem with 'stand-alone', dedicated Legal TA projects is that the legal sector itself never stands alone; there is no reason to suppose judges and other government legal professionals are less resistant (more amenable) to reform than the rest of the public sector.
  - 19 Electronic processing and dissemination of legal information and automation of legal and judicial management and information systems might justifiably be regarded as the leading (certainly in terms of funding levels) form of Legal TA in the RM. They are not discussed here, because while they do serve to remind one that much of what goes under the name of 'Technical Assistance' is in reality more like 'Technological Assistance' and has very little to do with institutional support as such, they are (indeed for that very reason) tangential to an exploration of the vision or version of the law-economic nexus undergirding Legal TA.
  - 20 'Ownership' of legal-institutional reform projects has been a major thrust of latter-day (PM) Legal TA and has been extensively pursued by the World Bank and other donors as a corrective to 'supply-driven' reform agendas, i.e. imposed by donors. Borrowers are encouraged to claim ownership of Legal TA projects and to identify and empower 'stakeholders': diverse government agencies, businesses, citizens, NGOs, media etc. The difficulty remains that both the broad outlines and programmatic specifics of Legal TA projects continue to originate with the donors, however desirable may be the idea of even collaborative Legal TA design, let alone Borrower or beneficiary initiative. The prestige effects of Legal TA projects (every up-to-date Ministry of Justice wants to have one) also complicate the question of demand for Legal TA.
  - 21 Not invariably, however. In the Sri Lanka law school curricular reform programme cited above, the trade law syllabus was designed by a noted critical scholar and did not reflect a 'mainstream' view.
  - 22 For examples of just such studies, see the work of the University of Maryland IRIS (Institutional Reform and the Informal Sector) Centre.

## 2 Using legislative theory to improve law and development projects

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### Introduction

After decades of hovering in the background, law<sup>2</sup> has re-emerged and taken centre-stage in development debates, policies and projects (Faundez 1997:1-24; Kennedy 2003; Otto 2001). Today, law is considered vital to the promotion of economic growth, human rights and democracy (World Bank 1992; Wetenschappelijke Raad voor het Regeringsbeleid (WRR) 2001). Since 1990, hundreds, if not thousands, of legal advisors from the West have visited developing and transitional countries<sup>3</sup> to assist in expensive law-reform projects.

Often, these advisors have had limited knowledge of the host countries' existing laws, lawmaking institutions and socio-legal processes, and many of them even now tend to assume incorrectly that they have arrived in legislative deserts. In addition, many feel torn between two conflicting ideas: that their legal transplants may be inappropriate for the host countries and yet that legal development has always largely been a matter of legal transplantation.<sup>4</sup>

Consequently, the involvement of foreign experts in such legislative projects in developing countries has raised two important sets of questions: first, over the nature of the drafting processes and the role of foreign advisors (Trubek and Galanter 1974; Seidman and Waelde 1999; Tamanaha 1995) and, second, about the effectiveness of the resulting legislation. Some authors (including the Seidmans) have noted a strong relationship between these two problem areas and suggested ways to better address them.

Despite the number of programmes, the complexity of their tasks, and the budgets involved in such endeavours, surprisingly little information and theoretical guidance exists for legislative advisors who, called in to promote development through law, seriously try to understand the challenges.<sup>5</sup> Thus, this article explores whether and how a better command of legislative theories might improve the performance of legislative advisors. By way of introduction, this article briefly discusses how law relates to governance and development and attempts to identify

the major problems concerning lawmaking in developing countries. Next, the article lays out and categorises some theories of lawmaking commonly addressed by Dutch scholars and then discusses to what extent these theories might be useful to law and development projects. Finally, the authors present some concluding remarks about whether and how international legal assistance might benefit from a more concerted approach to underpin lawmaking projects with sound theory.

### **Law and development: real legal certainty**

A basic understanding of development, itself, is necessary to an understanding of the question: how can law contribute to development? Esman has described the core meaning of development as ‘steady progress toward improvement in the human condition’ (1991). Because such improvement involves both the fulfilment of the basic needs of the population as well as improvements in the polity of any given state, this article differentiates between the goals of general development with regard to the basic needs of the population and the goals of development with regard to governance (Otto 2001; 2004).

One of the objectives of seeking to improve the polity of any given state is to ensure good governance. The relationship of good governance to the more general goals of development has two aspects. First, virtually all general development processes (whether involving the economy, health, education, justice or environmental protection) require good governance. Second, as suggested by the authors’ insistence on distinguishing between general development goals and those involving polity, good governance has become a goal of development in its own right. The legal dimensions of this goal are expressed through such concepts as the Rule of Law and human rights.

Problems arise from the fact that such concepts place more emphasis on law-in-the-books rather than on law as it exists in social reality, and in developing countries the gap between prescribed norms and actual practice is exceptionally wide (Riggs 1970; Allott 1980; Falk Moore 1978). Thus, in the context of development, steps which seek merely to *enhance* legal certainty are too often incapable of achieving their *real* goals – to ensure that well construed and consistent legislation and case law as well as predictable interpretations by the courts not only exist on paper but also take proper effect in real life.<sup>6</sup>

To address this deficit, the socio-legal concept of real legal certainty has been coined.<sup>7</sup> This concept is comprised of the following five elements, the first of which directly relates to the subject of this article:

- that a lawmaker has laid down clear, accessible and realistic rules;

- that the administration follows these rules and induces citizens to do the same;
- that the majority of people accept these rules, in principle, as just;
- that serious conflicts are regularly brought before independent and impartial judges who decide cases in accordance with those rules;
- that these decisions are actually complied with (Otto 2002).

The authors of this article suggest that redefining the objectives of law and development projects in light of these five factors would increase the effectiveness of their efforts to achieve meaningful legal reform.

### **Problems regarding lawmaking in developing countries**

For purely practical reasons, this article can do no more than address *some* of the major problems identified in the literature regarding lawmakers and lawmaking in developing countries. These are categorised into two sets. The first set is made up of factors and problems concerning the roles and legitimacy of both lawmakers and the lawmaking process in which they engage. The second set concerns the effectiveness of the resulting legislation in society itself.

The authors wish first to draw particular attention to the following five sets of factors which generate problems that complicate and interfere with formal lawmaking (or bill-creation, as the Seidmans call the process):

- Political elites of developing countries often pursue development by introducing ambitious plans for law reform. Implementing such new legislation often necessitates a quite radical degree of social change. Thus, many reforms initially encounter much resistance followed by a period of stagnation – the arrest of further legal development.
- Members of legislatures often lack adequate knowledge about as well as interest in the key task in this process of reform, namely lawmaking.
- The pluralistic and fragmented laws of developing countries reflect their history: they may typically contain some or all the following elements: local and tribal customs, religious mores, colonial law, socialist law, new national law, international law – including human rights – and a variety of foreign laws. It is indeed a daunting task to harmonise, co-ordinate and integrate the various elements into a coherent whole.
- Even decades after independence, a major divide often exists between a traditional sphere, strongest in rural and *peri-urban* areas, and a modern sphere, usually limited almost exclusively to more urban regions. Especially in Africa, but also in other regions, such tra-



ditional authorities as chiefs or ayatollahs often wield more political influence at local levels than regional or national governments do. These traditional sources of influence often compete with great success with formal state actors whose work is limited to the legal arenas of formal lawmaking, administration and the court system.

- New sets of laws, national policies, principles, models and other practices imposed or borrowed willingly from international institutions, business and NGOs are transplanted on a large scale. Transplanted law may not fit local conditions, and may thus fail to achieve the desired developmental effect.

Second, problems exist with regard to the effectiveness of legislation:

- Overambitious lawmaking has often led to social resistance, to the ineffectiveness of law (Benda-Beckmann 1986), then to stagnation (Otto 1992), and finally to disrespect for the Rule of Law. How this situation plays out can be aggravated by various contextual factors such as politics, the economy, culture and particular institutions.
- Political power holders at various levels often impede the proper implementation of law by intervening in administrative and judicial legal processes.
- Social heterogeneity, i.e. the co-existence of highly contrasting socio-economic classes and ethnic communities in one state, makes the tasks of lawmakers especially daunting.
- Public access to the processes and institutions involved in the formulation and implementation of state law as well as access to the protections potentially afforded by state law are often limited. Most of the populace lack the requisite knowledge, money, time, energy and courage, and legal aid and legal education are provided only on a limited scale. This situation has given rise to a sometimes thriving ‘informal sector’ which remains largely an illegal sector.
- Administrative and judicial institutions often function inadequately. Many of their staff lack expertise, resources, incentives and integrity.

To summarise, lawmaking in developing countries is difficult and complex. The heterogeneity and bifurcation of society, the weakness of the state, the fragmentation of the law and the limitations of the drafters all contribute to the problem of fashioning laws whose outcomes in the real world actually reflect their intended goals. Can legislative theory give lawmakers and their foreign advisors a helping hand?

## Legislative theories

This section considers a particular range of distinctive legislative theories and models. Some are frequently applied to the legislation of the Netherlands and other Western countries; others have been developed specifically for the study of law in developing countries. Some have a normative character; others are grounded in empirical research. For the purposes of this article, the authors can only highlight the main features of these selected theories drawn from the following categories:

- theories on the lawmaking process itself;
- theories on the social effects of laws that are enacted;
- theories on internationally driven law reform.

Admittedly, most theories are confined to only one category, but some scholars and their theories deal with all three. The Seidmans, for example, consistently argue that behaviour lies at the core of all problems associated with lawmaking, i.e. the behaviour of lawmakers, of subjects of the eventual law and of foreign advisors. Thus, only through an understanding of these behaviours can one properly address the perceived problems which plague lawmaking. From time to time, this article will comment on their approach.

### *Theories on the lawmaking process*

Theories on the lawmaking process enable one to recognise relevant factors that influence the legal quality and the content of the law. The following theories will be examined sequentially:

- a) the synoptic policy-phases theory (Hoogerwerf 1992; Lindblom 1959);
- b) the agenda-building theory (Cobb and Elder 1972);
- c) the elite ideology theory (Allott 1980);
- d) the bureau-politics theory or organisational politics theory (Rosenthal 1988; Allison 1971; Tanner 1996; Tanner 1999);
- e) the four rationalities theory (Snellen 1987).

#### *Ad a.*

The synoptic policy-phases theory conceives of the process of lawmaking as a well-organised and well-directed process of binding decision-making that seeks to give direction to society as a whole. According to this theory, which differs from the others in its normative orientation, policy is developed under the aegis of politically accountable bodies, each of which has its own role. Political actors are the ones in charge in that they actually determine the content of the law. Legislative drafters, on the other hand, primarily provide advice; they perform a 'norm-

providing' role. At various times during the legislative process, drafters are consulted. Over the years, the synoptic policy-phases theory has grown increasingly sophisticated by including an ex-ante assessment of drafts as to the enforceability, adequacy, and *implementability* of its rules. It also has incorporated an element from the bureau-politics model (see below).

The synoptic policy-phases theory basically follows the ideal framework of the *trias-politica* and is premised upon bureaucratic neutrality. This theory can serve as a useful point of reference with regard to various key factors: the lawmaking procedure, the formal actors, as well as the various stages, the legal procedures and whatever standards might apply in any given country. Thus, to the extent that these factors truly are determinative of outcome, it would be worthwhile for foreign advisors to carefully study the existing regulations which apply to each of these factors.

*Ad b.*

The agenda-building theory can be characterised as a bottom-up approach. It conceives of lawmaking not as a well-organised and directed process but rather as the outcome of a societal process in which various parties with differing ideas and interests clash. The theory distinguishes five phases in which diffused societal discontent gradually is channelled through organised interest groups that subsequently make demands upon the government. Their aim is to gain the support of political parties so that they can significantly influence the political agenda and push for the submission of a bill.

The agenda-building theory seeks to demonstrate that the lawmaker is not one single central legal actor, but that lawmaking is a long, complex transformation-process upon which many different actors and factors can have an impact.<sup>8</sup>

In developing countries the extent of the applicability of this theory depends upon the degree of the democratisation and social liberalisation of each given society. Before the 1980s, this degree was frequently low outside of the West. Lawmaking was usually a top-down political process where often, a president or party leader would declare that a new policy or law was to be introduced, and the ministers and civil servants simply carried out their orders. This centralist type of lawmaking was prevalent in most African, Asian and Latin American socialist countries. Typically, lawmaking excluded popular involvement. Consequently, most countries lacked an active political middle class (Heady 1996). Even in instances where some big businesses and dominant ethnic groups could influence the agenda, in reality the existence of a truly free clash of ideas remained an illusion.

Inner societal factors also have prevented the emergence of true bottom-up democracies. In the traditional spheres of society, people have in fact since time immemorial considered themselves primarily as members of particular tribes, clans or religious groups which demanded full solidarity. The leaders usually acted as brokers in national politics, offering the votes of 'their' people as closed blocks to regional and national politicians. Understandably, neither the traditional leaders nor the politicians were interested in open discussions about socio-economic issues.

Particular since the 1990s, when waves of democratisation toppled many autocratic regimes, this political arrangement has changed considerably, as have other aspects of society. Urbanisation, economic growth as well as better education and communication have resulted in the emergence of domestic classes of entrepreneurs and of local NGOs. Both these classes have increasingly co-operated with international organisations and with governments to raise standards in such fields as commercial law, labour relations and the environment. Foreign influences have reached ever further due to the fact that the international donor community not only has sent in legislative experts but has also actively promoted the enactment of certain laws and even sometimes imposed them as a condition for receiving loans. Specific efforts were expended to reduce the power held by traditional authorities.

Yet, such change has been only gradual and incomplete. The new democracies are still fragile; autocratic elements persist and sometimes return to power. In addition, primordial relations among ethnic groups and widespread poverty continue to prevent many citizens and groups from participating in processes of agenda-building. In that realities vary from place to place, foreign legislative advisors should be well informed about political structures and the nature and degree of change if they are to assess both the societal forces at work and the legitimacy of the very projects in which they are involved.

*Ad c.*

Allott's theory of elite ideology (1980) argues that in most developing countries impatient and arrogant political elites have tried to transform their less developed societies through new ambitious legislation drafted without popular participation. These elites were inspired by a number of such 'informing principles' as unification, modernisation, regression, secularisation, liberalisation and mobilisation. Their ambitious agenda has given rise to much resistance, followed by a period of stagnation. Legal advisors must recognise that, at best, this pattern of events has yielded little more than the emergence of new 'informing principles', which, notably, still have not been tailored to suit local social realities. The overambitious attitude of the lawmaking elites has for the most part remained unchanged.

*Ad d.*

The bureau-political theory conceives of policymaking (lawmaking can also be conceived of as part of this greater process) neither simply as the result of a rational product of the will with separately identifiable parts nor merely as a society-driven process with a pronounced political intention, but rather as also a struggle between different sectors (bureaus) of the government administration. This model takes government administration as its point of departure: every bureau in each department is designed to be *geared towards the general interest*, but how each bureau conceives of this set of duties varies significantly. Whenever a new regulatory problem emerges, a struggle will naturally ensue between the various government agencies and bureaus. Each seeks to bring the problem within its own ambit, so that it can define, diagnose and resolve the matter. Seen from this perspective, government policy results from an unpredictable and capricious administrative competition with centrifugal forces at the interdepartmental level. No doubt this theory can serve as a useful analytic tool with regard to developing countries. The history of numerous bills testifies to the fact that a great deal of rivalry exists between administrative bureaus.

However, gaining an understanding of the complexity of the various potential rivalries is no easy task. Conflicts between such developmental goals as economic growth and environmental protection will play out in competition between the various ministries vying for control over the matters. But, in addition, a great deal of competition also exists within ministries. Thus, legislative advisors must properly assess the power held by the legal bureau relative to the policy bureaus and also recognise the power struggles which might be at play in the legal bureau itself. Still, other factors complicate the challenge.

In many developing countries, law in general is not granted a very high status or priority within the overall bureaucracy, and legal bureaus have many problems in 'getting the legal message across' (MacAuslan 1980). Attempts by foreign advisors to identify the main actors in bureau-politics which necessarily entail rather detailed studies of the administrative structure will undoubtedly lead to the discovery that some agencies unexpectedly play important roles. Often, familiar home-grown ideas about ministries must be abandoned. For example, a Dutch advisor would have some difficulty finding a familiar point of reference with regard to a Ministry of Religion, a National Land Agency, a State Planning Commission, a huge Bureau of the Vice-President, a National Advisory Council, or a General Body for the State Economy. Advisors have no choice but to examine the very policies, practices and legislative roles undertaken by such unfamiliar institutions. Still, the challenges facing foreign advisors demand even more.

Accepting the virtues of the bureau-political theory, it would be one-sided to focus completely on the ministries as ‘the fourth power’<sup>9</sup> and to believe that such internal competition is the only key to understanding lawmaking processes.<sup>10</sup> A foreign advisor should not neglect nor underestimate the other major power centres outside the ministries. In some countries, an extremely wide range of other sorts of agencies and agents are much closer to the heart of political power than are the ministries. These may include the office of the president, a central drafting office, and central party committees. Ideological, cultural or religious power centres may also exist, such as the Communist Party of China and various religious establishments in Islamic countries. International donors, NGOs, businesses, the army may be important players. Certainly, the legislatures and their constituent parts such as parliamentary committees as well as the political parties, all often play a significant role too. Finally, individual politicians, administrators and private citizens sometimes are essential in the process of pushing an idea through all the stages entailed in lawmaking.

*Ad e.*

Snellen’s theory of four rationalities suggests that government policy consists of four systems of thought that each have their own logic. These systems are somewhat autonomous, but related in their interaction with government policy: politics, law, economics and science.<sup>11</sup> These rationalities sometimes work in harmony with one another, but they often raise opposing demands: to what extent is something that is scientifically plausible also legally acceptable? Is a solution that is legally preferable also economically feasible? Does a particular politically expedient solution accord with legal rationality? These kinds of questions illustrate not only that studies on legislation are interesting and important but also that they should be interdisciplinary.

In that this theory addresses the deeper levels of policy and lawmaking, its application can raise the awareness of those seeking to more fully appreciate the complexities of lawmaking in developing countries. The problems facing development, or in Snellen’s terms, the rationality of underdevelopment, provide a sobering point of departure. How can effective lawmaking take place in a context in which there is not yet a viable nation-state, where there is little physical security but widespread poverty, where there are neither budgets nor qualified civil servants to implement policies, and where there is a high degree of illiteracy and ignorance?

The rationality of ‘politics’ in developing countries is much cruder than in most Western countries in that, there, power struggles far more often involve matters of life and death, order and civil war. There, ‘democracy’ as envisioned by the power holders is a ‘democracy with teeth

and claws' – a 'semi-democracy'. The very bills that are enacted reflect the compromises reached by politicians with traditional leaders and other forces necessary to remain in power. Thus, while most politicians would probably agree in theory with Seidman's lawmaking methodology which insists on a basis of reason informed by experience, more often, in practice, politicians in developing countries pursue strategies intended to ensure their political and physical survival.

Not surprisingly then, the rationality of 'law' plays a much less prominent role in developing countries than in most Western countries. As previously discussed in section three, both the law and the legal systems have limited 'autonomy' because they often function inadequately (if at all) and therefore command little respect in society.<sup>12</sup>

Attempts by Rule of Law programmes as well as the law and development and human rights movements which each aim to improve this situation often encounter a sceptical populace. In pluralist societies, particular groups are concerned about which rationality and which set of laws are to be amended: state law, national law, religious law or customary law? The absence of a normative consensus throughout many poly-communal and heterogeneous societies undermines the possibility that the rationality of law might take root in politics and in policymaking.

Although the rationality of 'economics' is generally considered of paramount importance, significantly one can wonder whether there is there such a thing as 'the rationality of economics' in developing countries. Consider the following factors which make it difficult to establish a firm and lasting notion of what such a rationality might consist of: in any given country wide gaps exist between the economic goals, plans and practices of various donors and of the host governments, their leading politicians, and their citizens at large. Donors' strategies have not been consistent but rather have evolved over the years – concentrating on central planning, then on a market-economy approach and decreasing transaction costs. Host governments have always been more concerned with employment and income growth for what it considers its most strategic groups. The economic decisions of the leading local politicians in many developing countries have often sought to advance their own interests and those of their particular *clienteles*. As for the general populace, the same old economic dualism of colonial times is still recognisable. The traditional rural economy and a modern urban economy exist side-by-side (though significant chunks of the urban economy belong to 'the informal sector' [Soto 2001]). Incomes, prices and practices vary immensely between these various economies. Thus, various and different invisible hands at work (along with Adam Smith's!) though some are less invisible than others. Informal economies are usually built on personal and group relations, creating 'economies of affection'

(Hyden 1983). Those who have studied the informal sector have aptly explained its rationality as one ‘for participants’.

*Empirical studies and theories on the effectiveness of laws*

Another rich scholarly research tradition in socio-legal studies focuses upon the effects of law. Generally speaking, such studies fall into one of three distinct categories:

1. ‘evaluating-the-law studies’ in which officials evaluate the state of the law, which are (particularly in the Netherlands) described as *informed by ‘legal centralism’*;
2. broad sociological studies which analyse effectiveness on the national level, informed by a socio-political, often historical, perspective of national law (Aubert 1967; Witteveen 1991; Hoekema and Manen 2000). Theories belonging to this category include Aubert’s symbol-act theory;
3. critical studies based on socio-legal field research conducted on local levels by legal anthropologists, and often carried out in developing countries (Falk Moore 1978; Griffiths 1996; Benda-Beckmann 1990). In these (and even other types of) studies, the theory of legal pluralism as well as the social effects theory are important.

*Ad 1.*

The evaluating-the-law studies are of rather recent origin in the West. They approach the effectiveness of law from the point of view of the legislator and strive to determine whether their objectives have been attained. In countries such as the Netherlands, the conclusion of such an examination usually confirms that the legislator’s intent has to a great extent been realised. Usually, the tone is optimistic yet critical; the lawmaker is found to have been *heading into the right direction*, but, *here-and-there*, there is room for improvement.

In developing countries, many policymakers have resisted analytical evaluations of their laws. When a policy or law fails to achieve its goals, policymakers usually are more eager to replace it with ‘a better one’ rather than to investigate the causes. Still, the gradual introduction of sound evaluation studies might greatly contribute to legal development. An analytical framework based upon *real legal certainty* might well serve as a useful initial instrument in such a process (Otto 2004).

*Ad 2.*

Among the broad sociological studies this article addresses two theories which focus on the effectiveness of laws.

The first, Aubert’s symbol-act theory (Aubert 1967), as elaborated upon by Aalders (1984), argues that lawmaking is often used primarily



to resolve or mitigate group-conflicts in the following manner: first, a group, made up of reformers striving for change, achieves a symbolic triumph in that an act which they support embodies particular values and standards. But, another group, the conservatives, is able to formulate the law in such a way (especially as to the enforcement and penal clauses) that is likely to thwart the full achievement of the first group's intended objectives.

The theory therefore distinguishes between political, substantive and formal effectiveness. Such mechanisms as legislative compromise, which contribute to political effectiveness, can result in legislation which lacks substantive effectiveness, i.e. is incapable of achieving its major goals. In cases where its key provisions are not complied with, the resulting law also lacks formal effectiveness. Such an outcome causes the reform faction to complain that the law needs to be made clearer and stricter. In such cases, the legislature usually responds by taking actions which results in less administrative discretion and a proportionally better administrative implementation of the law. Gradually, the objectives of the reformers are realised to a greater degree.

Such mechanisms certainly exist in many developing countries. Some typical targeted goals of reform are liberalised family laws and more progressive labour and environmental laws. On the other hand, conservatives have often been too successful in frustrating reforms involving land law, family legislation, and a variety of democratisation laws for the last phase of the reform to take hold – that is, the process through which the law is eventually made more effective.

Aubert's theory has value for two reasons. In the first place, the proposed connection between lawmaking and effectiveness provides a plausible hypothesis. In the second place, the theory also draws attention to the symbolic function of lawmaking which can in itself be highly significant: even if today's implementation is lousy, it may yet serve as a standard for future legislation and implementation. Of course, further evaluation studies might be necessary to demonstrate whether and to what extent this *symbol-act function* actually operates.

The second theory, Witteveen's communication theory (Otto 1992), addresses effectiveness in a different manner. It maintains that the ideal and essential effect of law is to facilitate a public debate. By developing authoritative terms and concepts, the legislators encourage the people to genuinely listen and talk to each other.

This theory can have valuable applications in the context of developing countries. The previously discussed approach to reform which tried to use new law as a programme of radical transformation (Allott 1980) failed in part because not only did it facilitate a dialogue among the people but addressed them as children in need of education and enlightenment.

But, the implication that the state must listen and respond to its people's needs does not automatically mean that democratisation, elections and liberalisation along Western lines can provide the best solutions for all segments of the population. For example, in order to reach rural populations in Africa, solutions which incorporate the use of both traditional and customary channels alongside more modern democratic ones are more likely to achieve effective results.

*Ad 3.*

The central hypothesis of the social-effects theory, as developed amongst others by Falk Moore and Griffiths (Falk Moore 1973; Griffiths 1996), is that legislation cannot have direct effects in that people's behaviour is not directly affected by national rules. The underlying explanation for this hypothesis is that people do not comply as autonomous individuals because they are social beings. The social structures within which they live, called semi-autonomous social fields (SASFs), produce rules of their own and interpret external rules, such as national legislation, in order to achieve their own strategic objectives.

Proponents of this theory are generally pessimistic about the extent to which government can provide guidance to society: laws do not actually reach the grassroots level without having been distorted by various SASFs to such an extent that nothing will come of the intended effects as formulated by policy- and lawmakers.

This scholarly tradition has been rather well-developed in the Netherlands, part of which can be traced back to Van Vollenhoven's Adatrechtsschool. Studies which apply this theory suggest that in developing countries (even more than in Western countries) many social fields are quite autonomous and produce many rules of their own and that these factors make the national law there even less effective. Von Benda-Beckmann and others have warned that in such contexts newly imposed governmental laws can even disrupt the predictable nature of pre-existing *local* laws. Thus, these commentators suggest that reliance on 'people's law' might often produce better results than attempts to create a new legal certainty through state law – that in many circumstances the best lawmaking is no new lawmaking.

This theory was not developed at home in the West but rather grew out of field-work performed in developing countries. The theory plays an unmistakably essential role in socio-legal studies. The SASF theory pays particular attention to the strategic behaviour of individuals and groups whose primary interest is the continuation of the SASF-group. Such individuals and groups, after all, interpret signals emitted from the government with reference to the primary social relations that are paramount to them.

The potential for this theory to provide workable explanations for law-makers and their advisors has been called into question because of the theory's conspicuous focus on legal pluralism and the virtual absence of case studies showing even modest successes of national legislation. Admittedly, research into such traditional areas of human relations and fields of law as those involving marriage, land, and processes of customary dispute settlement are likely to support the notion that national law is of limited relevance, but they do not reflect the entire spectrum of matters where national law might be an effective tool through which to enact change. There are simply other sectors of society and other fields of law where less legal pluralism exists. Commercial law has been applied in its appropriate business settings with an expected degree of effectiveness. In addition, administrative law is a major and often underestimated field in which many developmental laws have been effectively enacted. Although there are no particular reasons for optimism in those areas, the gloomy theory of social effects of law needs further testing in various fields of law where traditions are less likely to stifle their effectiveness.

Circumstances have changed which call this theory further into question. Developing countries are quite different from what they used to be a century ago. Instead of consisting mainly of rural, homogeneous, traditional communities, they are now more a variety of heterogeneous mixtures of traditional, modern and mixed spheres. Testing of the social effects theory in such modern and mixed spheres should greatly increase its value as a means of understanding more about the potential effectiveness of legislation in developing countries.

#### *Theory on internationally-driven law reform*

This chapter examines three theories addressing internationally-driven law reform:

1. legal transplants theory (Watson 1993);
2. theory critical of law and development projects which promote legal transplants (Trubek and Galanter 1974; Shapiro 1993; Garth and Dezalay 2002);
3. theory promoting country specific and problem-specific laws, thus in principle rejecting legal transplants (Seidman, Seidman and Waelde 1999).

#### *Ad 1.*

Watson's theory of legal transplants is well-known among scholars of comparative legal history. According to Watson (1974), even in theory, there is no simple correlation between a society and its law. This viewpoint implies that legal development can be achieved by transplanting

rules or a system of laws from one country to another. In fact, he maintains that this is the main way that law develops. Once a system is quarried, it will be borrowed from again. Whether or not a particular transplanted rule turns out to be suitable, the more a legal system is borrowed from, the better it is to continue borrowing from it. Instead of any discovering that social criteria might act as an effective guide to legal reform, Watson found accessibility, habit and fashion served as the main criteria for selecting which rules should be borrowed.

Watson concluded: if borrowing is the main way law develops, and if the lawmaking elite is bound by its legal culture (by what it knows), then it follows that the quality of legal education plays a powerful role in the success or failure of law reform. Thus, scholarship programmes which bring Asian and African students to law faculties in Western countries will, in his view, eventually bring the legal ideas of those Western countries to Asia and Africa.

Observers of legislative processes in developing countries will immediately recognise this picture. On the supply side, many international organisations, bilateral donors, businesses, NGOs and domestic pressure groups urge governments to enact new laws and provide them with models from other countries.<sup>13</sup> Likewise, on the demand side, many ministers, senior administrators and NGOs complain of the quality of the laws in their country. They often send out urgent requests for legislative improvements in the belief that appropriate solutions will come from more 'developed legal systems', from countries where the law seems to work better than in their own country. Watson has documented this historical process. He suggests that this is the way things obviously have to go and, therefore, argues provocatively that the mirror thesis – that law reflects the values and needs of a particular society – is mistaken.

The present authors believe that Watson's theory is sound as a descriptive theory, but limited to the legal framework and to the techniques of improving and keeping that framework consistent. Watson's theory does not address to what extent and how one should assess whether the transplanted law is effective in achieving its stated goals in society.

#### *Ad 2.*

Many theorists have written critiques on law and development which question the transfer of Western law to developing countries. In the mid-1970s, Trubek and Galanter (1974) launched a strong attack on the law-and-development movement in the form it assumed in those days which sought to establish and support laws and legal institutions overseas, funded by USAID (Tamanaha 1995). These critics characterised it as naïve, ethnocentric and ineffective and further stated that the under-

lying assumptions of the enthusiastic law reformers were false. More recently other authors, such as Shapiro, Faundez (1997) and Garth, have also questioned the *Americanisation of laws* worldwide and its specific corresponding economic models (Newton 2004).

*Ad 3.*

In *Making Development Work*, the Seidmans have advocated 'hands-on lawmaking for development' stressing the importance of drafting problem-oriented and country specific laws. Their theory addresses the process of lawmaking, the social effects of legislation, as well as the international transfer of law, neatly summarised in Seidman's 'law of the non-transferability of law' (Seidman 1978a).

It should be noted that the Seidman's theory is based on their particular interest in the effectiveness of laws addressing development. Their methodology for lawmaking calls for the proper analysis of particular problematic behaviours that new laws seek to regulate, for efforts to explain those behaviours, for evaluation of the implementation of old law and explanations for its failures and, finally, for the development of alternative ways through which to regulate the targeted situation. Thus, they go beyond the usual critiques on law and development. Their aggregated theories are indispensable for anyone involved in the practical work of legal drafting for specific development purposes. However, in order to address important questions which have been raised, the theory should be re-evaluated using more recent case studies in that much of the fieldwork that provided the data upon which their theory was originally grounded theory was gathered between 1960 and 1990. Is the figure of the 'passive drafter', one who fails to consider the policy issues and blindly copies foreign laws, still an accurate depiction of the prevalent approach to lawmaking in developing countries? Does their model (which is known under its acronym Rocciipi, see Chapter 4) still provide the main variables for explaining compliance? Is the problem-solving methodology appropriate for the needs of lawmaking projects? Criticisms have already been voiced (MacAuslan 1980; Tamanaha 2001), but no practical alternative has thus far been proposed.

With regard to the various theories involving the international transfer of laws, one may reasonably wonder whether the Watson theory actually *clashes* with Seidman's law of the non-transferability of law. In the view of the present authors, Watson and Seidman actually deal with the lawmaking process from different perspectives, asking different questions. Thus, one might conclude that their theories complement rather than conflict with one another. Watson is interested ex-post in the technical-legal processes and the preference for certain legal systems over others, whereas the Seidmans are concerned with the actual behaviour of lawmakers and with the social effects of law.

### Some concluding remarks about the utility of legislative theory

The recent interest in law reform among the international donor community has given rise to the creation of the first guidelines and checklists for development projects in this field. However, work still needs to be done. For example, the Handbook on promoting good governance in EC development and co-operation of the European Commission does to an extent provide such guidelines. But, its section on the reinforcement of the Rule of Law does not address the challenges of legislative reform. At a minimum, this omission is remarkable in light of what has been said above about the various aspects of this complex process. Such a degree of complexity, in the opinion of the present authors, not only calls for an interdisciplinary approach but also urges that anyone involved in legislative projects in developing countries take cognisance and make use of relevant theories in this field in order to get a better understanding of lawmaking processes, the effects of legislation and the potential role of international legal transfers in developing countries.<sup>14</sup>

These theories would, however, be even more useful to legislative advisors were they to be consolidated into one coherent and comprehensive methodology. Such a methodology would have to encompass all of the following five steps:

- An evaluation of the effectiveness of the existing law before undertaking steps to improve upon it. In general, developing countries are very reluctant to conduct such evaluations themselves in that these might expose such sensitive issues as corruption. In addition, donors have shown little interest in this endeavour due to the fact that such evaluations are both expensive and time-consuming. Rather, donors have tended to focus entirely on drafting new legislation. This might be understandable in cases where no relevant laws previously existed, but in most developing countries this is simply not the case. Donors should, in fact, make the investment necessary to understand the nature of existing laws and determine whether they are consistent, whether they relate to the interests and needs of their target groups, how the implementing agencies perform their tasks and whether all the relevant legal mechanisms are actually accessible to the public.
- The development of an understanding of why laws are effective (or ineffective) using the legal pluralism and the social effects theory, Aubert's symbol-act theory. As does the Seidmans' basic model, Aubert's theory prescribes examining the implementation processes from several sides and, further, acknowledges that success or failure are determined by a combination of institutional factors (resources, internal structure, leadership) and target group factors (interest, access, reach and force), both of which, in turn, are influenced by con-

textual factors (history, politics, economics, culture, organisation, technology, and geography).<sup>15</sup> Though developed in the context of development administration, this usefulness of this model has been demonstrated in the analysis of legal processes and such institutions as courts (Bedner 2001; Pompe 1996; Otto 1992). The present authors propose that this model be further adapted to the specific study of lawmaking institutions and their relations with the addressees of the laws, both with regard to bill-creation and to questions of compliance.

- An analysis of problems in need of regulation in terms of identifiable targeted behaviours using the Seidmans problem-solving methodology. This step is comprised of four steps:
  - identifying the difficulty: because laws can only address behaviours, drafters must identify the role occupants who behave in ways that produce the social problems which their bills aim to mitigate;
  - analysing and proposing explanations for the existence of particular problems: drafters must systematically examine alternative hypotheses concerning the causes of role occupants' problematic behaviours;
  - proposing a solution: supported by evidence, the drafters may logically formulate legislative measures. The drafters must then assess each measure's probable social and economic costs and benefits to determine which specific elements to incorporate into or exclude from their bills;
  - monitoring and evaluating implementation: finally, drafters must build adequate monitoring and evaluation mechanisms into their bills.
- An analysis of the lawmaking process in which an advisor is going to participate with the use of normative theories on 'good legislation', such as the synoptic policy-phases theory and the Dutch guidelines for lawmaking (Staatscourant 1992). In this context, the present authors further recommend that proposed legislative solutions allow for a greater degree of legal differentiation in law-reform projects. Consider the following: case studies focusing on locally-specific conditions have often indicated a high degree of diversity or heterogeneity; in addition, old approaches towards legislation (including unification, modernisation, secularisation and liberalisation) have thus far been unable to address the actual degree of heterogeneity and complexity in bifurcated societies. These points indicate that new forms of legislation are needed (Newton 2004). These might include more legislative differentiation, experimental provisions, and greater degrees of delegation involving regional and local governments as well as more traditional authorities.<sup>16</sup> Perhaps sur-

prisingly, solutions tried under colonial law might in the appropriate setting well serve as constructive examples which could inspire new legal solutions. A greater degree of involvement by the relevant stakeholders in open discussions and debates could also serve as an instrument to inform a process geared to more differentiated lawmaking. To the degree possible, such consultations should be specifically exploited as means through which to identify potential relevant subjects of reform. Such participatory lawmaking would enhance the democratic character and the legitimacy of the law. Such a bottom-up approach to the creation of state law, initiated at the local levels, is an important and new phenomenon in most developing countries. Further, because such an approach necessarily starts at sub-national levels where adequate resources are usually scarcer than at the centre of national governance, these local levels truly need the strong support of donor communities if the process of lawmaking is indeed going to operate as intended.

- An analysis of the feasibility of a legislative endeavour with the use of the agenda-building theory, the elite ideology theory, the bureau-politics theory, and the four rationalities theory. Such an analysis should be accompanied by a critical examination to determine whether a legal transplant might provide the best solution to the problem at hand. This requires that the legal advisor be both self-critical and aware that some of the theories developed in the West (such as the synoptic policy-phases model and, to some extent, the agenda-building theory) are so firmly rooted in a set of home-grown assumptions about how politics and society operate that they simply do not reflect the social realities in most developing countries. This set of assumptions include: 1) that a consensus exists on the need for democratic or even participatory lawmaking; 2) that people are relatively free to engage in public debates, unbounded by tribal or religious affiliations or the fear of authoritarian power holders and, further, that the populace is educated and to some degree oriented not only to their own group and private interests but also to public issues; 3) that the executive leading the lawmaking process will be accountable to representatives, who in turn articulate the interests of the population; 4) that there is a relatively stable political situation which permits open debates about essential elements of state ideology and policies and where the media is an effective but sufficiently neutral channel of information to the public; and 5) that there are sufficient resources, personal and financial, to enable a participatory process of lawmaking, well prepared by policymakers and legislative drafters.



In sum, the theories that are proposed here – the agenda-building theory, the elite ideology theory, the bureau-politics theory, and the four rationalities theory – depart from many of the assumptions about Western societies where (for the vast majority of the population) the transition made long ago from a tightly-knit small-scale, traditional and authoritarian society where most people maintained multi-stranded relations with one another, to a large scale, modern, democratic, individualised and liberalised one.<sup>17</sup> However, as noted above, in most developing countries this transition has only been made in part, and even then, by only some segments of their populations and only in certain areas of their lives. Other traditions, ethnic loyalties, ethnic politics and money politics continue to directly influence the behaviour of many legislators.

In conclusion, this coherent methodology is, in the view of the present authors, not only helpful but even indispensable to the potential success of advisors who continue to be invited to participate in law reform projects in developing and transitional countries. Such a methodology can help to build an understanding of the roles of law and legal institutions in particular societies as well as an understanding of the appropriate role of the legal advisors themselves. This will enable advisors to reflect upon the lawmaking process and to anticipate the effects of the laws which might be enacted. These abilities ought to improve the quality of their projects and increase the potential contribution that law might make to the process development.

## Notes

- 1 The authors would like to thank Wim Oosterveld for his valuable comments on earlier drafts of this article and his editorial assistance.
- 2 We propose to make a distinction between two categories of law. The first should be law as a system of rules in the sense of Hart's primary and secondary rules. In practice this would mostly be state law, i.e. rules the binding effect of which can be enforced in last instance by organs of the state with fixed and regulated duties of administration and adjudication, including the use of force. The second category could simply be termed law in a broader sense, encompassing notions of customary law, religious law, local non-state law and others.
- 3 Obvious differences exist between the terms 'developing countries' and the more advanced 'transitional' countries as defined by OECD and other international organisations. The present authors do not elaborate further on these differences due to space restrictions. In this paper the term 'developing countries' also includes the transitional countries of the former Soviet Union.
- 4 Seidman formulated the former opinion in his law of non-transferability of law (Seidman 1978a). The latter was propagated by Watson (1974). On page 66 we will comment on whether these two theories really exclude each other.
- 5 For example, although the European Commission's Handbook on promoting good governance in EC development and co-operation (2003) contains a whole section on the rule of law and the administration of justice, not a single reference is made to

lawmaking. This is all the more surprising considering that lawmaking in the Netherlands and other Western countries has increasingly become a subject of analysis and theorising both among jurists and social scientists. Books have been written, conferences have been held, and even an Academy on Legislation has been founded, all of which discuss both empirical as well as normative theory on legislation. In 2003, Huls and Stoter presented an overview of theories currently debated in the Netherlands (Huls and Stoter 2003). Obviously, the ultimate goal of all this theorising is to improve the quality of lawmaking.

- 6 The Seidmans therefore have stressed throughout their work (1978, 1999) that legislative projects for development should be concerned both with improving the law in a technical sense and with the social reality it seeks to influence.
- 7 Otto 2001. Elsewhere, the present authors have elaborated upon this concept in an analytical framework that helps to build a greater understanding and that strengthens the interplay of legal institutions and processes and the society which they serve, taking into account the wider political, economic, socio-cultural and organisational contexts (Otto 2002).
- 8 Similar in this respect is the so-called garbage-can-theory (Cohen et al. 1972). Cf. Kingdon 1984, which argues that in the end a policy decision is always the outcome of a non-rational complex process through which actors, problems and solutions collide haphazardly.
- 9 In 1971, Crinice LeRoy launched his, for that time, revolutionary analysis of the influence of the civil service which made him conclude that this actually constituted the fourth power in a democratic state – next to the legislature, executive and judiciary. See Crinice LeRoy 1971.
- 10 A well-known study of lawmaking in China, for example, has revealed that there can be many other influential actors (Tanner 1999, cf. Otto and Li 2000).
- 11 These hypotheses about the influence and contradictions of law, politics, economics and technology in lawmaking processes are congruent with the problems of lawmaking dealt with in Section 2, and also with the so-called ‘countervailing powers’ that may hinder achieving Real Legal Certainty (Otto 2004).
- 12 Mattei launched a theory of global comparative law by distinguishing the rule of professional law from the rule of political law and the rule of traditional law (Mattei 1997). In his view, in any given society any one of the three is dominant and, thus, reduces the autonomy of the others. According to Mattei, most developing countries live under the rule of political law or of traditional law. But there are many differences. The degree of autonomy and professionalisation of the law has traditionally been higher in, for example, India, Malaysia and Egypt than in China, Indonesia and Sudan.
- 13 A reason for concern, in this respect, is that many transplants presently originate from the US, a common law jurisdiction. Not enough regard is paid to whether the host country embraces a tradition of continental law and has an institutional set-up of state-society relations which are more similar to those of Western Europe than of the US.
- 14 To maintain this relevance, the present authors strongly recommend further socio-legal research into lawmaking and implementation of law in developing countries. A constant flow of new case studies and improved theory are necessary in order to better inform the efforts of those involved in development projects involving lawmaking.
- 15 The institution-citizen model combines theory about the so-called Institution-Building universe with theory about access and participation (Esman 1959; Otto 1987). It considers policy implementation as a process involving transactions between indivi-

dual citizens and street-level government institutions. The model refers to the theory of transactionalism developed by Frederic Barth.

- 16 The 'piece-meal approach' employed by the People's Republic of China offers some interesting examples (Otto and Li 2000).
- 17 In as far as recent migration has made societies such as the Netherlands more heterogeneous and poly-communal, this article may also be relevant for lawmaking in changing Western societies.

### 3 Quality of legislation: A law and development project

N.A. Florijn

#### The quest for legislative quality

Since laws were first put into written form, there has been an urge to get them right. Thus, the pursuit of good legislation is not a recent phenomenon at all. But particularly in recent decades, novel ideas about what constitutes good legislation have been formulated, and their further elaboration is still on-going. The very idea of quality as applied to legislation is heatedly disputed not only in the wider legal community but also in parliaments. Producing good quality legislation is considered to be a priority by most governments in the world. However, though many governments are trying to get their legislation in shape, in honest moments they must admit that they have succeeded only to a limited extent.

The Dutch Government is no exception despite having developed rather sophisticated policies, methods and programmes to attain legislative quality. Of course the expectation is that the policy will ultimately yield the desired results, but it is also acknowledged that in all probability the policy's very formulation needs improvement. A greater degree of adherence to that policy in practice by legislators would be necessary as well.

The present author feels that the fact that the Dutch policy regarding legislative quality is still a *work-in-progress* is actually an advantage rather than a disadvantage. In this situation various approaches are experimented with in order to ascertain their usefulness. Thus, it is of particular interest and of great potential value for the researcher who can investigate the experimental, undogmatic ways in which governments – and more specifically the Dutch Government – strive to achieve legislative quality.

In general, this essay examines the evolution of the various approaches and factors which have given shape to the Dutch policy in order to illustrate its twists and turns. Further, this essay evaluates to some extent the Dutch efforts' usefulness, given their acknowledged

limitations. The author is not about to proclaim that the Dutch approaches to legislation are an entirely successful project that can be easily exported in its present form to or transplanted in other countries.

In truth, the Dutch approach is rather like a law and development project in which ideas originating from various sources are adapted to fit the local context. The policy is heavily influenced by developments in other countries, primarily Western Europe and the United States. These influences played a role in the political arena in which Dutch politicians, civil servants and lawyers work. In that respect the procedures and substance of this approach differ from the typical law and development project, because in the end the Dutch developed the approaches themselves. Hopefully, through an investigation of the factors which shape and determine the degree of success of the Dutch approach, readers will be better able to evaluate the specific needs of other countries and determine to what extent the Dutch experience might be helpful.

This article explores whether a law and development project to establish an approach for achieving legislative quality is feasible. First, the concept of quality with regard to legislation is discussed. The author also comments on the various ways in which the concept is put into practice. Then, the article deals with the development of the approach to legislative quality in the Netherlands and investigates the factors that determine the degree of success of the Dutch approaches. Finally, the article undertakes a discussion of the potential which a similar or related approach might have in other countries.

## **The concept of quality of legislation**

Although most people have an idea about what constitutes good legislation, still hardly any agreement exists about what it really is. The fact that ideas about the quality of legislation depend so heavily upon one's point of view explains why such a high degree of disagreement exists.

Veerman highlighted this point through his discussion of a common definition of 'quality' (Veerman 2004:13; cf. Veerman and Hendriks-De Lange 2007). According to that definition, 'the quality of a product or service is the degree in which all its properties combined satisfy the user expectations of the customer, limited by the price and delivery time which he is willing to pay or accept, and the ethical and professional values of the supplier'. The operative term is 'satisfying user expectations'.

There are many so-called 'users' of legislation. Consider first the very makers of laws. Perhaps they do not always see themselves as users, but they should. In modern society legislation has the primary function of acting as a legal instrument through which to reach a certain goal. Thus, lawmakers use the law to their political ends.<sup>1</sup> In the second

place, the people who carry out, interpret or apply the law in an official capacity ought also to be seen as users. Third, the citizens and businesses as well as the agencies and institutions to which the laws will be applied, can also be deemed users in that they must live according to laws in order to, for example, get things done, receive subsidies or merely stay out of trouble.<sup>2</sup> Thus, the users of the law include: politicians, civil servants, legislative drafters, advisory boards, judges, attorneys, public prosecutors, officials from central and municipal government agencies, citizens and businesses.

Inevitably these users have different expectations of the law. Some of them emphasise effectiveness, others stress clarity and legal certainty, and still others might seek legislation that is easily applicable and without undue burdens. A sound legislative policy has to reconcile all the various points of view. However, at times the views may conflict. Such conflicts sometimes simply do not arise when legislation is considered on the theoretical level. It is conceivable to think about legislation which is legally sound, well-written, effective and efficient, carefully drafted and whatever else one might imagine would be necessary. When these aspirations are put into practice, however, contradictions may emerge. The careful drafting of an act of a parliament, for example, might run counter to the aim to promulgate the law expediently and efficiently. Likewise the effectiveness of a law might be impaired by the necessity to make it constitutionally sound – for example, guaranteeing the rights of minorities might create an obstacle which keeps the majority from achieving its chosen goals. In addition, achieving clarity in the articles of an act is an inherently difficult task in that even a legal phrase which might be clear to the legal professional is hardly ever easily understood by the layman, while, vice versa, a sentence which seems sufficiently clear to the uninitiated may raise many questions in the eyes of those who deal with the problem professionally.

Such conflicts make it in principle impossible to draft laws which fulfil all the potential demands regarding quality. Ideal legislation simply cannot be achieved! The legislator has to perform a balancing act and find a workable compromise which offers an optimal mix of the most important requirements in every given case. And even then, the legislator has to be aware of the impact of time: What might have been appropriate yesterday may no longer provide the best solution for tomorrow because the circumstances have changed. That may induce the legislator to reconsider the law and rewrite it.

## Quality of legislation in practice

A generally accepted list of requirements for achieving legislative quality in the Netherlands has been established. This list was formulated in 1991<sup>3</sup> and has since been applied to the Dutch legislative process. Admittedly, some of the concepts are inherently vague. The list is made up of the following factors:

- legality, conformity with the Constitution, international treaties and the effectuation of general legal principles;
- effectiveness and efficiency;
- subsidiarity and proportionality;<sup>4</sup>
- practicability and enforceability;
- harmonisation;
- simplicity, clarity and accessibility.

Drafters of new legislation are obliged to find an optimal balance between these various quality requirements and translate them into bills that fulfil the most pressing user expectations. However, another complication arises out of the fact that just as the pool of users of legislation is not a homogeneous group, neither are the writers of such legislation. ‘The legislator’ does not exist as a person or body, but is more like a procedure in which various persons and bodies play a role. As this procedure runs its course, the points of view with regard to specific requirements change with each person or body working on the bill.

Legislative theorists have paid attention to this problem by postulating, among others, the theory of diverging rationalities (Otto et al. 2004) according to which four rationalities are at stake in the legislative process: the political, the legal, the economic and the technical-scientific. Veerman concluded that, of these four rationalities, the political rationality prevails. At the end of the day, writing and promulgating legislation is a democratically legitimised political act, which, if it is to make sense, must consider the more technocratic points of view of legal, economic and scientific thinking.

Since creating legislation is, in the end, a political act, one might think that writing and promulgating *good* legislation is also a political duty. But, in reality this seems to be true only to a limited extent in the Netherlands. The duty appears to rest on the Minister of Justice and not on the States-General. Although the policy concerning legislative quality is regularly debated in Parliament and, thus, receives its political blessing, the Minister of Justice develops and implements the policy itself. However, the policy can only be considered a realistic and successful policy if it is followed in individual cases and applied to specific Acts of Parliament. The responsibility for the formulation and passage of individual bills does not lie with the Minister of Justice but rather with the

specific minister who introduces the bill to Parliament, and that minister is only indirectly bound by the common legislative policy of the Minister of Justice – namely, insofar as the constitutional principle of collegiality for decisions made by the Cabinet has to be observed. In practice every minister can claim that the specific aspects of a given case require a deviation from the common legislative policy. Further, even if a minister adheres to the common legislative policy, Parliament is not bound by that policy in individual cases though it sanctioned the policy in general terms.<sup>5</sup>

The irony goes even a bit further: Members of Parliament consider themselves *not responsible* for good legislation not only on formal grounds but also for more ‘emotional’ reasons. They tend to consider that the creation of good legislation is primarily a responsibility of the government. Members of Parliament rarely develop any views about the quality of the legislation for themselves, but depend heavily on the views of such independent consultative bodies as the Dutch Council of State. In fact, they have only a limited interest in the quality of legislation. Even though they pay attention to the practicability, enforceability and the way in which new bills may limit administrative burdens, such problems as legality, effectiveness and the efficiency of legal norms occupy them far less (Veerman and Hendriks-De Lange 2007:168).

The solution adopted in the Netherlands to ease the tension between the implied and the perceived political duty is a partial ‘depoliticisation’ of the legislative process. Increasingly, making laws is seen as a professional activity to be carried out by specialised civil servants who work in a number of government institutions and organisations. Of course there are still political discussions about proposed legislation, and often those discussions get at the core of the proposed rules. Members of Parliament also have the final say about a bill in that they must vote in favour or against it. In addition, Members of Parliament have the right to amend a bill or even to initiate a bill themselves should they disagree with the way in which the government is regulating particular affairs. Nevertheless, the general view is that most legislative work has to be done by ministers and their civil servants.

Faced with this situation, the legislative professionals have not tried to counter the political powers of Members of Parliament in a direct manner but have often succeeded in channelling them. They consider the exercise of the right to amend to be potentially threatening to legislative quality. Thus, these civil servants are happy to draft amendments on the request of Members of Parliament. This provides them with some guarantee that the (legal) quality of the bill will be left unharmed even in cases where the bill is amended in ways they would not have chosen themselves.<sup>6</sup> In addition, these professional legislative draftsmen also assist in the writing of private member’s bills. Ministries sup-



port Members of Parliament in this way because the legislative department of Parliament is understaffed.<sup>7</sup>

However, such co-operative practices are obviously the source of some unease both for the politicians and the civil servants. When neither party takes full charge or ultimate responsibility, the result can be a game of finger-pointing whenever errors occur. A case in point is the government policy to alleviate the administrative burden imposed by legislation. Administrative burden is the effort which citizens and businesses have to expend in order to comply with legislation, especially by filling in forms and questionnaires. The States-General wholeheartedly agrees with the policy to diminish the burden and even would like to go further than does the Government. However, a frequent complaint among civil servants is that their efforts to lighten the burden are often undone by Members of Parliament who, during the legislative process, insist on new rules which, in turn, create new administrative burdens.

Regarding the state of legislative quality in the Netherlands, on a theoretical level a consensus exists with regard to the requirements for legislative quality, but each of the bodies and officials involved find it hard to put those requirements into practice. This problem is due in part to the conflicts inherent in the requirements for good legislation and in part to the various rationalities which are in play during the legislative process.

### **Developing a policy of legislative quality**

In the Netherlands criticism about the quality of legislation originally focused on language issues. In 1915 the Dutch lawyer Drucker chastised the Dutch legislature, which did not, in his view, really master the art of legislation. His wrath was provoked by the use of unclear formulations, archaisms and Latin expressions still found regularly in legislation (Veerman 2004:9). Such criticism is not unique to the Netherlands. In Great Britain similar criticisms have been voiced where the use of Latin in English law is still far more pervasive than in the Netherlands. Also, in the context of the European Union the first efforts to improve the quality of directives and regulations focused on the language(s) of the law. European legislators are now urged to strive for a clearer style, a more consistent choice of expressions and more appropriate formulations of the law. Of course, the linguistic surface of a law is the most obvious target for a policy of reform because it does not need a great deal of analysis to see that something is wrong.

Another point of criticism concerns inconsistencies in legislation. Bills which are drawn up by a particular ministry can differ in many re-

spects from bills drawn up by another even when they regulate similar or related topics. Sometimes various ministries regulate one area (such as trade, environmental protection, or working relations) from differing angles without consulting each other. This can lead to rules that are confusing to the citizens and companies who must abide by them. In 1977 this tendency was given the somewhat sarcastic description of 'fourteen families of legislation', each ministry a separate family insulated from its neighbours. Though this description struck a chord, actual efforts to harmonise legislation were only undertaken in the 1980s when harmonisation became an official government policy.

Helped by the Commission for the Evaluation of Legislative Projects that dealt with several substantive legislative issues, a department within the Ministry of Justice was created to develop and implement harmonisation policies. The Scenario for Legislation (*'Draaiboek voor de Wetgeving'*, first edition 1985), dealing with procedural aspects of legislation, and the Regulations for the Drafting of Legislation (*'Aanwijzingen voor de Regelgeving'*, issued by decree of the Minister-President in 1992, laying down more substantive rules about legislation and setting standards for dealing with certain legislative problems),<sup>8</sup> also have been significant.

Another harmonisation tool which has had a huge effect on Dutch legislation is the General Administrative Law Act, promulgated in 1992 and subsequently extended. This Act regulates many parts of Dutch administrative law. Deviation from the General Administrative Law Act is possible but difficult in practice for individual ministries in that the Ministry of Justice as well as the Council of State require convincing arguments for any such deviation. In this respect, one can no longer speak of fourteen families of legislation. Even though some ministries still have their own ways of dealing with particular issues, those differences are increasingly diminishing. There have been many marriages outside the family, so to speak.

A further point of criticism concerns the numbers and volume of laws. After the Second World War an enormous increase in legislation took place to facilitate the building of the welfare state leading to a condition which, in the 1980s, was described in pathological terms: *'legisferitis'*. One symptom of that disease can be called *'anomie'*, or the neglect of legal norms. This is a somewhat paradoxical symptom. The idea is that there are so many valid laws that need to be maintained by government officials – who have neither sufficient capacity nor the budget to do so –, that certain laws are neither maintained nor applied and thus lose their validity. This inspires a view of legislation as something to be followed only if one feels like it, which undermines the normative function of the law. Another stimulus for further criticism was the economic situation of the 1980s during which the Dutch economy stagnated and

the Government had to impose severe budget cuts to bolster the economy. The large number and volume of legal rules were considered to constitute impediments to prospects for economic recovery.

In reaction, since 1980 a policy of deregulation has been implemented. In this regard the late Professor Geelhoed (who later served as Advocate-General in the Court of Justice of the EU) formulated a theory on government intervention, and a commission began to scrutinise many Acts of Parliament for unnecessary rules. However, the achievements of the first deregulation policy were limited. Later attempts at deregulation took a different approach. The early policy focused on a numerical decrease of laws. Next, the policy promoted development of the economy by abolishing laws which stifle innovation and otherwise hamper businesses.<sup>9</sup> Nowadays the policy seeks to facilitate the smoother functioning of government by defining its tasks and duties vis-à-vis businesses and citizens. The idea was that the views about personal responsibility and the role of the government had to be adjusted to take cognisance of the fundamental political changes taking place because of difficulties in maintaining the welfare state as envisioned in the 1960s and 70s. The former Dutch Minister of Justice, Donner, a proponent of this reorientation, emphasised that with the newest ideas about deregulation, although the number of legal rules will not likely diminish, the character of rules and obligations will change such that they will not prescribe conduct, but create a framework for social interaction.

Related to this legislative policy of deregulation is an increased attention to execution and maintenance of legislation. Regulatory impact analyses are routinely carried out during the drafting process. Ex post evaluations are also held regularly, normally within five years after the promulgation of a statute. Also a healthier degree of co-operation between policymakers and the agencies that carry out the laws is sought in order to draft and implement laws that are effective and enforceable in practice. Thus, today Acts of Parliament are regularly evaluated and, when their execution and enforcement can be strengthened, the government does not hesitate to change them. The most recent ideas about the policy of legislative quality emphasise lawmaking as a holistic undertaking. During all stages of the legislative procedure – from policy formulation until actual implementation by government agencies – the actors in the process should keep in mind the work which has been done by others in the past and the efforts to be undertaken by the persons and bodies who will debate or carry out the proposals. Information technology should support this ‘integral lawmaking’.

So, the policy concerning legislative quality developed from efforts to *write* better laws into a comprehensive programme to *carry out and enforce* laws which are consistent with other laws and which together address real social problems. As previously written, the thrust of the pol-

icy has been aimed at the very civil servants who draft the laws. This has led to a greater degree of professionalism and a certain institutionalisation of the job of legislative drafter.<sup>10</sup> An ever-increasing amount of guidelines is drawn up to facilitate their work. Nowadays, the work of legislative drafters is acknowledged, and their position is more visible.

Still, a question remains as to whether the policy has actually yielded the desired results – better regulation. It seems almost impossible to fully evaluate its success. First, methodological problems persist, for example, due to the lack of an acceptable common definition of what constitutes ‘good legislation’. Second, it is difficult to measure causal effects due to the number of variables at play. In all, the general view is that the policy is beneficial despite the difficulty to identify its points of success or failure and the causes of those outcomes. Thus, the policy continues in a state of further development.

### **Factors determining the development of a policy of quality of legislation**

In the Netherlands three factors seemed to have helped create the policy concerning legislative quality:

- the existence of institutions which deal with legislation and strive for more professionalism;
- influential people with ideas about legislation which have caught on;
- significant incidents.

In the first place, institutions exist whose primary goal is the creation or evaluation of legislation. The Department of Legislation of the Ministry of Justice is an important player in this field. Another one is the Council of State, which advises the government about proposed legislation before it is sent to Parliament. Though difficult to establish which of these institutions was the first to develop a modern, professionalised approach to legislation, it is probably fair to say that they have been reacting to each other: proposals by the Ministry elicited criticisms and advice from the Council of State which, in turn, sometimes raised new issues that required policy initiatives from the Ministry.

In the opinion of the present author, Parliament has not really been instrumental in bringing about a comprehensive legislative policy despite having supported government proposals in this area. However, in recent years a change seems to have taken place, especially in the ‘First Chamber’ or Upper House of Parliament. There, Members of Parliament increasingly pay greater attention to the quality of proposed legislation. They deal with broader legislative policy issues and scrupulously

investigate whether the bills before them adhere to the general principles of legislative quality formulated by the government.

Several newer institutions now also deal with legislation, though usually only in a limited number of fields. Examples include the Interdepartmental Commission for European Law (*ICER* dealing with, among other things, the creation and implementation of European Regulations and Directives), the Dutch Advisory Board on Administrative Burdens (*ACTAL*, advising government agencies and Parliament about proposed and existing legislation with regard to the reduction of administrative burdens on enterprises and citizens) and the Netherlands Scientific Council for Government Policy (*WRR*, advising the Government about a variety of themes from a long term perspective, including legislative problems). Their opinions can be very helpful to the development of more comprehensive and consistent legislative policies.

A second factor which should not be underestimated is the work of individuals. The 'big names' in legislation theory for Dutch lawyers used to be foreigners, but gradually Dutch universities began to offer a greater number of home-grown researchers and professors in the field. Probably the most important one in this respect is Ernst Hirsch Ballin, a former professor at Tilburg University, Chairman of the Commission for the Evaluation of Legislative Projects and Minister of Justice. In this latter capacity he formulated, with his staff, the White Paper *Outlook on Legislation* which still provides the basis for the policy concerning legislative quality. His upcoming White Paper *Trust in Legislation* will give insight in his present plans with regard to this policy. Of course he has not been alone in dealing with legislation, but he has been perhaps the most visible. Importantly, he and his successors have been able to draw upon a whole group of people within the various ministries and universities with extensive knowledge of and experience in legislation.

A third factor influencing the creation of a policy concerning legislation is the occurrence of significant incidents. The events in question were not really world-shattering as such, but their effects were very noticeable.<sup>11</sup> Particular incidents have unforeseeable effects on legislation which can potentially be exploited as a means to strengthen the policy concerning legislative quality. In the author's opinion, the change to the Act on the Council of State ('*Wet op de Raad van State*') in 1980 provides a good example. Until then, the advice given by the Council of State to the government was given in secret. Neither Parliament nor the citizenry could determine the nature or content of the criticism levelled by the Council of State at proposed legislation. After the change, however, the advisory opinions and the government's reactions to them were made public. This development led, on the one hand, to more concise advisory opinions<sup>12</sup> and clear insights into the reasons behind particular proposals. On the other hand, Parliament 'discovered' the ad-

vice was very helpful and now systematically examines whether the Government deals adequately with the points raised by the Council of State. The advisory opinions of the Council of State increased in their professionalism and importance simply because they were made public.

The state of the Dutch economy in the 1980s was another significant event or set of circumstances. It led to the deregulation efforts described in the previous paragraphs. The fact that the Dutch economy is once again in a period of stagnation provides an important incentive for the renewed interest in deregulation and the alleviation of administrative burdens on business and citizens.

Another recent example of an event with unforeseen but significant consequences is the so-called 'Securitel-affair' of 1996. In the Securitel case, the Court of Justice of the EC determined that according to EC-Directive 83/189 national laws containing technical specifications must be notified to the European Commission before they are promulgated. Laws promulgated without such notification are legally flawed and must be considered void. Specialists of European law within the various ministries quickly took note of this Belgian case but could not agree on a particular course of action with regard to Dutch laws that had not been properly notified. Some two years later, the case caught media attention and became such a big issue that official apologies were issued by the Minister of Economic Affairs for past failures to notify Dutch laws. In addition, an emergency operation was undertaken to identify and repair each defective law, and a pledge was given to never allow such a failure to be repeated. Subsequently, the Ministry of Justice received funds to support further knowledge formation and education for legislative drafters. This led, among other steps, to the birth of the Knowledge Centre for Legislation and the Academy for Legislation. The 'Securitel-affair' provided momentum to previously circulated ideas for such institutions and ensured that those ideas were put into practice.

These three factors – previously existing institutions, influential people and significant incidents – stimulated and shaped the development and content of the Dutch policy concerning legislative quality. However, because these factors can be said to be divergent and lead to different sorts of considerations, the combination of the factors has in fact led to a policy with a rather broad scope. The advantage of this broad scope is, of course, that hopefully all the important aspects of legislation are taken into consideration. The obvious disadvantage is that the policy lacks a unifying focus and may lead to many diverging courses of action – each one noble, but also potentially confusing to legislators.<sup>13</sup>

## Helping to set up a policy of legislative quality

Could the Dutch approach to developing quality legislation inspire other countries? Maybe it can be tried out quite close to home. The Flemish government, for example, is in the process of creating a legislative policy, and the Flemish Knowledge Centre for Legislation is in regular contact with its Dutch counterparts. As mentioned previously, although it would certainly be unwise to transplant the Dutch policy directly into Flanders, the Flemish legislators might gain some insights if they took notice of it. The present author supports the idea of pursuing a new Flemish policy concerning quality legislation along two lines: first, a strengthening of existing institutions and, second, a focus on enforceability and the practicability of legislation. These shall be considered in turn.

The institution which, in the author's view, might play a key role in the formation of a truly effective policy concerning legislation is the Flemish Council of State. Like its Dutch counterpart, the Council presently provides some advice on legislation, but its primary responsibility in this regard is to address the question of whether proposed legislation accords with the constitutional arrangement with regard to the division of competences on a federal and a 'state' level. With regard to this task, the opinion seems to be in the Flemish Parliament that, when the Council of State has given its advice, the constitutionality and legal soundness of a bill must be considered to be clear. However, the Council of State is not at present in a position to examine each requisite aspect of proposed legislation due to limited resources and a very tight schedule within which to give its advice.

Strengthening the functions and status of legislative lawyers in Flanders would also significantly contribute to the development of an effective policy towards legislative quality. As the present author understands the situation, Flemish legislative lawyers do not handle legislation dealing with important, politically sensitive matters but rather with legislation of a more administrative kind. Ministers and their political staffs write the controversial bills and do not consult with lawyers, whether legislative specialists or attorneys, on a regular basis during this drafting process. Resulting bills can create serious legal difficulties in that they do not fit in easily with pre-existing legislation.

With regard to the second line of suggested development, greater stress should be placed on enforceability and the practicability of legislation for the simple reason that these topics interest MP's, and, consequently, civil servants can muster political support for their own efforts to improve these two important aspects of legislation policy. In fact, these two aspects of the policy concerning legislative quality already get much attention in the institutions of the European Union, in other Eur-

opean countries, and in Belgium itself, by regularly undertaking regulatory impact analyses. Finally, these policy objectives strike at the heart of the problems addressed by legislation. Is it not better to write practical laws which can be carried out and maintained than to create rules which are well-written but will always remain a dead letter?

The Flemish case provides just one example of how a more advanced policy concerning legislative quality might be developed in a context where some key elements are already in place. Other countries with other needs and other institutions might call for a different approach. Consider the following example: some years ago the Academy for Legislation presented a course on legislation for civil servants from Kosovo. During that course it became clear that the Kosovo officials were very interested in what an institution such as the Council of State might accomplish but were unconvinced about the merits of consciously developing enforceable and practicable legislation. With regard to the Council of State they saw the possibility of having an institution which could focus on the creation of good legislation and which would have sufficient power vis-à-vis the Kosovo Parliament to have a positive impact. But, in respect of the enforceability and practicability they were of the opinion that, whenever politicians or, in their case, the international community (the UN and its organisation for Kosovo, UNMIK) ask for legislation in a certain field, a law should be written without hesitation. The idea that citizens and companies might have good reasons not to obey the law seemed very disturbing.<sup>14</sup> In such a context the idea of creating an effective policy concerning legislative quality appears tenuous. At present, no institutions to develop and carry out such a policy exist, nor are the usual requisite ingredients of such a policy even easily understandable to the relevant civil servants and politicians. Merely creating institutions and assigning them the tasks of developing a policy and educating legislators would in all probability prove to be insufficient. Rather, a more intensive project might be necessary whereby newly created institutions would get external help in order to develop and promote ideas about good legislation itself.

In the end the following steps for the development of an effective policy concerning legislative quality ought to be considered:

- Identify an appropriate institution (either inside or outside the Government, but with sufficient prestige and clout) which would consider legislative quality a worthy task;
- If such an institution does not exist, create one;
- Enlist sufficient political support by focusing on a part of legislative policy which politicians consider to be important (e.g. enforceability, conformity with international law and standards or whatever other aspect might prove to be an issue of importance to local political forces);



- Create tools and instruments which help officials to attain the goals set (e.g. make a checklist which leads to practical results, for example by giving indications whether a proposed bill will be enforceable or not);
- Educate all potential legislators whether they be civil servants or politicians;
- Monitor and communicate the results of the policy and the efforts to comply with it;
- Broaden or deepen the policy only when the desired goals are met.

Such a challenge may indeed require great and sustained efforts, perhaps taking years, but it is worth the effort. Quality legislation is, after all, a worthy goal.

## Notes

- 1 The instrumental function of legislation must be taken in a broad perspective: Acts of Parliament are promulgated to make it possible for the government to work on changes in society, but they can also be instrumental by giving citizens means to protect themselves against infringements of their liberties and privacy by the government. Thus the classical function of legislation as a safeguard against a too pervasive government is, in modern Dutch legal thinking, considered to be instrumental as well.
- 2 The equation of ‘makers of the law’ with ‘users of the law’, introduced in this paragraph, actually goes both ways: these users of the law – the citizenry – are the real lawmakers. Doctrinally, the power to legislate ultimately resides in the people, who are represented by Parliament which determines the content of bills. In addition, Acts of Parliament must delineate or limit the rights and obligations of people; thus the people, represented by Parliament, decide themselves what they think is acceptable social behaviour.
- 3 They were formulated in the Government White Paper *Outlook on Legislation* (‘Zicht op wetgeving’), and reaffirmed in the Memo *Policy of Legislative Quality* (‘Wetgevingskwaliteitsbeleid’), Kamerstukken II 2000/01, 27 475, nr. 2, and will be reaffirmed again in the upcoming White Paper *Trust in Legislation* (‘Vertrouwen in Wetgeving’) (unpublished).
- 4 ‘Subsidiarity’ is related to the subsidiarity principle known in European law, but has a broader meaning. On the one hand it means setting norms at the appropriate level (rules that must be promulgated by an Act of Parliament should not be laid down in delegated legislation). On the other hand it means that the choice for legislation is only made when it can be deemed the appropriate instrument. Otherwise other instruments must be preferred. ‘Proportionality’ means striking a balance between the costs and benefits of the proposed rules.
- 5 The (legal) reason is that those policies are not laid down in the Constitution. According to Dutch constitutional lawyers, it is impossible for the legislator to bind himself. He can only be bound by the rules laid down in the Constitution or in treaties with direct effect. The rules in the Constitution dealing with making and promulgating legislation are very general and formal and do not pertain to the material quality of legislation. The ‘Regulations for drafting legislation’ (‘Aanwijzingen voor de regelgev-

ing'), which contain guidelines for improving the material quality of legislation, are only meant for the civil servants who draft legislation. Members of Parliament may choose to apply them, but they are not obliged to do so. In the author's experience, MPs rarely know these regulations.

- 6 In a discussion of this issue with a number of MPs, the author learned that in general MPs are satisfied with the help they get but that there are also cases with which they had complaints. The most common problem is that a civil servant may see a conflict of interest between his duty to support a minister on the one hand and give independent advice to MPs on the other.
- 7 Just as an indication: there are at the moment six qualified staff members working full-time at the legislative department of the Second Chamber of the States-General, while there are 150 MPs and more than 700 civil servants who work as legislative lawyers at the ministries or the Council of State.
- 8 The Scenario has been updated four times and a complete overhaul is underway; the Regulations have been enlarged seven times as of 2008 and now consist of four hundred articles with explanations. Both books comprise more than two hundred pages of information which legislative drafters are supposed to know, if not by heart, then at least well enough to be able to apply smoothly.
- 9 Three cabinets made a lot of work of the so-called 'MDW-program', dealing with market functioning, deregulation and legislative quality. This programme was much more successful than the earlier deregulation policy.
- 10 As of 2008 there are a Society for legislation and legislative policy, an Academy for Legislation, a Knowledge Centre for Legislation, and a bi-annual Day of Legislation – each targeting the legislative lawyers and politicians, though primarily those working for the national government.
- 11 On the contrary, some actual cataclysmic events in the (recent) past have not had a significant impact on legislation. The Second World War, for example, did nothing to change the policy of legislation. On a much smaller scale the most important political events of recent years, the rise of Pim Fortuyn and his murder in 2002, were also instrumental to the reorientation of Dutch politics, but did not have any effect on the way in which legislation is drafted or promulgated, though it may be argued that recent populist tendencies in Dutch politics stimulate a more transparent legislative process in which consultations of citizens, companies and interested parties will be routinely undertaken.
- 12 To the author's knowledge, the Council of State used to express its advice more freely in the past, raising whatever points it found interesting, even when it did not have a specific opinion. Later advice has focused on legal or policy matters that the Council of State considers to be questionable or which it feels need more explanation.
- 13 Bonnes has shown that recent instruments intended to improve the quality of legislation are not effective because those instruments only indicate which procedure to take, rather than telling legislative lawyers what to do. In addition, the new procedures lead to more time spent on waiting for advisory agencies to give their opinions than on actually working on a bill and improving its quality (Bonnes 2004).
- 14 They are not alone in this idea. The author encountered the same view from a person who went to Turkey to discuss policies for implementation of legislation: the concept, as understood there, also seems to be that most people will obey the law simply because it is promulgated and, further, that those who will not obey it, must have bad intentions.



## 4 Lawmaking, development and the Rule of Law

*A.W. Seidman and R.B. Seidman*

*Law is but a part of social and cultural engineering. Today the questions about the limits of legislative action, about its relation to political force and economic efficiency, about its ability to create new types of man and new types of culture, are as practically cogent as they are theoretically illuminating...*

*The question... whether law is omnipotent is as important to the modern jurist as it is interesting to the sociologist. There are limits to the lawmaker. These result from the relation between law and the existing order in society. To study this relation is, in my opinion, not only the central problem of the sociology of law, but also of the lawyer's own jurisprudence.*

*Bronislaw Malinowski (1942:1246)*

### Introduction

Zambia's post-independence experience (see Box 1) serves as a metaphor for that of most African and many other poor nations. As the new millennium began, four-fifths of the world's peoples living in the so-called 'developing' and 'transitional' countries, receiving only a fifth of the world's output (UNDP [United Nations Development Programme] 2001), still suffered poverty, oppression, and, too often, tragic ethnic conflict.

Why had some 11 million Zambians, inhabiting a land area the size of England, reasonably well-endowed with natural resources, become so impoverished? Everywhere, institutions define a country. To describe how Nigeria differs from Norway, one would describe their banks, their schools, their family structures, their courts, their property systems – and a myriad others. In short, one would describe their respective *institutions*. For most of Zambia's population, Zambia's inherited *institutions* – including those engaged in lawmaking – spelled poverty, vulnerability and poor governance. Almost a century of British colonial rule had shaped economic institutions that at Independence perpetuated Zambia's dependence on copper exports and the neglect of its other potentially valuable resources.

### **Box 1: Arbitrary lawmaking in Zambia?**

In the 1970s, Zambia's<sup>1</sup> newly-elected post-independence government, endorsing what its leaders termed 'socialist humanist' values, created a state corporation, ZIMCO. ZIMCO then 'nationalised' the copper mines that dominated the national economy by purchasing 51 per cent of the shares from the mines' transnational corporate owners.<sup>2</sup> It contracted with them to continue managing the operations.<sup>3</sup> The Zambian government paid compensation for its ownership shares. The company managers, however, proceeded to manipulate the prices of imports from their home country to transfer funds out of Zambia, in effect reducing the government's share of profits (Seidman 1975).<sup>4</sup>

Other factors also reduced the benefits the Zambian government had hoped to gain by nationalising the copper industry. Along with other newly-independent copper-exporting countries seeking to finance social welfare and industrial schemes, Zambia expanded its overseas copper sales. At the same time cheaper copper-substitutes flooded global copper markets. As a result, in the late 1970s, world copper prices plummeted. The falling prices and increased costs slashed the government's hoped-for copper earnings, aggravated unemployment, and reduced the average Zambian per capita income. In the 1990s, a new Zambian government, adopting IMF neo-liberal advice, sold its mine shares back to the private sector. The predominantly transnational corporate buyers further cut output and laid off tens of thousands of miners.

Although at independence it had enjoyed one of sub-Saharan Africa's highest per capita incomes, forty years later, Zambia had become one of the world's poorest nations.

If the ideology denoted by the Rule of Law encompasses the lawmaking function, it demands that lawmakers<sup>5</sup> ground their decisions on reason in the public interest. Did Zambia's changing governments' lawmaking behaviours comprise a reasoned use of law in response to changing circumstances? Or did they, in the dictionary sense, appear 'arbitrary': reflecting 'whim', 'caprice', or motivated in part, not by public interest, but by private greed – the opposite of good governance?

Unless deliberately changed, institutions tend to reproduce themselves; and so in Zambia. In particular, over the years, the practices of five interrelated sets of institutions largely defined Zambia's poverty:

- Giant private U.S.- and South African-based mining firms and associated trade and financial institutions financed and managed the vast copper mines that hinged Zambia's development to the uncertainties of the global copper market;

- Decades-long traditions – initially enforced by a colonial government poll tax – motivated husbands, fathers, and sons to abandon their families' potentially-fertile rural hinterland areas to work on the Copper Belt at wages a fourth or less of those earned by miners in developed countries.
- With government support, European settlers carved out technologically-advanced estates along the railroad line which shipped copper to South Africa and beyond. Using low-paid African labour, these estates produced food for Zambia's copper miners and the expanded 'Copper Belt's' urban population.<sup>6</sup> Meanwhile, Zambia's rural dwellers – many of them women, children and old folks – struggled to supplement their insufficient share of mine workers' earnings by growing food for their own subsistence.
- Foreign trading firms continued to import high cost 'modern' consumer goods, ranging from synthetic fabrics to digital TV sets and computers, to meet the small but wealthy 'modern sector' elite's narrow demands. That practice tended to block Zambian efforts to develop an industrial sector within an increasingly balanced, integrated agricultural-industrial economy.
- The inherited institutions for making and administering state power through law retained many of the characteristics Zambia's colonial rulers had found useful: Strong ministry ties with the social and economically-powerful; inadequate provision for monitoring and evaluating government actions' social impact; decision-making processes clothed in secrecy which excluded broad citizen access and facilitated officials' corrupt behaviours; and party structures that thwarted elected representatives' initiative.

Few Zambians – certainly not the unemployed miners or their families – had the skills, technology, funds, or access to markets to initiate cash crop farming or small scale enterprises to compete successfully with the giant mine companies, 'line of rail estates' or globe-encircling foreign trading firms. At Independence, these dominated and distorted the economy. Successive Zambian governments sought to transform these institutions so that the surpluses earned from its copper reserves, from commercial farming and from international trade would redound to the benefit of the people. They failed.

Zambia's experience typifies the experience of most of the developing and transitional nations. To reach the level of 'development' necessary to improve productivity and meet the people's basic needs in Zambia's relatively isolated, semi-subsistence-economy outside the 'Copper Belt' required measures to foster specialisation and exchange and the introduction of appropriate new technologies. As its primary instrument to facilitate effort to attain those ends, the government has little choice but

to employ law and the legal order, broadly conceived. Law, however, is not a free good in unlimited supply. What must newly-elected governments do to use law to transform their inherited socio-economic and political institutions to stimulate the growth of increasingly productive employment, and improve their citizens' quality of life?

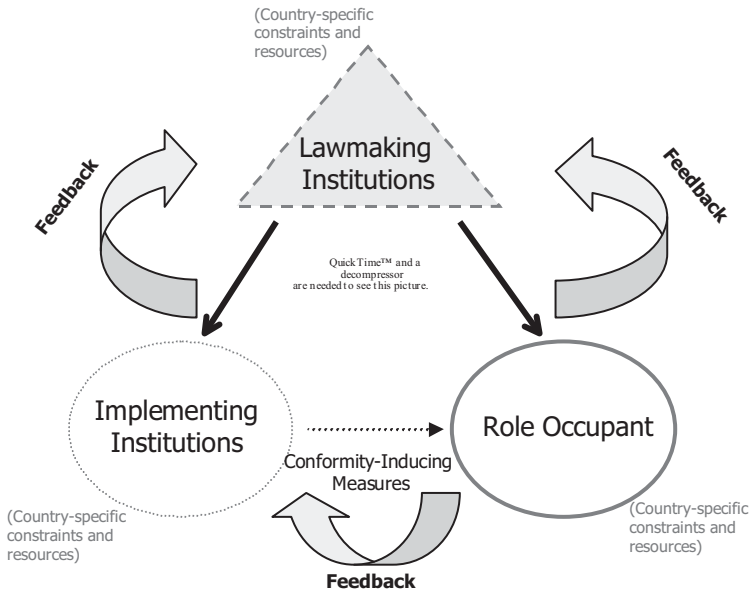
To improve the quality of life of the majority of its citizens, the government of Zambia – like those of all developing countries – had to find ways to use law to transform its inherited dysfunctional institutions (Seidman et al. 2001:3,7,11,61-79).<sup>7</sup> By 'institution', we mean a set of repetitive patterns of social behaviours. By 'a law' we mean a rule promulgated and enforced by the state – including administrative regulations, subordinate legislation, and government decrees. By 'the legal order' we mean the normative system in which the state has a finger.

To change a dysfunctional institution, government must change the problematic behaviours that comprise it.<sup>8</sup> Channelling behaviours into desired patterns constitutes a primordial 'law-job' (Llewellyn 1939:1373-1385).<sup>9</sup> In any polity (except a small, face-to-face, essentially subsistence-level, community), a relatively few highly-placed government officials nominally direct the behaviours of a myriad of state employees and, through them, the behaviours of all citizens. To maintain its legitimacy, a government can implement directions as to those millions' behaviours only through rules of law (Seidman et al. 2001:41).<sup>10</sup>

A gaggle of authors, however, contest the proposition that law can bring desired social change.<sup>11</sup> To refute these authors, one need only demonstrate one case in which law constitutes an effective instrument of social change. But for the income tax law, would anyone pay income tax? But for election law, would anyone vote? The issue becomes, not whether a law can ever induce desired social change, but the circumstances under which a law will, or will not, induce the appropriate behaviours.

Institutionalist legislative theory offers a way of thinking about that issue. As its model illustrates, every law has two addressees: the relevant social actors (primary role occupants)<sup>12</sup> and the officials of one or more designated government implementing agencies.<sup>13</sup> (See Figure 1)

In the developing countries, historically-shaped institutions – repetitive patterns of social behaviours – perpetuate poverty and vulnerability. Government has only one instrument deliberately to transform those institutions – the legal order. To do that, those who seek to use law instrumentally must understand how the law functions to change targeted behaviours in desired ways.

**Figure 1.** Model: The lawmaking process.

**Box 2: Institutionalist legislative theory's analysis of the factors likely to cause a social actor's problematic behaviours**

A law's addressees decide to 'behave' as they do, not only in response to the rules of formal law,<sup>14</sup> but also to all the non-legal factors that comprise the arena of choice inherent in their country's unique environment.<sup>15</sup> Legislative theory divides this broad 'arena of choice' into seven categories of interrelated causal factors, five objective and two subjective. The objective categories include, first, the *Rule* itself, that is, the existing cage of relevant laws that currently prescribe how the relevant actors *should* behave. As government's primary instrument for altering or eliminating the non-legal factors that cause existing problematic behaviours, and induce new behaviours more likely to resolve the targeted problem, lawmakers must design, enact and implement new law. That new law must alter or eliminate four categories of additional *objective* factors:

*Opportunity* (the environmental circumstances which facilitate or thwart the specified problematic behaviour);

*Capacity*(the actor's ability to behave as the existing law prescribes, or to behave in contrary ways);



*Communication* (whether the actor knows the relevant rules); and  
*Process* (the procedures by which the actor decides whether or not to obey the rule).

In addition, the new Rule must alter or eliminate two *subjective causes* of the relevant actors' problematic behaviours:

*Interest* (factors which the actors view as incentives for behaving as they do); and  
*Ideology* (the actors' own values, beliefs, attitudes that influence their behaviours).

These two 'subjective' factors subsume the 'human' causes that too frequently induce officials to wander from the trails identified by the ideology some denote as the Rule of Law – greed, ambition, poor morality.

Broadly conceived these seven categories include all the possible causes of a law's addressees' problematic behaviours in the face of existing law. (To facilitate remembering these categories, the first letters of their names comprise the acronym, ROCCIPI.)

For each set of role occupants, these categories have the function of stimulating lawmakers to develop tenable hypotheses ('educated guesses') as to the causes of those actors' problematic behaviours. In turn, the hypotheses indicate the kinds of information lawmakers must capture to determine whether their hypotheses prove consistent with the available evidence. Once having thus warranted (or revised) their hypotheses in light of the available facts, lawmakers may determine logically whether proposed detailed legislative measures will likely alter or eliminate the existing problematic behaviours' causes and induce more desirable new ones.

At least nominally, new, developing-country governors did capture state power. That gave them the constitutionally-granted power to make laws, i.e. rules ultimately enforced by the State's reserved monopoly of violence. Many governors (like Zambia's) poured available state revenues into financing new schools, clinics, roads, even a few import-substitution industries.<sup>16</sup> Only a few new governments, however, even tried to use law fundamentally to restructure the basic institutions that fostered the distorted resource allocations that underpinned and perpetuated their inhabitants' pervasive poverty (Makgetla and Seidman 1987; Nzongola-Ntalaja 1987). Most failed.

When (as in Zambia's case) falling world prices for their nations' exports slashed their foreign exchange earnings and tax revenues, most of those governments borrowed heavily to finance continued imports and expanded social programmes, accumulating extremely burdensome foreign debts. Often, in response to international financial agencies' pressures, these governments devalued their currencies, further multiplying their mounting international debts' dollar value.<sup>17</sup>

Further, having failed adequately to change the lawmaking institutions inherited from their colonial past, many new governors designed and implemented legislation arbitrarily, without either stating their reasons or engaging stakeholder participation. More and more comfortable in their new seats of power, many governing elites (both in the legislatures and in the implementing agencies) exercised wide discretion in designing rules which, without achieving a better life for their citizens, enhanced their own power and privilege. In most countries, the people lost the 'Fatal Race' between the old institutions and the thrust for 'development' (Seidman 1992b).<sup>18</sup>

From time to time, in the history of every nation, a Fatal Race takes place between populist political governors who seek to transform the inherited socio-economic institutions that perpetuate a status quo that benefits, not the people, but a still powerful elite. Unless the new governors can use the law skilfully as their instrument for directed change, inevitably, the people lose the Fatal Race. This paper focuses on the necessity of employing an adequate legislative theory and methodology not only in guiding officials in designing effective bills, and elected legislators in assessing them, but also in limiting government officials' discretion in making subsidiary rules ('administrative regulations' or 'subordinate legislation') in the course of implementing legislatively-enacted law.<sup>19</sup>

The cluster of ideas subsumed by 'The Rule of Law' comprises a vague but powerful ideology in support of efforts to achieve good governance. A review of the on-going debate over the meaning of the words, 'Rule of Law', however, raises questions as to whether and to what extent they adequately guide the design of essential constraints on the role of legislators, as well as government officials, in the lawmaking process. Some proponents smuggle into their definition of the term their substantive notion of 'development' – for example, that it requires lawmakers to avoid legislating limits on presumably competitive market forces. Nevertheless, careful examination reveals significant agreement that the 'Rule of Law' focuses attention on a significant social problem: *the dangers to the development project posed by arbitrary lawmaking, that is, lawmaking grounded, not on reason and experience, but on greed, power or caprice.*

The second part of this chapter offers a case study of a Zambian team's efforts (guided by legislative theory's problem-solving methodology<sup>20</sup>) to examine Zambia's particular set of circumstances in order to develop a basis for designing a law which might lead to the creation of a Commission on Law and Integrated National Development. The proposed law would empower a commission to perform the essential country-relevant research and design detailed legislation for transforming the institutions in ways likely to foster more balanced, integrated employment of resources in each major sector of the Zambian economy. At the same time, the team sought to design the proposed law's detailed provisions in ways likely to ensure that the Commission would exercise its powers in a non-arbitrary manner.<sup>21</sup> A post-script to the second part of this chapter comments briefly on the function of *values* in using a problem-solving methodology as a guide to drafting and evaluating legislation to ensure its effective implementation to achieve its desired social impact.

### **Legislative power and the Rule of Law**

The phrase, 'Rule of Law', comprises an important component of the dialogue relating to development and good governance. In reality, it comprises an ideology, a deeply-held belief that good governance must conform to some ideal embodied in the phrase itself (Kairys 2003:368; Solum 1994).

As in the case of most ideologies, no agreement exists on the precise content of the ideology denoted by 'the Rule of Law'. A review of the literature suggests that few authors agree on the term's meaning. Most writers define it by stipulation.<sup>22</sup> In the process, they have introduced many, frequently seemingly inconsistent, elements.<sup>23</sup> Kairys observes the phrase has 'an incredible fuzziness' (2003:308); Stephenson, that it 'has no fixed meaning' (2001) and (quoting Grote) 'belongs in the category of open-ended concepts... subject to permanent debate' (Grote 1999); Harel, that it remains 'a set of loose, vague and indeterminate principles' which often incorporate assumed 'community values' (Harel 1999:143).<sup>24</sup> Tan Soo Chuen remarks that the Rule of Law 'has been distorted, redefined and reinvented, to be bandied about and conveniently invoked every time it is politically expedient....' (Chuen 2003; Carnegie Endowment 2001; Marsh 1960:50). Judith Shklar goes further: the Rule of Law constitutes 'just another of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians'. 'No intellectual effort,' she suggests, 'need therefore be wasted on this bit of ruling-class chatter.' (Shklar 1987).<sup>25</sup> Randall Peerenboom suggests that

its very popularity breeds fear that ‘the Rule of Law’ ‘has become a meaningless slogan devoid of intellectual content.’ (Peerenboom 2004).

Recent claims that successful development requires the ‘Rule of Law’ seem to arise in part from governments’ failure to use law instrumentally to foster *effective* development. Instead, laws have granted officials broad discretion to design and enforce implementing rules – too often in practice used to serve their own interests (on this, see for instance, Seidman et al. 2001: chapter 14; Seidman and Seidman 1994). In the late 1980s, the World Bank’s General Counsel, Ibrahim Shihata (1991), concluded that market economies do require the Rule of Law.<sup>26</sup> Kleptocrat governments make poor investment climates. ‘Good governance’ he asserted, requires not only the effective use of government resources for development, but also ‘good order, not in the sense of maintaining the status quo by force of the state (law and order) but... of having a system, based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the rules’ application.’ In this sense, the ‘the Rule of Law’ ‘appears in different legal systems and finds expression in the familiar phrase, “government of laws and not of men.”’ (Shihata 1991).<sup>27</sup>

Fletcher summed up a seeming conundrum: ‘Of all the dreams that drive men and women into the streets, from Buenos Aires to Budapest, the “Rule of Law” is the most puzzling. We have a pretty good idea what we mean by “free markets” and “democratic elections.” But legality and the “Rule of Law” are ideals that present themselves as opaque even to legal philosophers.’

About two elements in the literature of the Rule of Law, a consensus seemingly does exist. One of those consists of the rubric mentioned by Shihata: The Rule of Law implies ‘a government of laws and not of men’. Even here, where agreement on the form of words exists, however, a new conundrum appears. Clearly that rubric requires that the official must conform official behaviour to existing positive law. Applied to legislators, drafters and others in the lawmaking system, it plainly requires them to conform to positive law, for example, with respect to legislators, procedural rules, or substantive limitations contained in a Bill of Rights.

Beyond that, does the Rule of Law imply sufficient constraints on the lawmaking power? If the Rule of Law means only ‘a government of laws, not of persons’, then it requires of legislators only that they obey positive law addressed to them – constitutional limitations for example. Otherwise, as in English practice, the Rule of Law seems to hold that ‘Parliament can do no wrong’. If indeed Parliament can do no wrong, then, in the context of the Fatal Race, does the Rule of Law offer an adequate guide to lawmakers in designing laws likely to foster the effective institutional transformation required to achieve development that fulfils

all a nation's inhabitants' basic needs? So construed, does the Rule of Law, when most needed, live up to its implicit promise?

Is the Rule of Law really so weak-kneed? If so, how to explain its remarkable hold on the mind and aspirations of so many? The answers lie in unravelling, first, what it means to say that 'a country ought to obey the Rule of Law', and, second, that – as seems widely agreed – the Rule of Law abhors *arbitrary* public decision-making.

First: the problem-solving methodology, advanced by John Dewey, one of the progenitors of philosophic pragmatism, suggests a way of understanding the frequently-made assertion that 'to develop, a country must follow the Rule of Law'. In developing public policy, he emphasised, do not begin with an 'end' and then focus on finding the appropriate 'means'. Instead, begin with a detailed examination of the facts as to nature and causes of *the social problem* a proposed policy targets.<sup>28</sup> Given evidence as to the probable social costs and benefits logically potential alternatives, one can then construct a solution grounded on a reasoned choice (Meehan 1969:27).<sup>29</sup>

Following Dewey, legislative theory's problem-solving begins with what *is* the case – a description and an explanation, grounded on empirical research, of the behaviours that comprise the targeted social problem. On that basis, a drafter logically can then formulate detailed rules to overcome the problematic behaviours' causes and induce new *behaviours likely* to resolve that problem.

Too often, in contrast, Rule of Law proponents employ a widely-used 'ends-means' methodology. They assert the achievement of an 'end' as a 'vision' or a goal – that is, in the case at hand, society's conforming to the author's definition of the Rule of Law. Then they search for the means of achieving that goal. In reality, these proponents have it backwards: instead of reaching their conclusion *after* a careful analysis of the facts as to the real-world problem's nature and causes, they *start* with what they believe *ought* to be the case. Why?

Dewey characterised the declaration of a desired goal – like that of the 'Rule of Law' – as a 'generalised end'. Methodologically, that characterisation simply helps to identify the problem which requires resolution.<sup>30</sup> Perceived as a generalised end, the phrase, 'Rule of Law', does not consist of detailed rules likely to change behaviours that comprise a particular existing problem. Rather, the assertion of the Rule of Law as a generalised end focuses attention on a widespread and supremely important social *problem*: the persistence of arbitrary government (see, for example, Shklar 1987:16).<sup>31</sup> The all but universal assertion of the desirability of the 'Rule of Law' identifies arbitrary lawmaking as a major social problem.

The authors understand the word 'arbitrary' in the sense used in their dictionary:

1: depending on individual discretion (...) and not fixed by law (...). 2 a: not restrained or limited in the exercise of power: ruling by absolute authority (...). 3 a: based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something (...). b: existing or coming about seemingly at random or by chance as a capricious and unreasonable act of will (...). (Merriam-Webster 1990).

Used in relation to lawmaking, the term ‘Rule of Law’ helps to identify what many development practitioners perceive as a generalised objective (Bunge 1962:27), the second of the agreed-upon elements included in the ideology of the Rule of Law: the importance of *non-arbitrary* government decision-making. In that sense, it requires lawmaking processes grounded – not on ‘a capricious and unreasonable act of will’<sup>32</sup> or the lawmakers’ ‘values’ (Johnson 1998),<sup>33</sup> – but on some form of reason.

However defined, the concept of the Rule of Law rejects arbitrary behaviours grounded, not on reason and experience, but on intuition, instinct, visions, tastes, in short, on unexamined, untested ‘values’. To emphasise the dangers inherent in attempting to ground government decisions on ‘values’ – which too often consist of the ‘values’ of the decision-maker – Bunge offered an extreme example: Nazi Germany ‘exalted blood, instinct, “sympathetic understanding,” or empathy, the vision of essences and the intuition of values and norms. As compensation, it denigrated logic, criticism, the rational processing of experience, the theoretical transcending and explanation of experience, the slow, zigzagging and self- “corrective search for truth.”’ (Bunge 1962:27; cf. Rawls 1971).<sup>34</sup>

To ‘think with one’s blood’, to ground a public decision on instinct, a ‘vision of essences’ or intuition, and conversely to negate in normative decision-making the functions of reason and experience, ‘the slow zigzagging and self-corrective search for truth’, means that the decision maker grounds decision on untested ‘values’. That spells arbitrary decision-making. Nazi Germany had a *Rechtstaat*, that is, a society in principle ruled by laws. That society, however, rested on the most arbitrary forms of lawmaking and public decision-making. It embodied the very opposite of the Rule of Law.

From a problem-solving perspective, to view the Rule of Law as a statement of a generalised end focuses on a serious social problem: arbitrary governance, that is, government, not by reason but by will, justified by the discourse not of reason and facts, but of power. Laws based on greed, power or caprice have a small chance to effectively solve the problems of the majority. Arbitrary lawmaking poses a problem every-

where. In developing or transitional countries it poses special dangers. As in Zambia, it may permit inherited institutions to further aggravate widespread misallocation of their available resources. It constitutes an important cause for the loss of the Fatal Race.

In conformity with the Rule of Law's underlying focus on rationality in the lawmaking process, legislative theory's problem-solving methodology offers a guide for designing legislation grounded on facts and logic. It teaches the careful analysis of available relevant evidence as to the causes of existing problematic behaviours (institutions). That enables lawmakers logically to design a proposed law's prescriptions which likely will induce behaviours conducive to good governance and development (Elmore 1979:602).<sup>35</sup> The remainder of this paper uses a Zambian case study to demonstrate the potential for using legislative theory and the problem-solving methodology to make it likely that government will use law instrumentally *and* non-arbitrarily, that is, consistently with the available facts, logically organised.

### **Towards a methodology for justifying rules that limit the arbitrary use of legislative power**

Legislative theory's problem-solving methodology serves to guide the logical organisation of available evidence to design and justify (see Nino 1996; Gutmann and Thompson 2000:161; Meehan 1969:27) transformatory law. As described in Part I, that theory and methodology specify the criteria and procedures which, if followed in the design of transformatory laws, will likely curb *arbitrary* lawmaking. If an adequate justification for a proposed law wins the support of all the stakeholders – not only one's supporters, but also one's opponents – the bill manifestly advances the *public* interest (Pitkin 1972). That a bill manifestly advances the *public* interest defeats a claim that it emerges from the arbitrary exercise of the legislative power. To appeal 'across the aisle' (and thus to prove that it results from a non-arbitrary legislative process), the justification for a bill must rest on reason informed by experience – on facts and logic (Rawls 1971; Nino 1996:122; Pitkin 1972; Gutmann and Thompson 2000; White 1990:50; Kronman 1989:1045; Meehan 1969). Also as argued in Part I, thus can the lawmaking power conform to the commonly-accepted demands of the Rule of Law?

Elsewhere, the present authors have shown how institutionalist legislative theory may guide the design of *effective*<sup>36</sup> transformatory laws (Seidman et al. 2001; Seidman and Seidman 1994:58; Seidman 1992c). Here the authors return to the Zambian case to illustrate how, guided by legislative theory's problem-solving methodology, the Zambian team proposed to use law to act as both an accelerator and a brake in the de-

velopment process: *accelerator*, by facilitating the design of *effectively implemented transformatory laws*; *brake*, by institutionalising *devices to ensure that, at every point, the law rests upon 'empirical evidence and rational calculation'* (Meehan 1969:6). First, this Part describes the central function of the problem-solving methodology in organising available data to *justify* legislative proposals. Second, it describes how the Zambian team's efforts illustrate the use of that methodology in practice: the team proposed a bill that specified criteria and procedures both to empower and limit the processes by which a national commission would conduct the necessary research and prepare draft bills designed to transform the economic institutions that still dominated and distorted Zambia's resource development. To justify the bill's detailed provisions, the team accompanied it by a research report grounded on the relevant facts, logically organised. Finally, in a brief sort of postscript, this section examines the function of 'values' in designing transformatory laws.

*The logical organisation of facts to justify a law's detailed provisions*

Employed to structure a *justification* for a bill, legislative theory and methodology hold the potential for supplying a quality control for legislation. This section explains that assertion.

We summarise how legislative theory and methodology supply an agenda for decision-making with respect to a bill. Its problem-solving methodology requires lawmakers – whether elected officials or those empowered to formulate regulations – to organise the available relevant facts *in detail* to 1) describe and 2) explain<sup>37</sup> the institutions (the behaviours) that, in the context of a country's unique realities, currently block good governance and development. For example, in Zambia, these comprise the institutions that perpetuated Zambia's external dependence, widespread unemployment, massive poverty, vulnerability, poor governance. The careful, detailed description and explanation of institutions – of repetitive patterns of social behaviours – supplies the indispensable foundation on which a drafter logically can 3) design (and deputies assess) detailed proposals likely to induce more appropriate behaviours.<sup>38</sup> Following these three steps, the bill described below aims to facilitate Zambians' efforts to use their own resources more effectively to provide more and better jobs in an increasingly integrated national (and regional) economy. These factors constitute the essential foundation for improving all Zambians' quality of life. In addition, 4) problem-solving requires, after a bill's enactment into law, an on-going monitoring and evaluation process to assess how well the new law has induced its prescribed behaviours, and the extent to which it has ameliorated the social problem at issue. (Almost inevitably, since the country's cir-



cumstances inexorably continue to change, this fourth step identifies new problems, frequently requiring new legislative solutions.)<sup>39</sup>

In lawmaking, institutionalist legislative theory performs a function in addition to providing an agenda for decision-making about a bill's content (Meehan 1969:53). Lawmakers must ensure that the drafters of a proposed transformatory law accompany it by a report of relevant research findings, logically-organised according to problem-solving's four steps. That kind of report enables lawmakers (drafters, other officials, legislators) and ultimately the public to decide *on the basis of facts and logic*, whether, at an acceptable cost, the proposed bill will likely contribute to resolving the social problem in the public interest – that is, non-arbitrarily (Winter 2002:139).<sup>40</sup> In that sense, the report supplies a necessary 'quality control' on proposed legislation.

To curb problematic lawmaking behaviours, a proponent in the 'strong'<sup>41</sup> Rule of Law tradition usually relies on a stipulated definition of 'the Rule of Law', too often grounded on the proponent's own value assumptions. From that definition, the proponent of a particular bill infers the particulars of the bill proposed. (A proponent in the 'weak' tradition likely throws up her hands and declares that the Rule of Law does not constrain the exercise of the legislative power; after all, in the familiar phrase of British constitutional law, 'Parliament can do no wrong.')

In contrast, problem-solving calls for the enactment of laws grounded on reasoned choice in the context of the lawmakers' own country-specific experience. Legislative theory and methodology's agenda for decision-making describes the steps required to make a reasoned choice about a bill's content. By the same token, it provides an outline for a research report justifying the bill in terms of facts and logic.

The problem-solving methodology transforms the debate over problematic lawmaking behaviours. Almost everywhere, practising drafters lacked a theory or methodology directing them to examine the specific constraints and resources that structure the environment within which a new law's addressees must determine how to behave in the face of the new law. As a result, they drafted using either of four 'seat of the pants' methodologies (Trachtman 1999): they copied law from other jurisdictions, they compromised between competing interests, they criminalised unwanted behaviours indiscriminately, they drafted in vague and imprecise terms.

As Fig. 1 shows, behaviour in the face of a new rule depends upon the constraints and resources of the specific local circumstances within which the law's addressees choose how to behave. Save accidentally, a new law can change behaviours only to the extent that its drafters examine those time- and place-specific *causes* of the problematic behaviours at issue, and design rules that address those causes. If the new law leaves intact those causes, the relevant actors will not likely change their

dysfunctional behaviours in desired ways. None of the ‘seat-of-the-pants’ methodologies demanded such an examination. In the event, almost none of the new states drafted bills grounded on a detailed examination of local circumstances, nor justified them in terms of reason informed by experience. Few laws in these countries actually changed their targeted institutions in desired ways. Thus did they deny the Rule of Law as applied to lawmaking institutions – and thus did they lose the Fatal Race (see, generally, Makgetla and Seidman 1987; Seidman and Seidman 2006; Seidman, Seidman and Uate 1999).

The quality of the justification used by a drafter for a bill’s detailed provisions constitutes a metric for the quality of the bill. A research report using facts logically organised according to problem-solving’s four steps creates an opportunity for anybody with better facts or more rigorous logic to challenge both the report and the bill it purports to justify. A research report that persuades a ‘rational sceptic’ on the other side of the political fence of a bill’s logical and factual foundation measures the extent to which that bill emerges from a non-arbitrary lawmaking process. To the extent that stakeholders across the board support a bill that offers evidences that the bill likely contributes to the public interest. To the extent that a report and bill meet these criteria, it appears likely that the bill’s detailed provisions conform to the Rule of Law. In that sense, an adequate research report may provide a measure of a bill’s quality.

To exemplify such a research report, most of the remainder of this Part summarises the research report prepared by the Zambian team, guided by legislative theory’s problem-solving methodology, to justify their proposed bill to establish a National Law and Integrated Development Commission. The bill would empower the Commission to conduct research and formulate detailed draft bills, looking to transform economic institutions in major sectors of Zambia’s economy, and submit them to Parliament for legislative action. The proposed bill specifies the criteria and procedures the Commission must use in drafting detailed bills. These include the preparation and publication of research reports structured according to the four steps of problem-solving. Those specified criteria and procedures aim to reduce the danger of arbitrary lawmaking in the design of detailed laws – legislation intended to transform the economic institutions that, over the last forty years, have worsened most Zambians’ quality of life.

*A justification of a Bill to create the Zambian Commission on Law and Integrated National Development*<sup>42</sup>

In four decades of seemingly increasingly disastrous efforts to transform Zambia’s copper mining industry, Zambian lawmakers apparently did not employ lawmaking processes grounded on reason informed by

experience. Instead, the two successive governments relied on seemingly arbitrary lawmaking processes shaped by their respective ideologies: first, ‘socialist humanism’, then neo-liberalism.

The Zambian team’s research report, outlined in Box 3, illustrates how problem-solving’s four steps can serve as a guide for organising the available evidence justifying a bill’s detailed provisions – in this case, for a bill to establish a Law and National Integrated Development Commission.

**Box 3: The proposed law and development commission act:  
Research report**

***Introduction***

As its primary substantive purpose, a research report’s Introduction seeks to persuade the reader that the Report and the bill that it justifies address a real problem about which the reader should have a concern. It accomplishes that purpose through several devices, especially by describing the larger social context in which the social problem exists. The Introduction briefly summarises the specific problem: here, the seemingly arbitrary approach employed by Zambian lawmakers to design and enact economic laws that proved inadequate to transform dysfunctional institutions. The Introduction acknowledges that the proposed law addresses only part of the larger development task of transforming all the institutions, economic and otherwise, that appear to perpetuate Zambia’s poverty, vulnerability, and poor governance – for example, a weak public health system, poor educational facilities, and endemic corruption at all levels of government. The Introduction further asserts that to accomplish those needed changes:

- Zambia’s legislative process must increase the rate and the quality of bills designed to facilitate institutional transformation. In turn that process requires changing the behaviours of those engaged in the bill-creating process (Ministerial officials, drafters, ministers, the Cabinet, Members of Parliament, parliamentary staff);
- To ensure good governance, Parliament must require that the resulting laws provide transparency, accountability, and stakeholder participation in their administration; and
- Parliament must ensure that the lawmaking institutions have these same qualities.

In conclusion, the Introduction describes the logic that underpins the remainder of the research report: Structured by the four steps of institutionalist legislative theory’s problem-solving methodology, each Part

provides the facts, logically organised, to demonstrate that the bill's prescriptions, conforming to the Rule of Law, will likely prove effective transformatory legislation.

***Step 1: Identifying the Social Problem: Arbitrary Lawmaking, and whose and what behaviours constituted it***

Here, the report describes (A) the particular problem's surface appearance – the existing lawmaking institutions' seeming failure to draft effective transformatory economic laws, and (B) precisely whose and what existing behaviours constitute to that social problem.

**A. The nature and scope of the social problem**

In this part, the report describes and provides evidence that a serious social problem exists: the continued existence in Zambia of serious unemployment and widespread, grinding poverty. This section describes only the surface appearance of the social problem – that, despite legislative efforts going back almost to Independence, Zambians suffer from deepening poverty. A 'social problem' merits that title because at its heart it comprises the consequences of human behaviours. Those behaviours, however, frequently do not appear at first glance. In this case, the social problem of poverty manifests itself in the distorted allocation of resources that characterises today's Zambian economy.

**B. Whose and what behaviours comprise the social problem**

Law can only resolve a social problem by changing the institutions (the behaviours) that comprise it. For that reason, a research report must provide hypotheses describing the relevant actors' problematic behaviours, together with the facts to demonstrate that those hypotheses prove consistent with the available evidence. Those behaviours comprise the institutions that, to ameliorate the targeted social problem, the bill must change or eliminate.

Here, the report must describe these behaviours in detail to lay the essential foundation for explaining the detailed causes of those behaviours in Step 2. Those detailed explanations prove essential to Step 3, the design of a legislative solution – the bill's detailed prescriptions to induce the necessary new behaviours. Reality underscores this requirement: in effect, legal rules drafted in broad terms give their addressee discretion as to how to behave. The addressee will then likely exercise that discretion in accordance with the addressee's existing value-sets. Those value sets usually support the old way of doing things. In other words, general descriptions of problematic behaviours too often leave drafters to employ relatively vague language in the bill.

Almost inevitably, that vague language proves insufficient to spur the relevant role occupants to behave in the new ways required to implement effective transformation.

To justify the bill to establish a Law and Development Commission, the Part I-B of the research report must describe in detail the problematic behaviours – backed by the available evidence – of the social actors responsible for drafting, assessing, and implementing bills supposedly directed to transforming dysfunctional economic institutions: ministerial officials; drafters; MPs; and the ministerial officials and the drafters of subordinate legislation.

1. *Officials in the ministries concerned with economic development.* Over the years, these officials made remarkably few legislative proposals to transform the inherited economic institutions. When politicians pressed for economic development measures (for example, to nationalise the mines), with few exceptions, ministry officials carried out those programmes through existing agencies and legal structures. In general, as far as concerned either the legislators or the general public, these ministerial officials made their decisions anonymously and secretly.

Ministerial officials proposed bills (usually incremental in nature) to remedy minor difficulties in existing laws, and accompanied them by one or two page memoranda or a 'layman's draft' of the proposed provisions. Typically, the memoranda neither provided nor called for evidence to justify the proposed legislation. Instead, they typically merely described the bill's general contours, leaving the legislative drafters to fill in the substantive details.

2. *Legislative drafters.* In drafting new laws, Zambian drafters usually followed the 'seat-of-the-pants' drafting methodologies earlier described (Trachtman 1999). They either a) copied law from some other country, frequently from Britain;<sup>43</sup> b) compromised between competing interest groups' claims.<sup>44</sup> These laws in turn usually either c) criminalised unwanted behaviour; or d) spoke in very general terms, granting broad discretion to administrative officials to work out the details. Not surprisingly, these practices did not produce effective transformatory laws. The drafters mostly carried on their work in secrecy, almost entirely within the civil service establishment, submitting their drafts to the Cabinet and Parliament accompanied by no more than a one or two page 'memoranda of law', usually merely briefly restating the bill in simplified language.

3. *Legislators*. Line ministry officials and drafters constituted the primary role occupants; that is, they actually designed the laws (see above, Figure 1). The Cabinet and the Parliament, together with their supporting staffs, served as the implementing agencies. In theory, MPs reviewed, assessed and voted on bills designed and drafted by the executive branch, and monitored that branch's implementation of laws after enactment. However, in Zambian practice, MPs did little to carry out these tasks. MPs rarely asked questions about the facts and logic that presumably underpinned a bill's detailed provisions; in debates, they usually followed their parties' positions. Seldom did MPs systematically try to monitor the resulting laws' implementation or social impact.

4. *Ministry officials and the drafters who prepared subordinate legislation*. The responsible ministers usually promulgated subordinate economic regulations by signing the drafts prepared by ministry officials (most of whom employed 'seat-of-the-pants' drafting methods [Trachtman 1999]). Almost never did drafters, officials or the Minister gather (and far less often publicise) any facts that might have logically justified the detailed provisions of subordinate legislation (see, generally, Seidman 1981).

### **Step II: Explanations for the Identified Problematic Behaviours<sup>45</sup>**

To induce new behaviours likely to help resolve a targeted social problem, a bill's detailed provisions logically must alter or eliminate the causes of existing problematic behaviours. Institutionalist legislative theory suggests seven categories of causal factors that, broadly-conceived, provide a checklist of the possible causes of problematic behaviours in the face of existing law.

The Zambian team's research report offers explanatory hypotheses for the problematic behaviours of each set of relevant role occupants identified in Step I (Seidman et al. 2001: Chapter 4-5), and demonstrates that those hypotheses appear consistent with the available evidence.

#### **A. Rule<sup>46</sup>**

Zambian lawmakers behaved within a remarkably vague framework of laws. The Zambian Constitution specified some limits on the legislative power, but none related to the law-drafting process. No rule required an official to make available to the general public anything more detailed than a brief cabinet memorandum, usually merely a restatement of the bill's purpose.

Following British practice, the Civil Service Regulations required a civil servant in charge of a proposed bill to consult 'interested parties'.

Beyond those whom senior civil servants considered appropriate, the inherited colonial Government Secrets Act made it a crime to reveal to an unauthorised person anything learned in the course of government employment. Experience everywhere suggests that rules enforcing non-transparent behaviours open the door to corruption.

A law seldom prescribed, in detail, the steps that the relevant Minister must take to implement its precise provisions. No law required a Ministry to examine Zambian experience as the basis for designing a new law intended to transform a specific existing economic institution within that Ministry's portfolio. For example, regarding the 'nationalisation' of the copper mines, the government merely purchased a majority of the mine companies' shares, leaving former company managers to run the mines. The Zambian Company Law (copied from the British model<sup>47</sup>) required the directors, when making decisions concerning company actions, to take into account only the interests of the shareholders (foreign firms still held almost half of the shares) – not those of Zambian mineworkers or the Zambian public.

B. The non-legal causes of each set of relevant officials' problematic behaviours

1. *Officials in the ministries concerned with economic development* did not generate transformatory legislative programmes for specific sectors like mining.

- *Objective factors* that hindered ministry officials from designing and implementing transformatory legislation included the following: as government officials, they had the *opportunity* to recommend decisions – first to impose state-ownership, then to privatise the mines and other industries. They had little *capacity* (training and skills) to design, implement or evaluate the social impact of the subordinate rules they drafted. (Like most officials, they probably knew what law applied to their behaviours in the law-making process – that is, the authorities had *communicated* the law to them.<sup>48</sup>) Too often, however, the officials' decision-making *processes* (the institutions within which they decided how to implement the law) typically admitted inputs of facts, ideas and feedback about their decisions' social consequences only from those whom the civil servants considered 'interested'. Usually, without publicising their reasons, the officials made their decisions behind closed doors, leaving the general public ignorant of whose and what facts might have influenced them.
- *Subjective factors*. Given the objective realities, ministry officials' own ideologies<sup>49</sup> and interests inevitably influenced their decisions and their actions. Those ideologies and interests did not al-

ways coincide with the public interest (Seidman 1989),<sup>50</sup> nor with the agendas of the new, populist governors. Many retained the Colonial Service ideology: government should serve as a 'night watchman state', maintaining law and order and collecting taxes (Adu 1965). Typically, they focused on implementing existing law, at most suggesting incremental changes, not institutional transformation (Dresang 1971).<sup>51</sup>

2. *Drafters* drafted bills with little regard for Zambian realities, in secret, and provided only flimsy 'memoranda of law'.<sup>52</sup>

- *Objective circumstances.* Zambia's drafters received few assignments (*opportunity*) which would have resulted in drafting transformative economic bills. On those occasions when they did, they lacked the requisite *capacity* to design detailed provisions likely to induce desired new behaviours, let alone to transform whole economic institutions. Trained in the British colonial tradition (frequently in English, Australian or Canadian Parliamentary Counsel's chambers), they learned the linguistic techniques of drafting. They rarely considered how to use law as an instrument of social change. The drafting *process* did not require them to design or to justify bills using evidence about the Zambian conditions within which their bill would operate. Rather, they wrote only brief legal memoranda restating their goals in 'non-legal' English (Seidman 1981:133; Makgetla and Seidman 1987).
- *Subjective factors.* Imbued by the British drafting *ideology*, drafters believed they had responsibility, not for their bills' substance, but only for those bills' linguistic form.<sup>53</sup> Its words, however, at once constitute both a bill's form and its substance. Thus, in the very act of putting words to paper, whatever their denials, drafters cannot avoid making decisions about a bill's policy. It is often said that 'the devil lurks in the details'. Leaving a bill's detailed provisions to the drafters inevitably leaves the drafters to make decisions based on their own pre-conceived, unreasoned ideas and interests. Unreasoned choices constitute the very essence of arbitrary lawmaking.

3. *Legislators* voted for government bills without assessing, in light of Zambian circumstances, their likely social impact.

- *Objective factors.* In Zambia, as in most countries, the legislative initiative lay almost entirely within the executive branch of the government. MPs lacked adequate staff to assess, far less to draft legislation (Muylle 2003:170).<sup>54</sup> Few Zambian MPs had the *capacity* to understand technical legal terms, or to assess a complex



bill's impact on the public interest. Very few Zambian MPs had the capacity to comprehend the potential consequences of legislation concerning the ownership of the copper mines for Zambia's future relationships to the global market.

- *Subjective factors.* To the extent that Zambian MPs articulated their *ideology*, it conformed to that of their political parties.<sup>55</sup> Ruling party MPs generally realised that voting against a government bill – whatever its likely substantive impact – reduced their chances of being re-nominated.

4. *Line Ministry officials* drafted and promulgated subordinate regulations, usually behind closed doors, without publishing supporting evidence or logically-stated reasons. Like ministry officials responsible for preparing bills for Parliament, the 'objective' and 'subjective' causes of ministry drafters' behaviours lay deeply imbedded in their Ministry's historically-shaped institutions.

### **Step III: The Proposed Legislative Solution**

Once a research report identifies and provides evidence to validate hypotheses as to the nature and institutional causes of the targeted social problem,<sup>56</sup> the research report should then demonstrate how the proposed bill's detailed provisions will likely overcome its causes, thus to induce more appropriate behaviours. In the Zambian case, the research report should demonstrate that, logically, the bill's prescriptions will likely alter the lawmakers' arbitrary behaviours and induce them to justify transformatory economic laws, not by whim, caprice or greed, but by reason informed by experience.

#### **A. The alternative solutions considered**

The research report should also list alternative legislative proposals that logically seem likely to overcome the causes of the problematic behaviours earlier identified – here, existing arbitrary lawmaking behaviours. Various sources may well suggest alternative solutions. These alternatives may be drawn from a variety of sources:

- From other governments' experiences in using law to transform analogous dysfunctional institutions (especially helpful in that one might learn from others' mistakes);
- From relevant literature addressing ways to improve governance while facilitating democratic social transformation;
- From the drafters' own ideas, formulated during the process of generating proposed legislative details based on Zambia's own experience.

Regardless of the source, at the end of the day the drafter must fashion a solution likely to prove effective in her own country's unique circumstances. To persuade our hypothetical 'rational sceptic' reader, that solution must appear as the result of a reasoned choice. As a step in demonstrating that the solution so resulted, a complete research report – which this essay does not purport to present – should list the alternatives considered. It should also demonstrate how the chosen solution will likely 1) adequately overcome the causes of existing problematic behaviours and induce more appropriate, less problematic, behaviours, and 2) prove more socially and economically cost-effective than either the existing law or the most likely alternative to the solution embodied in the bill.

The research report might also review the relative successes and failures of the various Law Reform Commissions that many countries adopted in the middle of the twentieth century.<sup>57</sup> Like the proposed Zambian Law and Development Commission, these constituted relatively independent law drafting agencies with a specific responsibility for drafting bills seeking to reform the law.<sup>58</sup>

#### B. Description of the bill's detailed provisions as the preferred alternative

This section of a report should include a description of the bill's detailed measures and an explanation of how the preferred solution addresses the causes revealed in Step II, above. Here, this article reviews only the bill's criteria and procedures logically designed to limit the Commission's discretion in developing bills for each sector of the Zambian economy.

##### 1. *Criteria and Procedures designed to limit the Commission's powers in drafting legislation*

- *Appointment and function.* The Law and Development Commission will have the duty to conduct research and draft legislation to alter the economic institutions that, in most sectors of Zambia's economy, tend to perpetuate external dependence and poverty. The proposed law provides criteria and procedures for the appointment of qualified Commission members. It empowers the Commission to appoint sub-committees as it required to prepare legislation for each major sector of the Zambian economy. The Commission may employ qualified, well-trained experts<sup>59</sup> to conduct the research necessary to conceptualise and draft detailed transformatory bills and supporting justifications for them. It requires the Commission to accompany a bill with a research report

justifying it in terms of facts and logic, and structured by legislative theory's problem-solving methodology, and to publish those research reports.

- *Building capacity.* The Commission will have adequate research and drafting capacity, and will train ministerial officials in the uses of law as an instrument for transforming dysfunctional economic institutions.
- *The Commission will submit a bill, accompanied by a research report, to the relevant ministry for review and submission to Cabinet and thence to the Parliament.*
- *The Commission will employ procedures and substantive criteria as specified in the bill in drafting a bill and research report:*
  - *Substantively,* for each sector, the bill will specify criteria for the kinds of institutional changes required. These must create more productive employment opportunities for Zambia's human resources, and more productive uses for its natural resources consistently with environmental protections, in ways likely to meet the population's basic needs, with special attention to achieving sustainable national (and regional<sup>60</sup>) economic integration.
  - *Procedurally,* the Commission will accompany a bill forwarded to the relevant ministry with a research report (structured in accordance with the problem-solving methodology). The Commission will publicise a draft report and invite comment on it and its proposed bill. The bill also requires that the Commission present the bill and the report at publicised meetings open to all those affected,<sup>61</sup> especially to organisations within civil society representing the poorest and most vulnerable.<sup>62</sup> The Commission must consider and respond to comments submitted.

***Step IV: Supervision, monitoring and evaluating the Commission's lawmaking role***

Step IV of the problem-solving methodology calls for monitoring and evaluation of the implementation of the law's effectiveness as a solution. That requires a bill calling for transformation to include provisions for that function.

- *Annual reports.* The bill requires that the Commission's board submit annual reports to the legislators and the public, summarising its legislative proposals, and the evidence and logic on which they rest. That will strengthen the nation's elected representatives' capacity to assess whether the Commission exercises its lawmaking duties efficiently and in the public interest.

- *Supervisory Committee.* The bill provides for the appointment of a supervisory agency, perhaps a Joint Committee of the economic ministries, to evaluate annually the new Act's implementation and impact in transforming institutions in each economic sector. It will define criteria and procedures, including feedback channels through which those affected may provide comments, facts and recommendations for improving the work of both the Commission and the Supervisory Committee.
- *Additional provisions specify limits on the Commission's powers*  
The bill includes provisions for, where necessary, funding; applying to a court for a subpoena to obtain evidence relative to proposed bills; dispute settlement procedures; criminal provisions (for example, to punish perjury in reply to a valid Commission inquiry); and empowering the relevant Minister to make subsidiary legislation pursuant to stated criteria and procedures.

A. Demonstrate that the bill addresses the causes of the identified problematic behaviours

In the 'Solutions' part, a research report should show that the bill's detailed provisions, in a cost-effective way, will likely help to alter or eliminate the causes identified in Step II, and induce new behaviours to help resolve the targeted social problem.

The report accompanying the bill to establish the Commission demonstrates the following:

- that the proposed bill's provisions will likely overcome the causes of the problematic behaviours of the relevant social actors – the ministry officials, drafters, and legislators;
- that those provisions of the proposed bill will likely transform the dysfunctional institutions that perpetuate distorted resource allocations in the relevant sector of Zambia's economy;
- that the probable social and economic benefits of establishing the Commission as structured by the bill will outweigh the probable costs.

This brief outline of a research report suggests how a research report, accompanying a bill, like that establishing a Law and National Integrated Development Commission in Zambia, can serve as the quality control for its bill. Tracking institutionalist legislative theory's problem-solving methodology, the report logically organises the available evidence to justify the bill's detailed provisions in terms of 'reason in-

formed by experience', of facts and logic.<sup>63</sup> Subject to the quality of the evidence adduced and the logic employed, such a report ought to persuade a rational sceptic reader. If the evidence does not warrant the report's factual claims, if the report's logic proves erroneous, then the bill does not have an adequate justification. Without an adequate justification for a bill in terms of facts and logic, its enactment would necessarily rest on arguments not of reason informed by experience, but of intuition, caprice, the clamouring of power. Its enactment would constitute an arbitrary act – and hence a denial of the Rule of Law.

Thus does the requirement of a research report reduce the danger that lawmakers will make arbitrary legislative decisions?<sup>64</sup> By providing the justification for a transformatory law *in terms of facts and logic*, backed by evidence, a report enables not only the legislators, but also the citizens at large, to assess whether the bill's detailed provisions will structure new institutions likely to resolve the targeted social problem in a manner consonant with the public interest. With respect to the lawmaking process, the required research report contributes to transparency, accountability and public participation.

In many of its several versions, the Rule of Law seems to bypass officials in the lawmaking process ('Parliament can do no wrong'). If, as contended here, the Rule of Law means the Rule of Reason, then the ideology embedded in the Rule of Law must insist that, like other governmental bodies, legislatures must act non-arbitrarily. A non-arbitrary decision consists of a decision that its author can justify in terms of 'public reasons', i.e. in terms of facts and logic. By regularly so justifying its decisions, the legislature becomes to that extent accountable and transparent. Because the force of such a justification depends upon the quality of the facts and logic included in the justification, justifying a decision in those terms opens the door to popular participation in legislative decision-making – anybody with better facts or better logic can challenge an official decision. The research report becomes the operative means by which the legislature regularly justifies its decisions. It becomes, therefore, the operative means for ensuring that the legislature obeys the Rule of Law's command.

A rational sceptic reader of this article may well interpose: all very well, but a bill contains prescriptions about how its addressees *ought* to behave. It constitutes a 'normative document'. Surely a justification for a bill therefore ultimately rests upon a value-proposition? In social science, the reigning positivist philosophy holds that values are like emotive states, or like taste. In what sense can a proposition resting ultimately on value choice deserve the name of 'non-arbitrary'? The final section of this paper argues that the rigorous use of the problem-solving methodology offers lawmakers a degree of control over their domain as-

sumptions – ‘values’, ‘residues’ (Pareto 1971),<sup>65</sup> ideologies, myths, and similar mental constructs.

### **The intellectual control of value-choice in designing and justifying a Bill**

In drafting a research report, lawmakers cannot escape the reality that, at each stage of the problem-solving methodology, their values inevitably do influence their discretionary choices. They have no choice but to make discretionary choices concerning at least five points in the course of problem-solving: as to the social problem the bill aims to help resolve; whose (and what) behaviours comprise it; the kinds of hypotheses chosen to explain those behaviours; which of the logically-possible alternative solutions seems most likely to prove effective and socially cost efficient, and what counts as a social cost or benefit; and, after the law’s enactment and implementation, what evidence counts in assessing its social impact. For the legislature to meet the Rule of Law’s criterion of non-arbitrary decision-making, those in the lawmaking process must justify those value-choices. Can they do so in terms of facts and logic?

Over time, guided by the problem-solving methodology, lawmakers and other policymakers can gain intellectual control over the value choices embedded in their explanations of the world. Essentially, they can do so iteratively, using ‘logic, criticism, the rational processing of experience, the theoretical transcending and explanation of experience, the slow, zigzagging and self-corrective search for truth’ (Bunge 1962:27). That zig-zag course requires viewing lawmaking as an experimental process, logically grounded on learning from experience. Just as, over time, particular trades drew on their experience to develop different kinds of hammers (a carpenter’s claw hammer differs from a mechanic’s ball peen hammer, an upholsterer’s magnetic hammer, a cabinet-maker’s Warren pattern hammer, a geologist’s hammer), so lawmakers can use experience to evaluate ‘ought’ propositions. As Long puts it,

Values (...) are human instruments and derive what validity they possess from their practical operation (...). We are not bemused by the fact that a hammer is an instrument devised in action for the purposes of action, and improved in action for purposes of action that themselves improve with the improved possibilities the hammer’s improvement opens up (1969:v,vi).

In the same sense, as a minimum, lawmakers can test the values they use to formulate a rule by its relative success or failure in resolving the problems it purports to address.

Alone, that sort of testing law by experience leads to a trial-and-error methodology. That methodology no doubt works well with the development of hammers. Used as a methodology for developing modalities of transformatory institutional change, it implies putting whole populations at risk in the course of testing new, transformatory law. Ordinary human caution in dealing with laws affecting whole populations tends to force decision-makers into an incrementalist methodology. Testing law by experience necessarily remains as the foundation for a programme for using law rationally as an instrument for social change. The monitoring and evaluation step in the problem-solving legislative methodology remains as the bedrock basis of rationality in the lawmaking process. Caution easily seduces the rational lawmaker to draft only incremental laws – and then farewell to institutional transformation and the bright promises of development.

Monitoring and evaluation, however, are necessary but not sufficient elements in using law instrumentally to transform problematic institutions. That process requires a rule or principle by which one can determine the probable societal consequences of a new rule of law *in advance* of its enactment and implementation – subject, of course, to the empirical demonstration embodied in problem-solving's fourth step. How to use 'facts and logic' to control value choice in the design of new law, thus to minimise the risk that new law inevitably places the population affected? How to subject the value-choices inevitable in lawmaking to the control of facts and logic?

To manage their value-choices, lawmakers might adopt either of three strategies. First, most theorists agree in principle that policymakers should as a minimum 'declare their values' (See, for example, Myrdal 1973). Others go further and demand that policymakers justify their choices by ordering their domain assumptions into a hierarchy, thus creating an ideal-type model or 'vision' of a desired state of affairs – e.g. a 'free market', 'democracy', 'socialism', or 'the Rule of Law' (Stokey and Zeckhauser 1978:5-7). As a third alternative, decision-makers could set out their domain assumptions not as 'objectives' or 'ends', but in the form of the logically-linked testable propositions of a 'Grand Theory' that purports to *explain* the world.<sup>66</sup>

Used in problem-solving, Grand Theories serve as the functional equivalent of 'values': They guide discretionary choice. A Marxist presumably will make much the same value choices as a visionary socialist. A researcher guided by Adam Smith will make much the same choices as a person dedicated to the 'value' of capitalism. The difference lies in this: no one, in advance, can test against real world experience the valuations that comprise domain assumptions. In contrast, at least in principle, one can test against evidence explanatory hypotheses drawn from Grand Theory.

In practice, however, it remains all but impossible to test the broad propositions of Grand Theory directly against the facts. To test such all-encompassing propositions, no two people can ever agree on what facts count. If so, then is it possible to falsify Grand Theory? Unless a proponent can suggest a modality to falsify a theory, Grand or otherwise, it hardly counts as a serious explanation of anything.

Grand Theory can guide the choice of hypotheses used in describing and explaining the specific problem at hand; that constitutes its function in the research enterprise. Asked to explain the decline of fish stock in Luapula, in Zambia, no doubt a researcher adhering to the Grand Theory expressed in *The Wealth of Nations* will seek to test quite different hypotheses than one adhering to *Das Kapital*. To the extent that the hypothesised descriptions and explanations of a research report prove consistent with the available evidence, they find their warrant in real world experience. The empirical warrant of hypotheses consistent with Grand Theory to that extent warrants the Grand Theory itself.

Furthermore, in principle, insofar as its details derive logically from those initially warranted hypotheses, every new law offers an empirical test: if the law's detailed provisions successfully alter existing problematic behaviours, that tends to confirm the explanatory hypotheses (and the theory from which they derived). On the other hand, if the specific hypotheses to which a Grand Theory directs attention repeatedly prove inconsistent with available data, and if the solutions logically constructed to overcome the causes those hypotheses suggest repeatedly fail, that tends to falsify the Grand Theory from which those particular hypotheses derived.

Structuring a research report along the lines of problem-solving's four steps offers a potential for testing hypotheses drawn from the propositions that comprise a Grand Theory. As in the Zambian case, to require for a transformatory bill a research report structured by problem-solving offers lawmakers a guide for deciding how to design legislation with a predicted higher probability of reducing arbitrary lawmaking behaviours. That this may not always prove true underscores the importance of incorporating in the bill itself a provision for monitoring and evaluating the resulting law's implementation and social impact. The results should provide further evidence of the utility of the hypotheses and the theory from which the lawmakers derived them.

## Summary and conclusion

General agreement exists that 'a government of laws, not persons' – that is, 'the Rule of Law' – requires legislation to curb arbitrary official behaviours. In a democratic polity, that should include imposing con-



straints on the several actors in the lawmaking process. The problem remains: how to translate the vague generality of 'the Rule of Law' into specific, implementable norms that reduce the danger of the arbitrary exercise of the legislative power?

Some simply infer detailed norms from a stipulated definition of the Rule of Law – a bare assertion of an end derived from their own domain assumptions. Instead of justifying a law by explicating a reasoned choice that approach merely clothes the author's value-choice, frequently in a misty cloud of twenty-dollar words. The multitude of alternative definitions, however, testifies to the difficulty of beginning a justification with the Rule of Law's grand concept. The grand project concerning how best a human society might ensure itself a *non-arbitrary* government, a government that bases its decisions on reason and logic, degenerates into an arid contest of alternative definitions.

In contrast, problem solving begins not with the Rule of Law, but with the problematic behaviours that constitute the social problem at issue – in this case, legislators' and administrative officials' arbitrary lawmaking behaviours. It leads, logically, to the conclusion: 'And, therefore, the proposed rules will tend to ameliorate the defined problematic behaviours that constitute an aspect of arbitrary governance, and thus will tend to further the purposes of the Rule of Law.' The invocation of the Rule of Law as a generalised end serves only to prioritise the urgent social problem of arbitrary government.

This paper undertook to demonstrate the use of legislative theory and methodology to justify a rule addressing that urgent problem. It did so by outlining a research report concerning a proposed bill creating a Law and Development Commission for Zambia. That hypothetical new law would authorise the Commission to draft and submit laws looking to transformatory institutional change. It would, however, limit the Commission's own discretion as well. Rather than justifying in terms of a stipulated definition of 'the Rule of Law', the proposed law would require the Commission to justify a draft bill by a research report resting on reason informed by experience.

This paper focused on one problem of arbitrary government: exercising the legislative power in response, not to facts and logic, but to will and power. The goal of reducing the ever threatening dangers of arbitrary lawmaking requires changing both the manner of drafting bills and the law-enacting institutions in a country-specific and subject-specific context (in this case, the lawmaking procedures and institutions involved in economic development in Zambia). Asserting a generalised end, like 'the Rule of Law', cannot alone justify specific rules limiting official legislative power. Exploring the causes of arbitrary behaviours in a specific time-, place- and subject-context, however, facilitates the design of concrete provisions.<sup>67</sup>

Methodologically gathering evidence during the process of testing explanatory hypotheses and subsequently monitoring and evaluating the social impact of rules once implemented may provide deeper insights into the potential utility of the grand development theory from which they were derived. In a real sense, every time lawmakers prepare a research report to justify their legislation's detailed provisions and compile evidence generated by monitoring those laws' social impact, they contribute to building the factual basis required to revise and improve – or reject as each case might warrant – a grand theory as a potential guide for designing additional transformatory legislation. Using legislative theory's problem-solving methodology to justify transformatory laws intended to curb arbitrary lawmaking behaviours involves continually reviewing the (frequently implicit) theories underlying the Rule of Law and good governance. Over time, that should also help to deepen understanding of those concepts' potential roles in institutionalising democratic lawmaking processes intended to facilitate development. Thus, this problem-solving approach would offer a way of using facts to assess the value propositions inherent in the Rule of Law and its intended corollary, good governance.

At least since the Realists' jurisprudential revolution, legal academics have conceived of their task as one which uses reason and experience to solve problems that arise in the realm of the judiciary (See, for example, Dworkin 1986). That these scholars have neglected the problems inherent in arbitrary lawmaking behaviours seems to reflect a widely-accepted view that the lawmaking discourse involves not reason and experience but rather will and power. In the words of one legal academic, Jeremy Waldron, 'we are not in possession of a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law (...)' (Waldron 1999:1). By that term, 'genuine', Waldron means laws which adequately address the problems facing society in a reasoned manner that benefits from past experiences.

Developing such a model ought to have high priority. Aside from legislation, what other devices does society have for achieving the kinds of rational, deliberate social change subsumed under the notions of 'development' or 'transition' – or, for that matter, solving the problems of post-industrial society? Lawmakers desperately need an intellectual compass to guide their lawmaking (lest it remain arbitrary). Such a compass would hopefully foster sustainable development and provide for the basic needs of the impoverished 80 per cent of the world's population. Academic lawyers can find no more important task than developing such an intellectual compass.

Eugene J. Meehan sums up the importance of this challenge:

The problem in social criticism is to agree on a conception of the enterprise that will emphasise the close relation between social policy and human needs, between social science and ethics. Then we may expect the kind of systematic probing and experimenting that is needed if we are to place normative recommendations on defensible grounds and incorporate the results of normative inquiry into the mores, practices, and institutions of society (...). Life (...) is a journey (...). There is no more to the journey than the journey; neither the point of departure nor the destination is of any great significance. The human enterprise can only be dedicated to improving the quality of the journey. There is nothing more that man can do (Meehan 1969:156).

## Notes

- 1 For two years (1972-1974) the authors taught, respectively, economics and law at the University of Zambia. Ann Seidman served as Chair of the Department of Economics; for one semester, Robert Seidman served as Acting Dean of the Faculty of Law.
- 2 Anglo American Corporation (South African) and Roan Selection Trust (American Metal Climax). See Grijp and Mupimpila 1998.
- 3 During the colonial regime, Northern Rhodesia (as Zambia then was called) 'received' – that is, it enacted as its own law — the English Company Code. Like corporations law worldwide, that law purported to impose on corporate managers a fiduciary duty to shareholders.
- 4 That is, Zambian Company Law did not succeed in inducing the managers of the mining companies completely to fulfil their fiduciary obligations to shareholders. Other countries experienced a similar phenomenon – consider, for example, in the United States, the Enron debacle.
- 5 Throughout this paper, the term 'lawmakers' includes everyone engaged in the law-making process: ministry officials concerned with legislation, drafters, legislators and their staff, and others.
- 6 Because most Zambians can hardly afford to buy their produce, many of these farms (including some recently purchased by whites fleeing Zimbabwe's much-criticised land reform) now produce and sell crops – including tobacco – mainly in foreign markets. Zimbabwe's White Farmers Start Anew in Zambia, *N.Y. Times*, March 21, 2004.
- 7 See, for a more extended discussion, Benda-Beckmann 1989.
- 8 For background material, see Waldron 1999 (quoting Seeley 1896:146), 'We live, said Sir John, in a legislation-state, which is not at all the same thing as a *Rechtstaat*, but rather a form of state devoted to the business of making continual improvements to the life of the community by means of explicit legal innovation, i.e. by parliamentary legislation.' See also Wunsch and Olowu 1990; Pound 1942; Seidman and Seidman 1994; Seidman et al. 2003b.
- 9 The law-jobs are in their bare bones fundamental, they are eternal. Perhaps they can all be summed up in a single formulation: such arrangement and adjustment of people's behavior that the society (or the group) remain a society (or a group) and gets enough energy unleashed and co-ordinated to keep on with its job as a society (or a

group)' (Llewellyn 1939). In this seminal article, Professor Llewellyn did not define 'law-job'; he invented the word. In the context of that article, by 'law-job' he plainly meant a function of the law. Figure 1 builds on a central proposition advanced, among others, by Llewellyn, a leader of the American Realist school of jurisprudence: a systematic difference exists between the law-in-the-books and the law-in-action, between what the law commands and how people behave in response to it (Llewellyn 1939). A similar proposition underpins the sociology of law (Chambliss and Seidman 1971).

- 10 According to Benda-Beckmann, 'In all contemporary societies salient elements of state policy have to be formulated in terms of law... The involvement of law in development planning and practice is no coincidence, neither is it a matter of conscious choice. Development... implies change. Inasmuch as the government agencies engage in development planning and implementation, they aim at changing behavior. In other words, they try to exercise power...[S]tate law is the primary source of legitimation for the exercise of power by or in the name of state agencies...' (1989). Examples could be multiplied.
- 11 For many, perhaps most writers, law always plays 'catch-up' with society. Society changes; law changes to express the new social relationships. See, for example, Sawyer 1965; Reid 1970. Reid states that 'Law is the signet of a people and a people are the product of a land. The primitive law of the eighteenth-century Cherokee nation reflects the mores, the integrality, and the rapport of the Cherokee people just as the characteristic traits of the Cherokees themselves reflect the physical environment of their existence: the mountains upon which they lived, the harvest reaped from forest, field and stream, and the enemies – both in nature and mankind – that their geographical position required them to fight.' For others, mainly influenced by Marxist writing, society constitutes the 'basis', and law is merely part of an infrastructure shaped by the 'basis' (Williams 1981). Some would restrict law's function to dispute settlement (Driedger 1983). For additional material, see Singer 1984, who adheres to the deconstructionist literary theory, whereby a person construing a bill reads into it his own views; law therefore cannot direct new behaviours unless those affected by it agree with it in advance. Griffiths asserts that law constitutes a mere epiphenomenon of the underlying political decision (1979) and in a similar fashion Kidder maintains that human behaviour is so complicated that one cannot analyse the extent to which the law acts as an independent variable in explaining it (1983). Another set of writers urged that deliberately designed law never proved as beneficent as law that 'has grown up and established itself unconsciously over a period of time' (Oakeshott 1962). Buchanan, following Coase, purports that if law remains stable for a sufficient time, parties will bargain their way around the law to reach the same social allocations of goods and services — whatever the law in force (1972).
- 12 Cf. Kelsen 1961. For explication of the theory that underpins the model, see Seidman et al. 2001: chapter 2. The sociological term, 'role occupant', refers to a set of social actors to whom the rule under consideration addresses. *Ibid.* at 16.
- 13 Implementing agency officials presumably take into account the same three aspects of their own experience that affect any role occupant's choice: the prescription of the law (here, the rule addressed to the implementing agency officials); the expected behaviour of whatever agency oversees those officials' implementing behaviours; and the non-legal constraints and resources of the implementing agency official's environment (Seidman et al. 2001: chapter 5).
- 14 Counter-intuitively, for designing a new law, existing law always constitutes part of the explanations for the problematic behaviours addressed. The problem-solving methodology teaches that a solution always addresses an explanation for those beha-

- viours. For a drafter, the solution always must change existing law. Existing law must therefore in part explain the problematic behaviour at which the new law aims.
- 15 For a detailed explanation of these categories and their use as guides to lawmakers engaged in efforts to draft, assess and implement effective transformatory legislation, see Seidman et al. 2001: chapter 4-5.
  - 16 Rather than importing high-cost consumer goods for a wealthy few, an import-substitution policy tries to develop new, in-country industries to engage domestic workers in producing a broader range of goods. Ideally, import-substitution industries should employ appropriate technologies together with national human and physical resources to produce a wider range of lower-cost goods to satisfy the broader population's basic needs (Seidman and Seidman 1994:208).
  - 17 Generally objecting to governments' efforts to restructure inherited institutions, international financial institutions such as the World Bank and the International Monetary Fund urged them, instead, to withdraw government from productive sectors, and allow 'market forces' to prevail. When world prices for countries' exports dropped to the point where they could not afford to pay for the imports on which their economies remained dependent, the international financial institutions required them to devalue their currencies. Theoretically, this would lower their export prices and increase their ability to sell more exports in the global markets while raising the relative import prices and forcing their consumers to reduce their imports. In reality, as developing countries entered this competitive 'race for the bottom', rising import costs sharply reduced their impoverished citizens' access to the imported necessities on which their economies remained dependent.
  - 18 For early post-independence examples in Africa, see Diamond 1987; O'Brien 1982.
  - 19 In the European tradition, and increasingly in the English-speaking world's practice, legislatures have enacted laws that grant government agencies the power to formulate and implement what some call 'subordinate legislation' and others call 'regulations' (Rubin 1989). Especially in conditions of development where rapidly changing circumstances vary from locality to locality, this practice has the advantage of enabling implementing agencies to formulate and implement regulations appropriate to local and changing conditions. At the same time, it raises significant questions about how, and the extent to which the legislature should limit the agencies' discretion in making those changes – an important question relating to the Rule of Law.
  - 20 For a detailed review of how to employ legislative theory's problem-solving methodology as a guide to gather and organise relevant facts as the basis for a bill's detailed design, see Seidman et al. 2001: chapter 4-5. To consider that methodology as a guide to assessing a proposed bill, see Seidman et al. 2003b.
  - 21 In proposing a law to establish the Commission, the Zambian team explored the possibilities of introducing an accountable, transparent, participatory process for designing legislation to transform the inherited institutions that thwarted development of balanced, integrated use of Zambia's resources to fulfil the basic needs of all Zambians. Organised by Lucian Ng'andwe as a project in the Brandeis University Masters programme on Sustainable International Development, the team initially involved former Zambian government officials and university students engaged in conducting research on the causes and possible legislative solutions for Zambia's growing post-independence poverty. As part of the project, Ng'andwe returned to Zambia to conduct further discussions with personnel in Government, Parliament, the University and non-government organisations.
  - 22 If someone says, 'I saw an elephant this morning,' every native English speaker knows 'elephant' means a big grey mammal with a long trunk and big ears. One defines the word by describing an elephant. For concepts like 'God', 'beauty', 'the Rule of Law', however, an author has no alternative but stipulate the definition. No one

- can, as one might an elephant, capture a living 'Rule of Law', hog-tie it, and then describe it (Ogden and Richards 1923).
- 23 See, for example, Hutchinson 1999 ('The familiar slogan of a government of laws, not of persons is considered to be at the heart of the rule of law'). See also International Commission of Jurists 1960:2; Cooray 1987 (listing ten 'essential characteristics' of the rule of law: the supremacy of law, a concept of justice that emphasises interpersonal adjudication, restrictions on official discretion, the doctrine of judicial precedent, the common law methodology, prohibition against retrospective legislation, an independent judiciary, the exercise of the legislative power by Parliament, with appropriate restrictions on executive rulemaking; and 'an underlying moral basis for all law'); Cass 2001:2-19 (Rule of Law has four 'constitutive elements': 1) fidelity to rules 2) of principled predictability 3) embedded in valid authority 4) that is external to individual government decision-makers. These elements are common to many conceptions of the rule of law and moralist alike, though different scholars gave different divisions to the component parts or add further requirements.'; See <http://www.rule-of-law.info/>: (Rule of law consists of several 'important concepts': government decisions made according to written law and rules; no ex post facto government decisions; rules applied consistently to all; no taking of life, liberty or property except pursuant to consistent, written processes; courts provide reasons based on the law for their decisions); Walker 1988:24-42 (Content of Rule of Law summed up in two basic propositions: 1) that the people including their government should be ruled by law and obey it; and 2) that the law be capable of guiding the people; from these two propositions 'one can deduce twelve requirements': guarantees against general anarchy and disorder; government under law; certainty, generality, equality; general congruence of law with social values; enforcement of laws against private coercion; independence of the judiciary; an independent legal profession; impartial tribunals; etc.). Examples could be multiplied.
- 24 '... [A]s many theorists have realised, the rule of law is not simply a set of mechanical rules to be followed. It is a set of loose, vague and indeterminate principles which require interpretation in light of the values which the rule of law is designed to realise'.
- 25 For additional material, see Marsh 1960. '[A]s a convenient term to summarise a combination on the one hand of certain fundamental ideals concerning the purposes of organised society and on the other of practical experience in terms of legal institutions, procedures and traditions, by which these ideals may be given effect...[T]he precise meaning to be attributed to the rule of law is far from uniform, and this, I think, [is] because, although of extreme significance, it is no one simple idea but rather a group of principles, and like most of the biblical ten commandments, these principles are mainly expressed in negatives, descriptions of what should not occur in a democracy which has regard for human rights and is respectful of the liberties of its peoples.' (Ibid. at 187,191).
- 26 The World Bank's charter forbade it to interfere with the internal affairs of a debtor country. In 1987 however, the Bank wanted to attach to some loans conditions that required the recipient country change its laws in specified ways. In answer to the question of whether it had such legal power, Shihata, its General Counsel, replied by drawing a distinction between 'government' – clearly a matter of the internal affairs of a country – and 'governance' – which Shihata asserted did not constitute a matter of a country's 'internal affairs' (Ibid. at 58).
- 27 The literature distinguishes between 'weak' and 'strong' versions of the Rule of Law. A weak version limits its definition to elements that protect human rights and dignity, usually in procedural rules. About these, in the literature, relatively little dispute exists. A strong version stipulates as part of the Rule of Law substantive characteristics that its author asserts constitutes necessary elements of the Rule of Law. These

typically would incorporate elements of the 'Washington Consensus':

'Rule of law rhetoric is all around us – in the business press, in the programmes and publications of the World Bank, International Monetary Fund (IMF) and Asian Development Bank (ADB), in bilateral development assistance projects, and even in US-China diplomatic dialogue. Notably, however, the Rule of Law is not being touted in these primarily for its traditional political role as a protector of human rights and individual dignity. Rather, the new rhetoric makes the claim that the Rule of Law is a crucial element in economic development, not only in formerly socialist countries, but in developing capitalist countries as well' (Ohnesorge 2003b).

- 28 Dewey's problem-solving methodology rests on the proposition that, far from occupying disparate, unconnected, non-commensurable boxes, the Is and the Ought comprise two extremes of a continuum (Dewey and Neurath 1939). Applied to the relationship between medical art and scientific enquiry: 'When standards of health and of satisfaction of conditions of knowledge were conceived in terms of analytic observation of existing conditions, disclosing a trouble statable as a problem, criteria of judging were progressively self-corrective through the very process of use in observation to locate the source of the trouble and to indicate the effective means of dealing with it' (Ibid.).
- 29 For a description of the problem-solving methodology as applied to the lawmaking process, see Seidman et al. 2001:88-93.
- 30 For example: a family decides it needs a new home. The assertion, 'We need a new house' becomes its generalised end. It then consults with architects and builders, and finally comes up with a blueprint for its new house. The blue-print and its accompanying contract to build constitute the end-in-view. A statement of a generalised end ('we need a new house') can as well take the form of a statement of a perceived problem ('our present housing is insufficient') (Dewey and Neurath 1939:47).
- 31 The Rule of Law aims, *inter alia*, at 'the insecurity of arbitrary government' (Ibid.). See also Weinrib 1987:59 ('As an ideal, the Rule of Law implies a contrast to the rule of men and evokes an image of... lack of arbitrariness'); Thompson 1975: 266-267 ('I am insisting only upon an obvious point... that there is a difference between arbitrary power and the rule of law.... But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-inclusive claims, seem to me an unqualified human good.');
- Krygier 2004:4 ('[F]aced with a choice between arbitrary power and the rule of law, the latter gets my vote every time.' '[A]rbitrary power is... the evil that [the Rule of Law] is supposed to curb');
- Wintgens 2002; Popova 2002:5 ('Clearly the rule of law doctrine's popularity does not stem from its conceptual precision. It emanates from the belief that a legal system based on the rule of law is more likely than other systems to guarantee the promulgation of non-arbitrary laws and their predictable application. Since both predictability and non-arbitrariness are believed to be associated with greater justice, a rule-of-law-based legal system becomes a justice-enhancing and thus desirable social arrangement.');
- 32 As suggested by Habermas, two discourses predominate in lawmaking: One reflects interest groups' power in the bargaining process over laws' details (read: 'will' and 'caprice' of the powerful and privileged); the other focuses on the use of reason grounded in empirical evidence (1996:180).
- 33 'Rationality...must suffice all law and lawmaking.... Rational law seeks to translate present wisdom, based on past experience, into future action. Such wisdom should be disciplined by "logic" (rules of clear thought and expression), nurtured by "science" (the evolving sum and substance of all hypotheses embracing all credible experience, observation and experience, and inspired by the faith that to be human means to exercise free will, to aspire to make meaningful and good choices – rational, balanced and "impeccable" selections among various options....)' (Ibid).

- 34 For one way of reducing the dangers of grounding policy or law on unexplicated values, see text accompanying note 61 below.
- 35 Policymakers require 'a logically ordered sequence of questions that policymakers can ask, prior to making a decision that will provide prescriptions for asking' (Ibid). See also Meehan 1969:27 ('Until standards of argument can be produced and defended, bad argument will continue to pile on top of bad argument, and normative discourse is likely to remain at the level of endless, noninteresting monologues – futile, exasperating, profitless.')
- 36 'Effective law' here means law that proves effectively implemented (Otto 2002:23).
- 37 See Seidman et al. 2001 (ROCCIPI categories suggest an agenda for investigating the causes of behaviours in the face of a law.)
- 38 See Seidman et al. 2001 (ROCCIPI categories which, broadly conceived, suggest the interrelated factors likely to influence the relevant social actor's – role occupant's – problematic behaviours.) For an illustration of the use of the ROCCIPI categories to suggest explanatory hypotheses, and thus guide research for the relevant facts required to warrant them, see page 107.
- 39 Besides the four 'seat-of-the-pants' methodologies (see page 104), the problem-solving methodology stands in opposition to two other, widely used methodologies for designing a law: 'ends-means' and incrementalism. In the ends-means methodology, the decision-maker first determines the 'end' or objective that the law proposes to achieve, and then devises the most cost-efficient means of attaining it (Rubin 1991). In that methodology, the 'end' of the proposed law presumably derives from the 'values' of the decision-maker. To the extent that 'values' defy justification in terms of facts and logic, the ends-means methodology defies justification in terms of facts and logic. Incrementalism emphasises the practical difficulties in weighing the social and economic costs and benefits to a problem more complicated than reducing spitting on the public sidewalk, and the risks involved in large-scale social change. It holds that the best solution to a social problem is the solution that requires the least change in the behaviour of relevant actors. See Lindblom 1963. For a lawmaker engaged in using law to transform problematic institutions, incrementalism has its uses (usually, where the factual knowledge is small and the Minister wants the bill on his desk before Monday) – but it defies the kinds of large-scale changes required for institutional transformation.
- 40 A 'forum' model of legislation rests on '(...) the assumption that through the evaluation study, information becomes available, which creates possibilities for a public debate. Ideally, a law is the result of such a debate, based on arguments relative to the situation as determined in the evaluation' (Ibid), but cf. Mill 1963:309 ('(...) men range themselves on one or another side in any particular case, according to this general direction of their sentiments; or according to the degree of interest which they feel in the particular thing which it is proposed that the government should do, or according to the belief they entertain that the government would, or would not, do it in the manner they prefer; but very rarely on account of any opinion to which they constantly adhere, as to which things are fit to be done by a government. And it seems to me that in consequence of this absence of rule or principle, one side at present is often as wrong as the other; the interference of government is, with about equal frequency, improperly invoked and improperly condemned.')
- 41 See Ohnesorge 2003a and text accompanying note 27.
- 42 This outline essentially summarises the main points of the draft research report, written to accompany a proposed law to establish a Zambian Commission on Law and Integrated National Development. Prepared by Lucian Ng'andwe on the basis of research by a team of former government officials, Africanist historians and social scientists, and his own research, that report aims to stimulate discussion among gov-



- ernment officials, legislators, non-government organisation personnel, and university staff and students about the possibilities and problems of formulating and implementing legislation to transform inherited economic institutions. We thank Lucian Ng'andwe for permission to describe the draft report's main features here.
- 43 African drafters followed Colonial precedent. In the 1930s, the British Colonial Office exported a Penal Code to the Colonies which simply codified English criminal law from a mishmash of convoluted case law and random statutory interventions. The Code included one provision (originally a statute to deter poachers in the English King's forests, seeking to avoid forest wardens' unwanted attention by blackening their faces with soot) that made it a crime in most African English colonies 'for a person to be found wandering at night with intent to commit a felony with a blackened face'. Lesotho copied a South African act that contained a provision prohibiting lorries in excess of 20,000 lbs. to travel on Lesotho's highways. Lesotho then (and now) has no weigh station (Seidman 1969). On the dangers of 'legal transplants', see generally Seidman and Seidman 2006.
  - 44 This accords with pluralist theory's focus on bargaining among interest groups as the basis of legislation (Carnoy 1984:47; Kesselman 1988). It resonates with the view that 'legislation (...) is a matter of politics, and politics is not rational. Politics is a power game, which results in compromises framed in a legislative or statutory structure. This power game seems to have its own logic, and, most of the time, the results outweigh any other form of logic' (Wintgens 2002:1).
  - 45 'Clearly, the limits of man's capacity for explanation are a significant constraint on his ability to act or choose rationally, and the relative lack of explanatory capacity in the social sciences has some interesting implications for the prospective social or political critic or actor (...). An explanation focuses on the record of change found in descriptive accounts of the environment, seeking a reason for changes – asking how and why changes occur. Questions in the form "Why did these changes occur?" "How can this situation be changed?" Or "What would follow if this element of the environment were changed?" are all requests for an explanation.' (Meehan 1969:58,70).
  - 46 See Seidman et al. 2001. As to the form of this section of a research report: ordinarily, a research report should group all the hypotheses explaining the behaviours of a particular set of actors, including the Rule, together to reveal their interrelated influence in shaping the relevant behaviours (Ibid. at 120). If, as here, however, existing law seems to affect all the relevant actors in similar ways, the explanations part may begin by analysing the overall legal framework within which all the problematic behaviours takes place, and then, in separate sections – here, see Part II-B – show how the non-legal factors interact to influence each set of actors' behaviours within that framework.
  - 47 During the colonial regime, Northern Rhodesia (as Zambia then was called) 'received' – that is, it enacted as its own law – the English Company Code. Like corporations law worldwide, that law purported to impose on corporate managers a fiduciary duty to shareholders.
  - 48 In a given case, like that of 'Communication' in this case; one or more ROCCIPI category may appear as an empty box, most ministry officials (except perhaps in remote areas) know what behaviours the relevant laws prescribe.
  - 49 At Independence, most of the senior ministerial officials remained the same expatriate Colonial Service officials who manned those posts immediately before Independence. Whatever the political ideologies of the new populist government that took power at Independence, it seems wholly unlikely that the senior officials fully endorsed them.

- 50 Recent evidence indicates that, when the second post-independence government privatised state-owned assets, several ministry officials took the opportunity to enrich themselves without regard to the impact on Zambian economy or people (Musambachime 1999). On the use of law and the legal order to make corruption more difficult, see Seidman et al. 2001: chapter 14; Seidman 1978b; Seidman 1989.
- 51 In Zambia, as everywhere in English-speaking Africa, the compromises that led to democratically elected (and black) government included a provision protecting the jobs of the existing Colonial civil servants – almost all white expatriates. In every governmental system, senior civil servants inevitably have great discretion in areas within their competence. As earlier mentioned in the text (see Step 1(B) above), to grant discretion to the addressees of transformatory law makes it less likely that those addressees will actually transform their behaviours. Notwithstanding precepts inherited from the Colonial civil service about civil servants conforming to the requirements of the government of the day, in every former British African colony in which we have worked, many of our informants complained that some old-line civil servants, designated to implement programmes, dragged their heels (or worse).
- 52 See text concerning Step I-A,B above.
- 53 In 1869 Britain created the office of Chief Parliamentary Counsel as its central drafting office. Line ministries objected that this diluted their power. To deflect that criticism, the first Chief Parliamentary Counsel, Sir Henry Thring, insisted that the new drafting office would deal only with bills' form and legality, not 'policy.' Under colonial rule, British officials transplanted that ideology into their African colonies' drafting chambers where it still persists (Driedger 1983; Russell 1938; Thornton 1987).
- 54 '[O]ne should not contrast legislation and parliamentary control; scrutinising legislation is an additional way for parliament to control the government' (Muylle 2003).
- 55 Zambia's first independent government, that of President Kaunda, seemed motivated – as did many African governments of the time – by a vaguely socialist ideology. 'Socialist Humanism' built on values that called for government control and use of the nation's assets to meet the people's needs, but offered no guidelines as to the kinds of detailed legislation required to transform inherited institutions in ways essential to achieve these goals. The second post-independence government, elected by a population disappointed by the growing unemployment and poverty aggravated by falling copper prices that reflected the nation's continued external dependence, adopted World Bank and IMF ideologically-propelled advice to privatise the state assets acquired in Zambia's earlier post-independence days of seeming prosperity (Musambachime 1999).
- 56 Some authors object that gathering the relevant evidence proves too difficult and thus reduces the potential for grounding a research report on available facts logically organised. See, for example, Tamanaha 1999. Of course, for whatever reason, if drafters cannot access the detailed evidence about the relevant constraints and resources affecting the choices of relevant actors in the face of the new law, to that extent the drafter's predictions of how the new law will affect behaviour will likely prove that much less reliable – and the new law will prove that much less likely to succeed in inducing its prescribed behaviours or of ameliorating the social problem addressed. A research report, however, is not a Ph.D. thesis. It reports the available evidence, structured in terms of legislative theory. The reader must of course consider it in light of its limitations. At any rate, much of the Zambian evidence has appeared in the national press and on the internet, partly as a result of new governments' investigations of the previous governors' behaviours. Undoubtedly, as in most countries, direct access to Zambian ministry files would provide more.
- 57 A number of countries established Law Reform Commissions charged with proposing draft bills as required to reform the law. As originally proposed by Dean Roscoe

Pound, these Commissions consisted of small bodies of experts looking towards the reform of 'lawyer's law' (that is, the law which ordinarily only lawyers consider – for example, a law prescribing that, for a court to enforce a will, two witnesses must have subscribed their signatures to it). In practice, the common law system ordinarily remits claims of defects in 'lawyers' law' not to the legislature, but to the piece-meal decisions of common law judges (Pound 1942; Hurlburt 1986).

- 58 Many of the various Commission websites suggest that those Commissions do not perceive themselves as participating in an auction of laws to the highest bidder (as one popular version of public choice theory teaches that in practice they do). Many plainly perceive themselves as drafters seeking to develop laws on the basis of reason and experience. At least some of these law reform commissions place considerable emphasis on seeking inputs from the public at large. Their reports seem based on their version of reason and experience. Although originally designed to reform primarily 'lawyers' law', their enabling statutes gave broader power. The Chairman of at least one such Commission argued that it should undertake drafting transformatory laws. Few other countries have undertaken major transformations of specific areas of law.
- 59 That requires specification of the kinds of skills required and, if necessary, the institutionalisation of the necessary staff training programmes, as well as provision of adequate budgetary support.
- 60 Space limits exploring here the potentials or institutional changes required to achieve self-sustainable regional development. Suffice it to say that extensive evidence exists that if Southern Africa, a region roughly the size of the United States, with vast resources (mostly untapped except for exports abroad), could – given institutions designed to foster regional co-operation and development – rapidly increase not only Zambians' but all Southern Africans' living standards. See generally Seidman 1978a; Seidman et al. 1985; Seidman 1992a; Seidman and Anang 1992.
- 61 As a quality control, notice-and-comment procedures, and public meetings will give legislators, the public, and especially all concerned stakeholders an opportunity to challenge both the hypotheses and the evidence that supposedly underpin the bill's detailed provisions; and, whenever possible, to substitute other hypotheses and facts derived from Zambian experience. See text accompanying footnote 56 above and footnote 90 below.
- 62 Widespread experience underscores the fact that, while the rich and powerful usually have an inside track to both lawmakers and administrators, the poor and vulnerable – in Zambia, for example, poor peasants, the unemployed, and the workers in the mines and line-of-rail estates (and their families) – seldom have access to the halls of power. For these reasons, the United Nations Development Programme requires that, in proposing a drafting programme for the People's Republic of China, Lao P.D.R., Sri Lanka, and elsewhere, consultants had to demonstrate that they had taken into account the concerns of women, children, the aged, the poor and ethnic minorities.
- 63 In the case of the Zambian report discussed above, the report's descriptive and explanatory hypotheses provide the relevant Zambian evidence. That evidence should help the legislators determine whether, as 'educated guesses' about the nature and causes of Zambian lawmakers' past arbitrary behaviours, those hypotheses prove consistent with the available facts. If the legislators conclude that the initial hypotheses fail that test, of course, the drafters would have to revise them, and then search for the additional evidence required to justify the revised version of the report and presumably, the bill – or, in light of the new evidence, perhaps the legislators might reject them both. If warranted by the facts, those hypotheses logically lay a foundation for the design and assessment of the proposed law's detailed provisions. Those include provisions for training commission staff and the criteria and procedures by which they

will design transformatory economic legislative measures for consideration by the Zambian Parliament's elected members. See Seidman et al. 2001:chs. 4-6.

- 64 See the text accompanying footnote 42.
- 65 For the possible dangers of grounding bills on unexplicated value choices, see Bunge 1962.
- 66 For example, Adam Smith did not write a tract favouring capitalism; he wrote an explanation of how mercantilism impeded industrial capitalism's potential for expanding the wealth of nations. Karl Marx did not spend twenty years in the British Museum writing a polemic in favour of 'socialism'; in the four volumes of *Das Kapital*, he never even mentioned that word. Instead, he sought to explain how nineteenth century capitalist development created and exploited the working class. In a sense, these authors did try to organise their 'explanations' of the world into a series of interlinked propositions. Each of those propositions, at least in theory, remains subject to assessment in light of available facts. In the same way, if lawmakers could explicate their values as a set of logically-organised propositions, or hypotheses, at least in theory, it remains possible to test those hypotheses against the available evidence. Indeed, that premise underlies problem-solving's requirement that a research report organise the available evidence to validate hypothesised descriptions and explanations on which a bill's detailed provisions must rest. See Seidman and Seidman 1994: chapter 5.
- 67 That the Commission will justify its bills on the basis of reason and experience does not exhaust the kinds of restraints that, to reduce arbitrary government, the law ought to place on lawmakers. In Zambia, officials not only failed to make rules affecting its entire economy without resting them on reason informed by experience, they also made the rules secretly, without accountability whether to the Parliament or the electorate, without participation by the stakeholders. A polity's lawmakers should ensure that they have in place rules requiring drafters and legislators, in every bill they draft and enact, to pay attention to these issues.



## 5 Legislation in a global perspective

*I.C. van der Vlies*

### **Introduction: Reformulating responsive legislation**

Legislative bodies should make appropriate laws in a global perspective. These bodies should meet the expectations of the population and those of the global community. The legitimation of laws is not only to be found in expressing the will of the people of a nation state. A legislative body should be pro active and take care that the laws of a country can communicate in global networks. Import of legislation of other nations by transplantation of laws facilitates the linking into these networks.

Under a classical theory intended to explain the role of the legislature, lawmaking was viewed as codifying unwritten law and expressing the will of the people in general. Thus, a lawmaker might strive to present laws with a clear message that might endure ages and which would reflect the will of a fairly homogeneous populace. Such a model (with codifying laws) might explain a relatively static society into which formal rules are introduced, but as Franz Neumann pointed out, the function of law in a changing society differs from the classical (static) one for a number of reasons (1966).

First, the citizenry often want their society to undergo change and recognise that changing laws can play an important role in such development. Laws ought to reflect the ambitions of a society and facilitate the transition between what is at present and what might one day be. Second, the traditional view of the function of the legislature is further undermined by the fact that the old view of what constitutes the 'will of the people' has eroded. In fact, 'the will of the majority at any one given moment' (for the make-up of the majority itself changes over time) is a more accurate expression. And, in a multicultural society or, in some instances, in the face of legal pluralism, the concept of a 'one for all and all for one' attitude towards particular government actions has lost its credibility. In a society which lacks cohesion, no institution is truly able to speak on behalf of 'all the people' at any one time. A system of cohabitation of various legal systems might be necessary (legal pluralism).

For present purposes it is noteworthy that fragmentation stems not only from internal circumstances but also as a consequence of interna-

tional factors. It is obvious that the population of a nation state does not form the harmonious unity that once was subscribed to them. They participate in networks that can concur or compete with the wishes of a majority in parliament. Via these networks people can have direct international links. It is rather common that people participate in non-governmental organisations (NGOs). The other way around, international operating actors can meet people. International enterprises can do business with anyone or operate from any country.

Parliaments are confronted with various wishes from the people. Wishes can stem from local issues or from a combination of national and international visions. Besides that demands will come from international developments as such.

How is responsive legislation in a fragmented frame like this perceivable? In the approach of Nonet and Selznick, law strives to resolve the dilemma between an openness that is flexible towards political needs and an autonomy that is rigid out of respect for legal values such as legality and democracy (1978). In a global perspective this dilemma poses an even bigger dilemma, while in making legislation in a global perspective the Rule of Law has to be constituted.

Thus, a real need has emerged for better models which might illustrate how legislation might be better fashioned. Nonet and Selznick put forward a theory which categorises laws into four groups, though admittedly a cross-over exists – no one model can fully capture the dynamics of human behaviour. Of particular importance is the ‘responsive approach’ which demands that the legislature take cognisance of the particular context in which its proposed laws are to operate. Laws which fail to appreciate the particular context of a developing state are likely to fail to achieve their goals and may even be counterproductive (Nonet and Selznick 1978).

Consider the fact that laws in a changing society are often numerous and perceived as intrusive. As Kagan put it in the introduction to Nonet and Selznick’s book: ‘Year by year, law seems to penetrate and constrain ever larger realms of social, political, and economic life, generating both praise and blame’ (Kagan 2001). As will be explained in greater detail later in this essay, the legislature must realise that the State is not the only lawmaker in any given society.

Domestic legislatures in developing countries might follow up treaties on human rights, intending to ensure greater freedom of action by individuals, notably women. These laws might in fact lead to major social consequences should it lead a citizen to break a religious or tribal taboo. But it should also be open to the differences within local communities. To the extent that an attempt to transplant a law which would legally grant rights and obligations (one that might be taken for granted in Europe) directly into a society where the intended beneficiary would,

on the one hand, enjoy new rights (not to suffer circumcision or to be someone's property), but on the other is not fully able to deal with the new situation, direct transplantation implies a risk. Thus, transplantation should be undertaken carefully. The 'responsive approach' to legislation is intended to strike a balance.

Careful implementation over time of new rules which take cognisance of local circumstances certainly makes sense. But, an overly cautious approach to lawmaking (one that only looks inward) is likely to inadequately address other responsibilities facing the legislatures of developing states. Legislatures must also develop the law to ensure stronger economic futures for their citizenry and to ensure 'good governance' by legislating for institutional change. Is it reasonable to expect that without leadership from a legislature (one which also looks outwards to other legal systems) that a developing state is likely to fare well in this rapidly globalising world? Responsive legislation need not force a legislature to abandon its role as a leader.

### **Network structure**

On a global level the Rule of Law is thin, though not totally absent. Review of the nearly absent Rule of Law on the global level in a traditional way, would foster a feeling of hopelessness. Others have taken a different approach and mentioned the influence of courts on international treaties as an important step in making a difference between the absence of a global legal order and the start of development of respect for rights in a systematic way.

For the moment most nations form their own networks of lawmaking and meet other networks of legislation only in rare exceptions. They are rather closed toward each other. Rulemaking networks can be very closed, as is described by Falk Moore (1973) and Teubner (1989).

Furthermore, elected legislatures are not the only legislative bodies to make rules that are important from a global perspective. Treaties can be seen as global rules as well and therefore treaty-making bodies can be seen as legislative bodies. In addition, rules from international agencies, whether attached to the UN or made up by a combination of national agencies, can be seen as global rules as well. Then there are rules from NGOs and professional networks. And there are trend-setting rules, like the Code on Corporate Governance. Still, one might try to find the ways via which these networks can open up to each other.

Starting from the axiom that legislative bodies have to tune-in into what is developing on an international level, lawmaking habits will have to change. Especially for the parliamentary legislative bodies a change of focus has to come. They constitute general bodies, be it for one coun-



try, while all others are specialists. For the specialised bodies it is easier to constitute a global network.

### **Parliamentary outward look**

The Seidmans' approach deals notably with the relations of the legislative bodies with interest groups, regions and peoples: the internal focus (Seidman et al. 2003a; Seidman, Seidman and Waelde 1999). They stress that legislative drafters should do research on the perception of the people. This is the first step to responsive law. Principles of the Rule of Law can be weighed in the context of political wishes. However the legislative body should take another step: laws should be placed in an international context. For any parliament this context is difficult to perceive, as it is not coherent in itself. What steps do parliaments already take to bring the international context home? We can mention: exchange of knowledge, comparison, transplantation and preparation of treaties.

#### *Exchange of knowledge*

Communication between legislative bodies can be perceived in many ways. Slaughter mentioned the need for 'helping legislators' do their work better (2004:125). Within the US, co-operation among state legislators is well established, in the National Conference of State Legislators. A growing number of legislators around the world are finding their voices in an international arena (Slaughter 2004:127). In many ways legislators are giving each other technical knowledge and provide each other with examples and ideas on the way policy can be translated into law. Many international organisations offer courses.

#### *Comparison*

In many countries under the Rule of Law, members of parliament will demand comparison of the legal acts of neighbouring or leading countries, before they give their consent to a bill. This method can reach further. Sometimes an international trend can be signalled, such as the Code for Corporate Governance. Countries then will follow up this trend. Sometimes comparison will result in a nearly complete transplantation of a law that seems to adapt very well to the national legal culture of the 'receiving country'.

### *Transplantation*

Many developing countries, but developed countries as well, use the instrument of transplantation, notably for general laws such as a Civil Code. Sometimes the help from Western countries for developing countries is doubted because copying Western laws could damage the establishing of an own identity of development countries (Seidman et al. 2003a). This objection finds its roots in the traditional theories on legislation.

Despite the fact that many authors now stress the need for domestic legislatures to take greater responsibility for meeting the challenges of lawmaking in developing countries, the importance of legal transplantation from one legal system to another should not be scrapped as 'a failed strategy'. Certainly, a greater role for domestically developed legislative solutions has the potential to build important relationships between governmental institutions and the general citizenry, particularly if those solutions take cognisance of local history and domestic conditions. But, reliance on domestic legislative solutions cannot adequately address other challenges which must be met by developing countries. Many aspects of the economy and the environment (to cite but two areas which require a global outlook) demand a co-ordination between local, foreign, and even global legal networks if indeed law is to serve its proper functions effectively. Domestic legislatures must at times lead their citizens and introduce ideas from the outside in order to meet the challenges of today's world.

### *Preparation of Treaties*

Preparing treaties is an international activity as such. Whether the treaty negotiations have an effect on the internationalisation of the outlooks of parliaments depends on the communication between the delegates and the members of parliament.

It is obvious that other factors can also contribute to the outward look of parliaments, such as the way individual members gather their information, or the way parliaments respond to verdicts by international courts on their legislative output or the way treaties are implemented. The effect of these factors is dependent on the readiness to place this type of information in an international scope. It is possible that adaptations are made only reluctantly or that information is translated to the local situation without an appreciation of the international context. Under these circumstances the scope of a parliament is not really widened. We can add that parliaments within the European Community (EC) will sometimes work together within the frame of the implementation of a Directive and on other occasions.

## International actors

Parliaments can build legal bridges to each other and profile international co-operation. They are not the only ones on the legislative side that are building an international frame. An issue for parliaments should be to detect networks that can be international partners in law-making.

Other legislative bodies are important players in rulemaking. In first world economies new systems of legislation are developed. As Picciotto (2002, amongst others) put it:

In parallel, the public sphere has become much more fragmented, as many activities have been divested from direct state management through privatisation, and operational responsibility for an increasing range of public functions has been delegated to bodies with a high degree of autonomy from central government. In the 'network society' it has become harder to distinguish public and private, and their interactions and permutations are more complex.

He underlines that the 'rolling back' of the state has not simply given free rein to market-mediated social relations, but has involved new forms of regulation. Thus new legislative bodies have been added to classical ones. Their competence is limited to specialised policy areas such as financial market, environment, health care, or competition (see: Smismans 2004: Chapter 1.II and Ziamou 2001: chapter 2). The character of the rules these regulators or agencies issue may differ from those of elected legislative bodies. Their power is less broad, but their decisions can be very effective. Because of the non-political and specialised character of their rules they do not find too many difficulties in establishing cross-national links.

Parliaments find it often difficult, on hindsight, to deal with these types of regulators. Sometimes they give the impression that they did not know beforehand what the new regulators would do with the power invested upon them. They have made their own competitors. It is a pity that in many cases parliaments did not provide a structure of communication with these new regulators. They should have built legal bridges for themselves or should start to build them now.

Agencies started building these bridges with each other. Specialised agencies find each other. Thus they have built a legal network of similar agencies. The international communication between these agencies is often better organised than the communication between parliaments all over the world.

Other actors set up similar bridges. Civil servants travel around the world in vast numbers. One can think of inspectors, civil servants preparing bi-lateral or multi-lateral treaties. Their official legislative power may be weaker than that of agencies or even absent. However their effect on rulemaking cannot be neglected. If parliaments cannot put forward a similar network, their power may erode. It is obvious that ministers as such have many cross-national relations that can easily grow into networks.

### **Democratic approach**

Are these legislative cross-national networks sufficiently met with democratic accountability? Such accountability is needed, as these networks are apparently building power on an international scale.

The position of governments is different from other networks. They are accountable to parliaments or placed under the Rule of Law in various constitutions. In these cases a minimum of accountability towards national parliaments is guaranteed. This national form of accountability is not always sufficient to get influence on international movements of governments. It can easily occur that from a political point of view the phase of no return is reached, as ministerial agreements will get their own moment of truth. As a consequence, in legislation parliaments have to follow the guidance.

However: counter balancing powers on a global level cannot be sufficiently done by national parliaments. If the assumptions that cross national networks are gaining power, hold truth a system of cross national accountability should be developed.

What methods can be imagined to develop systems of cross national accountability? Parliamentary legislative bodies can empower others to check on the dealings of cross national operating actors. Why should parliaments create their own inspectors? Most parliaments can institute investigative committees. These could be joint committees from various parliaments. Furthermore parliaments could demand that agencies are instituted with similar democratic guarantees. It is peculiar that now many of the cross national co-operating agencies were set up without a sufficient system of checks and balances or accountability, though they were instituted by democratic acting bodies. The democratic legislative bodies could have structured the powers of the new regulators more than they did. But they did not. That they were in a hurry to create new regulators is understandable, because it seemed to be an appropriate answer to globalisation. The new regulators were set up to control the economic players on the world market, but were not submitted to countervailing powers themselves.

And other separate powers can be seen arising to contribute to counterbalancing, such as NGOs like Amnesty International or Greenpeace. They form independent forces that are not committed to government actions.

## **Change in the position of the government**

The traditional theories on systems of checks and balances give the executive power a free rein in foreign relations. This conception matched with the idea that nation states were one and united. As a consequence they could be represented as such to others. Immigration and globalisation brought this perception to its ending. Many actors within a nation state act directly with others on a global level. They have their own systems of representation and compete in a way with the government on certain aspects of state policy, like the regulation of the markets, the protection of the environment or the world cultural heritage. Parliaments could conquer a place for themselves as a spider in a web.

## **Parliament**

Parliaments have to reconstruct their own position in order to cover the demands from the principles on the 'Trias Politica' or similar principles of checks and balances. They can no longer perceive the international relations as a business of the government, with which they have to deal only marginally. They should rethink their position.

## **Interface**

As Picciotto, amongst others, stated, the character of lawmaking has changed. Informal and formal rules are forming a web of norms that is intertwined and difficult to unentangle. Regulators exist in sorts. National and international levels work together in systems of multi government levels or cross national agreements (Picciotto 2002).

The statement of Seidman et al. which is at stake here claims a traditional reference: laws as the expression of the will of the people (Seidman, Seidman and Waelde 1999). However people can hardly be seen as a stable and permanent group under all circumstances and in all perspectives. Within a nation state some groups can see their interest better covered by international acting networks than by their government. This observation does not imply that a local parliamentary legislative body should not pay attention to the wishes of the groups in which a

country is divided. On behalf of the various groups they should try to make the relevant global connections.

The legislative power stands in the middle of various forces. Responding to the wishes of various groups within a nation state is one part of their job. Another part is to respond to international connections from within their own states.

As a variation on the traditional theories one should at least state that the legislative power should be more than marginally involved with international relations and that international relations are of a different character. Cross-national acting of so many actors, demands cross national thinking of the legislative body. Legislative bodies should act as interfaces between local and international affairs to form a countervailing power or to be a ruling force. In that respect all parliaments across the world share a similar obligation.

Legislative bodies should perceive themselves as being part of various international networks and seek co-operation within these networks for the sake of democracy. The beginning of this repositioning by the parliamentary bodies can already be seen on a moderate level.

## Structuring

The change in the function of law has found its parallel in the change of the position of the legislative body. This position change entailed a change in the method of lawmaking. The perceived immediate relationship between the legislative power and the people has already partly changed into a mediated relationship.

The concept of Teubner might be helpful here. He offered the concept of reflexive law. Reflexive law is not purposive. It retreats from taking full responsibility for substantive outcomes. It seeks instead to design self-regulating social systems through norms of organisation and procedure (Teubner 1983). Then questions will arise as to the precise role of the state in policy-formation, in particular regarding the locus of decision-making and whether regulators can act as mediators.

This implies that the proper role of the state might be to structure deliberation among decision-making far beyond its boundaries, rather than just to guarantee the conditions of communication necessary for effective debate and public reason within the legislator (Teubner 1989: 36).

This concept of lawmaking can be useful in the perspective of the developing globalisation of legal networks as well. From this follows that na-

tional legislative bodies should define their place as an organiser between other rulemaking bodies.

Elected legislative bodies can be more effective if they work together and know how to make their norms attachable for social, economic, environmental and cultural networks. In this way they can contribute to a system of responsive lawmaking.

### **Legislators among each other**

The need for co-operation by elected legislative bodies and other rule makers can imply a change in the method of lawmaking. The methods of co-operation by legislative bodies have been mentioned under 4.

Co-operation can be performed from a distance. If elected legislative bodies compare mutually their laws and decide to copy another state's legislation they contribute to a harmonised approach on a global level. One can assume that a growing harmonisation of state rules can offer an appropriate answer to the actions of global enterprises.

It cannot be excluded that legislative bodies pass laws under these circumstances that are not based on their own research. Seidman et al. reject this method (1999:206):

In reality, copying foreign law usually reflected one or all of three misconceptions about the law and the drafters' task: that law does not relate to behaviour; that people behave in the face of a rule only by considering the rule's language; or that – explicitly in the French tradition, but often implicitly elsewhere – implementation provisions to ensure behaviour changes remain someone else's responsibility.

Their critical approach in these lines contains a useful warning that should be heard by legislators. It neglects though the international aspects. Lawmaking should be imbued by needs to communicate with the international developments and not be used as a tool of national communication only. Though they pay respect to the law used by international business, they do not explain how their system of fact finding and resolving peoples' problems can match with the demands of the international society (Seidman, Seidman and Waelde 1999:5). For any elected legislative body in the world this turns out to be a challenge. A legislative body has to decide for itself whether the making of similar transplants or the use of transplants can offer an appropriate solution to keep up with international demands. This is an autonomous decision and cannot be based on internal fact finding only.

Co-operation of legislative bodies is common between those within the US (Slaughter 2004) and not uncommon between those within the EC. Another form of co-operation can probably be found in the structures of former colonisation, notably of the Commonwealth. But nowadays legislative bodies could try to find partners in the policy fields that are especially confronted with the effects of globalisation, such as the financial markets or the environment. In the confrontation with these forces, they could strengthen their position by working together.

Striving towards networks on an international level underscores the significance of the Rule of Law. It cannot only be construed on a national level, though it is important that it is acknowledged as such (Tamanaha 2004). This insight is needed to create a common basis for a cross-national endeavour to establish the Rule of Law in a global perspective.

### **Seen from the perspective of citizens**

Citizens live in various networks with different norms. Within nation states they experience that many rules are of a temporary character. Various laws can contain different norms for similar situations. The problems of the legal system make citizens sometimes cynical law watchers. The assessment of differences in the national laws is important. Some of the changes in the law are the effect of supra national decisions, such as EC directives.

Within a structure as the EC it can be accepted that codification should not be perceived as a national assignment only. Harmonisation is prescribed in the basic rules of the EC. However it takes a long time to complete this kind of harmonisation, while at the same time citizens of various nations communicate with each other in so many ways, e-shopping, vacations, investments, immigration, work abroad, and so on. For these reasons they are not confronted with changes in one national legal system only. Any reduction of differences in legal systems can be helpful for them.

### **Conclusion**

Establishing an international legal order poses challenges. There is no global constitution, though by recognising international courts and making treaties nations start building. A democratic system of checks and balances is also only present as a first vague sketch. Politicians have a rather free rein, being accountable to the media, home parliaments and a single international forum only.



Establishing the Rule of Law within a nation state is an on-going obligation. Societies move forward and make changes in the constitutional systems necessary from a legal perspective. Tamanaha has demonstrated the problems that have to be overcome in establishing the constitutional Rule of Law within nation states that were governed otherwise (Tamanaha 2004). It is self-evident that establishing the Rule of Law in a global perspective implies a challenge of another degree. The way it should be conceptualised or organised is not discussed here.

From the assumption that an amelioration of the elected legislative bodies is an attribution to the development of a global system of checks and balances, the focus is placed on the co-operation of these bodies. Co-operation amongst legislative bodies is important. Co-operation should help in making similar norms, which is important in the perspective of legal certainty. It is also important in the perspective of a democratic reaction on the globalisation of economics. In this respect well chosen transplantation of laws can be useful. Transplantation of laws regarding the establishing of agencies can be useful as well. Agencies operate cross-national and can become competitors to the legislative bodies. It is up to the legislative bodies to take care that the regulators are obliged to co-operate with them and have a democratic structure. Parliamentary legislative bodies should establish the cross-national operating regulators in such a way that their rules are attachable and their functioning is legitimised from a democratic point of view. Ruling on a global level can then be retraced to democratic roots.

## 6 Bargaining about the land bill: Making effective legislation to protect arable land in China

*B. van Rooij*

### Introduction

In 1994, Lester Brown predicted that China would soon face food shortages (Brown 1994).<sup>1</sup> Central to his analysis is the causal relationship between food security and arable land protection. China's growing and rapidly urbanising population was getting richer and eating more food of a higher order in the food chain, and consequently China needed more arable land at the very moment that urbanisation and industrialisation were actually eating into its pool of potentially arable land. Thus, Brown predicted that China would soon have to import amounts of food not readily available on the global food market. China's central leadership heeded his warning because they knew all too well what food shortages can lead to.

Faced with one of the lowest levels of per capita arable land and possessing the largest population in the world, China has long recognised that the risk of food shortage is very real. In fact, an estimated 30 million Chinese perished in the last major famine during the Great Leap Forward (1957-1960), the most severe in world history (Smil 2004:72-73). Ever since, food security has been a priority for China's leadership. After the Great Leap, China's hunger for arable land resulted in a high level of damage to natural environment: forests on mountain slopes were cut to make rice paddies, and lakes were converted to arable land (Shapiro 2001:95-137).

Despite great efforts, the supply of arable land continued to decline, especially after the reform of 1978 when industrialisation and urbanisation converted much arable land to construction use. The early 1990s were especially counterproductive, and Brown's wake-up call came just at the right moment to convince China's central leadership to strengthen its legal and institutional structures for better management of its land resources. This led in 1998 to a major amendment to the 1986 Land Management Act (LMA). This amendment represents the wide shift in Chinese lawmaking of the second half of the 1990s.

China's legal reconstruction had started after 1978 when Deng Xiaoping initiated his reform programme. China had to build a completely new legal system from scratch in a context of a rapidly changing society. During the first years after reform China adopted a 'piece-meal approach', keeping national legislation abstract in order to be able to adapt it to changing circumstances and to conform to its experience with and insight into the challenges of legal construction (Chen 1999). Since the 1990s, this type of abstract and vague legislation increasingly evoked criticism which called it weak and questioned its impact.<sup>2</sup> In response to this criticism and because China had become more stable and experienced in operating its legal system, China's legislators began to enact increasingly specific and stricter legislation.<sup>3</sup>

However, an important question remains: how specific and strict can national legislation in a country as large as China be before it loses its local legitimacy and becomes too difficult to implement? A related issue is whether specific and strict legislation is able to represent the interests of all relevant stakeholders. This chapter analyses the lawmaking process responsible for China's 1998 Land Management Act amendment. First, it presents a theoretical framework for the analysis of both the processes involved in lawmaking and its final results. Then, this chapter analyses how the various stakeholders attempted to protect their own interests during the amendment process and to what extent this bargaining process is reflected in the final legislation.

These analyses demonstrate that only those interests supporting arable land protection (or at least those not obstructing it) were able to substantially influence the content of the final draft. In most respects China's legislators chose to emphasise national concerns about arable land protection and food security and to ignore concerns about the law's local impact. With regard to lawmaking in China, this case illustrates an on-going shift towards stricter and more specific legislation. However, this present study argues that this shift is not as positive as it might seem at first blush in that although the new legislation is more certain and stricter, it is also more likely to be less effectively implemented because of its inflexibility and unfeasibility.

### **Lawmaking theory: Quality and process**

These present analyses of the debates leading up to the adoption of China's arable land amendment need a theoretical framework through which to evaluate the quality of the legislation in relation to the process of lawmaking. Thus, this section first introduces theories about the quality of legislation in terms of its capacity for implementation. These theories demonstrate that two sets of conflicting interests arise when

measuring the quality of legislation. The first set involves conflicts between legal certainty and the flexibility of law, and the second set involves conflicts between the adequacy and feasibility of the legislation.<sup>4</sup> This section also discusses various other theories concerning the process of lawmaking and examines the relationship between the type of participation and the level of rationality involved in that process on the one hand and the law's final capacity for implementation on the other.

Consider the first set of conflicts between legal certainty and flexibility. According to such scholars as Thornton, the Seidmans, Hayek, and others, legal rules should be as certain as possible<sup>5</sup>, and vagueness and ambiguity in legal drafts should be avoided.<sup>6</sup> Legally *certain* law is more predictable and allows people to know what is expected of them (Seidman et al. 2001:255). Legal certainty is also important because it decreases the exercise of discretion by the various actors involved in the implementation process (including norm applicants as well as norm addressees). This is important for guaranteeing that legislation achieves what it has been set out to do. Rules that are vague and ambiguous can be interpreted in a variety of manners, and the final outcome may not be what the legislator originally had envisioned (Seidman et al. 2001:255). Despite inherent limits to attaining legal certainty due to the unavoidable existence of uncertainty and unpredictability in society, legal certainty is an important goal in lawmaking processes.

At the same time, flexibility is also an important but, all too often, conflicting goal in lawmaking processes. Legislation should be sufficiently flexible to represent various interests in society and to be adaptable to the variety of circumstances which occur in social life. Some scholars have argued that highly specific, legally certain legislation is flawed in that it is unable to adapt itself to modern society's complex social relationships.<sup>7</sup> Thus, some scholars have argued for a reflexive (Teubner 1983) or legitimate law (Habermas 1975) – law which represents, as much as possible, the interests of the various stakeholders in society.<sup>8</sup> If law fails to do so, it will lose legitimacy and ultimately fail to be implemented properly.

Similarly, others have argued that legal rules should be sufficiently adaptable to deal with the complexities of reality in which no two cases are truly fully alike (Bardach and Kagan 1982:59). To serve in a flexible manner, legislation should be somewhat abstract, and open norms should be used<sup>9</sup>. Open norms can better represent the complex interests of society. Furthermore, they can be interpreted to fit a variety of cases. However, a major problem with flexibility is that abstract legislation offers far less control over the range of expected outcomes in that it allows for a high level of discretion on behalf of both the regulating and the regulated communities.

Thus, in terms of its capacity for implementation, truly good legislation requires both legal certainty and flexibility<sup>10</sup>: legal certainty is needed to control the outcomes of the implementation process, and flexibility is needed to apply the law to the complexities of social reality and to balance the various interests in society sufficiently to maintain the law's legitimacy.

As stated previously, the second contradiction that impacts upon the quality of legislation is that between the law's adequacy and its feasibility. Legislation should first be sufficiently strict so that, when fully implemented, it is able to achieve its goals (Jong 1997:76-79; Netherlands Ministry of Justice 1991:21). This means that the norms should be strict enough to make the regulated community behave in the manner that the legislator wishes. This includes both the substantive norms that define the required behaviour and the procedural enforcement norms that provide tools for punishing violators. If legislation is inadequate, its norms are too lax, and even if they are fully complied with, the law will be unable to attain the goals it set out to achieve. However, if the law is too strict, implementation itself may no longer be possible.

Thus, the law's feasibility is important. Unfeasible legislation is difficult or even impossible to implement in practice. A first type of unfeasible legislation occurs where a particular law's norms are so strict that compliance would lead to unreasonable effects for the regulated community, or even for the greater society (Hawkins 1984:32; Wasserman 1992:32). Such a law will be less effectively implemented, first, because the norm-addressees cannot or do not want to comply. Second, enforcement institutions and courts may not enforce the law because they recognise that compliance will lead to unreasonable situations. A second type of unfeasible law occurs where a law attempts to change or even prohibit behaviour that is widespread in society. In such cases, violations will also be widespread, and the costs of enforcement may make it unfeasible (Wasserman 1992:53).

If adequacy demands strict norms, feasibility requires less strict norms. Weak legislation will usually be feasible but may be inadequate. Thus, adequacy and feasibility are to some extent at odds with each other. Here again a balance needs to be found, in this instance not with regard to its language but to its content.

Having established in theory what constitutes *implementable* legislation, attention can be shifted to the practice of lawmaking, the determination of what type of law is actually made. Different types of lawmaking will lead to different levels of abstraction and of strictness in the law. Thus, it is important to look closer at the process of lawmaking itself.<sup>11</sup>

Consider, first, the level of participation in the process of lawmaking. This spectrum ranges from the ideal of full participation in pluralist

lawmaking,<sup>12</sup> to limited participation in corporatist lawmaking (Otto et al. 2004; Schmitter 1974:93-94), to the very limited participation in elite lawmaking<sup>13</sup>. The higher the level of participation, the more bargaining will take place. As a consequence of such bargaining, compromise legislation will result. Such compromise legislation will be less strict, more feasible, but less adequate legislation; often it will be more abstract, less certain, but more flexible law.<sup>14</sup> Thus, more participation leads to more flexible and feasible but less certain and adequate legislation.

Consider, now, the second aspect of the lawmaking process, the level of rationality in the decision-making process. This ranges from full rationality (Rheinstein 1954:xliv-xliii) to the bounded rationality (Simon 1957:79) of incrementalism (Lindblom 1959) and finally to the substitution of coincidence for rationality in the so-called Garbage Can model of decision-making (Kingdon 1984; Cohen et al. 1972). Here the links with the quality of legislation are less clear. Of these, the ideal of full rationality is best able to gather information capable of balancing all four requirements of implementable legislation and will, therefore, be most likely to strike the best balance between certainty, flexibility, adequacy and feasibility. Incremental lawmaking is very similar to pure bargaining and, therefore, leads to more flexible and feasible legislation that scores lower in terms of its certainty and adequacy. Under the Garbage Can decision-making process, lawmaking is based on coincidence: various streams of problems and solutions find one another accidentally (Kingdon 1984; Cohen et al. 1972). This coincidental aspect makes it impossible to predict what the content and the quality of the legislation will be. The analytical framework just set out will provide a context for the analyses in the following sections of this chapter.

### **Lawmaking in China: Top-down, from abstract and weak to specific and strict**

China's post-reform lawmaking has often been characterised as vague, contradictory and weak. This is, in part, due to a legislative strategy adopted to cope with the challenges which China faced after 1978, and also partly because of changes in China's political system. In order to understand the special nature of the various instances of lawmaking cited in this chapter, it is important to establish how lawmaking has functioned in China since reform. This section briefly discusses China's incremental, bargained and top-down system of lawmaking as well as several recent trends that indicate further changes.

In the post-Mao era, China has faced an enormous legislative challenge; that is, how to re-establish the world's largest legal system. When Deng's reform in 1978 first reinstated the legal system, there was not

much to work with. Decades of revolution and internal struggle had left China literally lawless. Instead of proper legislation, the country had internal CCP norms – policy instead of law. China was in a hurry, and the first legislation was largely made in a top-down manner through legal transplantation (Watson 1993; Cotterrell 2001) from abroad or by translating policy into legislation. While China set out to make new legislation, the country started to change rapidly under reform. China's leadership was aware of the great challenge it faced when making new legislation for a large rapidly changing single country with a great deal of regional differences. Furthermore, the leadership was aware of the lack of experience with law and lawmaking that the preceding revolutionary period had brought about.

To face these challenges China adopted the so called *piece-meal approach* to legislation (Chen 1999). Under this piece-meal approach, first, abstract general rules were made that could later be made more specific at lower levels, mainly through administrative legislation. Sometimes, legislation was at first adopted on a trial basis, and, only later by the end of the 1980s and in the 1990s, were such laws transformed into regular legislation. A second aspect of the piece-meal approach was that national legislation should not be made too strict in order to enable local adaptation through local legislation. This approach was adopted because, under China's unitary legal system, local law may only be as strict or stricter than national law. Thus, this incremental and piece-meal approach resulted in legislation which was highly abstract and not too strict – flexible and feasible, but uncertain and inadequate.

The corporatist process of lawmaking in post-Mao China further enhanced the law's vagueness and weakness. Whereas pre-reform CCP policy was largely an elitist affair, under Deng all politics became bargaining between national and provincial power holders and between the various national ministries (Shirk 1993). Because of the bargaining, national lawmaking has become corporatist as well as incremental. The various parties involved in the drafting process have enacted new legislation only after compromising on the main issues of contention. The result has been a compromise: more abstract or watered-down – in essence, weaker legislation.

A third characteristic of lawmaking in China has been that it is a top-down process. This has resulted because in post-Mao China lawmaking has not occurred through codification, and, in addition, the legal system has lacked a bottom-up rule formation system such as case law. Due to the absence of any impact from case law, legislation remains less certain in that the system leaves virtual full discretion to those applying the law. Given this lack of a case law system, China's legislators need to make clearer, more specific legislation.<sup>15</sup> But, as previously stated, making specific legislation has been difficult in China because of the coun-

try's size, rapid changes, inexperience with lawmaking and the compromise-based political system.

The fact that lawmaking is mainly exercised from the top-down adds a further problem. Without any form of bottom-up law formation it is nearly impossible to develop legislation that fits local circumstances simply because information about such circumstances too often fails to reach lawmakers.

While the piece-meal approach, bargaining and top-down process have been apt descriptions of lawmaking in reform China thus far, recently there have been trends that seem to indicate changes. First, the need for the piece-meal approach has decreased over the last decade. Since China adopted a market economy in 1992, reform has matured, ever reinventing itself. Consequently, society and law have been able to become more stable as reforms are gradually adapted to. Furthermore, China has gained sufficient experience with lawmaking and established a legal system more capable of developing more stable and less experimental legislation.

In addition, China has come under pressure to make more specific and stricter legislation in order to enhance legal certainty and the adequacy of some of its laws. Part of the pressure has come from within. Leaders have complained about weak legislation and vague rules. Part has come from the outside world. For example, China faces growing international obligations in the World Trade Organisation (WTO) and a greater degree of scrutiny from international scholars. An important part of this development has been China's adoption of the *Yifa Zhiguo* (Ruling the Country on the Basis of Law) principle that was enacted into the constitution in 1999 which demands more specific rules through which to bind the government.

As a result of such pressures China has made a Law on Lawmaking that is intended to lead to better lawmaking, and legislation has indeed become increasingly specific. Consider, for example, the 1996 and 1997 Criminal Procedure Law and Criminal Law amendments and the 1999 Contract Law. In some cases, even notoriously weak legislation has become stricter. The area of environmental law provides ample examples through such legislation as the 2000 Air Pollution Prevention and Control Law and the 2002 Environmental Impact Assessment Law.

The rest of this chapter examines the specific example of how these trends, combined with the national concern for food security, have led to overly certain and demanding legislation that fails to provide sufficient flexibility and feasibility.



## Debates on the 1998 Land Management Act amendment

The legislative history of the LMA amendment shows that the drafting process reflected more the macro level concerns about arable land loss than the local concerns about the feasibility of the new law and local economic development. This becomes clear from the legislative debates addressed in this section. This section will cover debates about the following aspects of the new law. The first debate is about what the law was supposed to accomplish.

### *Goal orientation*

Central leadership's concern over the loss of arable land is clearly represented in the debates on the amendment's goal orientation. The central leadership's influence explains why only a few voices expressed dissenting concerns about local economic development.

The protection of arable land was a central goal of the original 1986 law and remained so in the 1998 amendment. Article 1 reads:

In order to strengthen land management, uphold the socialist system of land ownership, protect and develop land resources, rationally use land, in earnest protect arable land, and promote sustainable development of society and the economy, this law is adopted on the basis of the constitution.

In its legislative interpretation of this article, the National People's Congress Standing Committee Legal Affairs Committee (LAC) points to the importance of arable land protection (NPC-SC Legal Affairs Committee 1998:32). LAC quotes data on arable land loss during the 1958-1986 period – an annual average of 21 million mu<sup>16</sup> was lost between 1986-1995, and on average 10 million mu of arable land was still being lost (NPC-SC Legal Affairs Committee 1998:33). The interpretation further draws attention to the new amended law's importance as a potential tool for countering local bad practices which had caused considerable loss of arable land despite the fact that a national Land Management Act and legal institutions for implementation of the arable protection legislation had been in place for more than ten years (NPC-SC Legal Affairs Committee 1998:33-34). To deal with this problem, the (CCP) Central Committee and State Council in 1997 issued a notice demanding the strengthening of macro level management of land resources (NPC-SC Legal Affairs Committee 1998:34). Thus there was a strong push to enhance and strengthen the existing legislation geared to protect arable land.

Because of this strong central CCP support, all comments on the first draft amendment share an urgent concern for arable land protection and focus on this macro-level concern – there are no dissenting voices questioning the impact on local economic and social development (NPC-SC Legal Affairs Committee 1998:34). Consequently, each comment expresses a similar demand for an effective and specific law that will have a significant impact. Central level ministries emphasise, for instance the importance of arable land protection and state that ‘some articles in the draft are too general and lack specification which makes it difficult to realise the goal of protecting arable land’ (NPC-SC Legal Affairs Committee Economic Law Section 1998d:334).<sup>17</sup> Given this almost uniform approach to the formation of the goals of the amendment, the lawmaking process can be characterised as elitist (Parsons 1995 [reprinted in 1997]:248-249;Allott 1980;Otto et al. 2004) rather than corporatist (Schmitter 1974:93-94;Otto et al. 2004) as it might have been in the past. The involved stakeholders believed that more specific law would be more effective, reaffirming that China’s lawmaking has shifted towards emphasising adequacy and legal certainty, abandoning the piece-meal approach that favours flexibility and feasibility.

This draft comes at precisely the appropriate time, just a couple of years after Brown’s alarming report and right after central level leaders called for action. Thus, the process seems to be more the result of opportunity, the Garbage Can approach, rather than the outcome of rational planning. Having established what the new law set out to do, the next question was how the new LMA would protect arable land. The following sections illustrate that the new law makes use of several systems.

#### *Land use classification system*

The facts that the goal of arable land protection was paramount and that a belief that more specific laws would work more effectively in practice support the view that certainty and adequacy were of primary concern for the lawmakers involved in the amendment process. The Land Use Classification System is the first of the LMA’s systems to be discussed. It defines various types of land use: agricultural use, construction use and unused land.<sup>18</sup> This classification system also forms the basis of other systems intended for arable land protection that limit conversion of arable to non-arable use. The underlying idea is that land is assigned a specific use classification based upon planning made at the district and township level and upon more general planning made at higher levels of administration.

However, the original State Council draft contained no provisions as to how this classification was to be made.<sup>19</sup> This evoked criticism from

many of the actors who reviewed the draft. Five central level departments, the Forestry Department, the Public Rail Department, the Department of Transportation, the Ministry of Construction, and the State Council Office of Institutional Reform, asked such questions as:

But, what is 'land used for agriculture', 'land used for construction', and 'unused land'? And how can land use change? The draft contains no specific regulation on this point. We suggest, therefore, to make specific regulations on the land use management system (NPC-SC Legal Affairs Committee Economic Law Section 1998d:335).<sup>20</sup>

In its first review report, the NPC (National People's Congress) Legal Commission recognised and took note of this problem noted in various opinions on the draft law (NPC Law Commission 1998:312-313). The committee found that the existing legislation needed to be made more specific. The committee amended the draft and added several sentences further tightening the prohibition of converting agricultural land into construction land, and added definitions for agricultural, construction and unused land (NPC Law Commission 1998:312-313), each of which made their way into the final law.<sup>21</sup>

Thus, the law became more specific and less prone to varied and changing circumstances. Interestingly this happened at the request of most of the actors from the various localities and departments. Apparently, the protection of arable land was so strongly supported by the central level leadership that most participating actors in the lawmaking process primarily looked at whether the law might be effective (on paper) – not whether it suited local circumstances in practice.

#### *Land use planning system*

The powerful NPC Law Commission rejected those concerns which were voiced by local stakeholders about the local feasibility of the land use planning system. They chose strict legislation protecting arable land over appeasing local interests. Thus, adequacy prevailed over feasibility.

The new law establishes a top-down structure of land use planning that protects agricultural land<sup>22</sup> through provincial level general land use plans that guarantee the quantity of existing arable land.<sup>23</sup> Lower level plans must be in accordance with high level plans;<sup>24</sup> thus, construction land use cannot exceed (and arable land is not allowed to be less) than that of higher level planning.<sup>25</sup> Provisions to this effect were already part of the original draft amendment (State Council 1998:s.20, 21). In order to further specify the implementation of the land use classification system based on input about the draft, the NPC Law Comis-

sion amended section 22 of the draft on land planning and specified that the land plan at the township level should classify all plots of township land as agricultural, for construction or presently unused land.<sup>26</sup>

During the drafting process there was concern that some provinces and large cities undergoing rapid development and urban construction would not be able to guarantee the maintenance of a given total amount of farmland (NPC-SC Legal Affairs Committee 1998:88; NPC-SC Legal Affairs Committee Economic Law Section 1998a:374-375). It was, therefore, proposed that provinces having difficulty meeting this target could develop arable land elsewhere as a means of compensation (NPC-SC Legal Affairs Committee Economic Law Section 1998a:375). But the NPC Law Commission rejected this idea. It stated that preliminary research had shown that the target was realistic and, furthermore, that it is too difficult to police a system of cross-territorial arable land compensation (NPC Law Commission 1998:317).

In all, the NPC Law Commission exercised its considerable power (probably backed by the CCP central leadership) in order to safeguard the law's effectiveness in protecting its macro level interests of arable land protection over such local interests as urban development. Here again, no real bargaining took place, and thus elitism beat out corporatism. Furthermore, local interests were not taken into account, and again adequacy and legal certainty beat out flexibility and feasibility.

#### *Arable land conversion balancing system*

The new amended Land Management Act introduced a balancing system to safeguard arable land quantity. Under this principle of balancing, the amount of arable land converted into construction land is measured against the conversion of unused land into new agricultural land to ensure the protection of the total amount of agricultural land.<sup>27</sup> Under this system, when arable land is converted into construction land, the company responsible for the conversion must develop a plot of unused land into arable land.<sup>28</sup> Provincial governments are intended to perform a central role in this balancing system in that they must safeguard its operation at the provincial level.<sup>29</sup> To a large extent the land balancing system was part of the State Council draft (State Council 1998:299-300). However, the draft article evoked the same sort of criticism as did the provision on the provincial guarantee on arable land quantity (NPC Law Commission 1998:317; NPC-SC Legal Affairs Committee Economic Law Section 1998a: 375). The NPC Law Commission stated:

Some localities, experts and masses think that land resources reserves are limited and that these provisions are difficult to carry out, and that more arable land is converted for construction than

unused land developed for agriculture. But there are also localities and masses who hold that if we do our best, these provisions can be realised. There are some localities who think with regard the 'Compensating the Same Amount as Was Converted' that if a province has difficulty developing new arable land because of its own particular circumstances the State Council should allow it to develop land elsewhere.

The NPC Law Commission weighed these various opinions regarding the law's potential for effective implementation, including the possibility of local exceptions, but concluded that the law was executable as proposed and that there was sufficient unused land available for development. Thus the Committee decided against further amendments in the law (NPC Law Commission 1998:317). Once again, local concerns were pushed aside by the central authorities, and a strict norm protecting macro level interests, with no exceptions, became the national law.

#### *Basic arable land protection system*

Regarding the Basic Arable Land Protection System, which establishes strict approval procedures for the conversion of basic farmland into construction land, the Law Commission flexed its muscles yet again and adopted this protection system in the face of significant dissenting opinions held by local stakeholders who questioned the feasibility of the proposed provisions. Since 1988, China has experimented in setting up a system of basic farmland protection (NPC-SC Legal Affairs Committee 1998:115). This system was enacted into law in 1992 and 1993<sup>30</sup> and was later also incorporated into the 1998 LMA which established that in order to convert basic farmland into construction land State Council approval is necessary.<sup>31</sup> The law provides that certain kinds of land are basic farmland – That is: land approved for the following uses: designated for producing wheat, cotton or oil; land designated as favourable as paddies or for producing vegetables; or land set aside for experimental, scientific or other approved purposes. In each province basic farmland must make up 80 per cent of all arable land.<sup>32</sup>

However, the original draft did not provide such details as to how Basic Farmland was to be designated. During the deliberations on the draft amendment, some commentators felt that this point should be clarified in order to enhance the law's effectiveness in protecting arable land. The NPC Legal Committee supported this idea and added still further detail on this point which made its way into the final law.<sup>33</sup>

Yet another point of debate in the drafting process was the amount of arable land that each province must have. Hunan and Hainan, for example, pressed for higher levels of set-aside while Guangdong, Yunnan

and Henan argued for lowering the amount to 70 per cent (NPC-SC Legal Affairs Committee Economic Law Section 1998a:375-376). Qinghai, Shanxi and Shaanxi argued for differentiation according to local circumstances, and Guangxi wanted a stricter mandatory norm and proposed the removal of the phrase 'in general' (NPC-SC Legal Affairs Committee Economic Law Section 1998a:376) which was still part of the wording of the draft text that read that provinces must *in general* have 80 per cent basic farmland (State Council 1998:300). Of these proposals, only the idea proposed by Guanxi for stricter mandatory norms made it into the final law (Wang 1998 332).

Just as in the prior debates, China's legislator chose a specific rule to protect arable land over ideas for norms that could be adapted to different local circumstances. While parties were allowed to raise their concerns, there was no real bargaining – the goal orientation was paramount. This reaffirms that the LMA lawmaking can be aptly characterised as elitist and based on the Effective Law paradigm. In terms of quality, this system (as have the systems previously discussed) illustrates a lack in local feasibility and calls into question whether the provisions can be effectively implemented in practice.

#### *Arable land conversion approval system*

The new law provides for a procedure for using arable land for construction. This procedure consists of four steps: first, the approval for conversion of land use from arable to construction<sup>34</sup>; second, in cases of collective land use, a procedure for requisitioning collective land and conversion into state ownership<sup>35</sup> (only under which construction is, in general, permitted); third, (linked to the requisitioning) a system of compensation for the loss of the land use rights for requisitioned land; and, fourth, the payment for the use of state land.

Land use conversion approval works as follows: in cases where the land to be used to build upon is originally farmland (regardless of whether it is building on state owned land or collectively owned), first, a procedure of approval for converting the land use must be completed.<sup>36</sup> Larger conversions must be approved by the provincial level authorities (or in some cases, even by the State Council) based on current land use plans.<sup>37</sup> Batches of several projects are decided upon at the level at which the relevant land planning relevant was made – that is, if such projects fall within the scope of such planning.<sup>38</sup> Authorities at city and district level decide upon specific projects which fall within the scope of their relevant land use plans.<sup>39</sup> Projects that fall outside of their land planning are to be approved by the provincial authorities.<sup>40</sup> The approval procedure has recentralised some of the decision-making on land use conversion to the provincial and, under some circum-

stances, even to the national level (NPC-SC Legal Affairs Committee 1998:135).

The original draft amendment had been even more centralised in that it prescribed that all land use conversion must be approved at the level of the provincial government or even higher (State Council 1998:302s.39). Some commentators (including certain NPC Law Commission members, central level ministries and local governments) felt that the draft article was unrealistic and could not be put into practice, and in this instance the Law Commission heeded their concerns and created a somewhat watered down version which allows for approvals at lower governmental levels in cases where the projects fall within the scope of their relevant land use plans (NPC Law Commission 1998:313-314). Here, for the first time, the comments on the draft actually work in favour of local concerns.

#### *Collective land requisitioning procedure*

Central level concerns about arable land protection also precluded real bargaining about land requisitioning procedures. Thus, the Legal Committee enacted disproportionately strict provisions which favoured adequacy at the expense of feasibility. The LMA dictates that construction on collectively owned arable land is not allowed except for rural housing, township and village enterprise (TVE) premises and village public works such as schools.<sup>41</sup> Thus, after the land use conversion has been approved, but before such land can be used for construction, it must first be requisitioned by the state and become state owned land.<sup>42</sup> The idea behind this ban on using collective land for construction projects is to provide a further check on putting arable land to use for other purposes and, further, to ensure that rural collective land is primarily used for collective rather than for non-collective commercial usage (NPC-SC Legal Affairs Committee 1998:132).

The conversion procedure specifies that approval for basic farmland requisitioning and for large land requisitioning should be given by the State Council. Other requisition must be approved by the provincial level government.<sup>43</sup> In this regard, the approval procedural is very centralised in that it is the provincial level government or the State Council that must approve each requisitioning request. Lower level governments no longer have the right to approve land requisitioning (NPC-SC Legal Affairs Committee 1998:140).

In fact, at present, all basic farmland requisitioning needs to have national level approval for parcels up to 500 mu of basic farmland, as opposed to simply provincial level approval which had been deemed sufficient under the old law (NPC-SC Legal Affairs Committee 1998:140). Commentators on the draft (including that from the local governments

of Hunan, Liaoning, Beijing, Jilin, Guangxi, Shanghai and Henan) felt that the requisitioning approval procedure in the draft amendment was too centralised and would take away power from local, city and district levels of government and, thus, would be detrimental to the effective implementation of local land use planning (NPC-SC Legal Affairs Committee Economic Law Section 1998a:377). They felt that the top-down system of land use planning was already sufficient to ensure land protection and that the more centralised approval procedure was unnecessary (NPC-SC Legal Affairs Committee Economic Law Section 1998a:377).

Despite the fact that several provincial level governments offered compromise solutions which would have limited the approval of proposed requisitions by the State Council only to larger projects involving basic farmland, the NPC Law Commission did not take any of these concerns nor suggestions into consideration and maintained the original draft. This draft authorised centralised requisitioning approval at the provincial and national levels (NPC Law Commission 1998:314). As a result, even if only 1 mu of basic collective owned farmland is to be built upon, State Council approval is needed. This applies, in fact, to 80 per cent of all farmland.

#### *Compensation for requisitioning collective land*

Regarding cases where arable land protection is not at stake, the Law Commission allowed for more ambiguous, flexible and feasible legislation in recognition of China's regional differences. The LMA maintains a system under which collectives and individual farmers whose land and land use rights have been expropriated for construction must get compensation.<sup>44</sup> The LMA provides for a standard compensation rate ranging from 6 to 10 times the annual average output value of the three preceding years and a resettlement fee ranging from 4 to 6 times the average annual output.<sup>45</sup> The specifics are determined at the provincial level.<sup>46</sup> Both Village Committees and farmers are to be consulted with regard to requisition compensation.<sup>47</sup> Compensation payment must be made public, and the new act explicitly forbids embezzlement and diversion of compensation funds.<sup>48</sup> During the lawmaking process, commentators (including local governments) complained that the proposed compensation rates were too low, that the procedure lacked transparency, that hearings for farmers should be instituted and that payment of compensation should be performed publicly. In addition, some thought that compensation in the form of money is not sufficient and that farmers ought to be helped in finding new employment (NPC Law Commission 1998:316).



The NPC Law Commission reacted by stating that establishing an appropriate compensation level is indeed a difficult issue and that circumstances vary from place to place. Therefore, the committee held that it would be impossible to devise a draft which would adequately cover all the points raised.<sup>49</sup> However, the Law Commission did suggest amending the draft to allow for more transparency by instituting hearings, making payment of fees public, and establishing a rule that local governments should do their best to help farmers start new enterprises. These suggestions made it into the final law.<sup>50</sup> Here, China's national legislature recognised the challenges presented by regional differences and refrained from enacting more specific legislation with regard to the actual amount of compensation. However, as previously discussed, in cases where arable land protection was at stake, similar considerations were not given such recognition.

#### *Approval and payment for using state owned land for construction*

The centre powers made some concessions in favour of local governments with regard to financial arrangements for payment involving the use of state owned land in cases which did not affect arable land protection, but rather only involved land for construction. The last step in the construction approval procedure is the approval and payment for using state owned land for construction. Those carrying out construction projects must ask approval at the county level or higher land department.<sup>51</sup> Once approval for use has been granted and construction starts, a land use fee is to be paid to the state.<sup>52</sup> The LMA requires that 30 per cent of this fee go to the central level government to be used for protecting arable land and that 70 per cent remain with the local government, also to be used for land cultivation.<sup>53</sup> The original draft amendment, which evoked criticism from local governments who felt they should receive more, had set different quotas: 40 per cent to the centre and 60 per cent to the local government (State Council 1998:s.50.2). Some governments (including Shaanxi, Xinjiang, Shanghai and Henan) proposed a 20/80 ratio. Xinjiang further proposed exceptions for minorities in border regions and other poor areas where the money would remain entirely with local governments. Others argued for a flexible rule to be set at the provincial level.

None of these suggestions made it into law; however, they did influence the NPC Law Commission decision to change the ratio from 40/60 to 30/70. Here, the Legal Committee made a concession to local interests but, once again, not over a major issue involving arable land protection. The limited financial benefit which this concession brought to local governments was not sufficient to make them less critical of the

fact that most of their other concerns were not seriously addressed in the final version of the law.

*Construction on collectively owned arable land by the collective*

The LMA provides special rules on farmers, TVEs and Village Collectives building housing, factory premises and public interest buildings, such as schools, on collectively owned land. For this kind of construction, land requisition is not required,<sup>54</sup> and only a land use conversion approval from the district level land authorities is necessary.<sup>55</sup> There are two important specific norms regarding construction on collectively owned land.

The first stipulates that rural households can use only one plot of land on which to build a house and that its construction must conform to provincial level standards.<sup>56</sup> Furthermore, households are not allowed to build a second house in the event that they sell or rent their original house.<sup>57</sup> Thus, the LMA imposes a highly specific norm on rural housing and disregards local circumstances. These proposals provoked some comments during the drafting process. Four provinces, Zhejiang, Jiangxi, Xinjiang and Henan, asked for a clearer definition of 'household' (NPC-SC Legal Affairs Committee Economic Law Section 1998a:379; NPC-SC Legal Affairs Committee Economic Law Section 1998c:368). Henan province called for decentralisation of rulemaking on rural housing (NPC-SC Legal Affairs Committee Economic Law Section 1998a:379). Hunan province called for decentralising the approval procedure for rural housing from the district to the township level (NPC-SC Legal Affairs Committee Economic Law Section 1998a:379). Heilongjiang province stated that, given that houses in their barren climate were somewhat larger and often surpassed standard size, an exception should be made (NPC-SC Legal Affairs Committee Economic Law Section 1998b:360). None of these local concerns or suggestions affected the final version of the amendment.

The second important norm concerning construction on collectively owned land is that such land may not be leased or rented out for non-agricultural construction purposes.<sup>58</sup> Local governments voiced concern about this rule because, prior to the amendment, construction on collective land through lease or rent had been widespread and in accordance with the market economy (NPC Law Commission 1998:318). The NPC Law Commission was not impressed. It stated that the proposed draft banning lease and renting out arable land for construction purposes was in line with the 1997 CCP policy on arable land protection (NPC Law Commission 1998:318). Thus, once again the proposed norm was sustained in order to protect macro level interests despite apparent difficulties involving local adaptation.

### *LMA Debates: Some general findings*

In the end, the law has favoured adequacy and certainty over feasibility and flexibility. Although stakeholders were able to participate in the drafting process to some extent, no real bargaining took place. All those opinions voiced against overly strict norms protecting arable land were either ignored or simply not accepted. Throughout the process, the NPC Law Commission played a dominant role in that it had the power to choose whose interests made it finally into law and, in fact, ignored local concerns in its exercise of this power. To this extent, this process of lawmaking was elitist rather than corporatist. The main reason behind why the amendment so strongly favoured arable land protection was the central backing of this aim. Thus, to this extent, this process resembles the Garbage Can model in that the opportunity to develop strict legislation was related to the coincidence that there was a major national policy at stake. All told, the 1998 LMA scores better in terms of legal certainty and adequacy, but worse in terms of flexibility and feasibility.

### **Local legislation at the provincial and village level in Yunnan: Selective copying**

When national land legislation is ill adapted to local concerns, should not local regulation provide a remedy? In theory it might if the national legislation is sufficiently abstract to allow for further adaptation to local circumstances through more specific local legislation.<sup>59</sup> However, given that the 1998 LMA is very specific and strict (for example, forbidding farmers to build houses on more than one plot of land<sup>60</sup>), what is left for local legislation to do? What role does it have if not to provide locally legitimate law? The following sections briefly examine two examples of local regulation drawn from Yunnan province and villages at Lake Dianchi near Kunming City. The first example involves the Yunnan Provincial Regulations on Land Management. The second involves village regulations from the three villages in which the author and his colleagues conducted fieldwork. These examinations will show that local legislation is largely copied from higher level laws and, thus, serves as part of a system to promote higher level law and make its implementation more effective rather than to adapt it to the local contexts.

#### *Yunnan provincial level land regulation*

The Yunnan Land Management Regulations were adopted on 24 September, 1999. They replaced the Yunnan Land Management Implementation Measures of 1994 and incorporated the 1998 Land Management

Act regulations. Part of the law consists of specifications and clarifications of LMA norms. The Regulations thus specify the criteria for land use conversion, land requisitioning and land compensation procedures.<sup>61</sup> The Yunnan Regulations regarding these procedures are almost entirely in line with national legislation.

On only one point do the provincial regulations actually help adapt national regulation to local circumstances. This point involves the rule that at the provincial level the total amount of arable land must remain unchanged. Yunnan has opted not to apply this rule in a strict manner at lower levels. At prefectural and municipal levels below the provincial level the general rule is that local governments must ensure a balance of arable land, however, in cases where they simply are unable to develop enough new arable land in compensation for land lost to construction, they are allowed to develop such land outside of their own jurisdiction. Thus, Yunnan carries out what local governments previously suggested for the national LMA and thereby enhance the flexibility of the arable land compensation system.<sup>62</sup>

However, regarding other rules, Yunnan strictly adheres to the letter of the national law. Article 16 for example specifies that all subordinate levels (the prefectural, municipal and district levels) must ensure that 80 per cent of all arable land is basic farmland. Here, the provincial legislature has not exploited the potential leeway offered by the national legislation which only demands 80 per cent at the provincial level as opposed to each of the smaller *district* levels. For large cities, such as Kunming, this rule is difficult to implement.<sup>63</sup> The biggest problem with the Yunnan provincial regulations is that they do little more than clarify some points and primarily copy rules from the LMA. Examples are found in articles 2, 3, 7, 8, 9, 13, 14, 16, 19, 20, and 33, all of which, more or less, are simply copied from the LMA. Not surprisingly, the LMA, while vague on points not related to arable land protection, is relatively specific on those related to arable land protection.

The lawmaking process for the LMA failed to adequately balance the interests of the parties most concerned. Such a national law leaves local legislation little room for action, save for clarification and copying. Thus, only in form do such laws appear to truly be *local* law. What, then, is the role of such provincial law?

First, provincial law provides working procedures for the implementation of matters not yet regulated by the national law nor by State Council Regulations. Secondly, and perhaps more importantly, such law serves to bring the LMA to the local level. The process of copying the new national law brings it to bear on the local level – to a local audience.

*Licun, Baocun and Jiacun village regulation and statutes*

A second type of local legislation that brings national legislation to the grassroots level is village legislation. Although village level legislation is also largely copied from superior legal norms, in contrast to provincial level legislation, some of the village level rules, studied here, have made a very selective copy of national level land norms, discarding norms deemed unfavourable locally.

Village legislation does not have a formal role in China's legal system, but is, nonetheless, influential in that it is the law of the village: it is the only law which most villagers *own* and the law which they know best. All three villages, where the author and his associates conducted fieldwork, have issued their own village regulations (*cunguimin'yue*) and village statutes (*Cunmin Zizhi Zhangcheng*) made by the local directly elected body of self-government, the Village Council (VC). It is noteworthy that such village regulations are not as local as one would expect. Two of the villages located in one township (Licun and Baocun) are illustrative as they have regulations and statutes that are nearly exactly the same despite the fact that they are two completely different villages with their own characteristics (one a Muslim, Hui minority, agrarian village and the other a Han Chinese, part industrial/part rural village). Here the superior township government has issued model village regulations. By dictating the village rules, the township government has seen that there is truly nothing *local* about the regulations applicable to these villages.

All three sets (Licun, Baocun and Jiacun) of village regulations and statutes contain provisions on land. The land provisions are largely copied from higher level legislation. As they are copies the regulations provide little further specification and local adaptation of the superior level norms. Village statutes have made selective copies though leaving out those norms unfavourable to local circumstances.

Consider the following: the law states in article 22 of the Baocun statutes and in art 16 of the Licun statute that the village 'will strictly enforce land law, and based on village and town construction planning, will strictly deal with disorderly land occupation and building and housing construction without following the proper procedures.'<sup>64</sup> Yet, the statutes provide little or no detail about how such housing procedures work at the grassroots level, nor is it specified in higher level regulations. In Licun and Baocun, the statutes merely provide for an approval procedure for rural housing construction carried out in the natural village (*xiaozu*),<sup>65</sup> while with regard to Jiacun there is only slightly more detail regarding a three tier approval procedure including the natural village, VC and township governments.<sup>66</sup> But, the village regulation provides nothing on two of the most important rules concerning build-

ing on collective land: the ban on more than one house per household and the ban on leasing out arable land for construction purposes. Why have these points not been addressed?

In this manner the village (and perhaps also the township government – which is clearly the author of some of this legislation) has purposely not copied such rules into local statutes because the violation of the rules regarding one house per household and the ban on leasing is *common practice* in all three villages.<sup>67</sup> The importance of the village regulations and statutes must be acknowledged for one to understand the situation. All households have a copy of these local rules (which cannot be said for the national land management act or for the Yunnan Land Management Regulations). This copy serves as *the* law in the village, and if the VC breaks a rule contained in this little booklet, the next day villagers will come to complain. Thus the VC (and perhaps the township) has been careful about what is and is not included in the booklet.

In Liujia, for example, there is some detail about rebuilding houses: that such houses should not be bigger than the old one and should not have balconies nor illegally occupy land.<sup>68</sup> Furthermore, Liujia prescribes that housing in old housing districts should be built according to historical standards and that housing in new areas should follow the appropriate village planning regulations.<sup>69</sup> Although the booklet has such detailed rules, it is silent about the rules concerning the building of two houses or about renting land for non-arable purposes, which is clearly forbidden in the national LMA.

A second example is that in Liren and Zhongbao the statute merely stipulates in general terms (and at the end of the section on land) that villagers should use land economically in accordance with the LMA, and that the VC has the right to punish violators according to law – but without specifying the national norms for such *economical use*. Again important national norms banning building of second houses or leasing out collective farmland for non-collective construction are not included. Such selective reference to higher level legislation is, in fact, a method of adapting national law to the local level, without officially specifically enacting illegal legislation. Given villagers have local legislation to read, why would they look to higher level rules, especially if the higher level rules might prohibit them from building houses?

Thus, although village level law might be employed as a tool to distribute higher level norms to the grassroots level, if villages make statutes that do not include the relevant major norms, those norms never reach the village level, and therefore do not take effect.

## Conclusion

The enactment of the 1998 LMA amendment exemplifies how the concern for arable land scarcity, a national, macro level concern, influences the lawmaking process by placing national over local interests. While most local actors involved in the drafting process recognise the national problem of arable land protection, they have in several instances voiced concern over how overly centralised and strict rules fit their actual local circumstances. In most cases the NPC Law Commission that, as we have seen, plays the most important role in this drafting process, has ignored such local criticism and has, in fact, fashioned a law that is in some respects even more centralised, more specific and stricter than the proposed draft amendment. One can conclude that this law was made through power that flows from the centre fuelled by a fear of famine, a fear of losing autonomy through a growing dependence upon food imports, and a belief in the causal relationship between food production and arable land loss. In addition, it is a law based on the conviction that more specific and stricter law is also more effective law.

The problem with such specific and strict national legislation in a country as large and varied as China is that it cannot fit all the various local circumstances. In other words, while China's new land law provides a greater degree of legal certainty and adequacy, it lacks the degree of flexibility and feasibility necessary for its effective implementation. For a national law regulating land use this is especially problematic given that China's agricultural methods vary so widely. Furthermore, local legislation has not been able to adapt such specific national law to local circumstances.

The problem is that any legislation which fails to take proper cognisance of local circumstances is always more difficult to implement. The author's research on the local implementation of the 1998 LMA in Kunming, Yunnan, clearly demonstrates this point. The LMA specifically and clearly forbids households from building more than one house as well as forbidding collectives from renting out collective land for non-collective construction. Yet research demonstrates that in the rural areas near Kunming, where there is sufficient infrastructure and rapid urbanisation and industrialisation, the value of using land for agriculture is far less than for construction. Consequently, most of the arable land in these areas has been converted to construction land despite the strict letter of the law which simply did not halt local development. Such violations of the new law are, in fact, widespread. Local enforcement is difficult because it directly opposes local development and because few local leaders support rigid punishment of those who violate arable land protection laws.

Despite China's lawmakers adherence to its beliefs that specific legislation is good legislation and that it will be effective in achieving the law's goal of protecting arable land, practice in Kunming demonstrates that legislation that lacks local legitimacy is doomed to fail. The larger the scope of application as well as the stricter the law, the lower the chances for local legitimacy will be. At the same time, it is essential to note that if any one piece of comprehensive legislation were to attempt to fit all the various local circumstances in a country as large as China, it would be so abstract as to lose its meaning, and the goal of arable land protection would also likely be unachievable. The challenge thus lies in setting the appropriate level of abstraction and strictness, one which balances the national concerns for land protection with local concerns for development. In the case of China, such a balance would require a continuation of incremental 'piece-meal' approach of the past and an abandoning the unrealistic expectations in favour of a more pragmatic and realistic approach. Only such an approach can prevent a further hollowing out of the legal system – overly idealistic, strict and specific rules fail to lead to effective implementation.

## Notes

- 1 This paragraph is based on Brown's book on the topic, see Brown 1995. Smil made a similar but more nuanced warning, see Smil 1993: 53-57, 140-149. For criticism on Brown's use of Chinese data and his analysis in general see Smil 2004.
- 2 For an overview of legislative reform and its critique, see Peerenboom 2002: 239-279. For examples of Chinese policymakers demanding stricter environmental legislation see Xie 2004a: 13, Xie 2004b: 8. For criticism on the quality of China's legislation, see Corne 1997.
- 3 Examples are: the 1996 Criminal Procedure Law and the 1997 Criminal Code Amendment, the 1999 Contract Law, the 2000 Air Pollution Prevention and Control Law Amendment, and the 2002 Environmental Impact Assessment Law.
- 4 Few studies have linked the quality of legislation to its capacity for implementation. The present author makes an attempt, based primarily upon the studies of the enforceability of law derived from a framework devised by Jong. See Jong 1997. For an overview of his framework and its relation to the quality of legislation in terms of implementability see Van Rooij 2006: chapter 2.
- 5 See Thornton 1987: 56; Seidman et al. 2001: 255; Fuller 1976: 38-39, 63, 65, 79; Hayek 1955: 34 (quoted by Tamanaha 2004: 66), for studies specifically about environmental legislation see: Hawkins 1984: 32 and Wasserman 1992: 52.
- 6 For an explanation of the two terms see Seidman et al. 2001: 262, 263.
- 7 This point is made most clearly by Luhmann and Habermas. For an overview of their arguments see Teubner 1983: 244-246 and 268. Weber himself already noted this development, see Rheinstein 1954: 303-314, but remained critical of them see: Rheinstein 1954: 314-318. On this point, see also Kennedy 2004. The origins of this line of thought can be traced to early sociologists of law including Ehrlich and Pound, see Ehrlich 1936 (ed. 1975) and Pound 1917. In China this point has been advocated strongest by Zhu Suli. See Su 1996a, Su 1996b.



- 8 For an overview of the literature see Teubner 1983 Teubner quotes the following authors: Nonet and Selznick 1978; Luhmann 1972; Luhmann 1973; Luhmann 1974; Habermas 1975; Habermas 1981.
- 9 Luhmann makes this point, see Teubner 1983: 244. See also Hart 1961: 125-127.
- 10 Here we have been influenced by Jong's concept of enforceability which also makes certainty and adaptability central. See Jong 1997. For more about the concept of enforceability see Van Rooij 2002.
- 11 Although there have been some studies on lawmaking, for most information one must borrow from public administration. This field has made an in-depth analysis of how governments make policy that is to a large extent applicable to lawmaking. From here onwards the author will use policymaking theory to describe lawmaking without referring to policy every time.
- 12 This idea is best represented in Dahl 1961 (reissued in 1963), quoted through Parsons 1995 (reprinted in 1997): 134.
- 13 Parsons 1995 (reprinted in 1997) 248-9; Allott 1980.
- 14 Compromise legislation is not necessarily more abstract. But very often it will be because abstract language is a good tool to combine diverse points of view.
- 15 This point we have analysed in more detail elsewhere, see Van Rooij 2004 and Van Rooij 2006. China has a system of legislative or judicial interpretation of law.
- 16 1 mu is approximately 667 square meters.
- 17 Another example is that several provinces expressed similar sentiments. See NPC-SC Legal Affairs Committee Economic Law Section 1998a:373.
- 18 Land Management Act 1998 s. 4.2.
- 19 State Council 1998 294 s. 4, 3.
- 20 For another example see NPC-SC Legal Affairs Committee Economic Law Section 1998a:374, where the Jiangxi, Sichuan, Chongqing, Xinjiang, Guangdong, Hainan, Hubei, Guangxi, Shanghai and Henan all ask for more detailed regulation.
- 21 Land Management Act 1998 s. 4.2-3.
- 22 Land Management Act 1998 s. 19.1.
- 23 Land Management Act 1998 s.18.3.
- 24 Land Management Act 1998 s.18.2.
- 25 Land Management Act 1998 s.18.2.
- 26 Land Management Act 1998 s.22, 2.
- 27 Land Management Act 1998 s.31.
- 28 Land Management Act 1998 s.31 The basic norm addressee for the conversion compensation system is the land developer. Those who wish to use arable land for non-arable use are the ones who must get approval and make land reclamation compensation. In the legislative commentary on the LMA this is further explained. See NPC-SC Legal Affairs Committee 1998:109-114. Only in case the developer himself cannot compensate with land he will pay a fee to the local government who will in turn do it for him.
- 29 Land Management Act 1998 s.33.
- 30 The system was regulated in the 1993 Agriculture Law and the 1994 State Council Basic Farmland Protection Regulations. See NPC-SC Legal Affairs Committee 1998:115
- 31 Land Management Act s. 45.
- 32 Land Management Act s. 34.
- 33 Land Management Act s. 32.2 which states that the District level land authorities together with the Agricultural Office carry out this task for Township level land.
- 34 Land Management Act s. 44.
- 35 Land Management Act s. 43.
- 36 Land Management Act s. 44 and NPC-SC Legal Affairs Committee 1998:133-135.

- 37 Land Management Act s. 44.2.
- 38 Land Management Act s. 44.2.
- 39 Land Management Act s. 44.2.
- 40 Land Management Act s. 44.3.
- 41 Land Management Act s. 43.1.
- 42 Land Management Act s. 43.2 and 45-46.
- 43 Land Management Act s. 45.
- 44 Land Management Act s. 46-49.
- 45 Land Management Act s. 47.1.
- 46 Land Management Act s. 47.2.
- 47 Land Management Act s. 48.
- 48 Land Management Act s. 49.
- 49 NPC Law Commission 1998:316.
- 50 Land Management Act s. 48, 49, 50.
- 51 Land Management Act s. 53.
- 52 Land Management Act s. 55 and relevant State Council Regulations.
- 53 Land Management Act s. 55.
- 54 Land Management Act s. 43.1.
- 55 Land Management Act s. 44, 59, 60, 62.
- 56 Land Management Act s. 62.1.
- 57 Land Management Act s. 62.3.
- 58 Land Management Act s. 63.
- 59 Law on Law Making.
- 60 Land Management Act s. 62.
- 61 Yunnan Land Management Regulations s. 17-30.
- 62 Yunnan Land Management Regulations s. 15.
- 63 Based on interviews with Kunming Land Management Bureau December 2004.
- 64 Liren Village Committee, Self Government Statute s. 16, Zhongbao Village Committee, Self Government Statute s. 22.
- 65 Liren Village Committee, Self Government Statute s.17, Zhongbao Village Committee, Self Government Statute s. 23.
- 66 Liujia Village Committee, Village Regulations s. 38.
- 67 Based on interviews in all three villages, May-November 2004.
- 68 Liujia Village Committee, Village Regulations s. 39.
- 69 Liujia Village Committee, Village Regulations s. 40.



## 7 Amalgamating environmental law in Indonesia\*

*A.W. Bedner*

### **Introduction**

The question of how countries adopt and reshape foreign or foreign-inspired bodies of law has challenged (socio-)legal scholars since the reception of Roman law into European legal systems. In recent years, the increased scale and intensity of the process of international legal transplantation has given new urgency to this research and stimulated the debate about the conditions under which imported law can be effective. Some approach this matter from a legal-internal perspective (e.g. Watson 1993), while others have taken a broader view and examine to what extent the imported law actually works (e.g. Seidman and Seidman 1994). The perspective taken in this case-study more closely resembles the latter approach. It intends to shed light on the mechanism of adaptation and how this may influence the effectiveness of the new law.

The present case-study on the transplantation of environmental law to Indonesia highlights the importance of two special features impinging on the endeavour to transplant law in general. The first concerns the importance of the 'history' of the law involved for the success of the effort. In this case that history is relatively short. Thus, in all parts of the world, environmental law is still emerging as a legal discipline, or one only recently developed. Compared to other legal fields, before recently environmental law had less complete and less well-integrated sets of legal rules and institutions from which other countries might borrow.<sup>1</sup> The development of anti-pollution laws on a worldwide basis only began in 1972 with the UN Stockholm conference (e.g. Baker 1989a), while policies and laws concerning sustainable natural resource management followed fifteen years later, after the publication of the Brundlandt report in 1987.<sup>2</sup> As a result, environmental law is not as legally specific as many older, more entrenched fields of law and therefore easier to transplant.

The second feature is that the adoption and development of environmental law in Indonesia has been a case more of 'amalgamation' rather than of mere 'transplantation'. As will be shown, Indonesia has adopted various elements from different legal systems, which may well lead to 'mismatches' (Otto 2003). However, Indonesia has managed to adapt

these elements to its own specific legal and ecological conditions over a relatively extended period of time, and as a result Dutch, Canadian, Australian and other foreign influences have been channelled to form a fairly coherent system (Bedner 2003a). In this case, a combination of well-informed lawmakers, various forms of foreign assistance, and, even, chance have contributed to the creation of a body of law far better tailored to the specific Indonesian situation than would have resulted from the wholesale adoption of a foreign model. As will be demonstrated, the remaining flaws of Indonesian environmental law and the problems regarding its implementation are therefore the result of adverse political conditions rather than uncritical foreign borrowing.<sup>3</sup>

### **Some general notes on the transferability of environmental Law**

The statement that environmental law's relative youth facilitates its transferability should not be understood as meaning that introducing environmental law in a legal system is easy. Rather on the contrary, several factors considerably hamper the introduction of environmental law in any country.

First, environmental law is complex by its nature. Not only is it comprised of the discreet but related fields of nature conservation, anti-pollution, and sustainable resource management, but it also must draw upon support from the more general fields of administrative, civil and criminal law. A fine-tuning of new legal concepts to align them with those from more traditional areas of law is required for the effective enactment and implementation of environmental laws. The ability to perform such fine tuning often suffers from a lack of communication between the different specialised branches of legal scholarship. The need for jurists in various positions – universities, government, and private firms – to take up this challenge in order to develop the field and create a 'forum' is a prerequisite for progress (cf. Drupsteen 1996:5-9).

Second, legislators and policymakers have had to struggle with the fact that this new field of law- and policymaking deals with ecological processes which have been to a large extent administered by various 'sectoral' departments, such as public health, forestry, industries, etc. (Baker 1989a:33).<sup>4</sup> In addition to this horizontal allocation of responsibilities, the situation is further complicated because several levels of government create environmental law, and an even greater number of them implement it – from the central government down to the village level. Efficient environmental management requires that these responsibilities and powers be reallocated. This is a difficult task in that government agencies' are usually unwilling to surrender powers voluntarily (Wilson 1989:179-195) and also due to the perpetual tension which ex-

ists between forces favouring centralisation and those favouring decentralisation in any policy arena. The central problem of establishing environmental law and environmental management institutions has thus been to reshuffle and deal the cards among the appropriate players to ensure more sound environmental policies and their implementation so as to avoid having responsibilities and powers fall to institutions which are ill-suited to handle them.

This kind of reform is dealt with through the processes usually described as co-ordination, harmonisation, and integration. Virtually all states have been forced to employ such processes in order to manage their environment in a more sustainable and efficient manner.<sup>5</sup> While a country may adopt general elements of legislation from other countries with relative ease, their own particular institutional organisation impacts significantly on the question of how best to strike a balance between integration, harmonisation and mere co-ordination in order to find the most feasible way to effectively achieve ecological goals.

The process of reallocating responsibilities and powers proves troublesome in any country but obviously is even more difficult in developing countries. Their governance structures are at least as intricate as those of more developed countries, and these various structures tend to overlap with 'informal' ones to a far larger extent (Riggs 1964:15). Thus, although in many ways environmental legal transplants in developing countries display the same sorts of problems as those found in more developed countries, their problems are considerably magnified.

Third, the establishment and development of environmental law often takes place in highly contentious political contexts. While every politician will champion 'sustainable development', this concept is yet too ambiguous to offer much guidance in finding actual solutions to the problems stemming from the tensions between socio-economic development and environmental protection. Conflicting perspectives with regard to 'time lines' and scientific disputes continue to impede progress in this respect (e.g. Lang 1995; Harrison 2000).

Another area of political contentiousness concerns the struggle over such general governance principles as democratisation, the establishment of the Rule of Law, and decentralisation – all of which are forcefully championed by such international institutions as the World Bank and the IMF. Among these, decentralisation is particularly interesting with regard to environmental law in that decentralisation creates new opportunities to redraw the map with regard to policymaking and implementation. Thus, as a product of legal globalisation, the development of environmental law is subject to a variety of other governance policies which are also spreading across the globe.

As we will see in the course of this essay, most of the points raised in this section have been relevant to the Indonesian case.

## Colonial roots

The development of Indonesian environmental law has primarily taken place in recent times under Suharto's New Order regime (1966-1998), but its foundations date from the colonial period. The colonial state left behind a number of regulations pertaining to nature conservation and forest management which were based on 'romantic' ideas of nature conservation *per se*, concepts as 'scientific forestry' and concerns about erosion processes which significantly impeded sustained land use (Boomgaard 1994; Cribb 1997:398-404; Donner 1987:106-115). In addition, during this era, an embryonic legal core of laws pertaining to pollution and noise abatement was established both in sectoral laws (e.g. certain provisions from the 1899 Mining Law) and one general regulation. The latter, the so-called Nuisance Ordinance of 1926, was expanded in 1949 to include a regulation concerning the use of hazardous substances. These regimes provided for licensing, supervision and some enforcement. However, the colonial regime did not have the capacity to fully implement the laws regarding these tasks.<sup>6</sup>

From a long term perspective on the development of environmental law in the post-colonial state, perhaps the growing power of various departments of the central colonial government in charge of policy fields related to environmental issues has been more important than the legislative efforts mentioned above. Departments such as the forestry service and those overseeing plantations, public health, industries, etc. increasingly assumed the powers previously held by the *Binnenlands Bestuur* (Van Doorn 1994:145-165; Cribb 1994:4) – the Dutch part of the administration at the provincial and lower levels. This development laid the basis for the later centralised sectoral design that characterises post-independence bureaucracy in Indonesia and most countries worldwide (Baker 1989a; Baker 1989b).

The system for environmental management was left unchanged for a significant period of time after Independence. Despite the fact that during colonial times numerous officials had warned for the disastrous effects of unbridled population growth combined with loss of forests on sustainable use of natural resources (Donner 1987:333-334), the scale of environmental degradation was such that it failed to draw much public attention (Cribb 2003:37-38). Indeed, nowhere in the world were environmental concerns high on the political agenda. The situation changed rather abruptly, however, under Suharto's New Order.

## The New Order from 1967-1982: Genesis of Indonesian environmental law and legislative inspiration

After the demise of President Sukarno's Guided Democracy the new regime under general Suharto (commonly known as the 'New Order') instituted a policy of expansion with regard to the industrial sectors and natural resource use. This policy intended to unlock Indonesia's economic potential through more liberal laws on foreign investment (Law no. 1 of 1967), forestry (Law no. 5 of 1967) and mining (Law no. 11 of 1967). The results of the new approach were impressive, but brought with them environmental consequences on a scale hitherto unknown. With the growth of industries and mining and the introduction of pesticides into farming practices came their resulting pollution. The disappearance of forests caused nature disasters and loss of livelihood for a large number of people.<sup>7</sup> Other consequences soon followed such as forest fires, floods, erosion, dwindling fish stock, etc.

Despite the fact that the New Order invested so heavily in economic development the regime did not react against the idea of environmental management for two reasons. First, environmental management became a 'hot topic' worldwide and was considered 'modern' after the 1972 United Nations Stockholm Conference, and thus the idea of supporting environmental concerns fit nicely into the New Order's development declared ideology (Cribb 2003). Also, at least some segment of the government seemed to acknowledge that environmental problems were becoming (or might soon become) a serious issue (Cribb 1990: 1125; McAndrews 1994).<sup>8</sup> Consequently, in 1978, the government took the important step of appointing a special 'State Minister of the Environment'.<sup>9</sup> Still, the scope of the powers of this State Minister was limited in that he held no formal portfolio and was granted use of only a limited number of staff for policymaking and no staff or powers with regard to operations (Otto 1996:41-42; Warren and Elston 1994:18).

Despite these limitations, the first Minister of the Environment, the charismatic and forward-thinking Emil Salim, succeeded in making some progress – particularly with regard to establishing legal development as one of the first necessary steps towards better environmental management. Salim's main achievement in this respect was the promulgation of the Environmental Management Act (EMA) in early 1982, whose drafting process began with consideration of an inventory of existing environmental legislation formulated back in 1976 (Moestadji 1996:22) when Salim held the portfolio of environment within the National Planning Agency (*Bappenas*).<sup>10</sup> The EMA introduced a number of environmental law principles, the legal basis for Environmental Impact Assessment (EIA) procedures and criminal clauses which might enable the prosecution of those causing harm to the environment. Although



the 1982 EMA primarily was intended to counter pollution and similar forms of environmental damage, its criminal clauses also applied to those who violated nature conservation laws and some of its general principles demonstrated an acceptance of the basic concept of sustainable development.<sup>11</sup> In addition, Article 12 laid the basis for a subsequent law on conservation.<sup>12</sup>

While the remarkable speed with which this act of parliament was put into place might suggest that environmental legal expertise was already well-developed, this was hardly the case. Environmental law was a relatively novel field, studied by only a few legal scholars and with little institutional support from universities (Hardjasoemantri 1987). It would be hardly conceivable that the drafters involved might have analysed the challenges and designed such an act for Indonesia without using foreign sources. And this raises the question of where Indonesian environmental legal drafters drew their ideas from.

At the time, only very few examples of what might be properly called 'general environmental protection acts' were in place anywhere in the world. The present author's studies revealed that only in Sri Lanka, Brazil, Colombia, Denmark, Sweden, Poland, Japan, the Netherlands, and the United States had such laws been developed – probably because most governments had embarked upon a so-called sectoral approach (Kloepfer and Mast 1995). These 'general' laws differed widely in nature from one another. Some of them provided an integrated framework for environmental management (or at least pollution control in the cases of Sweden and Denmark) while others only imposed obligations upon the government to take account of environmental considerations in the formulation of their policies (United States). Yet another approach was taken by the Dutch, whose Environmental Management Act did not specify any environmental principles, but attempted to harmonise a number of procedures for the granting of environmental licenses.

After an examination of the various available acts in existence at the time, it is impossible to pinpoint any single model the Indonesian legislator might have relied upon. The drafters apparently drew various features from various bodies of law. The following analysis intends to demonstrate in as far as possible the origins of the form, definitions, principles and norms of the EMA, and indicates that for the general sections the Stockholm Declaration itself and the Action Plan for National States that formed part of it were the primary sources for the drafters – as confirmed in person to the author by the leader of the drafting team Koesnadi.<sup>13</sup>

To start with the form of Indonesia's EMA, the legislative technique employed was unmistakably continental. Originally adopted from the Dutch (who call this technique a framework law (*kaderwet*)), by 1982 the use of this approach was already an established tradition in Indonesia.

The EMA is a very broad law indeed. It contains a set of basic rules which, in turn, must be further built upon with specific regulations in order to be implemented (cf. Waller and Waller-Hunter 1984: 1; Warren and Elston 1994:19; Otto 1996:36). In addition, such laws contain a number of general principles in accordance with which all government departments are obliged to adjust their own policies and legislation. Indonesian jurists refer to such acts as 'umbrella acts'. This approach has clear advantages where legislative capacity is limited, and where political opposition – in particular in parliament – is likely to hinder the introduction of a comprehensive law. The danger of such an approach is of course that in the absence of implementing legislation the framework law itself remains a mere symbol, the genuine political fights taking place within the government itself and focusing on the implementing regulations instead (Niessen 1999:326-330).

The introduction starts with the ritual lines on God, the Pancasila, development and the 1945 Constitution, just as every major law in Indonesia. The next section, titled General Provisions (Art. 1-2), defines the central concepts of the Act and cannot be reduced to a particular legislative example. Most likely, the authors have looked at definitions in the various foreign acts available and adjusted them following their own ideas. An important item of clearly Indonesian origin is Article 2, which underlines Indonesia's claims to sovereignty over the entire archipelago and its seas by defining it as the Indonesian environment (Hardjasoemantri 1994:8-9).

This is different for section 2 on Principles and Objectives (Art. 3-4) Here the Stockholm Declaration is clearly discernible, albeit not in the form of a direct translation. Thus, Article 3 on a harmonious relation between environment and human welfare and development corresponds to point 6 of the Declaration's introduction, Article 4(a) and (b) on the need for attention to carrying capacity to Principle 3, Article 4(c) on the role of citizens in environmental management to point 7, Article 4(d) on safeguarding the environment for present and future generations to Principle 2, and Article 4(e) on the protection of states against damage from activities outside their jurisdiction to Principle 21.

Nevertheless, the Indonesian legislator has made one major adjustment: development may take precedence over environmental protection. Thus, Article 4(b) stipulates that 'wise control of the utilisation of resources requires to take into account thrift, effectiveness, and reuse' rather than that 'the capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored and improved' (Principle 3).

The same influence of the Stockholm declaration is visible in the next section of the EMA, on Rights, Obligations and Authorities. Thus, Article 5(1) on the right of every person or group on a healthy environment

corresponds with Principle 1, Articles 5(2) and 6(1) on the right and duty of every person to maintain or participate in maintaining the environment with Principle 4, Article 8 on an integrated approach to development planning to improve the environment with Principle 13, Article 9 on environmental education with Principle 19, Article 10(a) on the exploitation of natural resources for the benefit of the population with Principle 21, and Article 10(b) on regulating the utilisation of man-made resources for the benefit of the population with Principle 15.

The EMA is rather more straightforward in its formulations and less concerned with nature conservation – substituting that word with ‘environment’. That development is central follows also from the EMA’s adaptation of Principle 13, which says that ‘*in order to (...)* improve the environment, States should adopt an integrated and co-ordinated approach to their development planning’. Article 8 puts it slightly different: ‘The government develops policies (...) which promote improvement of the environment *in the context of* integrated development’.

In sum, the Stockholm Principles have been central to these two sections of the EMA, but the Indonesian drafter has looked at them critically, rephrased them in the Indonesian environmental law style and adjusted them to Indonesian political conditions. This has notably resulted in fewer environmental bridles on development and less concern for nature conservation.

The EMA’s next section outlines the legislative programme required for environmental management, under the heading Protection of the Environment. Here no direct link with one particular example can be established. They include the environmental law concepts ‘in the air’ at that time, while Indonesian legal drafters looked for environmental law almost everywhere (as will be discussed below). Moreover, they do not include any details, which renders examples superfluous at this particular stage. It concerns the announcement of the following pieces of legislation: on protection of natural and man-made resources (Art. 11, 12 and 13), protection of cultural heritage (Art. 14), environmental quality (Art. 15), environmental impact assessment (Art. 16), and on prevention and abatement of environmental damage and pollution (Art. 17). Section VI adds procedures for acquiring compensation and restoration to the list (Art. 20), and a regulation on strict liability (Art. 21).

The section in between deals with the institutional approach of environmental management. It follows the sectoral cum co-ordinating agency approach followed in most countries at that time (Baker 1989a) – although calling it an integrated mechanism – and thus provides the legal basis for the State Minister of the Environment, who has no operational tasks (Art. 18). This is a type of minister without portfolio well-known in Indonesia. It also establishes the duty for governments at the provincial and district level to implement environmental legislation.

In the same section we find an additional provision (Art. 19), recognising that non-governmental organisations (NGOs) are to perform a supporting role in the management of the environment. According to Koesnadi, this specific provision was homemade and necessary because ‘in developing countries (...) it is very difficult to ask the people, even the fearless, to come up with their views. They have to be invited, they have to be motivated, and for this purpose the NGOs are performing an important role.’ (Hardjasoemantri 1987:10-11).<sup>14</sup>

Finally, the Act contains a single provision *not* in need of implementing rules: Article 22 renders criminally liable all acts that damage or pollute the environment. Judging from the discussion of the Article in Rangkuti’s dissertation, this provision was as homemade as Article 19. Rangkuti discusses the provision in the framework of a comparison with Dutch and Japanese law and comes to the conclusion that for its interpretation neither country offers any clues. As a result, Rangkuti (who was involved in the drafting process) interprets the article solely within the context of the EMA (Rangkuti 1987:198-205).

The written sources referring to the drafting process indicate that those participating in it considered the broadest spectrum of existing laws.<sup>15</sup> In fact, at the time there was a worldwide flurry of countries looking for knowledge of environmental law (Kloepfer and Mast 1995:318). The following account from a member of the Indonesian drafting team Danusaputro clearly conveys both the atmosphere and how diverse the sources contemplated were:

Thus, since mid-1975 and 1976, study visits were made to Europe with a focus on the following countries: 1) France; 2) United Kingdom; 3) West Germany; 4) the Netherlands; 4) Belgium; 6) Switzerland; and 7) Italy, apart from visits to international organisations such as a) UNESCO; b) IOC; c) IMCO; d) WHO; e) WMO; f) ILO; g) IUNC; h) ICEL; i) CEPLA (Commission on Environmental Policy, Law and Administration) and j) headquarters of the European Community. After the closing of the UNCLOS-III session in New York in 1976, study visits were continued to 8) USA; 9) Canada; 10) Japan; and 11) South Korea. With the assistance of the UN headquarters in New York, we had already succeeded in establishing contacts with k) the Organisation of Latin American States; and l) the International Organisation on Legal Science in Mexico. Another team, which visited Australia and New Zealand and the Indonesian Delegation that went to the UNEP in Nairobi, already received the task to look for and find information and comparisons in the places concerned (Danusaputro 1978: 50).

The author continues to highlight the assistance provided by international organisations, in particular the United Nations Environmental Programme (UNEP), the Food and Agricultural Organisation (FAO), the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) and the Asian-African Legal Consultative Committee (AALCC). These agencies facilitated several international conferences which were quite important to the drafters (Danusaputro 1978:51). One such forum was the ASEAN Expert Group on the Environment, formed in 1977 as an offshoot of UNEP. Meeting annually after the first conference in Jakarta in 1978, member states shared their experiences with regard to the development of environmental law (McDowell 1989:315). Of particular importance was the 1981 Montevideo conference which, according to EMA drafter and participant Koesnadi, convinced the drafting team that they definitely needed to include the principle of strict liability into the EMA (Hardjasoemantri 1987:9).

Thus, it appears that the first Indonesian Environmental Management Act was compiled from various sources, tailored to the context of the Indonesian New Order, and, in fact, was remarkably progressive on paper – in particular with regard to its list of the rights and duties of citizens vis-à-vis the environment. The law foresaw the introduction of all major environmental legal instruments developed worldwide at that time. In 1987, the Director of the Canadian-Indonesian Environmental Co-operation Programme even claimed that regarding its environmental legislation Indonesia was ‘right up there with the world’s most sophisticated countries – and certainly a leader among developing countries’.<sup>16</sup>

Nonetheless, the question remained whether Indonesia was indeed prepared to construct on this foundation the legal edifices required for implementation. This matter will be examined in the next section, together with an analysis of the influence of international legal co-operation on this issue.

### **The New Order from 1982-1994: New influences, new regulations and a new institution**

As stated in the previous section, the start of environmental law development in Indonesia seemed timely and adequate.<sup>17</sup> However, expanding the system and bringing it into operation turned out to be a difficult process. At the legislative level, the implementing regulations required by the EMA followed rather slowly: in 1986 the Government Regulation on Environmental Impact Assessment, in 1988 the Minister of the Environment’s decrees on environmental quality standards,<sup>18</sup> in 1990 the Government Regulation on Water Pollution Prevention, and in 1994 the Government Regulation on Hazardous Waste. In the case of envir-

onmental quality standards the problem was exacerbated by the continuing absence of the further provincial legislation required for implementation. According to Otto, citing Rahmadi, by 1996, East Java was the only province to have enacted such legislation (Otto 1996:64 n.20).

Thus, the aforementioned danger of political opposition from actors within the government hindering the introduction of implementing legislation did materialise in the case of the EMA. The key to this opposition was the dependence of the Minister of the Environment on his sectoral colleagues, whose agreement he needed for contentious issues – and in fact most issues were contentious. Environmental measures were for the larger part deemed to hamper economic development, which was (and still is) the overriding concern of sectoral ministries. Indeed, if a sectoral department considered an environmental regulation beneficial for economic reasons, and not only benefiting the environment, the legislation followed relatively soon. The main example is the Government Regulation on Forest Protection, which helped the Department of Forestry to constrain illegal logging and was the EMA's first major implementing regulation to be enacted, in 1985.

The regulation of Environmental Impact Assessment (EIA) illustrates the difficulties and compromises required by the Ministry of the Environment to produce implementing regulations. In order to remove the resistance of the sectoral departments concerned the Minister of the Environment had to give in to their wishes regarding the composition of the EIA-commission. The outcome was that EIA-commissions were to be headed by a representative from the relevant sector with only limited involvement of the Ministry of the Environment (or the provincial or district environmental bureau at these levels, Articles 23 and 25). This would effectively allow the departments concerned to dominate the outcome of the procedure, where they already held the authority to issue the business license.

Likewise, the Minister of the Environment had to compromise in the case of the Government Regulation on Water Pollution of 1990. As noted above, the environmental quality standards stipulated by the Minister were not directly binding, but depended upon further regulation by the provincial governors. As these governors were largely bound formally and informally by the sectoral bureaucracies within their jurisdictions, the ministers in charge of these sectors disposed of a powerful instrument to delay provincial anti-pollution standards which in their opinion would be harmful to the expansion of the economic activities within their field.

However, in spite of such opposition the body of Indonesian environmental legislation continued to grow slowly but steadily and the policy programme contained in the EMA increasingly took shape. Again, this

raises the question how Indonesian drafters developed their ideas and where they looked for examples for the drafts they made.

It will be no surprise that foreign influence continued to be of importance during this phase, but now its vehicle was bilateral projects rather than international fora.<sup>19</sup> Whilst during the phase of drafting the 1982 EMA those involved cast their nets very widely when considering legislative designs, now they mainly restricted themselves to the two countries they were involved with in bilateral projects: Canada and the Netherlands, to be followed at a later stage by Australia. As will be discussed in the next paragraphs, the influence of these projects on Indonesian environmental legislation has been considerable, in spite of some serious obstacles for effective co-operation.

Indonesia's major partner in environmental legislation during this period was Canada. In 1983 the Canadian International Development Agency provided funding for the so-called Environmental Management Development in Indonesia-programme (EMDI), with co-funding from the Indonesian government. This programme would run for almost eight years.<sup>20</sup> EMDI's influence expressed itself through a variety of efforts in the field of education and through the presence of Canadian environmental jurists in Indonesia, there to provide advice on various subjects including environmental quality standards, EIA-procedures, hazardous waste management and enforcement. Altogether EMDI was involved in the drafting of ten major implementing regulations of the 1982 EMA (CIDA 2002:4).<sup>21</sup>

Given the importance of the Canadian influence on the formation of Indonesian environmental law, one may well wonder how apt it was in theory, considering the nature of Canadian environmental law and Canada's environmental problems. Problematic from the viewpoint of environmental legal transplantation was obviously the federal nature of the Canadian government, whereas Indonesia, certainly under the New Order, clung to its centralised model for governance as much as possible. Moreover, the civil law roots of the Indonesian legal system clearly differed from the common law ones of Canada, which could potentially create problems of design regarding issues as the role of the judiciary or the structure of liability in environmental law. On the other hand, Canada had much to offer. Most significant were the similarities in the sizes and the nature of the environmental problems of Canada and Indonesia. In particular mining and forestry were fields where Canada had gained experience which was potentially useful in Indonesia. Finally, Canada was more advanced than Indonesia in environmental law development, but not to the point that the gap could never be bridged.

It seems that with the exception of the latter point in the end neither special advantages nor disadvantages played an important role in the Canadian-Indonesian co-operation as far as legal drafting was con-

cerned. Regarding the advantages, EMDI's placement within the Ministry of the Environment prohibited the programme from having much influence in the fields of forestry and mining. Legislation in these fields was developed by the sectoral departments concerned, with both the Forestry and Mining Departments mainly working on their own.<sup>22</sup>

But neither were the disadvantages inhibitive. In no case were Canadian environmental law examples simply copied to become Indonesian drafts. This certainly was promoted by the form of EMDI, which did not provide for consultants who were just brought in for a few days or even weeks, carrying with them a portfolio of legal drafts. By contrast, several Canadians worked for the Indonesian Ministry of the Environment during several months, up to more than one year,<sup>23</sup> becoming thoroughly acquainted with the Indonesian situation and seeking genuine co-operation with the Indonesian drafters.

Documents concerning EMDI bear testimony to this conclusion and two examples may serve to illustrate the point. The first one are the proceedings of a seminar that took place shortly after the start of EMDI. It consists of co-presentations on subjects as air pollution legislation, waste water regulation, etc. In each case the Canadian and Indonesian situation are explained, followed by a comparative discussion with equal participation of Canadian and Indonesian environmental legal scholars. It clearly shows how the objective was for both sides to become acquainted with the two legal systems rather than the Canadian participants presenting shortcut solutions to Indonesian legislative problems (Vander Zwaag et al. 1987). A second example is a discussion paper of 1990 called an 'Environmental Permitting System for Indonesia'. In this case each item starts with a critical discussion of the Canadian system, to proceed with an analysis whether elements of this system are suitable to be used in the Indonesian context. It is important to note that this analysis also takes into account practical features of the Indonesian administrative system. For instance, in the case of assigning licensing authority the conclusion is that capacity at the district level in Indonesia is still insufficient to deal with complex license applications and hence this authority should be reserved for the provincial level – unlike in Canada. In summary, such documents demonstrate communication travelling in two directions, rather than one.

In line with this observation is that one can hardly pinpoint the Canadian influence on environmental legal *texts*, but it is obvious that the Canadian example helped to provide *elements* for the legislative drafts. If for instance, we compare the Indonesian Regulation on Environmental Impact Assessment of 1986 with the Canadian regulation valid at the time<sup>24</sup> their wording and structure differ considerably, but most of the elements are the same: scoping and screening, EIA in case of significant impact, public access and participation, and review by a panel. One



major difference is the composition of the panel, which in Canada should be non-partisan (Art. 22) whereas in Indonesia it ought to represent various interests, but is clearly dominated by the department concerned (Arts. 23 and 25) – a political concession required from the Ministry of the Environment as stated above. Another significant difference is the Indonesian regulation imposing a strict time limit of 120 days in total for the entire procedure with approval of the EIA as the consequence of non-compliance. Finally, a typically Indonesian contribution to the system is the requirement to add an environmental management plan and an environmental monitoring plan to the EIA, which should be approved of before the license can be provided. In Canada such a plan would be part of the license, but this was not feasible in Indonesia given the power of the sectoral departments over the business license (e.g. Warren and Elston 1994:27-28).

In line with this cautious approach has been the educational part of EMDI, which in the long run is likely to have been even more important for the development of Indonesian environmental law than the direct input into the legislative process. A substantial number of Indonesian environmental lawyers obtained their LL.M.-degrees in environmental law at the Law Faculty of Dalhousie University and at Osgoode Law School (York), including well-known activists and scholars as Mas Achmad Santosa and Takdir Rahmadi. This led to a diversification of legal background, as the first generation of Indonesian environmental jurists was a Dutch-oriented group, and further increased the Indonesian receptiveness to diverse influences without endangering the integrity of the system.

The educational part of EMDI was also of special importance because of the slow development of environmental law as a scholarly field in Indonesia itself. Although some relevant textbooks appeared during this period,<sup>25</sup> academic efforts to develop the field were rare and often of little practical use. Few universities took environmental law seriously, and few environmental articles were published during this period – let alone a specialised journal.<sup>26</sup> Consequently, conceptual problems were often neglected, and debates often concerned such peripheral matters as whether environmental law should be deemed part of administrative, civil, or criminal law.<sup>27</sup>

Training and education were also important in the co-operation programme with the Netherlands, the other partner in environmental law during this phase. When in 1982 the Indonesian Minister of the Environment concluded a Memorandum of Understanding with his Dutch counterpart, anti-Dutch feelings rooted in the colonial past had by and large ebbed away. Personal contacts and the emerging programme of legal co-operation fostered intensive exchanges between environmental law specialists in the two countries.<sup>28</sup> Dutch professors and practi-

tioners gave courses on environmental law in Indonesia and Indonesian PhD-students spent time in the Netherlands studying the Dutch environmental legal system. This reinforced the Dutch influence on Indonesian environmental legal thinking that – as stated above – had already been present from the start of the development of environmental law in Indonesia, through jurists from older generations holding key government positions who had considerable knowledge of Dutch law in general and could speak and read Dutch.<sup>29</sup>

With regard to legislation Dutch influence remained indirect. This was largely because legal drafting was already part of the EMDI programme, but also because the field in which the Dutch had potentially most to offer proved a bridge too far for Indonesia. In 1990 two experts from the Dutch Ministry of VROM produced a report titled 'Priorities for Environmental Legislation in the Republik Indonesia' (Biezeveld and Berg 1990:1990). The report contained a number of suggestions on how to integrate the Indonesian licensing system, following the Dutch approach. The proposed regulation would be an implementing regulation of the EMA's Article 17. Since the Netherlands had developed its licensing system on largely the same legal basis as Indonesia's, this seemed a fruitful approach.

However, the sectoral opposition in Indonesia appeared stronger than in the Netherlands and the proposals never even became a draft. It is unlikely that this had much to do with a higher degree of environmental consciousness within Dutch sectoral departments, making them more inclined to relinquish powers voluntarily. It rather seems that the differences in the vertical allocation of powers present in each country were central. In the Netherlands, a decentralised system of licensing for some of the major environmental licenses was already in place, and as a consequence the vertical allocation of licensing powers was no obstacle to using the nuisance license as the basis for the newly integrated environmental license.<sup>30</sup> In other words, environmentally relevant licenses could be integrated without fidgeting with licensing authority and thus without risking any turf wars. By contrast, under the extremely centralised New Order administration, national departments and their decentralised branch offices (*Instansi Vertikal*) managed all sectors of economic activities, but administration of the nuisance license fell within the scope of the autonomous powers of the district heads (*bupati* or *walikota*).<sup>31</sup> The powerful sectoral departments concerned were simply not prepared to give up their licensing powers.

Obviously, if we look at potential obstacles to fruitful co-operation the striking differences between Indonesia and the Netherlands also come to mind. First, the environmental problems facing the two countries differ substantially. Although both of them have to deal with pollution issues, Indonesia faces the additional set of challenges which flow from

its abundance of natural resources whereas natural gas is the Netherlands's single exploitable natural mineral resource. Secondly, the size of Indonesia precludes a straight comparison with the Netherlands, unlike with Canada, and easily leads to confusion.<sup>32</sup>

If we evaluate this phase of Indonesia's environmental legal drafting, the conclusion is that the process of amalgamation continued. There was no case of straight transplantation of legal texts, but 'foreign' elements continued to be adopted. The main difference with the previous phase was a sharper focus on two environmental law systems as examples, of which Canada was the more important one. Still, one should not overrate the importance of Canada as a donor of ideas, because most elements of the Canadian system could also be found elsewhere, including in the Netherlands. It is for example striking how similar the suggestions concerning the integration of environmental licensing in the Dutch Priority report are to the ones made in EMDI's discussion paper on the same subject. By contrast, with regard to the next major step in environmental management, we will see that one particular feature of Canada's institutional structure for environmental management did become important in shaping Indonesia's system for environmental management. This concerned the establishment of an environmental impact agency. The main reason thereto was the problem to bring into practice the environmental law in place during the 1980s. This applied to most or all of the regulations, including EIA (e.g. Moestadji 1997:138), GR no. 28 of 1985 on Forest Protection and the rules concerning water pollution (insofar as already operational).<sup>33</sup> Confronted with both legislative and administrative resistance from the sectoral agencies and difficulties surrounding criminal and civil law enforcement, Indonesia's highest environmental officials realised that the fastest and, perhaps, most feasible way to achieve significant results was to have their own operational arm.<sup>34</sup>

The outcome of the formation process, strongly supported by the EMDI-programme (CIDA 2002:4) was Indonesia's Agency for Environmental Impact Control *Bapedal* (*Badan Pengendalian Dampak Lingkungan Hidup*), founded in 1990 (cf. Otto 1996:43). The definition of this agency's tasks was influenced by those of Canada's federal environmental ministry Environment Canada, before it was reformed during the late 1980s.<sup>35</sup> Thus, *Bapedal* did not become a US-style EPA with its own officers to check on and supervise the environmental performance of sectoral departments and provinces, and to enforce regulations for itself. The intention of the reform was to provide the State Minister of the Environment with a staff that could do more than frame policies. Not subject to the legal restraints imposed on the State Ministry apparatus,<sup>36</sup> *Bapedal* had at least in theory the potential to further develop its

powers – just as was happening in Canada at the time *Bapedal* was established.

For political reasons, the outside world – i.e. sectoral departments – had to be convinced that *Bapedal* was not a cloaked attempt to raise the Minister of the Environment's status from a State Minister to a full-fledged one. Therefore, *Bapedal* did not reside under the power of the Minister of the Environment but directly under the President. PD no. 23 of 1990 authorised the State Minister of the Environment to propose someone for appointment as the Head of *Bapedal* to the President (Art. 19[1]), and to provide guidance (*pembinaan dan pengarahan*) to the organisation (Art. 17[2]). In practice, however, the State Minister of the Environment has actually always himself been the Head of *Bapedal* – something never codified in law.

This development would potentially allow for a replication of the Canadian experience, where the federal Department of the Environment, better known as Environment Canada, had also been reputed for its weakness during the early 1980s (Doern 1993:176-177). The case of Environment Canada differed because no formal legal obstacles obstructed it from becoming operational, but lack of budget and powers that had already been given to other departments proved as insurmountable, as well as the delineation of powers between the federal and provincial governments (Brown 1992, Skogstadt and Kopas 1992). This changed after 1985 when rising environmental awareness and the appointment of a political heavyweight as Minister of the Environment laid the foundation for what the Department is today: a US Environmental Protection Agency-style (EPA) agency performing 5274 inspections during the fiscal year 2004-2005 within the framework of pollution prevention alone.<sup>37</sup> Establishing *Bapedal* could set the stage in Indonesia for a similar development as had taken place in Canada a few years before.

It seems that this idea found fertile soil in Indonesia. *Bapedal* was rather successful in overcoming its lack of a legally recognised operational status<sup>38</sup> and sectoral resistance (Otto 1996:40-41) by developing a number of environmental programmes for the provincial and district levels. The Clean River Programme *Prokasih* and the Environmental Rating Programme *Proper* are two such examples (e.g. Bedner 2003b; Arnscheidt 2003). Although reportedly understaffed and underfunded, *Bapedal* managed to get some well-trained officials on board and to some extent compensated its lack of budget with foreign funding for its programmes (McAndrews 1994:91-99). Numerous *Bapedal*-officials have received trainings in Canada, Australia, and the Netherlands. Moreover, *Bapedal* has hosted a considerable number of foreign experts from both the EMDI-programme (CIDA 2002) and from an Australian programme (McAndrews 1994:93).

In all, *Bapedal* has been of much significance in developing and implementing environmental law in Indonesia. Its special status has allowed it to perform some operational tasks, which in turn attracted foreign experts. Despite the presence of such foreign funding and expertise, the programmes were primarily created by Indonesians who prevented donors from imposing directions that would not fit the particular Indonesian circumstances.

Perhaps the major problem *Bapedal* had to deal with was that some of its tasks and powers overlapped with those of the State Ministry of the Environment, a situation which raised considerable irritation within that organisation (McAndrews 1994: 93-94; Otto 1996: 43). *Bapedal's* mandate not only included operational or semi-operational tasks, but also some of the traditional tasks of the State Ministry, i.e. policy- and lawmaking. Perhaps this may be attributed to a lack of attention from the drafters for the consequences of establishing a separate organisation and following the Canadian model of a genuine – albeit weak – department too closely.

On the other hand, *Bapedal* could well use its experience and knowledge of operational matters during the next phase of environmental law development: the process of drafting a law to replace the 1982 EMA. The next section further examines how these powers were exercised.

### **The late New Order: The 1997 EMA**

In the early 1990s, many Indonesian environmental law specialists started to feel the need for a more encompassing environmental management act. The main reason was that the system in place did not lead to proper enforcement of environmental law (LMECT 1995:1-2). This, it was argued, could be remedied by further entrenching the position of the Minister of the Environment and *Bapedal*, which could only be done through an act of parliament. The same applied to changes concerning citizens' rights to environmental information and litigation – the latter in particular because some of the courts misused the requirement in the EMA that before citizens could bring a compensation case to court they first had to try conciliation (Nicholson 2005:123; Bedner 2007). More in general, the need was felt to give a more important role to civil law instruments in order to deal with the challenges of Indonesia's increasing integration into the world market (Niessen 2003:67-68, citing the 'Academic Script' of the 1997 EMA). Furthermore, the intention was to update EMA with the latest international developments in environmental law (Moestadji 1996).

The increasing visibility of environmental problems everywhere and continuous economic expansion seemed to guarantee that sufficient po-

litical support for such a piece of legislation could be mounted.<sup>39</sup> However, on closer examination it appears that several factors stacked the odds against the successful enactment of a new EMA. First, the political position of the environmental movement had declined during the 1980s and 1990s. As the major powers in the New Order government increasingly saw environmental activists as 'dissidents' in pursuit of a cause that was dangerous to the regime's own position (Cribb 2003: 46-47), support from within the New Order regime itself was not self-evident. Second, the last years of the Suharto regime were tainted by an ever-increasing amount of corruption, which from an environmental point of view had particularly devastating effects in the forestry and mining sectors.<sup>40</sup> Here environmentally-conscious officials had lost much power.<sup>41</sup> And finally, half-hearted attempts at decentralisation had failed to change the state management structure (Niessen 1999). The central departments of forestry, mining, industries etc. remained in control at the expense of the interests of the various provinces and districts.

Why, then, were the drafters sufficiently confident to start their project? Perhaps their state of mind was mainly 'just see what you can get', but perhaps they may also have garnered some optimism from the successful review of EIA-procedure, laid down in GR no. 51 of 1993. Quite surprisingly, this new regulation made *Bapedal* the chair of the Environmental Impact Assessment committee at the national level, whereas in 1986 this had been unacceptable to the sectoral departments involved. The answer to this unexpected outcome is that it were quarrels among the sectoral departments involved rather than *Bapedal*'s strength which caused such a change. It had turned out in practice that in multi-sectoral projects the former could not agree on which of them would chair the EIA committee (Arnscheidt 2003:51). Apparently to get out of this stalemate, *Bapedal* as the weakest and therefore least dangerous bureau was then appointed chair.<sup>42</sup> Apparently, adroit political manoeuvring could lead to legislative success in environmental matters.

In the end the choice proved right. In spite of serious opposition Indonesia enacted a new EMA in 1997. Primary political credit for this feat probably lies with the former State Minister of Environment Sarwono Kusumaatmadjah, who deployed his considerable political skills and connections to steer the law through the government and the Parliament. One effective argument Sarwono could use was the international concern about the state of Indonesia's forests, as illegal logging and forest fires had become front page news worldwide (Tan 1999:826-827). Absent an effective response to these issues, a new EMA was at least something the Indonesian government could point at.

The 1997 EMA was one of the last major pieces of legislation under the New Order which still carried all the characteristics of the centra-

lised government system. Its nature differs from that of the 1982 EMA in that it is more of a 'law' and less of a 'policy document'. This is reflected by its sheer number of articles – 52 as opposed to 24. Nonetheless, neither could the 1997 EMA stand on its own: it required 16 pieces of implementing regulations (Niessen 2003:80).

Thus, to some extent the 1997 EMA still continued along the same path as had its predecessor (cf. Niessen 2003:68). Unmistakably, the law is still an 'umbrella act' – calling for harmonisation of environmental law rather than for integration. Second, it supplemented the principles which had been incorporated into the 1982 EMA on the basis of worldwide developments in this field by adding such internationally established principles as good neighbourliness and international co-operation as well as the principle of common but differentiated responsibility. Important other principles included are those of sustainable development, preventive action, the precautionary principle and the polluter-pays principle.<sup>43</sup> In addition, the law elaborated on the issues concerning civil and criminal enforcement.

Completely new are the sections on administrative enforcement, the introduction of environmental auditing and the legal basis for *Bapedal*. The latter agency was given some significant operational powers, notably in processing hazardous waste and supervision. Thus, the Minister of the Environment had finally obtained a strong statutory basis for performing such tasks.

No other breakthroughs occurred. An example is the failure to include provisions that would impose a daily fine on those who violate the law's obligations. The original bill aimed to introduce this important administrative sanction, but the proposed provision met with serious resistance from the Army faction in Parliament which considered that such a provision might manifest a suspicion of bad faith on the part of potential polluters.<sup>44</sup>

Indeed, despite its many achievements the weaknesses of this law are obvious: the State Minister of the Environment still has insufficient powers to effectively enforce the law (Bedner 2003b:91-94); there are some flaws regarding civil enforcement (Nicholson 2003); similar problems exist in the phrasing of the stipulations on criminal enforcement as were present in the 1982 EMA (Bedner 2003b:86); and, finally, the rules about administrative sanctions are too limited and somewhat confusing (Bedner 2003b:81-86).

Such failings were not complete surprises. Published in the same year that the new EMA was passed, a revealing article in the Indonesian *Journal of Environmental Law* by its principle drafter, Moestadji, shows that he was well aware of the 1997 EMA's shortcomings (Moestadji 1997). Still, the 1997 EMA is an important step forward as compared to its predecessor statute and keeps Indonesia up to date with interna-

tional developments in environmental law. It is hence justified that most environmentalists considered it a major victory that this Act was eventually passed at all in the late New Order.

To what extent is the 1997 EMA more of a home-grown statute than its predecessor? At this point in time Indonesia was no longer involved in intensive collaboration with Canada or the Netherlands. The third and final phase of the EMDI programme ended in 1994. And although not all co-operation in the field of the environment was cut off, a rupture in Dutch development aid following the Dili massacre in December 1991 generally reduced the role played by the Dutch in Indonesian legal issues. Another potentially important factor in terms of the lessening of the Dutch influence on environmental matters was that the main drafter of the new law, special advisor to the Minister Moestadji, felt that his Dutch counterpart assumed a somewhat paternalistic attitude.<sup>45</sup> But in addition to any discomfort which the Dutch may have inadvertently caused, Moestadji, the principle drafter of the EMA, may well have also felt that the major contribution the Dutch could offer – their proposals for integrated licensing – were too ambitious. Similar proposals by EMDI were not followed on either. In Moestadji's view integrated licensing may have been a 'lost cause' from the outset, and he simply may have preferred to focus on more promising matters. Thus the Indonesian law took an altogether different direction from that of the Dutch EMA or the Canadian Environmental Protection Act. While the Dutch proceeded on their chosen pragmatic legislative path with integrated licensing at its core, the new Indonesian EMA to some extent covered nearly every aspect of environmental law except licensing which was left out altogether. The new Indonesian EMA paid mere lip service to the concept of integration:<sup>46</sup> substantive integration was absent, and all previous pieces of legislation remained in place (Niessen 2003). At the same time, the new EMA also bore little formal resemblance to the 1988 Canadian Environmental Management Act which contained more than 140 articles and elaborate annexes.

Notably, Canada and the Netherlands were not the only foreign countries to have an active presence in the development of Indonesian environmental law. In 1991, a third partner for environmental co-operation appeared on the scene when Australia and Indonesia undertook a co-operation project in the field of environmental management. Because of EMDI's involvement at the central level, the Australians started work in East Java (CIDA 2002:9). Nonetheless, from the very beginning, this project was also involved with the central level of government and subsequently became involved in other provinces and districts as well. However, the focus of this programme – which continues to this day – has been on capacity-building and education in the field of enforce-



ment. Therefore, it was not of direct significance for the genesis of the new EMA.<sup>47</sup>

In the end, like the 1982 EMA, the 1997 EMA was not a legal transplant in any direct sense. The co-operation with the various partners in the period preceding the drafting process did influence the drafters and enabled them to draw from different sources. This is quite clear from the Academic Draft document. In its discussion of most topics the language used is Indonesian, with references to Indonesian legal texts and concepts. Some terms are clarified by citing the English equivalent (e.g. 'tindak pidana yang bersifat umum [*generic crimes*]'). However, when certain issues emerge, the text uses English or Dutch wordings and citations, and refers to foreign legal materials. Thus, in its discussion of the audit, it cites the Canadian Environmental Protection Act (Academic Draft: 15), and when it comes to public participation reference is made to Dutch legal doctrine (Academic Draft: 29-30). The section on administrative sanctions comprises a discussion of major Dutch textbooks on this issue (Academic Draft: 85-86), while the section on standing in court suits and class action refers to both United States and Dutch case law (Academic Script: 100-101). Finally, the section on criminal aspects refers to the 'Proposed Model for a Domestic Law of Crimes Against the Environment' which was drafted at an international meeting of experts on environmental crime, which took place in Oregon in 1994 (Academic Draft: 109-110).

Thus, the new Act resembles neither the Dutch EMA nor the Canadian Environmental Law of 1988, but it bears a relation to both of them – and to other environmental legislation. International law provided environmental principles, Anglo-American law the class action, Dutch law the definition for standing in civil and administrative actions, and an international meeting some of the components for the criminal provisions. In short: the elements of the law are international, but the 'amalgam' is distinctly Indonesian. It is adapted to Indonesian conditions, but also structured and formed by Indonesian political forces.

## Conclusion

The ultimate conclusion of this article is that a reasonably balanced development of environmental law knowledge in Indonesia itself has resulted in a law that is in much better condition than the environment it is supposed to protect. The drafters concerned have avoided the trap of 'wholesale copying' of environmental laws from any one country. Rather, they have explored legal systems worldwide and selected and adapted various items to suit Indonesia's ecological and political-economic conditions. This adaptation has been easier with regard to envir-

onmental law than in other fields of law because the elements drawn from various systems do not overly differ from one another. Every environmental legal regime has quality standards, EIA, provisions for criminal enforcement etc., and their forms do not differ greatly either. What does make a difference are the issues as to what extent these elements have been integrated into a single act and as to what extent they have been harmonised.

The following factors have significantly contributed to this evolution of Indonesian environmental law. First, the persons most closely involved in the drafting processes have had considerable knowledge of environmental law in various countries and the ability to tailor their proposals to the Indonesian political situation. In addition, these individuals have been supported by State Ministers of the Environment with considerable political skill and sufficient political clout to win a number of 'turf fights' with much stronger departments.<sup>48</sup>

Furthermore, the development from the 1982 EMA to the 1997 one was only possible because of the presence of a corps of environmental jurists that engaged in discussions and provided feedback on various drafts and ideas. Although this corps was slow to develop, particularly during the 1980s, their numbers increased markedly during the 1990s and included some who had been trained abroad. The establishment of the Indonesian Center for Environmental Law (ICEL) in 1993, the subsequent publication of the first environmental legal journal in Indonesia one year later, and the classification of environmental law as an obligatory course in Law Faculties in 1994 (Hardjasoemantri 1994:33) each contributed to the growth of legal expertise and interest in environmental matters in Indonesia.

Another contributing factor to the development of environmental law in Indonesia have been international co-operative programmes. These operated over a relatively extended period of time amongst which the EMDI programme played a particularly pivotal role. However, in the author's view the fact that there were several such programmes was highly beneficial to the development of environmental law, because it exposed Indonesian environmental jurists to a variety of influences.

Despite these positive factors and a degree of success, Indonesia's environmental law is not perfect, and its implementation is often weak or altogether lacking. One might argue, therefore, that the law has largely failed if we look at it from a 'Seidmanian' perspective. As mentioned earlier, even the primary drafter of the 1997 EMA, Moestadji, candidly acknowledges flaws in 'his' law. The question then poses itself whether it was worthwhile to go through the time- and money-consuming effort of producing a new environmental statute at all, or whether the energy should rather have been guided elsewhere? After all, in 1982 some

NGO-activists reprehended Minister of the Environment Emil Salim just to have provided Suharto with a legitimising 'smoke screen'.<sup>49</sup>

In the author's view the answer is affirmative. The presence of the Environmental Management Act has had a positive effect on environmental management in several ways, even if it is not operative in the fullest sense. Thus, with regard to the opportunities for civil actions through the courts the situation has changed considerably in recent times. Some of the 1997 EMA's most radical changes concern the opening up of new legal avenues for victims of environmental pollution or destruction, including class actions and a mechanism for environmental mediation. These have started to blossom since the reformation process has got underway (Nicholson 2005, Bedner forthcoming)<sup>50</sup> and to a certain extent they provide a remedy for the absence of institutionalised enforcement.

Second, neither should the symbolic importance of the EMA be underestimated. It provides an important point of reference in disputes and sets standards that may not be enforced in any direct way, but which are invoked in public debates and therefore structure the way disputes are processed (e.g. Nicholson 2005; Bedner 2007). This role of legitimising environmental action is of great importance in the current political context.

A third point worth mentioning in this context is that the institutional mechanism created by the EMA plays an important role in protecting the environment. Even if it is insufficiently staffed and funded to cope effectively with all environmental problems in Indonesia, the Ministry of the Environment constantly draws attention to environmental problems and represents environmental interests within the government apparatus. It also provides an indispensable ally for NGOs and those afflicted by environmental distress in environmental conflicts. Without the EMA's entrenching this apparatus, the environmental situation would certainly be bleaker than it is today.

In short, the potential of the EMA should not be underestimated, even if it is not implemented in any straightforward manner. Some of the problems hindering this can be attributed to flaws in the statute itself, but the main obstacles are the macro-conditions under which environmental law must evolve and be implemented in every developing country. In the words of Carpenter and Dixon (quoted in Baker Baker 1989a:46), environmental law 'is seen by the policymakers as yet another obstacle to "real development", a deterrent to outside investment and yet another procedure to delay and increase the cost of capital investment'. This condition exacerbates the institutional problems of implementing environmental law, in particular where conservation and exploitation must be balanced. But at the same time a statute such as the EMA changes and restructures the context in which Carpenter and Dix-

on's policymakers operate, and therefore furthers environmental protection in other ways than through mechanical application alone.<sup>51</sup> One could therefore critique the view the Seidmans take of law as being too instrumental, failing to incorporate the alternative ways in which laws may produce effects as coined by Aubert, Witteveen and others.<sup>52</sup>

The potential of the EMA becomes more relevant with the Indonesian political climate slowly turning towards more attention for environmental protection. Certain environmental problems have now become so dramatic and so visible that they simply cannot be denied. The complete logging ban for Java implemented in 2003 may be the first manifestation of the central government's awareness that the situation must be reversed. Decentralisation, democratisation and attempts at Rule of Law formation have led to important changes in governmental attitudes regarding the environment, both in a positive and a negative sense.<sup>53</sup> At a more technical plane, the decentralisation process with its resulting loss of sectoral power provides opportunities for integration of environmental law that were unthinkable thus far. Independence of the judiciary has furthered the chances of successful environmental litigation (Nicholson 2005; Bedner 2007), and democratisation has provided new opportunities for people to address their environmental problems to representative bodies. In all these processes, the EMA has sustained such efforts and provided legal underpinning to the claims made on behalf of the environment. It would therefore have been most unfortunate if Indonesia would have waited until this moment to start creating new environmental laws.

## Notes

- \* The author wants to thank Stijn van Huis for his invaluable research assistance, and Professor Koesnadi Hardjosoemantri, Sandra Moniaga and the editors for their comments on earlier versions of this chapter.
- 1 There are many different definitions of environmental law. For the purpose of this article I define it as all law pertaining directly to ecological processes. If we consider environmental law in its widest sense, encompassing nature protection law, anti-pollution law, and the body of laws concerned with sustainable management of natural resources, of these only nature protection law had what might be called a 'long record' in Western states before non-Western countries began adopting and developing similar laws and policies.
- 2 Local practices intended to attain sustainable forest management have, of course, had a longer history (for Java, see Peluso 1992:44–78).
- 3 The discussions in this essay do not go beyond the enactment of the Environmental Management Act of 1997, which is still in effect.
- 4 The use of the term sector here is the same as that in Indonesia, referring to a certain set of activities constituting a policy field – such as mining or industries.
- 5 Meaning that government structures and processes are well-adjusted to other social structures processes (cf. Biezeveld 2002:27). For an in-depth discussion of the con-

- cepts of co-ordination, harmonisation and integration, see Otto 2003. By co-ordination the author means that although the various legal regimes remain in place, the agencies implementing policies operate through mutual consultation. In the case of harmonisation separate legal regimes remain in place as well, but they are adjusted so as to guarantee a particular level of uniformity in standards and procedures. Integration refers to the merger of standards, procedures, or even government agencies.
- 6 This was particularly the case with nature conservation (e.g. Peluso and Vandergeest 2001).
  - 7 For a comprehensive overview, see Donner 1986, and for the period thereafter, see the country reports by the World Bank.
  - 8 Colombijn notes that during the 1970s there was not yet any serious concern for the environment in the government itself and that the motivation for the appointment of a State Minister of the Environment was the desire to please foreign donors rather than for genuine environmental concerns. He refers to Aditjondro for the view that this appointment was primarily intended to appease protesting students (Colombijn 1998:317).
  - 9 From 1978 until 1982 his title was State Minister for Development, Supervision and Environment (*Menteri Negara Pembangunan, Pengawasan dan Lingkungan Hidup*). Over the next ten years this official was also responsible for co-ordinating policies in the field of population control, and his official title became State Minister of the Environment and Population (*Menteri Negara Lingkungan Hidup dan Kependudukan*). For the sake of simplicity this essay refers to him as the Minister of the Environment.
  - 10 Several sources point at the 1975 oil spill of the Showa Maru in the Strait of Singapore as an important catalyst for the formation of the drafting team (e.g. Danusaputro 1978: 46; Silalahi 1992: 31).
  - 11 In particular, see Article 4 which reads: 'Environmental management aims at: (...) d. effecting development with respect for the environment in the interest of the present and future generations'; (*Pengelolaan lingkungan hidup bertujuan: (...) d. terlaksananya pembangunan berwawasan lingkungan untuk kepentingan generasi sekarang dan mendatang*). See also Article 7(1).
  - 12 Enacted in 1990 as Act no. 5 on Conservation of Biological Natural Resources and Their Ecosystems.
  - 13 Interview with professor Koesnadi, Leiden 11-01-2005.
  - 14 Several scholars refer to this provision as positively reinforcing the position of NGOs, e.g. Colombijn 1998: 321.
  - 15 This was confirmed by the Head of the Drafting Team, Professor Koesnadi, in an interview in July 2004.
  - 16 Indonesia Development News, December 1987. Likewise, in 1994 Warren and Elston stated that 'On paper the Indonesian environmental protection system is one of the most comprehensive in the world' (Warren and Elston 1994: 8).
  - 17 Neither were authoritative foreign observers altogether pessimistic. Thus, in his excellent study on land use and environment in Indonesia, Donner – after a far from optimistic assessment of Indonesia's situation – does not end without at least a hint of optimism: 'It is a vast country with great potential, and with an industrious population and authorities aware of what needs to be done. Should it not be possible to save Indonesia from internal and external destruction?' (Donner 1987: 334). See also Cribb 1990: 1135 (about pollution abatement) and Otto for a short discussion about this issue (1996: 44-45).
  - 18 The list is too long to include in this article: they can be found on the website of the State Ministry of the Environment: [www.menlh.go.id](http://www.menlh.go.id).

- 19 There are some notable exceptions, for instance the Technical Co-operation Programme concerning legal and institutional arrangements for soil conservation, which involved the FAO (see Burchi 1987).
- 20 It was implemented on the Canadian side by the School for Resource and Environmental Studies of Dalhousie University (Vander Zwaag et al. 1987:v).
- 21 The project also led to a number of well-researched reports, a.o. Dick and Bailey 1992; Villamere and Nazruddin 1992; Kent and Kartakusuma 1991; Susilo and Keir 1992.
- 22 The exception is a report for EIA-implementation in the mining sector, which was drafted within the EMDI-framework (Villamere and Nazruddin 1992).
- 23 See for instance Dick and Bailey 1992:4 regarding the EIA-programme.
- 24 Environmental Assessment and Review Process Guidelines Order, approved by the Governor General in Council and registered as SOR/84-467 22 June, 1984.
- 25 Most used is Koesnadi's *Hukum Tata Lingkungan* (1981), which is now in its seventh edition (1999). Also worth mentioning is Rangkuti's *Hukum Lingkungan dan Kebijakan Lingkungan Nasional* of 1996 (2nd edition of 2000).
- 26 In 1987, Koesnadi Hardjosoemantri remarked that he was having discussions with the Director-General of Higher Education to include 'an environmental aspect in the basic courses of the first year' at university level. This led to a compulsory course in all Indonesian universities starting in 1994-1995 (Hardjosoemantri 1996: acknowledgement). The first Indonesian environmental legal magazine appeared in 1992 (published by the Indonesian Center for Environmental Law (ICEL)).
- 27 Personal communication of professor Drupsteen, who taught environmental law in the framework of the MoU during this period. In contrast, during the same period in the Netherlands the dialogue between environmental legislators and environmental law scholars became the key engine for the development of more effective environmental legislation and led to the Dutch 1992 Environmental Management Act (Drupsteen 1996:5-9).
- 28 Personal communication of one of the front runners of Indonesian-Dutch legal co-operation, Leiden professor Jan Michiel Otto.
- 29 The best example is the already mentioned Professor Koesnadi, who defended his PhD at Leiden University.
- 30 Of those licenses integrated in the environmental license one was provided by the municipality (the nuisance license), by the province (air pollution, noise pollution, waste disposal). Only the chemical waste license fell within the central government's authority (Environmental Resources Limited 1982: 27, 52, 79, 93, 98).
- 31 At that time a municipality was still called a *kotamadya*. For reasons of simplicity this essay employs the terminology introduced by the Regional Autonomy Act of 1999 (no. 22 of 1999). There are two types of governments at this level: municipalities (*kota*) and regencies (*kabupaten*). If there is no reason to make a distinction they are both referred to as districts.
- 32 Although it is theoretically possible to keep this difference in mind, in the author's experience discussions among Indonesian and Dutch environmental jurists and practitioners always tend to equate the Netherlands to Indonesia – to treat an Indonesian province on a par with a Dutch province – something that does not make much sense if one realises that, for instance, the province of East Java matches the whole territory of the Netherlands with more than twice the number of inhabitants.
- 33 The picture is mixed, as one can certainly indicate some progress. Thus, Cribb 2003: 45 points at some action being taken against illegal logging practices during this period and control on the use of pesticides. For a balanced account of positive and negative views, see Otto 1996: 44-45.

- 34 Interview with Nabel Makarim (23-8-1999), at that time one of the *Bapedal* Assistants of the State Minister of the Environment.
- 35 Department of the Environment Act (R.S. 1985, c. E-10).
- 36 On account of Article 1 of Presidential Decree no. 25 of 1983 State Ministers could not hold any operational powers. Although the regulation has been changed many times since, this basic tenet is still the same (see Article 90 of Presidential Regulation no. 9 of 2005).
- 37 National CEPA Statistics 2004-2005, available at <http://www.ec.gc.ca/ele-ale/default.asp?lang=En&n=5C63F879-1>.
- 38 According to the introduction of PD no. 23 of 1990, *Bapedal* is operational. However, this function is made difficult by the absence of any real substantive powers.
- 39 Donner noted in 1986 that environmental awareness in Indonesia was quite high (Donner 1986: 330-331).
- 40 Cribb (2003: 47) suggests that this may have been the reason for the lax response of the government to the forest fires in 1997. For an account of the degree of capture see Robison and Rosse (1997) in general and Barr (1998) on the forestry sector. For a case study in the mining sector, see Leith 2003.
- 41 Within the Forestry Department (which has existed under various names and in various combinations with other sectors) there has always been a split between producers and conservationists, with the latter according to Colombijn (1998: 319) 'at the bottom of the pecking order'.
- 42 Another reason to revise GR no. of 1986 was that the administrative burden it put on firms was too large (Otto 1996: 39-40). This resulted in the removal of the obligation to produce a preliminary inventory of environmental information (*Penyajian Informasi Lingkungan* or *PIL*).
- 43 The precautionary principle had appeared in seminal form in the 1982 EMA in the form of an arrangement of powers at the central government level with an extension of powers for the State Minister of the Environment. For a discussion of the entire list of principles, see Niessen 2003:84-86.
- 44 Interview with one of the advisors of the government, Professor Philipus Hadjon (25 July, 1999). See also Bedner 2003b:82 n.7.
- 45 Interview with Pak Moestadji (25 August 1999).
- 46 See notably Article 9.
- 47 It is more than likely, however, that through the education programme officials involved in the drafting process were indirectly influenced by ideas obtained from Australian environmental law.
- 48 For more information on this issue, see Arnscheidt 2003.
- 49 Personal communication of environmental activist Sandra Moniaga (March 2006).
- 50 Likely, part of this success is also due to AusAid's training programme for Indonesian judges.
- 51 Cf. this argument to my earlier account of the ideological impact of administrative courts in Indonesia (Bedner 2001). For more general accounts I refer to the opening chapter.
- 52 For an overview, see Otto et al. 2004:129-132.
- 53 So far there have not been any comprehensive analyses of the effects of these processes on the state of the environment.

## 8 Lawmaking in the new South Africa

R.B. Mqoke

### Introduction

When the new democratic government came into power, it adopted the slogan *Batho Pele*<sup>1</sup> ('people first') as a rallying cry for the constitutional values of accountability,<sup>2</sup> responsiveness and openness embraced in the founding provisions of the new Constitution.<sup>3</sup> In addition, the practice of holding a series of public hearings at strategic locations throughout the Republic where Departmental functionaries and politicians explain to the public the objects of proposed Bills and also invite comments further demonstrates that the new constitutional arrangement has opted for an inclusive approach to lawmaking. On other levels, the State President and members of the Executive are in the habit of holding *Imbizos*<sup>4</sup> ('community gatherings') which reinforce the notion of democratic accountability.

The losers in this new lawmaking process have been the traditional authorities who have been allocated a very limited role<sup>5</sup>. Although the South African government has accepted the House of Chiefs option<sup>6</sup> (as adopted in a few other African States), this step was only taken as a matter of compromise.<sup>7</sup> Fortunately, there are indications that the government has left the door wide open, in the hope of finding a more amicable solution which will lend greater legitimacy to its pursuits of rural development objectives.<sup>8</sup> Regretfully, despite increasing support<sup>9</sup> for more effective participation by traditional leaders at the local government level, the government appears to still be indecisive – as if hoping that the problem might disappear.<sup>10</sup>

Nonetheless, there is cause for some optimism. This essay demonstrates the resilient nature of the institution of tribal consultation with reference to governance and land administration as reflected in the Traditional Leadership and Governance Framework Act 41 of 2003 and the Communal Land Rights Act 11 of 2004. To a large extent the new government seems to have heeded the concerns<sup>11</sup> contained in an Institute for Democracy in South Africa (IDASA) publication (Boraine 1991) based on a conference theme of democratic accountability.



## The legislative authority

Broadly speaking, lawmaking in South Africa takes place at two levels and involves both legislative and judicial processes. The judicial process seeks, *inter alia*, to ensure that all laws (both statutory and non statutory) are consistent with the provisions of the Bill of Rights. Further, lawmaking under the guise of the development of the law has neutralised the role of precedent, thereby enabling the High Court to ignore prior judgments of the Supreme Court of Appeal where deemed appropriate to achieve progress in these pursuits.<sup>12</sup> An additional significant contributory factor in the lawmaking process (as well as in shaping policy formulation) is the role played by particular statutory bodies established in order to support constitutional democracy. Notable among these are the Human Rights Commission, Commission for Gender Equality and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities. At various times these bodies have overcome the need to challenge the constitutionality of the existing law in the courts.

According to section 43 (a and b) of the Constitution, the legislative authority of the Republic of South Africa at the national level vests in Parliament and at the provincial level vests in the provincial legislatures as set out in section 44. Further clarification is found in Section 104 (1) of the Constitution which states:

The legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power –

- a) to pass a constitution for its province or to amend any constitution passed by it in terms of sections 142 and 143,
- b) to pass legislation for its province with regard to –
  - any matter within a functional area listed in Schedule 4;
  - any matter within a functional area listed in Schedule 5;
  - any matter outside those functional areas, and that is expressly assigned to the province by national legislation and
  - any matter for which a provision of the Constitution envisages the enactment of provincial legislation; and
- c) to assign any of its legislative powers to a Municipal Council in that province.

The introduction of bills is dealt with in s. 119 of the Constitution. The premier of a province enjoys the same powers with respect to assent to a provincial bill as the state president does with respect to a bill emanating from the National Assembly noted below.<sup>13</sup>

Schedule 4 of the Constitution contains a list of areas of concurrent national and provincial legislative competence. Schedule 5 contains a

list of functional areas of exclusive provincial legislative competence. The Constitutional Court plays an oversight role in respect of provincial legislation whenever there is a challenge with regard to the constitutionality of a provincial act.<sup>14</sup>

Section 43(c) states that, at the local government level, legislative authority vests in the Municipal Council, as set out in section 156. Part B of Schedule 4 contains a list of matters that are reserved for local government legislative competence. Local governments are competent to pass bylaws with respect to those areas.

### *Legislative process*

Under the new constitutional arrangement, a bill reaches Parliament through two distinct routes – namely, a) the recommendation of the South African Law Commission and b) Ministerial route (through the task team approach).<sup>15</sup>

#### *The South African Law Commission route*

The Law Commission works through project committees. The members of each project committee are invariably persons deemed experts in the relevant sphere of law under consideration. The majority of members are university professors and other academics recognised as experts in the field.<sup>16</sup> The new government inherited this practice of using professional expertise from the previous government. Public engagement takes place at two levels – namely, through the Issue paper and the Discussion paper. The former publishes the problem to be investigated in an outline form and invites interested members of the public to comment. Upon receipt of the comments, the Project committee prepares a revised document which is itself published in order to invite further comments. The resulting Discussion document is more structured than the Issue paper. Both papers contain a chapter which deals with the issues in a comparative form – for example, if the investigation deals with the role of traditional courts in the judicial system, the comparative chapter will provide a survey of several traditional courts drawn from various African states. After receiving comments on the Discussion paper, a Project Committee prepares a report for consideration by the South African Law Commission, the statutory body clothed with the power to make recommendations to the appropriate Minister of State. Their report contains a draft Bill for consideration by the Cabinet. Two important pieces of legislation – namely, the Matrimonial Property Act 88 of 1984 and the Recognition of the Customary Marriages Act 120 of 1998 – are notable examples of numerous pieces of legislation that have originated in this manner.

### *The Ministerial route*

The Ministerial route functions substantially in the same way. The various stages of consultation are, in this case, called the Green Paper and the White Paper<sup>17</sup>. Not surprisingly, the majority of statutes originate in this manner<sup>18</sup> in that the preparation and initiation of legislation are parts of the core business of the executive authority in keeping with the terms of the s. 85 (2) (d) of the Constitution.

### *The Bill stage and public access in the National Council*

A new enactment which is still in its draft form is known as a Bill.<sup>19</sup> According to s. 72 (1) of the Constitution, the National Council of Provinces must:

- a) facilitate public involvement in legislative and other processes of the Council and committees; and
- b) conduct its business in an open manner, and hold its sittings, and those of its committees in public but reasonable measures may be taken –  
to regulate access, including access to the media to the Council and its committees; section 118 (1) provides a similar procedure with regard to public participation in a provincial legislature.

The relevant department arranges public hearings.<sup>20</sup>

### *Different kinds of Bills*

Bills are categorised into three basic categories – Bills amending the Constitutions (s. 74 of the Constitution), Ordinary Bills not affecting provinces (s. 75 of the Constitution), and Ordinary Bills affecting provinces (s. 76 of the Constitution). According to s. 73 (2), only a Cabinet member or a Deputy Minister or a member or Committee of the National Assembly may introduce a Bill in the Assembly, but only the Cabinet member responsible for National financial matters may introduce a money Bill in the Assembly.

A Bill passed by the National Assembly must be referred to the National Council of Provinces if it must be considered by the Council under (s. 73 [5]). According to s. 76(1b), if a Bill has been passed by the Council without any Amendments, it is then referred to the State President for his assent. According to s. 76(1c) if the Council amends the Bill, it must be sent back to the Assembly for their approval before being sent on to the President for his assent. If however, the Council rejects the Bill, under s. 76(1d) it should then be referred to the Mediation Committee which may take any of the following:

- It may agree on the Bill as passed by the Council;

- Agree on the Amended Bill as passed by the Council;
- Agree on another version of the Bill.

According to s. 76(e) if the Mediation Committee is unable to agree within 30 days of the Bill's referral, the Bill lapses unless the Assembly again passes the Bill.

### *The role of traditional institutions in the lawmaking process*

Traditional institutions participate in the lawmaking process at two levels – at the local and national government levels through the National House of Traditional Leaders.

#### *Traditional Institutions at the local level*

According to s. 4 (1) (f) of the Traditional Leadership and Governance Framework Act<sup>21</sup>, the functions of traditional councils include 'participation in the development of policy and legislation at local level'. Again, according to s. 17 (3) of the Act, a local house of traditional leaders is tasked to participate in the development of bylaws that impact on traditional communities. Hard on the heels of the Framework legislation, the government enacted the Communal Land Rights Act.<sup>22</sup> Although both statutes have laudable objectives<sup>23</sup>, they each result in the reduction of the powers of traditional authorities in the lawmaking process.

The Preamble to the Framework legislation contains the following positive declarations:

Whereas the State, in accordance with the Constitution, seeks to set out a national framework and norms and standards that will define the place and role of the traditional leadership within the new system of democratic governance; to transform the institution in line with the constitutional imperatives; and to restore the integrity and legitimacy of the institutions of traditional leadership in line with customary law and practices (...).

The Act contains seven chapters. Chapter 3 is further divided into two Parts. Part I deals with the recognition of traditional leadership positions. Part 2 introduces the nomenclature of kings and queens. Chapter 4 deals with various Houses of Traditional leaders and the referral of Bills to the National House of Traditional leaders. What is conspicuous by its absence in the entire Act is the power to make laws according to customary law and the colonial practice.

This is surprising in view of the constitutional imperative contained in Chapter 12 of the new Constitution. Section 211 (1) of this Chapter reads: 'The institution, status and role of traditional leadership accord-

ing to customary law, are recognised subject to the Constitution'. During the public hearing on the Framework legislation the idea that the Act would restore the integrity and dignity of the institution was asserted, and thus it was expected that the traditional institutions would continue to exercise the lawmaking powers which they had enjoyed under both customary law<sup>24</sup> and the colonial legislation which was enacted in 1951. At least three national departments of state initiated a parallel process of introducing Bills affecting traditional leaders – namely, the Department of Provincial and Local Governments introduced the framework Bill; the Department of Agriculture and Land Affairs introduced the Communal Land Rights Bill (which was amended several times); and the Department of Justice attempted to introduce the Traditional Courts Bill which failed to be adopted.

Interestingly, the Communal Land Rights Act had a hidden political agenda to divest the chief of the power to influence the decision-making process in the rural areas by transferring control over land to their subjects.<sup>25</sup> As will be shown below, this aim did not in the end materialise. The Land Act contains 10 chapters.

Chapter 1 deals with the definitions and their application:

- I. Beneficial occupation which means the occupation of land by person for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner;
- II. 'Communal land' means land contemplated in section 2 which is, or is to be, occupied or used by members of a community subject to the rules or custom of that community.
- III. 'Community' means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group.

The various Chapters which follow set out the factors which lead to the lessening of power vested in the traditional institutional leaders. Chapter 2 deals with the new notions of juristic personality of communities and the security of tenure. This chapter envisages the determination of new land tenure rules to be known as Community rules. Upon the registration of the rules, the community would acquire juristic personality with perpetual succession and would, of necessity, 'acquire and hold rights and incur obligations; and (b) own, encumber by mortgage, servitude or otherwise and dispose of movable and immovable property and otherwise deal with some property subject to any title or other conditions'. According to s. 4 (1), a community or person would be entitled (to the extent and in the manner provided for in the Act) to either tenure which is legally secure or to comparable redress.

Notably, this chapter does not even mention the chief of the area. Further, another departure from customary law is illustrated by the fact that this chapter envisages the commercialisation of land. From time immemorial, rural land had never been for sale but rather was identified with the King or Chief of the area who was said to be a trustee on behalf of the whole tribe. Even, the term tribe has been replaced by the term community.

Chapter 3 deals with the registration of communal land in the name of the community concerned (sections 5 and 6). Rural land would now be free hold ownership (s. 9). Chapter 4 deals with the award of comparable redress in respect of tenure that cannot be made sure. Chapter 5 deals with what is known as the conduct of land rights enquiry which looks into various issues such as the nature and extent of all rights, interests and tenure of land, whether legally secure or not. The land rights enquirer is an officer designated as such by the Minister. Chapter 6 deals with the making, registration and content of community rules. These rules are intended to regulate the administration and use of communal land within the framework of law governing spatial planning and local government. But the most controversial provisions are found in Chapter 7.

This Chapter, dealing with the establishment of a land administration committee, was the most contentious element in the entire Communal Land Rights Act because it sought to divest the chiefs of their customary powers of allocation and control over what had always been tribal land. Under the Act, the administration of rural land would vest in the land administration committee in which, through previous Bills, traditional leaders were given 25 per cent representation in the committee. After intense negotiations which included direct negotiations with the State President, the chiefs ultimately obtained a partial victory in the form of a provision which provided for the continued involvement of the chiefs in land administration.

The provision reads: '(...) if a community has a recognised traditional council the powers and duties of the land administration committee of such community may be exercised and performed by such council' (s. 21(2)). Because most rural areas do indeed have traditional councils, no land administration committee operating outside of the traditional authority system has yet been established. But, this aspect of the Act has been criticised<sup>26</sup> on the ground that it amounts to a denial of full citizenship rights to rural communities.

Chapter 8 deals with the Land Rights Board, a body with merely an advisory role. According to s. 28 of the Act, this body has to:

- Advise the Minister and to advise and assist a community generally and in particular with regard to matters concerning sustainable

land ownership and use, the development of land and the position of access to land on an equitable basis.

- Liaise with all spheres of government, civil institutions and other institutions. It seems that South Africa has followed the example of Botswana which introduced Land Control Boards.

The following seven factors account for the fact that traditional leaders in South Africa continue to be a force to be reckoned with:

- *The interim Constitution*

The previous Constitution contained Constitutional Principles that were said to constitute a solemn pact agreed upon by the multi-Party negotiation process to constitute the foundation of the new Constitution. Chieftainship or traditional leadership was provided for in Constitutional Principle XIII which states: '(...) the institution, status and role of traditional leadership, according to indigenous law shall be recognised and protected in the Constitution (...)'.<sup>27</sup>

This provision has also found its way into Chapter 12 of the new Constitution. When the position of traditional leadership and the traditional courts was not clearly spelt out in the text of the new Constitution, the Congress of the Traditional Leaders<sup>27</sup> (CONTRALESA) objected to the adoption of the new Constitution on the grounds that it failed to protect the 'institutions, status and role of traditional leadership' as provided for in the aforementioned Constitutional Principle. In paragraph 197 the Constitutional Court expressed itself as follows:

In our view, therefore, the NT (new text of the constitution) complies with PXIII by giving express guarantees of the continued existence of traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected. The CA cannot be constitutionally faulted for leaving the complicated, varied and ever developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to the future social evolution, legislative deliberation and judicial interpretation.

Each time a piece of legislation is introduced, the traditional leaders refer to the solemn promise contained in the interim Constitution and how the government have reneged on the promise. Whenever there is a disagreement with the particular National Minister, the chiefs demand an audience with the State President and make sure that their delegation includes the kings. In these negotiations the chiefs persist in one demand – namely, the amendment of the Constitution to clarify the im-

precise position contained in Chapter 12. It is commonly believed that in one such meeting the President promised to take their request to Parliament. In one of the cases based on the interim Constitution the chiefs won against the African National Congress's interpretation of the meaning of ex-officio representation of the Kwazulu-Natal chiefs in the Regional Councils (Pieterse 1999).

- *Widespread grassroots support for traditional leadership*

The support for traditional leadership during the post 1994 democratic government has been attributed by some (Ntsebeza 2001: 322)<sup>28</sup> to the fact that the newly elected councillors lacked real power and are not accessible to the people in times of need as compared to the traditional leaders.

- *Recognition of traditional leaders as the gatekeepers in the rural areas*

Provincial governments<sup>29</sup> work hand in hand with traditional authorities and the Provincial Houses of traditional leaders. The government officials are also encouraged to co-operate with traditional authorities when carrying out development projects in the rural areas.

- *Political patronage*

Traditional leaders also enjoy massive support across the political divide. Each political party mobilises for rural support by working through traditional leadership. Senior traditional leadership is provided with luxury vehicle transportation at government's expense.

- *Recognition of traditional religion and the notion of African Renaissance*

The new Constitution provides for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. One of the objects of the Commission is to promote respect for the rights of cultural, religious and linguistic communities. In line with these goals, African religious leaders have championed the recognition of traditional religion even at state functions. In African societies the king is seen as the embodiment of African culture and religion. Operating in parallel with this is the President's notion of African Renaissance which has been interpreted in a variety of ways, particularly in rural areas where the notion of African Renaissance is seen as the government's recognition of African culture and religion.

- *Ability to adapt and to mobilise rural urban support*

Traditional Leaders in South Africa are well organised. There are, at present, two big organisations of traditional leadership – the Congress of Traditional Leaders, which was formed with the assistance of the African National Congress, and the Coalition of Traditional Leaders, which was formed after the new Constitution. These organisations lend support to statutory bodies known as Houses of Traditional Leaders. Working within these structures, traditional leaders have demonstrated leadership on such topical issues as the fights against Aids and poverty. In



the process, they have been able to embrace the skills provided by technology put at their disposal by Provincial governments.

- *Negotiating techniques*

Finally, during the presentation of the Bills (culminating into the two statutes noted above) traditional leaders adopted multi-pronged negotiating techniques through which they sent delegates to the Ministerial task teams while, at the same time, negotiating directly either with the office of the deputy president or the State President. The traditional leaders sometimes openly ridiculed the relevant Minister of State and demanded to speak directly with the President, citing some previous commitment by the relevant office. Through such meetings, they were able to obtain numerous changes to the various versions of the Communal Land Rights Bill.

#### *Traditional Institutions at the National level*

According to s. 18 (1) of the Traditional Leadership and Governance Framework Act, a parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.

b) The National House of Traditional Leaders must, within 30 days from the date of such referral, make any comments it wishes to make.

2) A provincial legislative or a municipal council may adopt the same procedure referred to in subsection (1) in respect of the referral of a provincial Bill or a draft bylaw to a provincial house of traditional leaders or local house of traditional leaders, as the case may be. In a nutshell traditional authorities play an advisory role.

#### *Composition of the Mediation Committee*

According to s. 78 (1) of the Constitution:

The Mediation Committee consists of:

Nine members of the National Assembly elected by the Assembly in accordance with a procedure that is prescribed by the rules and orders of the assembly and results in the representation of parties in substantially the same proportion that parties are represented in the Assembly; The delegate from each provincial delegation in the National Council of provinces, designated by the delegation.

*Assent to Bills and publication of the Act*

According to s. 79(1) of the Constitution:

The President must either assent to and sign a Bill passed in terms of this Chapter (Chapter 4 of the Constitution) or if the President has reservations about constitutionality of the Bill, refer it to the National Assembly for recommendation.

According to s. 79 (4) of the Constitution:

If, after recommendation, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill; if not, the President must either –  
assent to and sign the Bill; or refer it to the Constitutional Court for a decision on its constitutionality.

According to s. 79 (5) of the Constitution:

If the Constitutional Court finds that the Bill is constitutional, the President must assent to it.

According to s. 81 of the Constitution:

A Bill assented to and signed by the President becomes an Act of Parliament, must be published and on a date determined in terms of the Act.

*Resolution of conflicts between National and Provincial legislation*

According to s. 146(2) of the Constitution:

National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the conditions is met:

- a) the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;
- b) the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation and national legislation provides that uniformity by establishing:
  - norms and standards;
  - frameworks; or
  - national policies.
- c) the national legislation is necessary for:
  - the maintenance of national security;
  - the maintenance of economic unity;
  - the protection of the common market in respect of the mobility of goods, services, capital and labour. See further section 146(3), (4) to (8).

## Initiation of the Bill in Parliament and provincial legislatures

The procedure for the introduction of the bills in provincial legislatures is set out in s. 119 of the Constitution. According to this section: ‘Only members of the Executive Council of a province or a Committee or member of a provincial legislative may introduce a Bill in the Legislature’.

There are prescribed procedures laid out for the introduction of bills relating to Order papers and the role of parliament Committees in the whole legislative process.

## Co-operative government

In the lawmaking functions all the major role players are expected to take cognisance of the provisions of Chapter 3 of the Constitution that require, *inter alia* at s. 41 (g)(h):

- each major role player should not encroach on the geographical, functional or institutional integrity of government in another sphere;
- and co-operate with another in mutual trust and good faith by –
  - fostering friendly relations;
  - assisting and supporting one another;
  - informing one another of, and consulting one another on matters of common interest;
  - co-ordinating their actions and legislation with another.

## Judicial lawmaking

Sections 8 and 39 of the Constitution provide for judicial lawmaking through the development of common law and customary law in order to achieve the spirit, purport and objects of the Bill of Rights.

According to section 8 (3) of the Constitution:

When applying a provision of the Bill of Rights to a natural or juristic person in terms sub section (2), a court – in order to give effect to a right in the Bill, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

According to s. 39(2) of the Constitution:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The judiciary has been reluctant to engage in the development of the law and showed its preference for legislative reform – particularly with regard to the structured process of the South African Law Commission.<sup>30</sup> In the *Bhe* case<sup>31</sup> the Court expressed itself on the question of judicial development of the customary law rule in question in the following manner:

I have found that the primogeniture rule as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality. The question whether the court was in position to develop that rule in a manner which would promote the ‘spirit, purport and objects of the Bill of Rights’ evoked considerable discussion during argument. In order to do so, the court would first have to determine the content of customary law as it is today and to give effect to it in its order. There is, however, insufficient evidence and material to enable the court to do this. The difficulty lies not so much in the acceptance of the notion of living customary law, as distinct from official customary law, but in determining its content and testing it, as the court should, against the provisions of the Bill of Rights.

In this instance, it is noteworthy that the court was urged not to defer to the legislature to make the necessary reforms due to their delays in producing appropriate legislation. The court had been asked to issue a definitive order that would solve the problem once and for all.

## Conclusion

In the author’s view, the comment from Discussion Document entitled ‘Towards A Ten Year Review, Synthesis Report on Implementation of Government Programmes’<sup>32</sup> makes an important point:

A critical element in the first years of the democratic State was the introduction of a new constitutional and legislative framework. This entailed the adoption of the new Constitution in 1996, and the introduction of the new legislation at the average

rate of about 90 Acts per annum in the first nine years; such that since 1994 over 879 laws or Amendments aimed at reconfiguring South African Society were adopted. The fact that the intensity of such legislative work has diminished in the recent period is a reflection of the progress made in this regard and of the fact that the emphasis of government work is shifting increasingly from policy formulation towards a much greater focus on implementation.

One might also note that, unlike the previous government, presently members of Parliament and Provincial legislatures operate on a full-time basis with offices in the respective centres of lawmaking. The assessments set out in this essay demonstrate that, beyond any shadow of a doubt that lawmaking is regarded as a serious business under the new constitutional arrangement.

## Notes

- 1 This idea is the driving force behind the delivery of service, particularly at the grass-roots level.
- 2 The seeds for accountability were also sown in the ruling party's important policy document known as the Reconstruction and Development Programme (RDP) Publication by the African National Congress in 1994. In paragraph 5.2.6 under the heading of Democratising the State and Society the document states: 'the democratic order we envisage must foster a wide range of institutions of participatory democracy in partnership with civil society on the basis of informed and empowered citizens (e.g. the various sectoral forums like National Economic Forum) and facilitate direct democracy (people's forums, referenda where appropriate, and other consultation processes).'
- 3 See s 1 (d) of the Republic of South Africa Constitution Act 108 of 1996.
- 4 Imbizos are gatherings of citizens of a particular community for the purpose of discussing matters of common interest. During the pre-colonial period, tribal meetings used to be gatherings of the largest possible number of people whose voice counted in the management of tribal affairs. See further Mqeke 1997:73. A similar gathering among the Tswanas in Botswana is called Pitso. In the space of one week the Constitutional court declared invalid four Acts of Parliament by reason of Parliamentary failure to comply with its constitutional obligation to facilitate public involvement before the Acts were enacted. These cases are: *Doctors for Life International versus the Speaker of the National Assembly First Respondent and Others* case CCT/ 12/05. The Acts which were declared involved are the *Choice on Termination of Pregnancy Amendment Act 38 of 2004* and *Traditional Health Practitioners Act 35 of 2004*. The order of invalidity was suspended for a period of 18 months to enable Parliament to re-enact these Acts in a manner that is consistent with the Constitution. The second case: *Matatiele Municipality and others v President of the Republic of South Africa and others* case NO CCT 13/05. The court ruled that part of the *Twelfth Amendment Act* and the *Cross – boundary Municipality, the Repeal and Related Matters Act* that alters the boundary of *KwaZulu Natal's* invalid as it had not been adapted in a manner that is consistent with the Constitution. The declaration of invalidity was simi-

larly suspended to enable Parliament to follow the correct procedure. See further on this judgment <http://www.constitutional.court.org.za/site/matatiele>.

- 5 Under the previous government traditional authorities enjoyed a local government status at the rural (local) level with power to make bylaws with respect to rural administration.
- 6 Other countries with a House of Chiefs include Namibia, Ghana, Zimbabwe and Botswana. See further Ray 2003:25. The author makes it appear as if these houses came about as a result of consensus and that the citizens of these countries decided that matters that concern all citizens will be dealt with by their parliaments and that special traditional or indigenous questions will be handled by their Houses of Chiefs. The truth is that chiefs had no choice but to settle for the advisory role; otherwise, they stood to lose everything.
- 7 In South Africa, traditional leaders have always insisted on the amendment of the Constitution so as to occupy a position which is similar to that promised to them in the interim Constitution. When it became clear that traditional leaders would disrupt the 2000 Municipal elections, the State President agreed to recommend amendments to the Municipal Structures Act 117 of 1998 (the Act which determined the number of traditional leaders who would participate in local council meetings and increased the level of representation by traditional leaders from 10 per cent to 20 per cent of the membership of the local Council. See further on this development: Reddy and Biyela 2003:274.
- 8 The government's commitment to the grassroots bottom-up approach to rural development is clearly evident in s. 3 of the Development Facilitation Act 67 of 1995 and s. 1 of the Local Government: Municipal Systems Act 32 of 2000. The government believes that the gateway to the rural areas is the traditional leader (Chief or headman).
- 9 In a previous stand-off between the traditional authorities and the South African Civic Organisation (SANCO), the former came out as victors. They proved to be the gatekeepers to the rural areas. Even the government officials prefer to access the rural areas through the traditional authorities. See in this regard Ntsebeza who recounts his personal experience with a development project (the formation of a Communal Property Association) that was frustrated by the traditional leaders who were suspicious about the project (2001: 322). See also Reddy and Biyela who express the view that it is imperative in Kwazulu-Natal that a complimentary relationship be developed between elected local leadership and traditional structures (2003).
- 10 Ntsebeza finds the uncertainty regarding the exact roles, powers and functions of traditional Authorities in local government as amounting to widespread confusion (2001:285). He thinks that lack of clarity in the Constitution as well as in the legislative framework lies at the heart of the problem.  
The White Paper on Local Government also created a crisis of expectation on the subject of a co-operative model for rural governance. The document reads: 'Proposals range from traditional authorities becoming the primary local government in their areas, to a clear and exclusive division of powers and functions between elected local government and traditional authorities ... The proposal put forward here attempts to combine the strengths of various approaches within a model which is consistent with the Constitution and recognises the positive contribution that both elected structures and traditional authorities can make in the overall development of traditional areas and communities. The proposed model ensures co-operation, communication and consultation between local government and traditional leaders and institutions.' see 4.3 [Ltp://www.local.gov.za/dcd/policydocs/whitepaper/wp4.htm](http://www.local.gov.za/dcd/policydocs/whitepaper/wp4.htm).
- 11 See, for example, Boraine, quoting with approval Helen Suzman as saying that the most effective single system of accountability is that parliamentarians have to answer to their constituencies (1991:54).

- 12 See *Bhe and Others v Magistrate, Khayalitsha and Others* 2004 (1) BCLR 27 (C) (2004 (2) SA 544) (C); 2005 (1) BCLR 14 (CC). The Cape High Court ignored the judgment of the Supreme Court of Appeal in *Mthembu v Letsela and Another* (2000) 3 All SA 219 (2000(3) SA 867 (SCA)). For a writer who is not an adherent of a system of precedent, see Gillette 2000:245 who states: 'But precedent simultaneously limits the capacity of decision makers to adjust to new conditions and, arguably, discourages detection of these changes by reducing the need for judges to justify their decisions, as long as they discern no novelty in the case they are deciding.'
- 13 See also s. 114 of the Constitution dealing with powers of a provincial legislature.
- 14 See in this regard the whole of s. 122 of the Constitution.
- 15 A minister sets up a task force of experts to produce a White Paper.
- 16 The present writer has served on various project committees of the South African Law Commission dealing with matters relating to customary law.
- 17 Taljaard and Venter state: 'The process of passing a law usually begins with some need expressed by public service department through the initiative of the Minister concerned. A discussion document is then drawn up by experts in the department and circulated to concerned organisations in civil society. Once comments by individuals are available, a preliminary statement of possible public policy is drawn up in the form of a Green paper. This paper is circulated to all MPs, the government and other interested parties in civil society for their comments. When these have collated, the public service department concerned draws up a White Paper which has to be approved by Cabinet. A White Paper states official government policy (...). Once the White Paper has been circulated, the public service department can start to draw up draft laws (...)' (1998:41). The new constitutional arrangement has followed the British system of Green and White Papers, see in this regard Miers and Page 1990:41. These authors point out that, in the British system, consultation takes place on the basis of an informal system and private communications between departments and affiliated interests.
- 18 The present writer was part of the Ministerial Task Team which produced the White Paper on Traditional Leadership and Governance Framework, which culminated in the Traditional Leadership and Governance Framework Act no. 41 of 2003.
- 19 See also Rautenbach and Malherbe 2004:150 who define a bill as a: '(...) detailed proposal by a competent institution or functionary for the enactment of law of which parliament has taken official notice'.
- 20 The notion of a public hearing is reminiscent of the African system of lawmaking through *Imbizos*, see introduction.
- 21 Act no. 41 of 2003. This Act will hereafter be referred to as the Framework legislation.
- 22 Act no. 11 of 2004.
- 23 The long title makes provisions, *inter alia*, for the 'recognition of traditional communities, to provide for the establishment and recognition of traditional Councils; to provide a statutory framework for leadership positions within the institution of traditional leadership (...)'. On the other hand, the Communal Land Rights Act seeks, *inter alia*, 'to provide for legal security of tenure by transferring communal land including Kwazulu-Natal Ingonyama land, to communities or by awarding comparable redress; to provide for the conduct of land rights enquiry to determine the transition from older order rights to new order rights; to provide for the democratic administration of communal land by communities (...)'.  
 24 This was known as the Black Authority Act 68 of 1951.
- 25 See Pycroft 2002:105,110, 120 and 121. On page 120 the author states: 'Although traditional leaders in rural arrears do not provide significant municipal services (...) their control over the dispersion of tribal authority land secures their political and

economic influence within their areas of jurisdiction. As democratic local government in rural areas seeks to increase its influence through control over land use planning, rural municipalities are likely to encounter resistance from traditional authorities (...). It was this perception that made the government weaken the authority of traditional leaders.

- 26 Ntsebeza is of the view that this section gives enormous powers to a structure with a majority of unelected members (2004). The author thinks that in the two statutes outlined above the ANC government has bent over backwards in its accommodation of traditionalism.
- 27 The case is cited as *Ex Parte Chairperson of the Constitutional Assembly: in Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC)*.
- 28 The author states that attempts by the Transitional Councils (TrepCs) and their allies in South African Civic Organisation, to challenge traditional authorities have often been seen by some as being disruptive. 'Some NGO's operating in rural areas find it easier to work through traditional authorities when calling meetings (...)'
- 29 In the Eastern Cape several conferences and workshops have been held since 2002 on the theme of fostering good relationships between the government department responsible for traditional authorities and the traditional leaders. During the workshops the traditional leaders were accommodated at hotels and were also provided with transport to and from the workshop venues.
- 30 See, *inter alia*, the following cases: *Mthembu v Letsela and Another* 1998 2 SA 675 at 688 and *Anne Prior v Donald Battle and Others* 1998 (8) BCLR 1013 (TK). In the recent case of *Bhe & Others v Magistrate, Khayalitsha and Others: Shibi v Sithole; South African Human Rights Commission and Another v President of the RSA and Another* 2005 (1) (CC) 1, the Constitutional Court decided to abolish the customary law principle of primogeniture instead of developing the rule.
- 31 See note 13 above.
- 32 Policy co-ordinating and Advises Services (PCAS), *The Presidency* October (2003) 110.





## 9 Comments on lawmaking and legal reforms in Central Asia

*J.J. Deppe*<sup>1</sup>

### Introduction

The terms 'transition to democracy' and 'transformation into a market economy' have been used quite often since the demise of the USSR. In the context of national independence of the Member States of the CIS<sup>2</sup> these terms initially carried a fairly positive connotation. They underscored a particular way of thinking and had a significant impact on the push for legal reform as well. Now, after a decade of Perestroika and early capitalism, these terms are a reminder more of the disappointments than of the achievements of the reform efforts. Certainly, these terms are not invoked any longer in the same euphoric manner as they once were. This does not mean that all Member States have met with the same results with regard to their reforms. It has already been written that 'there was no single "transition to democracy" in the formerly communist world but a variety of outcomes ranging from a stable parliamentary system in the Czech Republic, Hungary and the Baltic republics to more authoritarian forms of politics in "Far Eastern Europe", and to personal dictatorship in the former Soviet republics in Central Asia' (White 2000: 288-289).

Similarly, a variety of outcomes have resulted with regard to the diverse economies of the various Member States. Some countries of the CIS have developed into prospering oil-exporting states; others have fallen behind (even in comparison with their former status within the Soviet Union). Kazakhstan and Azerbaijan, for example, fare remarkably well, but the economies of Georgia, Uzbekistan and Tajikistan struggle with substantial problems.<sup>3</sup>

Despite these differences, over the last decade a certain pattern has established itself throughout much of the CIS. Most of the states now present themselves to the outside world as presidential democracies – with the emphasis usually on the word 'presidential', for executive power truly dominates. In fact, the criminal prosecution of at least some of Russia's 'oligarchs' can be interpreted as a step to further stabilise and entrench their particular political system.<sup>4</sup> On the other hand,

only recently have there been what might be called *rather unexpected changes* from this status quo. Consider, for example, the so-called 'Rose Revolution' in the Georgian Republic which led to a flurry of reformist activity. And, the victory of Yushenko in the series of elections which culminated on 26 December 2004 and which has given rise to what will likely be substantial changes in the Ukraine. Notable also is the recent revolt in the Kyrgyz Republic which is a clear sign that the spark of revolution might yet jump across to Central Asia. The tragic events in Andijan, the Eastern city of the Ferghana valley of Uzbekistan, located next to southern Kyrgyzstan, might have a broader impact as well. Some ten years after the first wave of reform, a second is going on in the Caucasus and in Central Asia. It will be interesting to see whether new life is breathed into the movement for legal reform throughout the Member States of the CIS.

What conclusions may be drawn about the various efforts to undertake legal reforms in the CIS? Have they been completed or has the situation stabilised into a status quo where further change is perceived as a threat? After all, many codes and other legal acts have already been written. In some people's eyes, their implementation appears to be a question of time.

### **Lawmaking and legal reforms in Central Asia**

Actually, many reforms are stuck in the middle of the process of implementation. It would not be unfair to say that in Central Asia, the implementation process is far from being completed. Outside support of this current phase may be even more important than was the engagement of such support at the very time of the introduction of the various new forms of legislation. Many CIS countries continue to welcome (and even expect) assistance from European countries. There is a considerable interest in foreign expertise and continental law. Yet, not all help is welcomed, nor is all proffered help appropriate.

German involvement provides an informative example. German assistance in the process of legal reformation has been brought to bear in nearly all of the Member States of the CIS – though, admittedly with a greater level of energy and enthusiasm at the beginning of the 1990s than is the case nowadays. In fact, one intention of this article is to speak in favour of further German and European engagement in the legal reformation taking place in the CIS countries, particularly with regard to the Caucasus and Central Asia.

History demonstrates that law reforms need time to develop properly. In comparison to our own past,<sup>5</sup> the legal progress made by the Russian Federation and other CIS countries is remarkable. Substantial changes

have occurred in civil and economic law. Many fields of criminal and administrative law will undoubtedly be revised and updated in the coming years. If we understand legal reform as an essential element of the greater spectrum of social and economic reforms, we can more easily accept that on-going support is vital to the success of the further development of civil societies. Still, effective support becomes more and more difficult to provide and presents new sorts of challenges to advisors. Legal advice was much easier to provide in the past than in today's situation in that, immediately following the demise of the Soviet system, a real demand existed for Western law, and the attitudes towards both reform and reformers were more optimistic.

In a matter of a moment the former Soviet states, enjoying their political autonomy, wished to create their own legal systems. Even countries such as Russia, with a high potential for taking on the challenges of engaging in self-directed law reform, were open to foreigners who promoted their own domestic law. A new kind of capitalism was introduced by Western advisors but rendered *home-made* by former communists and an emerging class of new businessmen.<sup>6</sup> In public law, a new approach to the legal relationship between the state and the citizen was undertaken and initiated by the Perestroika laws regarding freedom of the press and shaped by new constitutions. These constitutions were progressive from the very beginning in terms of the establishment of the Rule of Law and chapters on human rights – though, in many respects, their goals still await realisation.<sup>7</sup>

The present phase of legal reforms can be characterised as centered on implementation and consolidation. Frequent changes to statutes and codes have led to contradictions in legislation which, in turn, have caused widespread feelings of uncertainty. With the exception of the Russian Federation, commentaries and textbooks are lacking. Judges are sometimes ill-informed or even puzzled by the new law. Thus, court decisions can be inscrutable. Public authority is often reproached for behaving arbitrarily. The power of the executive permeates everyday life. In many state systems of the CIS, the President seems to be the only fixed point. Constitutional courts designate the President the guarantor of the constitution. Presidential decrees often take the place of parliamentary statutes which have not been – or will not be – adopted. Normative acts of the ministries fill in the gaps found within statutes adopted by Parliament. The presidential administrations appear more involved in the reform process than are other state institutions. The presidential right of veto sometimes serves as a corrective to radical developments.<sup>8</sup> Rarely is the Parliament the true instigator of initiatives and reforms. In some countries of the CIS, the various Legislatures act with little *self-confidence*. Until this phase is more complete, problems and conflicts will arise with some frequency.

Consider the following examples: the Land Code of the Republic of Kazakhstan has been adopted and signed against a vote of the majority in the lower house of Parliament. In Kyrgyzstan, the mandated period of discussion for the updated Constitution (signed 18-2-2003) had been drastically reduced by the former President. A national referendum took place much earlier than expected, and numerous suggestions to amend the first draft version were not taken into account. Such factors have contributed to a weakening of the Constitutional court and in the strengthening of presidential powers. In Uzbekistan, the Institute of Monitoring the Legislation of Parliament has been brought under the supervision of presidential authorities.

Thus, clearly the strengthening of legislative power is a major task yet to be performed under the legal reformation of the Member States of the CIS. In this context, one might suggest that the courts should enhance the separation of powers and, thus, play a more decisive role in the formation of civil society. The legal protection of citizens and enterprises from excessive oversight and inspections performed by regulatory agencies is presently inadequate. Generally speaking, at least theoretically, the way to the courts is open. In practice, however, citizens do not often choose this path. A stronger legislature which strengthens the courts – and higher salaries for the judges – would do much to encourage the faith of the citizenry.

In addition, extortion and bribery are perceived as other significant problems which hinder the development of small and medium size businesses and further contribute to a climate of fear and reprisal.<sup>9</sup> In spite of more than a decade of rebuilding and reorganisation, the legal systems of many CIS countries appear to be inadequately strong enough to cope effectively with the present situation. Why is this? And, what conclusions can be drawn with regard to the process of lawmaking?

First, as has been stated, the implementation of a new legal system is a lengthy process which requires greater resources and more patience than would the wholesale creation of a new set of rules. A second conclusion is that not every proposed Western remedy performed effectively, nor should they be expected to work without subtle adjustments; in many cases and contexts it would have been better to have begun the process of legal reform with a more open mind and more flexible concepts – to have proceeded step by step.

However, this approach was not taken for a number of reasons. For one thing, lawmakers did not merely concentrate on the aim of ensuring the welfare of their citizenry. They used the process of lawmaking to create new ties with the West. Civil and corporate law were among the first areas of law to be reformed. Sometimes the process of lawmaking in these areas served as an affirmation of Western knowledge, legal

theory, and practice. In such cases, lawmaking amounted to little more than 'law-copying'. A lot of *paper* has been generated in the meantime. Initially, success was measured by the sheer number of statutes passed and codes updated. But, subsequently, opinion polls and questionnaires answered by businessmen, enterprises and trading organisations indicated that the Rule of Law they had once expected after such sweeping reforms were not, in fact, materialising (ABA Rule of Law Initiative Europe and Eurasia Division – CEELI 2006; White 2000: 288). Today, it is commonly recognised that both economic and legal reforms in the CIS have suffered a number of setbacks.<sup>10</sup>

Several of the key factors which are behind these setbacks – including such failures as establishing realistic goals, setting sound priorities and paying careful attention to the nature of particular challenges – are linked with one another, and it would, therefore, be a mistake to conceive of them as entirely independent from one another. On the other hand, some points can be singled out which have not been beyond the influence of policymakers and legal advisors.

If the reform agendas of the 1990s had been more realistic, the results might well have been more effective. In fact, in a number of cases potential problems might have been diagnosed even before reforms were enacted. Just as the sudden lifting of controls on prices and the quick transition to a market economy proved to be disastrous for the social and economic life of the post-soviet states, so the acceptance of foreign theories and new principles has created a legal landscape with many unfamiliar and uncertain outcomes. Some of the resulting new legislation turned out to be unsuitable under the new circumstances.

One example involves the statutes concerned with insolvency proceedings. From the very beginning of the introduction of the market economy reforms, high hopes had been placed on them. They were thought to be excellent means of achieving the privatisation of state enterprises and as valuable instruments for the reconstruction of a company. But, in the practice of the Member States of the CIS, they have had to undergo successive changes. In an EBRD Legal Indicator Survey A. Ramasastry has written that in 1995 a gap between extensive laws and effective implementation was apparent (2002). Creditors and debtors simply did not make use of bankruptcy procedures. During the years to follow, many countries of the CIS have enacted new insolvency legislation or substantially amended existing laws. Still, in 2001 almost the same lack of implementation was to be observed in a number of countries. Therefore A. Ramasastry has drawn the conclusion that it may take several more years for the true measure of the effectiveness of the second wave of legislation (Ramasastry 2002; cf. Harmer and Cooper 2004). In the present author's opinion, a later study of the reform results might, among other questions, also ask to what extent the insol-

veny proceedings have been misused by the various state agencies of the Member States of the CIS.<sup>11</sup>

The implementation gap is an apt expression to apply to many projects involving legal reform. So called accompanying measures which deal with the implementation of basic reform legislation should have received a greater degree of careful attention. Many legal acts, especially those involving civil and commercial law, were initially mistakenly conceived of as self-fulfilling and/or self-explanatory. For example, the meanings and significance of the principle of party disposition and the so-called 'contest of the parties' in Russian civil procedures have yet to be clarified by the legislature and the courts (e.g. Petrukhin 2003:258-285).<sup>12</sup> Achieving clarity will take more than simply removing legal contradictions. Such basic strategies as retraining judges and lawyers and updating the system of legal education should be given careful consideration.

Institutions as well as codes must undergo changes. A commentary on the Code of Civil Procedures notes that one of the objectives of reform is to ensure that judges play an active role (Shakaryan 2003:5). Yet the Public Prosecutor's Office continues to take part in civil court procedures (Art. 45 of the Code of Civil Procedures of the RF) despite the fact that the withdrawal of the Public Prosecutor and a strengthening of the legal professions should be clear objectives of the reform of civil procedures. Significant changes of these sorts, however, cannot be achieved in the framework of short-term projects. Indeed, the reform of procedure has generally been neglected in many areas of law.

A common feature is shared by the development of civil, criminal and public law in the CIS in terms of the chronological order in which legal reforms have proceeded. As compared to the treatment of substantive law, procedural law and other forms of support for substantive reforms have consistently lagged behind. In Russia, for example, the first legal acts during Perestroika addressed free entrepreneurship and the free press. The Civil Code followed only some years later – the first part in 1994, the second part in 1996, and the third part in 2001. The Code of Civil Procedures was finally updated in 2002. But, in order to effectively reform such areas of law, proper procedures, legal education and the courts, themselves, need to undergo changes, and the judges have to undertake additional training. In response to these needs, many legal reform projects presently engage in training seminars for judges and bailiffs.

Effective enforcement of court decisions is yet another stumbling block of reform. Like the above mentioned insolvency proceedings, the enforcement proceedings meet with many problems. Some of them are of a legal nature, but some are owed to other circumstances such as the lack of well-trained personnel. Especially when it comes to the enforce-

ment against agencies or enterprises of the state, raising an effective claim can be very problematic. In Central Asian states, voluntary compliance with court decisions is the exception rather than the rule. But unlike the case of new regulations regarding insolvency proceedings, the law regarding enforcement of civil court decisions still awaits deeper reform. The legal act of the Russian Federation 'On the enforcement proceedings'<sup>13</sup> merely consists of 95 articles which focus on the execution levied upon movables, but the attachment of debts and compulsory sale procedures for real property are relatively neglected under the law. Recently, a fuller draft, the 'Code of Enforcement' of Russia has been published. Its formal adoption has yet to occur (Uletova 2004).

The Criminal Code of Russia was amended in 1996, and a new Code of Criminal Procedures was adopted in 2001. But, the Public Prosecutor's Office has not undergone major changes. Under the governing statute of 1992 which is still in force and includes some 13 amendments,<sup>14</sup> the Public Prosecutor exercises the functions of control and oversight over the entire legal system. A first necessary step has been taken which authorises judges to approve or reject arrest warrants issued by Public Prosecutors. The principle of the separation of powers (found in Art. 10 of the Russian Constitution) speaks in favour of such reforms. Other reforms are warranted with regard to the penal system (Kalinin 2002) – above all, sentences should be reduced, and minor offenses should be decriminalised.

In the sphere of Russian public law, certain basic but critical legal acts are still yet to be enacted (Starilov 2001: Chapter 3 s. 3; e.g. Lebedev 2003). For some indeterminate reason, administrative law has been neglected over the years. Thus far, the Code of Administrative Violations is considered the basic legal act in the field of administrative law. This code, however, is a species of Soviet *dinosaur*. Basically, it works on the basis of punishing infringements of administrative regulations; however, its scope of application is vast. For example, citizens, civil servants, military servicemen, legal entities and foreigners are all subject to this Code. Viewed from the perspective of German legal principles, this Russian code is made up of such diverse elements that some of them would more properly be deemed as administrative violations and some as criminal offenses. Further, some matters would be regarded as pertaining to administrative law but others to civil service law. However, the Code also fails to lay the proper grounds for positive action by the state. In a manner of speaking, to a certain extent public law still resembles criminal law and operates by using repression, whereas authority for preventive actions and public planning is almost negligible.<sup>15</sup>

Recently some states of the CIS have adopted general administrative codes which will provide the basis for the work of the state organs and further provide for participation by the citizenry, prior hearings and



other measures to ensure adequate means of legal protection. The Republic of Georgia introduced an Administrative Code in 1999.<sup>16</sup> The Republic of Armenia has adopted a law 'On the foundations of administrative action and administrative procedures' which was signed on 16 March 2004. The Kyrgyz Republic adopted a new law 'On administrative procedures' on 22 December 2003. The Republic of Azerbaijan and the Republic of Uzbekistan are currently working on the draft of a corresponding legal act. They intend to draft not only a law 'On administrative procedures', but also special rules for court procedures for public law.<sup>17</sup>

In the case of Uzbekistan, a working group has prepared a concept paper which covers four different fields of administrative law: 1) court procedures, 2) administrative violations, 3) administrative procedures, 4) public participation & freedom of information. The actual drafting takes place only after particular strategic decisions concerning the administrative law reform have been made.<sup>18</sup>

Some advisors support the premise that the implementation of the new legislation is a matter which should be dealt with by the appropriate institutions of the respective countries. This would be true for countries which possess and are willing to commit sufficient finances and human resources to implement the reformed legislation. However, in the case of many of the Member States of CIS, few are in a position to take such actions. For example, universities in the Caucasus and in Central Asia lack sufficient numbers of legal experts. They are currently fully engaged in revising their curricula. Such subjects as 'Administrative Law' need to be restructured. The entire process of reform is further slowed by problems resulting from low wages, improper levels of funding, and the imposition of high fees on students.

Clearly, effective projects in support of legal reform in CIS countries should provide for a wide spectrum of appropriately identified actions. The author offers the following working agenda as an example of what sorts of actions are called for:

- assistance to local working groups involved in the drafting process;
- training for judges and lawyers – even training for trainers!;
- assistance in the publication of commentaries for proposed legal acts;
- assistance with regard to the provision of public information regarding the proposed changes;
- assistance with the challenges involved in the restructuring of institutions (e.g. the courts, the law enforcement departments, to name but a few);
- assistance with the processes involving consolidation and harmonisation of new acts with other legal acts;
- assistance in the monitoring of the effects of new laws.

Such a comprehensive agenda is simply not feasible for projects intended to extend for a period of 2-3 years. Yet, international organisations and their lawmaking programmes are often designed only for rather short engagements.<sup>19</sup> Even in the case of a relatively minor legal act, a two-year period is rarely sufficient. With regard to more complex laws, a period of four years is still insufficient. At present, many projects start even before the decisions about what the new law should look like have been made, and there are always several phases involved in such projects.

For example, initial discussions and strategic planning are followed by the drafting process itself; then, the presentation of the draft to other state ministries and the public must be undertaken, and amendments to the draft must be completed before the submission to Parliament; there, the proposed act must undergo various readings before its adoption, publication and the publication of information for the general public; and often, the process involves the preparation of commentaries and articles about the new legislation as well as relevant training for judges and civil servants. The list goes on, and not surprisingly some assistance projects expire before their work is completed. Some make it only as far as the point of the adoption of the new legal act and, thus, leave the process of implementation (and subsequent corrections) to others.

Another problem involves co-ordination between the various donor states and other organisations taking part in the legal reform process. Unfortunately, competition between Western European and US consultants and organisations has intensified. Not only do various schools of thought, but even different legal systems strive for supremacy in the CIS. On the other hand, if lawmaking is understood as an open process to begin with, the different approaches and their proffered solutions can be used in a positive manner and create a better (perhaps even, the best possible) law. Most important is that the new law *works*. Indeed, in Central Asia, the co-operation between Western European and US consultants has often been fruitful.

Another issue arises with regard to the development of the legal systems of neighbouring countries. A degree of consistency amongst these neighbours is important in that they may (hopefully) one day form a common market. This is a real possibility for Caucasian and Central Asian countries. Given the size and the capacities of some countries, unnecessary differences between their national legislations do not make sense. This has been the reason for the creation of the CIS model legislation of the Inter-Parliamentary Assembly (IPA) in St. Petersburg.<sup>20</sup> But even without this support, some CIS countries take advantage of Russia's new legislative actions on their own initiative. These countries first examine what is going on in Russia before they adopt similar legal

acts for themselves.<sup>21</sup> For its part, Russia not only takes Western law into account, but it also further develops its own existing legislation, resurrects certain pre-revolutionary legal traditions, and, thus, carves its own path (e.g. Makovskii 2005).

Many governments have grown *choosier* in their selection of whom to accept as a legal advisor from the West, especially since the demand for more effective law reform has increased. Thus, although the acceptance of foreign law continues, the process is not as straight forward as before and takes place on another, more sophisticated level. Those advisors who wish to see their own sorts of law adopted in the countries of the CIS sometimes still mistakenly think in terms of doing missionary work in lands where no legal traditions exist at all ('tabula rasa'). However, the legislation of CIS countries has reached the point where proposed changes must take into consideration the many laws of neighbouring states and even sub-legislative acts. As the reports of some organisations<sup>22</sup> still engaged in the on-going reform process suggest, the phase of consolidation of the reformed law has just got underway. In civil law, for example, no longer is the drafting of new legal acts seen as the greatest challenge, but rather greater emphasis is placed on the revision of the Civil Codes, the realisation of the Codes of Procedures, the education of judges, and the establishment of systems and enforcement procedures which provide for the certainty of the law.

Still another question arises as to what method to follow when drafting new legal acts (or amendments). A set of such well-known rules exists.<sup>23</sup> The linguistic skills of foreign jurists from various countries have increased, and their legislative techniques have been described more clearly and developed further in recent years. Language plays a decisive role in legal drafting, though foreign experts in law apparently lose sight of this fact when they write their comments on CIS legislation. Not every (quite few, in fact!) legal term drawn from one language and legal culture has an equivalent term in the language and legal culture of another country. The proper editing of legal texts demands time, diligence, and expertise as well as the services of excellent translators, particularly when more than one draft version of a proposed law is under consideration.

However, the challenges of effective lawmaking are not merely technical in nature. Human nature often pushes a person to take some sort of action when they recognise a problem, regardless of whether the proffered solution would actually improve the situation. Often, foreign legal experts do not hesitate to give advice whenever they see that 'something is wrong' with regard to a situation involving law, but many of them simply do not have the time or proper level of understanding to thoroughly assess the specific legal situation in a given country (Olden 2002).<sup>24</sup>

It would be a great relief if there were some universally applicable method (or, even better, a kind of universal law) to apply in each country engaged in legal reform. However, such a universal method of law-making has yet to be invented precisely because the object of regulation may be as complex as a civil code, on the one hand, or represent an economic measure with a rather limited effect, on the other hand. As has often been stated, 'The Law has many jobs'. It may aim at the building or restructuring of institutions. It may serve as an incentive or as a deterrent. Too often, the reformative effects of law have been overrated. A new legal act which is not in accord with the specific situation within a particular state will not lead to reform... it simply will not work! In order to develop a suitable draft with good chances for true implementation, it is usually a mistake to simply copy foreign law. Rather, foreign advisors must work in close co-operation with local groups of drafters and become thoroughly acquainted with the national legislation of the country for which the new laws are to serve.

Although clearly a need exists for the further development of rules, to determine how to carry out that development remains a difficult task. To some extent, all rules impact in some manner on the social and economic aspects of life, and few guidelines exist which allow one to predict the actual effect which any legal act might have on people's behaviour (Seidman, Seidman and Waelde 1999: 267-283). Vladimír Kubeš notes that the universities place particular emphasis on the teaching of substantive law, but they do not teach how to make law. He calls this situation the 'unfortunate inheritance of all legal positivism' (1987:285). According to Kubeš, laws should not be written in the form of commands and bans. Rather, law should formulate duties. This seems to be a valuable advice with regard to proposals for legislation in former Socialist countries. Their inheritance is a very particular one. Some years before the demise of the Soviet Union, Zoltan Peteri wrote:

In the socialist countries where political ideology and practice have been characterised by rejection of the theories of Locke and Montesquieu on the separation of powers, the conviction of the outstanding role of laws may claim a special validity. (...) The emphasis laid on the central role of legislative activity by socialist legal theory has resulted, however, in a certain one-sidedness in dealing with the problems of laws. 'Socialist normativism', having its origin in the theory and practice of the thirties, interpreted law as an accomplished fact; consequently, both its social roots and its realisation in society fell out of the sphere of interest (1988:307).

Only recently has continuous monitoring of the social and economic effects of law taken shape. The states of the CIS will have to develop their own institutions.

A further concern involves political and ethical factors which affect the process of lawmaking and implementation. Outside advisors have ethical responsibilities. Is it legitimate to co-operate and adjust the process of lawmaking for entrenched *presidential* systems and, at the same time, pay too little attention to such principles as democracy and participation of the people in their own government? Is it appropriate, for example, to work together with governments which have for a considerable period of time suppressed opposition in parliament? There is not just one answer to this question, and much depends on the prevailing situation. Critics may say that, by taking part in state reform programmes, outside lawmakers contribute to the confirmation of the administration in power – that they may in one way or another be reinforcing autocratic governments. Legal advice, on the other hand, does not necessarily constitute political co-operation. On the contrary, the work of a consultant may offer a variety of opportunities, for example, to question an ill-founded policy, to set out and explain alternative approaches to problem-solving. Through such a dialogue with established powers, foreign participation may improve the legal situation of a state to the better.

Of course, situations exist which call for the withdrawal of co-operation. Such a situation would arise were it to become clear that the assistance would legitimise theft and fraud. Other situations are less obvious. For example, it may be the case that foreign legal advice is sought merely to provide cursory approval for decisions which have already been taken without legitimate democratic participation. In such cases, foreign expertise serves as a superfluous justification which masks decision-making processes which otherwise lack legitimacy. In such cases, the advice of legal experts has no real impact on the final text or actual impact on a legal act.

Another questionable situation arises when outside advisors are asked to give advice or approval for laws which have merely been copied from the laws of another country. As mentioned earlier, Russian law is sometimes copied or amended only slightly before being offered to outside legal experts who, in turn, are asked for help with regard to further drafting. Although a certain degree of harmony between the laws of neighbouring states is good, the process should be dealt with in an open and honest manner.

Another problematic situation arises when several organisations are invited to take part in the process independently or without knowledge of one another's participation. Their efforts should be co-ordinated.

## Conclusion

In conclusion, it should be emphasised that legal advice should be offered without *strings attached*. The use of means of influence other than persuasion and of proper legal argument in support of reform legislation poisons the process. In this sense, legal advice should be politically neutral, functional and transparent. Public hearings and nationwide discussions should be organised, if possible, with the support of national institutions and international organisations. In the CIS, laws and decrees have often primarily been shaped and promoted by staff members of the administrations and their state ministries – or, at least, under their supervision. In such situations, subsequent discussions in Parliament are often little more than pro forma.

In a related matter, in order to properly evaluate proposed legal acts, Members of Parliament must actually be educated in lawmaking. At a minimum, Members of Parliament should know how to discern potential weaknesses in proposed legislation. Specific training programmes should be developed for this purpose. Finally, on-going independent monitoring should be established in order to check upon the level of observance of the law and other effects of new legal acts. After a decade of legal reform in the CIS member states, it is more important than ever to ensure that the new legislation actually works as it is intended.

## Notes

- 1 The author of this article is a project manager of the German Agency for Technical Co-operation Ltd. (GTZ) who works for legal reform projects in the Caucasus and Central Asia, beginning from August 2000.
- 2 Commonwealth of Independent States, consisting of the Azerbaidzhan Republic, Republic of Armenia, Republic of Georgia, Republic of Belarus, Republic of Kazakhstan, Kyrgyz Republic, Republic of Moldova, Russian Federation, Republic of Tajikistan, Turkmenistan, Republic of Uzbekistan and Ukraine.
- 3 For Georgia, see: Economist Intelligence Unit 2003: 23-36.
- 4 See, for example, the profile of Mikhail Khodorkovsky and related articles at <http://news.bbc.co.uk/1/hi/business/3213505.stm> (all cited web-sites as of 1 September 2005) and Khodorkovsky's defense website <http://www.khodorkovskytrial.com>. See also the Spiegel interview with Kremlin boss Vladislav Surkov 'The West Doesn't Have to Love Us', at <http://service.spiegel.de/cache/international/spiegel/0,1518,361236,00.html>. – Other well-known 'oligarchs' who have been accused of criminal offences are Vladimir Gusinsky and Boris Berezovsky.
- 5 In comparison: in Germany, the Civil Code dates from 8 August 1896. The decision to prepare the draft had been made in 1873. It finally entered into legal force beginning from the 1<sup>st</sup> of January 1900 (new edition 2<sup>nd</sup> of January 2002). The law on administrative court procedures has been adopted at the end of 1959, and the basic legal acts for administrative procedures have been adopted in 1976/1977.
- 6 See the autobiography of the passed away Alexander Panikin (2000).

- 7 This is the theme of Luchin 2002.
- 8 For example, in April 2004 the President of the Republic of Kazakhstan vetoed a new, more restrictive version of the law 'On Mass Media'. About the Russian process of lawmaking, Andrea Andreeva has written a dissertation, see Andreeva 2002. On the presidential veto, see 160–170.
- 9 For Russia, compare Politkovskaya 2004:113–127.
- 10 For the economic setbacks, compare the opinion of Joseph Stiglitz on the IMF policy (2002: chapter 5). See also Ellerman et al. who write: 'It was naïve to expect that privatisation alone would modernise Russian industry' (2001:299).
- 11 For example, applications for the opening of the insolvency proceedings have been issued by tax authorities although in some cases the company concerned had yet not become insolvent.
- 12 The central term in Russian reads 'состязательность сторон'.
- 13 Law No 119-FZ of 21.7.1997 'О принудительном производстве', with last changes of 22-8-2004. In addition to this, the Code of Civil Procedures of 2002 traditionally contains a set of basic rules on the enforcement of court decisions (Art. 428 – 446).
- 14 Закон 'О прокуратуре Российской Федерации' 17 января 1992 года N 2202-1 в редакции Федерального закона от 17 ноября 1995 года N 168 ФЗ.
- 15 The author does not suggest that Russia should adopt the German approach. But the author believes that a fundamental reform of the administrative law of Russia – which would go beyond amendments to the Administrative Liabilities Code – could be facilitated by the splitting of this Code.
- 16 On the administrative law reform in Georgia, Ukraine and Armenia since 1996, read: Fenton 2000. With regard to Eastern Europe: Luchterhandt 2001.
- 17 So far, a small set of rules is included into the respective Code of Civil Procedures.
- 18 See the Presidential Reform Programme for the years 2005 – 2007, including legal reform: Resolution of the President of the Republic of Uzbekistan of 10-3-2005 'On the programme of the realisation of the objectives and tasks of the democratisation and renewal of the society, the reform and modernisation of the state' and attachments. (The title has been translated from Russian by the author.)
- 19 In the countries of the Caucasus and Central Asia, long-term legal reform projects of the German Agency for Technical Co-operation (GTZ) take part in the on-going reforms. They are designed to comprise three or four phases, each of them with a period of time of about two or three years.
- 20 On the development until 2000 and the significant role of the model legislation of the Inter-Parliamentary Assembly (IPA) in St. Petersburg, see Simons 2000.
- 21 For example, the reformed Code of Civil Procedures of Russia served as a model for a draft of the renewed Code of Civil Procedures of Tajikistan. Nonetheless, the legislative working group asked US and German legal experts to support the drafting process.
- 22 For example, the EU's Tacis Programme, the Center for International Legal Co-operation (CILC) in Leiden, the Netherlands, the IRIS Center at the University of Maryland, USA, the German Agency for Technical Co-operation Ltd. (GTZ) and others. – For the GTZ, compare Knieper 2004.
- 23 For example, in Germany there exist rules about legislative drafting: 'Gemeinsame Geschäftsordnung der Bundesministerien', Chapter 6, 'Geschäftsordnung des deutschen Bundestages', s. 78, and rules concerning the issuance of decrees. In addition, the German Ministry of Justice has published a manual: 'Handbuch der Rechtsförmigkeit' 1999.
- 24 Olden writes: 'The problem of "double knowledge" – an ideal expert should combine knowledge of the law and administration in the donor country with comparable knowledge of the recipient country' (2002).

## 10 The codification process of Russian civil law

*F.J.M. Feldbrugge*

### The Soviet heritage

The need for a new codification of civil law in Russia can only be understood if the immediate past is taken into consideration: the state of civil law during the Soviet era.

To a considerable extent, the contents of Soviet civil law were determined by the ideological positions of Marxism-Leninism. They demanded that the means of production (land, capital goods, labour) be controlled by society (represented by the Soviet state). With regard to *land*, this resulted in wholesale nationalisation. Consequently, the law concerning real estate took on a completely different complexion. Most *capital goods* were also owned by the state, with the exception of simple and less costly items (sewing machines, agricultural implements, etc.). In agriculture, along with state farms (*sovkhozes*), collective farms (*kolkhozes*) appeared as the *users* of the land and the *owners* of the capital assets, but as *kolkhozes* were completely regulated and directed by the state, *kolkhoz* property could be considered as indirect state property. As to labour, the state, directly or indirectly, was the only employer, labour contracts between employees and private employers being forbidden.

Taken together, these factors allowed the state to exercise full control over production. Such control was implemented through the system of central planning of the entire process of production. Central planning directed state enterprises and *kolkhozes* to engage in a process of producing and selling raw materials, buying such materials and converting them into other products, and selling such products to other state enterprises or to state shops catering to consumers-citizens. In a conscious imitation of a free market, this process was regulated by civil law, although the main contents of the contracts which constituted the juridical expression of this process were dictated by the state plan.

During the early Soviet period, efforts were made to create a special branch of administrative law (called 'economic law') to provide the legal framework for economic life, but the supporters of the civil law approach (the 'civilists', as they were called) carried the day. This turned out to be an important factor in the post-Soviet era, because it assured a



certain amount of continuity with the pre-Soviet era. Before the Russian revolution, work on a Civil Code was well advanced, but left incomplete on account of the First World War. The draft Civil Code of the Russian Empire of 1905<sup>1</sup> had been heavily influenced by the German Civil Code (BGB) of 1900,<sup>2</sup> and when the Soviets decided, in the early 1920s, to draft their own code, their draftsmen, trained before 1917, were well versed in the civilistic technique of the BGB and the Russian draft of 1905. In this way, the civil law tradition was kept alive in Soviet legal education.<sup>3</sup>

Soviet civil law, as indicated above, concerned primarily the legal relationships between state entities (including *kolkhozes*) among themselves, engaging in economic activities. Additionally, it covered the much more restricted area of economic activities in which individual citizens could engage, such as the buying or renting of consumer products, the ownership of a limited range of goods, intellectual property, etc. The Civil Code also embraced the law of succession, but not marriage and family law (in which the economic aspect was supposed to be subordinate to other interests), nor labour law (an ideologically sensitive topic in the Marxist-Leninist approach).

### The post-Soviet codification process

Once Russia had made the express choice to transform itself into a democratically governed market economy, respecting the Rule of Law, it became obvious that very incisive reforms of the civil law would be required, involving both the amendment of existing law and the creation of new law.

The process of *perestroika*, initiated by Gorbachev in 1985, had been a gradual one, and accordingly the reform of civil law initially proceeded along the road of incremental change. After a while, however, it became clear that this was leading to an accumulation of inconsistencies and that a more integrated approach, a comprehensive overhaul of civil law, in other words a new Civil Code, was required.

The first steps were taken while the USSR was still in existence. In accordance with the prevailing system of distribution of legislative powers in the USSR, Federal (USSR) Principles of Civil Legislation were enacted (31 May 1991), to serve as the common basis for the civil codes of the union republics.<sup>4</sup> But before these Principles had become operative on 1 January 1992, the USSR had fallen apart. The drafting team for the Principles then started work on a Civil Code for the Russian Federation.<sup>5</sup> The USSR Principles of 1991 were temporarily adopted as the operative civil law of the Russian Federation, with the

old RSFSR (Russian Soviet Federative Socialist Republic) Civil Code of 1964 as the secondary source.

The first phase of the new drafting process concentrated on general principles of civil law, the law of property and related rights, and the general part (general rules) of the law of obligations. This work was completed within a remarkably short period and on 30 November 1994 the corresponding three chapters of the new Civil Code, after having been adopted by both chambers of the Russian parliament, were signed into law by the president and became operative as from 1 January 1995.<sup>6</sup>

The entire year of 1995 was spent on the preparation of the very extensive fourth chapter of the Code, devoted to the 'special part' of the law of obligations (as opposed to the 'general part', and covering specific contracts, torts, and other sources of obligations). This part (Chapter) was adopted in due course and became operative as from 1 March 1996.<sup>7</sup>

These four chapters together constituted the core of the new civil law of the Russian Federation, providing the legal foundation for a liberalised market economy. Work on other chapters of the Civil Code continued, but the most urgent tasks had been completed by 1996. On 1 March 2002 a third part of the Civil Code became operative, containing chapters on inheritance law and on private international law.<sup>8</sup> In fact, work on the completion of the Civil Code has been slowed down by the need to engage in more detailed legislation on matters regulated summarily by the first four chapters of the Civil Code.<sup>9</sup>

### **Main problems confronting the Russian drafting team**

The work on the first two parts (the first four chapters) of the Russian Civil Code had to be accomplished under heavy time pressure. Those responsible for introducing political and economic reforms had come to realise that there would be almost no progress without a proper legal foundation. As a result, the drafting team of the Civil Code was faced with very short deadlines.

Secondly, work on the first two parts had to be carried out during a period of great political unrest. The violent conflict between president and parliament during the summer and autumn of 1993 had resulted in a victory of the former, but the much weakened Duma elected in December 1993 was even less disposed to co-operate with the president. Under such conditions, great political adroitness was required to get the Civil Code adopted. For a while, a rival drafting team, assisted and financed by powerful foreign support, operated under the aegis of the presidential administration. In the end, however, the superior quality of

the original drafting team's work proved to be decisive and the attempts to push through an alternative draft had to be abandoned.<sup>10</sup>

Apart from these practical and political problems, very serious substantive legislative problems concerning the following issues had to be dealt with:

- the scope of civil law;
- the basic principles of civil law;
- areas of civil law, unregulated before, which had to be regulated now;
- the amendment or cancellation of existing legislative arrangements.

With regard to the *scope of civil law*, it was decided to adhere to Russian tradition and maintain separate legislation for family and labour law. The superior force of the Civil Code (CC) with regard to these and other branches of law (such as labour law) was explicitly expressed (Art. 3 CC).

The treatment of commercial law aroused more controversy. The existence of separate commercial codes in several Western European countries and of a Uniform Commercial Code in the United States was regarded by some members of the Russian legal profession as an argument in favour of enacting a separate commercial code in Russia. This idea was also supported by other sections of the profession who in the past had advanced the idea of a separate economic code. In the end, the view of the drafting team emerged victorious, stressing the unity of civil law and the importance of a comprehensive civil legislation.

The *basic principles of civil law*, now enshrined in Art. 1 par. 1 CC, were considered necessary to mark the contrast with the principles enunciated in the first article of the RSFSR Civil Code of 1964.<sup>11</sup>

The Code of 1964 had been provided with a preamble which set out the Code's ideological underpinnings; its first article then briefly summarised the preamble:

*Article 1. The Tasks of the RSFSR Civil Code*

The Civil Code of the RSFSR regulates property relationships and personal non-property relationships connected with them, with a view to the creation of the material-technical bases of communism and the increasingly complete satisfaction of the material and spiritual needs of citizens. In cases provided by law, the present Code also regulates other personal non-property relationships.

The basis of property relations in Soviet society is the socialist economic order and the socialist ownership of the tools and means of production. The economic life of the RSFSR is regulated and directed by the state economic plan.

The new Code dispenses with a preamble and enumerates the basic principles of civil legislation in its first article (par. 1):

*Article 1. Basic Principles of Civil Legislation*

1. Civil legislation is based on the recognition of the equality of the participants of the relations governed thereby, the inviolability of property, freedom of contract, the impermissibility of arbitrary interference by anyone in private affairs, and the necessity for the unfettered exercise of civil rights and for ensuring the restoration of violated rights and the judicial protection thereof.

*New areas to be regulated* emerged as a result of the introduction of a market economy. There had been no place in the Soviet system for joint-stock companies, and consequently no company law existed under that system.<sup>12</sup> A similar situation prevailed with regard to real property, which could only be owned by the Soviet state. Obviously, new civil law regarding companies, other legal persons, real property, mortgages, and similar topics, had to be created.

In other cases, existing law was no longer adequate and had to be amended. Soviet law, for instance, did know the concept of insurance, but only in a limited form, and with a single insurer, the State Insurance Company *Gosstrakh*.

The question concerning *parts of Soviet civil law which should be amended or cancelled* was primarily political. The drafting team, admitting the superfluousness or even undesirability of particular institutions in principle, nevertheless considered it politically opportune to keep them on the statute-book. Prominent examples were the retention of a special legal form for state enterprises (arts.113-115 CC) and the quasi-ownership which Soviet law conferred on state enterprises in the form of so-called operational control or economic management (see arts. 216, 299, 300 and 305 CC). Even the different forms of ownership (socialist vs. personal), which had been of such fundamental importance in Soviet law, were retained in the shape of private, state, and municipal ownership (Art. 212 CC), although par. 4 of this article provided that 'the rights of all owners are protected in equal fashion'.<sup>13</sup>

## **The sources of the Russian Civil Code**

Notwithstanding the fundamentally different ideological approaches of the Russian civil codes of 1964 and of 1993-1996, there was inevitably a great amount of continuity, particularly in the numerous and extensive parts of the codes which were of a more technical-legal nature. In such cases the RSFSR Civil Code of 1964 would usually have adopted

the analogous provisions of the 1922 Civil Code of the RSFSR, and the latter, in its turn, had borrowed from the Russian draft code of 1905. The definition of the important concept of 'legal acts' or 'transactions' (*sdelki*) offers a case in point. The 1905 draft had 'acts carried out to acquire or terminate civil [law] rights' (Art. 56), the 1922 Code 'acts directed towards the establishment, alteration, or termination of civil legal relationships' (Art. 26), the 1964 Code 'acts of citizens and organisations directed towards the establishment, alteration, or termination of civil [law] rights and obligations' (Art. 41), and the new Russian Civil Code has 'acts of citizens and legal persons directed towards the establishment, alteration, or termination of civil [law] rights and obligations' (Art. 153).

*The Civil Code of 1964* unquestionably served as the starting-point for the work of the drafting team, insofar as it provided the bulk of the building materials for the new text, once it had been divested of its ideologically determined superstratum.

*The USSR Principles of Civil Legislation of 31 May 1991* offered the first major enactment embodying the new approach to the legal infrastructure of the market economy. In that sense the Principles of 1991 (which, as stated, constituted part of Russian law until the introduction of the new Russian Civil Code) served as the second major source of the Civil Code. By their very nature the Principles provided little detail; they moreover represented an earlier stage of development of the new civil law of Russia, inasmuch as, at the time of their drafting in 1991 it was not even clear in every respect what the new system of civil law would have to accomplish.

*Earlier post-perestroika legislation*, although often inconsistent and hastily conceived, constituted a third source for the drafters of the new Code. After the proclamation of the sovereignty of Russia, on 12 June 1990,<sup>14</sup> a number of important economic laws were enacted in the course of 1990, pointing the way for further legal reforms.<sup>15</sup>

Unlike their Soviet predecessors, wary of foreign influences, the members of the drafting team displayed a genuine interest in legislative solutions worked out in other countries. Practical considerations also prompted this willingness: time would be saved if a satisfactory answer to a legislative problem could be found abroad. Such answers could be found in *international treaties* to which the USSR (and then Russia as its successor in law) was a party, such as the Vienna Convention on the Sale of Goods. Internationally respected agreements, to which Russia was not a party (various Unidroit and UNCITRAL conventions), as well as important EU arrangements, wherever this appeared to be useful, were also consulted by the drafting team (Khokhlov 1995).

A proper understanding of the Russian drafting process demands an awareness of the practical working conditions faced by the drafting

team. Time pressure precluded extensive comparative work. The availability of foreign literature and the required language skills circumscribed the possible range of comparative research even further. These factors raised the question of the practicability of directly involving foreign experts.

Russian sources mention the Netherlands, Germany, the United States, and Italy as the most prominent countries which contributed legal expertise (Makovskii 1998:338; Khokhlov 1995:243; Alekseev 1998:25; Kozyr' and Shilokhvost 1995:378). There were obvious differences between these partners as to their practical (financial) potential. Nevertheless, the Dutch were, in a sense, the best placed to provide the relevant comparative legal expertise. The Netherlands was the only Western country which had embarked on a recodification of its civil law after the Second World War.<sup>16</sup> Moreover, the drafting of the new Dutch Civil Code had been started soon after the end of the war and had extended over a long period; as a result, there was a large pool of experts who had been actively involved in the recodification process.

### **Dutch involvement in the drafting of the Russian Civil Code**

The first contacts between the Institute of East European Law and Russian Studies of the Leiden University Faculty of Law<sup>17</sup> and the Institute of Legislation attached to the Supreme Soviet (as the Russian parliament was then called) took place during the summer of 1992. Most of the members of the drafting team were connected with the latter Institute.

In May 1993 the first joint meeting of the drafting team and a small group of Dutch experts took place in the vicinity of Moscow.<sup>18</sup> The Russian team presented a first draft of the first three chapters of the Civil Code (covering general principles, property and related subjects, and the general part of the law of obligations) together with a very large number of questions formulated by the Russian side. In the course of an intensive one-week working session, these questions provided the basis for free and wide-ranging discussions of the problems the Russian experts were facing.

Whether by sheer luck or intelligent management of the agenda, the session of May 1993 produced a consultation procedure which had not been explicitly planned or designed, but which subsequently proved to be very effective. This experience was consolidated over the following years in this way that the Russian side would first produce a draft text of a portion of the Civil Code, together with a list of questions. These texts would then be translated into English at Leiden.<sup>19</sup> The questions would usually inquire how the matter at hand had been regulated in

the Netherlands and other Western countries, or how the Dutch experts judged the Russian solutions. Such questions left the Russian side in complete control of the consultation process, while the open nature of the questions allowed the Dutch experts to make any observations they would consider relevant. The working sessions usually lasted from a few days to two weeks, depending on the amount of material to be dealt with. Most sessions took place in the Netherlands, a few in Russia. When more specialist topics were to be discussed (such as insurance, or corporations), Dutch experts in the relevant fields were brought in, from legal practice, the courts, the academic world, and the Ministry of Justice.

Although the entire project was primarily supported and financed on the Dutch side by the government of the Netherlands (specifically, the Ministries of Foreign Affairs and of Justice), it was always made clear that the Dutch participants were fully independent and motivated exclusively by the wish to make a meaningful contribution to the important work of drafting a new Civil Code for Russia.

This point was reinforced by the awareness on the Russian side that the Netherlands, as a comparatively minor player on the international field, did not have a political agenda which might be a cause for concern for the Russian government.

The role of Dutch involvement was not to promote the expansion of Dutch civil law (the Dutch Civil Code contains numerous typically Dutch solutions to typically Dutch problems), but to provide expertise in the area of comparative civil law, in order to contribute to a fuller understanding of the problems involved and to enhance the possibilities for selecting the most appropriate solutions. Russian civil law, as has been explained above, was by no means a *tabula rasa*, Russia possessed a complex civil law tradition, and the problems facing the Russian drafting team were in many ways unique and unprecedented, deeply rooted as they were in the Soviet and Russian past. In such a situation, comparative legal expertise, such as the Dutch team was able to provide, could serve, not as an example to be followed, but as a point of reference in charting the best possible course for Russia.

A concrete example in this respect is the relationship between the judge and the law. In the long and stable Dutch tradition, great trust is placed in the judge and this allows a generous measure of judicial discretion and concomitant tolerance for rather general formulas in the law or, what might be characterised as the conscious omission of statutory regulation. In the post-Soviet situation of Russia, such an approach was not an option. The Russian Civil Code, much more so than the civil codes of Western countries, must clearly play a more educational role: it must explain the law to the judges and other members of the legal profession as well.

This does not mean that there are no traces of Dutch legal influences in the Russian Civil Code. One prominent example may be seen in Art. 6, which deals with the analogous application of civil legislation. Its second paragraph provides that 'where it is impossible to use statutory analogy (*analogia legis*, Russian *analogiia zakona*), the rights and duties of the parties are determined by proceeding from the general principles and the sense of civil legislation (analogy of law) (*analogia iuris*, Russian *analogiia prava*) and the requirements of good faith, reasonableness, and equity.' This provision echoes the central role which has been assigned to reasonableness and equity in the Dutch Civil Code.<sup>20</sup>

### The CIS dimension

While the Soviet Union was in existence, the union republics, as explained before, would enact their own civil codes, on the basis of a previously enacted federal law containing 'principles of civil law'. It was obvious from the beginning that, in fact, a model civil code was drawn up in Moscow, which then would be taken over with only minor changes and adopted in the individual republics. Soviet textbooks routinely referred to a specific provision of the RSFSR Code, adding 'and the corresponding provisions of the other union republics'. As a result, the USSR enjoyed in fact the advantages of an almost uniform legal system.<sup>21</sup>

Once the Soviet Union was dissolved, the unity of law would be under serious threat if every republic would embark on a legislative *Alleingang* and equip itself with a completely new set of laws.<sup>22</sup> In view of the survival of numerous close economic, social and personal ties between the former Soviet republics,<sup>23</sup> this constituted a real danger.

The Commonwealth of Independent States (CIS) offered a framework to counter this threat, because the preparation of model legislation was one of the agreed tasks entrusted to the CIS.

The actual task of drafting a model civil code for the CIS was assigned to a specially established Centre for Private Law, attached to the Interparliamentary Assembly of the CIS. This Centre was in turn closely connected with the Russian Research Centre for Private Law, which played the central role in the drafting of the Russian Civil Code.

An inter-republican working group met at irregular intervals to draw up the model code, on the basis of the draft texts of the participating republics.<sup>24</sup> As almost all of the republics made intensive use of the Russian draft in the preparation of their own civil codes, the final product, not surprisingly, closely resembled the civil legislation of the Russian Federation. The complete Model Civil Code of the CIS (including the parts concerning intellectual property, the law of succession, and private



international law) was adopted by the Interparliamentary Assembly of the CIS on 17 February 1996.

The Model Civil Code is not a law, but a recommended text. It has allowed the smaller republics to acquire a modern and technically advanced form of civil legislation. Even more importantly, it has to a great extent succeeded in maintaining the unity of civil law over a very large territory.<sup>25</sup>

## **Two afterthoughts, in lieu of a conclusion**

### *Demand-driven legislative consultation*

There is no shortage of governmental bodies, international organisations, professional associations, law firms, and even individual experts who are ready to write laws on all possible subjects for foreign clients. For a great variety of reasons, this approach is rarely successful. It would take a much longer paper to explain why this is so, but some indications have been given in the present paper.

The initiative in a consultation process which involves foreign experts belongs to the hosts; they should indicate what they have in mind and how their counterparts might contribute.

This also implies that the consultant should abandon any thoughts about the superiority of his own legal system and the great benefit his hosts would derive from copying bits of this system.

However, this does not take away from the fact that a legal system can also be looked at as a tool-box. Particular institutions, arrangements, or practices, may be very suitable for adoption in particular cases.<sup>26</sup>

### *The role of Russia*

There is an understandable tendency in the non-Russian successor states of the USSR to emphasise their newly-acquired sovereignty, to develop their national identity, and to insist on their independence. But such aspirations should not lead to the denial of geopolitical, historical, economic and social realities. There are many countries in the world that have to co-exist with one or more much bigger neighbours, and pretending that those neighbours do not exist is usually not the most sensible policy.

Secondly, a smaller country often has a choice in shaping its relations with its neighbours, if there are several. This is quite obvious in the case of Armenia and Georgia; would they rather be close friends with Iran or Turkey? And what hope of progress is there for the republics of Central Asia if they would ally themselves with their southern neighbours?

My advice, for what it is worth, to would-be consultants to legislative processes in the former Soviet Union could therefore be summarised in the following ‘ten commandments’:

- Leave the actual drafting of legislation to native experts;
- Keep in mind that every piece of legislation functions within a legislative system and must be compatible with that system;
- Do not volunteer advice, but let the native experts indicate where they believe foreign expertise could be useful;
- Be doubtful of the excellence of the solutions provided by your own legal system;
- Try to keep the consultation process away from political interests;
- Do not employ consultants you would not use at home;
- Be aware of cultural sensibilities (manners, demeanour, use of language, and, yes, also age, are highly relevant);
- Resist the tendency to let anti-Russian emotions enter into the consultation process;
- Keep in mind that the geopolitical, historical, and socio-economic realities of the region cannot be disregarded with impunity;
- Remember in all this that good laws are better than bad laws, even if they are not very effective.

## Notes

- 1 *Grazhdanskoe Ulozhenie. Proekt* (Civil Code. Draft), 2 vols., Sankt-Peterburg, 1910, 1215+1362 p. The editor of the Draft was I.M. Tiutriumov.
- 2 *Bürgerliches Gesetzbuch* of 18 August 1896, *Reichsgesetzblatt*, 1896, 195-603; it entered into force on 1 January 1900.
- 3 The Civil Code of the RSFSR (Russian Soviet Federative Socialist Republic) of 1922 was superseded by a new RSFSR Civil Code in 1964. The latter, in turn, was preceded by the Principles of Civil Legislation of the USSR of 1961, a more concise enactment serving as the basis for the more elaborate civil codes of the 15 union republics, of which the RSFSR was by far the largest and most important. The RSFSR was the legal successor of the Russian Empire, after the overthrow of the Kerenskii government on 7 November 1917. With the collapse of the multinational Russian Empire, many of the non-Russian territories had broken away. Some, like Poland, Finland and the three Baltic republics, succeeded in maintaining their independence. Others were forcibly reunited with Russia in the course of the Civil War. The usual procedure was to set up national communist governments who would then request the support of the Red Army. On 30 December 1922, the RSFSR and the Ukrainian, Belorussian and Transcaucasian Soviet republics founded the Union of Soviet Socialist Republics (USSR). Some legislative powers (such as those concerning foreign trade or maritime law) belonged exclusively to the USSR, but in most areas (such as civil and criminal law) the individual union republics were empowered to adopt their own codes, on the basis of general principles to be issued by the USSR legislature. In fact, the various codes of the republics were almost identical. After 1922, the number of union republics grew steadily, by the dissolution of the Transcaucasian Federal Republic into its constituent parts (Azerbaijan, Armenia,

- Georgia), by granting union republic status to five Central Asian republics, and by territorial acquisitions in the course of the Second World War (Moldavia and the three Baltic republics).
- 4 *Vedomosti S'ezda Narodnykh Deputatov i Verkhovnogo Soveta SSSR*, 1991, No.26, item 733.
  - 5 A first draft for a Russian Civil Code had been completed by the end of 1991. The drafting team was closely connected with the Research Centre for Private Law, an institution initially attached to the parliament (Supreme Soviet), but transferred to the presidential administration after Yeltsin's victory over the parliament in the autumn of 1993. The president of the Centre was S.S. Alekseev, one of the main draftsmen of the Russian Constitution of 1993. The drafting team had been led from the beginning by A.L. Makovskii, a specialist in maritime law; other prominent members of the drafting team were S.A. Khokhlov (executive director of the Centre), M.I. Braginskii (one of the most experienced civil law experts), V.V. Vitrianskii (vice-president of the Supreme Arbitration Court), E.A. Sukhanov (dean of the Moscow Law Faculty) and V.A. Dozortsev (a leading specialist in the field of intellectual property).
  - 6 *Sobranie Zakonov Rossiiskoi Federatsii* 1994, No.34, item 3301. The date of adoption by the Duma (which counts as the official date of the Code) was 21 October 1994.
  - 7 Adopted by the Duma on 22 December 1995; *Sobranie Zakonov Rossiiskoi Federatsii*, 1996, No.5, item 410.
  - 8 Adopted by the Duma on 1 November 2001; *Sobranie Zakonov Rossiiskoi Federatsii*, 2001, No.47, item 4552.
  - 9 The Civil Code itself explicitly requires special legislation on bankruptcy, consumer and producer co-operatives, civil status registration, legal persons, economic partnerships, companies with limited liability, joint-stock companies, privatisation, state and local government companies, immunity of the state and of state property, land and natural resources, foreign currency, registration of real property, securities, mining, airspace, housing condominiums, mortgages, consumer protection, supply of goods to the state, energy supply, contracting with the state, transportation, bills of exchange, and insurance.
  - 10 More details about this curious affair may be found in Wedel 1998. The leader of the Russian drafting team, A.L. Makovskii, referred briefly to this episode in his critical review of the entire foreign consultation process for the Civil Code: Makovskii 1998:341. This book was simultaneously published in Russian, *Puti k novomy pravu* (other data identical), and Makovskii's paper can be found there on p.356-365. The book was designed to offer an evaluation of legislative co-operation with the governments of the former Soviet republics and contains contributions from leading participants from both sides, including a number of ministers of justice.
  - 11 Translation of the 1964 Code, see Kiralfy 1984. Translation of the new Civil Code, see Van den Berg and Simons 1995.
  - 12 As relics from the New Economic Policy (NEP)-period in the early 1920s there were a few joint-stock companies, such as TASS, but their stock was fully owned by the state.
  - 13 Art.212 even allows the existence of 'other forms of ownership', without giving any indication what sort of ownership this might be.
  - 14 This was, to some extent, an empty gesture, as the RSFSR was already explicitly recognised as a sovereign state in the USSR Constitution of 1977. Accordingly, it possessed, as did the other 14 union republics, the right of secession. The idea of the secession of the RSFSR from the USSR, of course, made as much sense as the amputation of the torso from the rest of the body. The RSFSR was the legal successor of pre-revolutionary Russia, the mother republic, or rather the Adam out of whose ribs the

- other Soviet republics had been shaped, it covered three quarters of the territory of the USSR and was home to more than half of its population.
- 15 Such as the Russian Law on Ownership of 24 December 1990 (*Vedomosti S'ezda Narodnykh Deputatov RSFSR i Verkhovnogo Soveta RSFSR*, 1990, No.30, item 416) or the Law on Enterprises and Entrepreneurship of 25 December 1990 (*id.*, item 418).
  - 16 In Canada, the province of Quebec had a similar experience.
  - 17 Until 1993 the Institute was named Documentation Office for East European Law.
  - 18 The group was headed by the then Government Commissioner for the Dutch Civil Code, Mr. W. Snijders, vice-president of the Netherlands Supreme Court (*Hoge Raad*), and consisted further of Professor J. de Boer of the University of Amsterdam, Professor W.B. Simons and the author of this paper (both from the Leiden Institute), accompanied by Mr. J. van Olden, then director of the Center for International Legal Co-operation; the latter Center, supported by all the major sections of the Dutch legal profession, was in charge of practical and logistical aspects of the project.
  - 19 English has emerged as the standard language of communication in international co-operation projects with Russian-speaking partners; this has definite drawbacks, particularly in the field of private law, on account of the important differences between the Anglo-American legal systems on the one hand and the continental legal systems on the other. The institutions and concepts of the two systems, and consequently also the appropriate terminology, often diverge considerably. While the German BGB and the French *Code Civil* were available in a Russian translation (or could be read in the original language by many Russians), it was found necessary, for the success of the project, to produce a translation of the relevant chapters of the new Dutch Civil Code: Ferschtman and Feldbrugge 1996.
  - 20 'Equity' is the term used in the translation by Van den Berg and Simons 1995; another English translation of the Russian Civil Code offers 'justice' (Maggs and Zhiltsov 1997); my preferred translation of Russian *spravedlivost'* (Dutch *billijkheid*) in this case would be 'fairness' or 'equitableness'.
  - 21 The system of distributing legislative powers between the USSR ('principles') and the union republics ('codes') applied not only to the civil code, but to all major branches of legislation. Additionally, a number of legislative topics were considered to be within the exclusive jurisdiction of the USSR (e.g. maritime law, air law, foreign trade).
  - 22 Some of the smaller republics did not even have the facilities for higher level legal education and would therefore in any case be dependent on the importation of legal expertise.
  - 23 The Baltic republics, which had been joined to the USSR last and which had been the first to leave, had clearly opted for rejoining Europe and loosening their ties with Russia and the other states of the former USSR. They had left the USSR before it fell apart and never joined the CIS. The complicated history of their newest civil legislation (they all went their own way) demonstrates how fortunate the solution, worked out in the CIS, was.
  - 24 Professor William B. Simons and the author of this paper participated as observers in most of the working sessions (which were conducted in Russian).
  - 25 Only Georgia, and to some extent also Turkmenistan, have remained outside the CIS framework in this respect. The CIS project was supported by the Dutch government, although there had been a certain amount of uneasiness in Western government circles about it. It was felt that the CIS was to be considered mainly as a vehicle for Russian hegemonial aspirations and therefore unworthy of support. The Model Civil Code project, nevertheless, undeniably enjoyed the wholehearted support of the countries concerned. See also Makovskii 1998:342.

- 26 Work on the Dutch Civil Code proceeded slowly, and as parts of it were completed, they were adopted. This approach appealed to the Russian drafters, for entirely different reasons.

## 11 The Russian experience: A Dutch perspective on legislative collaboration

*W. Snijders*

### Introduction

My participation in the ALADIN Conference and this subsequent article are attributable to my involvement in the process of providing outside legal assistance to several of the successor states of the former Soviet Union and, first, to the Russian Federation. I write here about societies in transition.

Before the demise of the Soviet Union the various states had identical legal systems based on a planned economy with a few national variations, and even those were mostly symbolic in nature. After the fall of the Soviet system those states had to adapt their legislation overnight to cope with the new political, economic and social situation. I worked, in a manner of speaking, on three different projects, each time in somewhat different settings. First, I was consulted by the drafting committee of the Russian Federation who was working on the civil code. I collaborated with eminent legal scholars experienced in legislative drafting and possessing real insight in the problems that faced them. In the second instance, I was consulted about the civil codes of various other successor states of the former Soviet Union, including Ukraine, Kazakhstan, Kyrgyzstan, Armenia and Georgia. Not all these countries have legal scholars of the same calibre as do the Russians, and thus these consultations had a different character. In the third instance, I was consulted on the Code of procedure for the Commercial Courts of the Russian Federation that came into force in 2002 as the successor to the Code of 1995 which had been insufficient to support the important changing role which the courts had to play under the new set of circumstances.

In this article, I compare the nature of the work of these three projects and then evaluate them in light of the ideas presented by the professors Seidman. But, first I make the following general observations.

The projects, just mentioned, were each very extensive in nature. They all concerned *codes*. The legal systems of the successor states of the former Soviet Union continue to be grounded in the civil law tradition in terms of adopting a coherent civil code. In the Soviet period this

tradition was never entirely abandoned, but its application was limited to a small area of society. Therefore, I do not here discuss incidental laws which seek remedies for particular problems or a limited set of problems. These codes are of a more fundamental nature. They have to combine a workable elaboration of new fundamental principles (which, though often expressed in the codes themselves) have in fact a constitutional nature accompanied by many detailed provisions that can be applied in practice in cases where detailed regulation is needed on such grounds as, for example, a need for legal certainty or in view of the protection of weak parties.

Of course a code cannot regulate everything. This means that gap-fillers are needed. General standards are required such as good faith, reasonableness, equity and the notion of analogy of law in the wide sense of 'analogia iuris' which is specifically mentioned in Art. 6 of the Russian Civil Code and in Art. 13 par. 6 of the Code of procedure for the commercial courts. The problems involved here – a dividing of tasks between the legislature and the judiciary – exceed the specific issues usually at stake in lawmaking in the context of other developing or transitional countries.

### **The Russian Civil Code**

I became involved in the work on the Russian civil code in 1993. The Netherlands had just completed the most important part of their own new civil code on which I had worked extensively. A Russian drafting committee had begun work on their own code when Professor Feldbrugge thought that the Dutch experience could perhaps be of use to the Russians. So a trip to Moscow was organised to investigate how such assistance might be organised. It turned out that we were more than welcome.

Once there, we never discussed organisational matters. The Russian drafting committee's discussions about their draft took place outside Moscow in a location resembling a holiday resort. Upon my arrival, I was given a chair and immediately became the target of an uninterrupted flow of spontaneous questions on matters obviously discussed by the drafting committee during the previous days. I answered them as well as I could, taking care to be as clear and as on point as the situation allowed me. The answers, it turned out, were precisely what the members of the drafting committee felt they needed. What evolved there was a kind of intensive brainstorming on all varieties of subjects. Sometimes we discussed very fundamental questions, such as the role and nature of private enterprise in the new society; sometimes we discussed detailed and complicated technical questions related to such to-

pics as the registration and transfer of immovables, the protection of creditors against fraud and the influence of unforeseen circumstances in contract law. In fact, this initial meeting set the tone for all our later meetings: invariably a matter of oral brainstorming, using as a reference point the provisional texts on which they were working, translated into English. We asked the Russians to prepare our discussions by sending us beforehand the questions which they were interested in. But in practice, new questions popped up all the time, and many of the questions previously sent to us later turned out to be already answered by the committee itself before the start of our meetings.

All this may seem rather chaotic, but in practice it was not. The Russian drafting committee was comprised of very capable legal scholars with an open eye for practical consequences. They did not need to be told what the content of their code ought to be. Rather, what they needed was more insight into the nature of their problems and a range of available potential solutions with all their various advantages and drawbacks. And, they had to work very fast. Their new code had to be put into force as soon as possible.

The main problem with their existing and rapidly growing body of law was its more and more incoherent nature. A number of factors complicated matters. First, the new situation had led to an uncontrolled flow of unco-ordinated legislation coming out of various ministries which impacted upon important segments of civil law without any attention having been paid to its practical implementation, let alone any significant analysis of the problems which these new laws had been intended to address. Second, the civil code of 1964 was still in force; though full of provisions still reflecting the Soviet ideology. Third, a list of rather vague 'fundamental principles of civil law' published during the last stage of the Soviet period, but never officially endorsed by the Russian Federation, was being applied in practice. It was clear that this situation had to come to an end as soon as possible. It is an amazing achievement that in 1994 the Russians actually succeeded to put into force the first part of their civil code (the general part of the law of physical and legal persons, the law of property and the law of obligations), and the second part (special contracts, tort, unjust enrichment) soon followed in 1996. The third part was introduced in 2001 which concerned the law of inheritance and private international law.

With regard to codification (or re-codification) a general problem often arises – to set the appropriate balance between continuity and innovation. In Russia, there was certainly no point in adopting Western solutions unless a real need existed to do so. Such a practice would certainly have been counterproductive by overburdening practitioners of the law (especially in the case of the judiciary) with an unnecessary flood of new and entirely unfamiliar rules.



Although the Russians consulted many foreign experts, the results of their work remain clearly within the Russian tradition to the extent possible in order to deal with the new situation. They were wise enough to take their existing civil code as a starting point, freeing it from remnants of the Soviet ideology and adapting it to the needs of the emerging market economy. They did so mainly by elaborating upon what had already been there in a rudimentary form. The code of 1964 had some 479 provisions; the new code has almost three times that number. Some of the new rules are rooted in Russian law as it existed during Tsarist times.

The results are not perfect but are, generally speaking, workable. Of course the practice of law must cope with problems of interpretation and implementation. A number of them are solved by a combined statement of the plenums of the two Russian supreme courts (the Supreme Court of General Jurisdiction and the Supreme Commercial Court) which Articles 126 and 127 of the Russian constitution make possible. Other problems are solved by *flanking* legislation to which some of the provisions of the code refer (joint stock companies, Art. 96 par. 3, mortgage, par. 334, par. 2). Sometimes the existence or establishment of appropriate organisations achieves workability (e.g., through registration offices for rights on land). These sorts of problems are really no different from what one might expect to arise from any major codification project.

### **Civil codes of other successor states**

Before addressing matters directly involving the civil codes of other successor states, I draw the readers' attention to one of the big problems presently facing *Western* European law arising out of the fact that every state has its own legal system. Common law exists in the UK and Ireland; various civil codes are found on the continent; and still another system exists in the Scandinavian countries. The civil codes have, of course, common features and the principles underlying them are to a great extent the same. But, still, they differ considerably from each other in structure as well as in detail – differences that are often difficult to explain and which cause seemingly inescapable difficulties for countries wanting to conduct business with one another.

Within the European Union a heated discussion is underway on the unification of at least contract law. Nationalistic tendencies are at play in several forms, stressing the uniqueness of each culture – including each legal culture – or claiming that legal variety enriches our reservoir of legal tools and satisfies 'the right to be different'. There is an action plan of the European commission concerning a more coherent law of

obligations, but whether a real unification will ever be achieved is very uncertain and is perhaps merely a possibility in the distant future. In the meantime, solutions for real problems arising out of transactions between parties in various states must be sought through private international law – a field best suited for specialists, and well-known for its practical difficulties. Comparative law – another difficult discipline – has also become more and more important and can hardly be avoided in any kind of legal studies (academic or otherwise) which deal with problems arising out of different legal systems.

The successor states of the former Soviet Union, especially the CIS-states, had an opportunity to avoid such an awkward situation, an opportunity which Western Europe never had. As previously mentioned, the various successor states had identical codes during the Soviet period which were, in fact, imposed upon them from Moscow. In the new situation the possibility of maintaining this unity of law was seen in itself as an important potential asset. Every member state was intent on introducing at least some key elements of a market economy, and each had economic ties with neighbouring states. But there was a real danger that nationalistic tendencies would prevail.

It seemed like an attractive option to adopt a single and unified Western legal approach lock stock and barrel in hopes of attracting foreign investors. Indeed some Western specialists propagated the idea of direct ‘transplants’ of Western law into East European countries – sometimes tacitly recommending their own law for this purpose. In March 1994 a discussion took place on this subject in the Interparliamentary Council of the CIS during which I had the opportunity to express my opinion. This discussion resulted in a proposal to create a model code for the civil legislations of the CIS member states. In this way every state could participate in the work on the model code and be encouraged to adopt it while still remaining free to diverge from it where reasonably justified.

From the beginning, adopting such a strategy would clearly result in the lasting influence of Russian law on the civil legislation of all member states. Several factors lead to this realisation. The Russians were far ahead in their re-codification project, and all the member states were familiar with Russian law, having legal scholars and practitioners who studied the law at either Russian or Russian-oriented universities. In addition, language problems forced the drafters to look first to Russian legal sources and Russian case law.

This set of factors made my work with the successor states quite different from that with the Russians. Less brainstorming occurred, and the emphasis was more on explaining the texts on which the drafters were working and on convincing them that they should not indulge in unrealistic rules in an attempt to exterminate various social problems or, for example, to eradicate all inflation once and for all.

The professors Seidman have warned us in their article against the dangers of legislating without taking notice of the challenges of implementation and without analysing the real nature of the problem to be addressed and the possible consequences of potential solutions. This danger was much more real in the successor states than in the case of the Russian Federation. Of course it is important to investigate, if possible in person, the actual practical situation in any particular country in question and to analyse on the basis of such investigations the consequences for the people for whom the new legislation is intended. But in consultations of the nature I describe here, a foreign expert is simply dependent on the information and on the investigations of the national authorities. Moreover, the ultimate choices and the real drafting process were and should always be a matter for the national authorities themselves in accordance with their responsibilities for achieving a final result. A foreign expert should explain his views but not try to impose them.

### **Code of Commercial Procedure**

For a Western legal scholar, a confrontation with Russian commercial procedure is a *refreshing* experience. Nearly all recent innovations in procedural law in the world aim at the omnipresent problem of caseload congestion and the delays that result from it. All over Western Europe, legislators as well as legal practitioners are wrestling with the major problem of satisfying the requirement of the words 'within a reasonable time' in Art. 6, par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Problems of the same kind exist on the other side of the Atlantic Ocean.

But in Russia the situation is entirely different. Already under the Russian Code of Commercial Procedure (RF CCP) of 1995, a claim before a first instance commercial court was currently decided within two months from the date on which the statement was filed; a decision on an appeal was given within one month from the date of the filing of the appeal. This rapid action resulted from observance of articles 114 and 156 of the RF CCP.

To Western eyes, this situation can only be considered as a remarkable achievement and a source of envy for every legislator in this field. Law suits in Western Europe take years, not months, and in some countries even decades. The filing of complaints in Strasbourg asserting violations of the words 'within a reasonable time' has, in some European countries become a matter of routine. In this respect Western Europe has more to learn from Russia than vice versa.

The instruments with which this achievement in Russia has been obtained seem to coincide with the instruments which were developed in

the legislation of Western Europe, struggling with the problem of ever increasing procedural delays. From a primarily written procedure with strong emphasis on party disposition and a more limited power of the court concerning the course of proceedings, procedural law in Western Europe has moved in the direction of a more concentrated *oral* trial, presided over by a more active judge, party disposition having been reduced primarily to factual allegations submitted to the court. The CCP of 1995 had these features. Fundamentally, they have been maintained in the CCP of 2002. But in the new version the system has been further elaborated upon, clarified and improved.

The new procedural rules are better adapted to the needs of complicated commercial cases in that they stress the importance of a thorough preparation for the oral trial through an exchange of written statements and relevant documents. The parties have an obligation to take account of each others interests. Moreover, the code equips legal practice with important new instruments such as preliminary measures, seizure and arrest, summary proceedings and amicable agreement, leaving room for mediation efforts when the parties deem such a measure appropriate. Also, the new procedure makes provisions for rules on the recognition and enforcement of awards of national and foreign arbitration tribunals and of foreign courts, thus satisfying the requirements of international conventions and of international practice in this field.

The manner in which I assisted in the work involving procedure was entirely different from the methods followed in the two former cases. I worked with a small number of judges of the Supreme Commercial Court who functioned as a drafting committee. We began in May 1998 with an oral consultation on the CCP of 1995. Afterwards, I drew up a detailed report on both the merits and the potential gaps within this code. This report served as the basis for further discussions in which in a number of cases, judges from lower courts were asked to participate. This then resulted in a draft for a renewed code, on which I again made a report. Further discussions led to further drafts before a final text was presented to the Duma – the Supreme Commercial Court having the power to make such a direct submission. During the last stage, I was consulted once again by some members of the Duma who were obliged to give their opinion on the merits of the draft as presented to them. The new code entered into force in 2002.

In a project such as this, the emphasis of the work is on existing practical problems (usually pointed out by the courts themselves) and on preventing future problems (informed by previous experiences in Western countries). Of course, the guidelines developed by the professors Seidman are valid here as well. But the specific nature and requirements of procedural law have also to be taken into account. The existing court practice, which had been satisfactory in itself, had to be preserved

even as new rules were introduced intended to cope with the increasing importance and number of commercial cases.

A particularly tricky implementation problem concerns enforcement in the event that a favourable award is obtained at court. In a planned economy, there are sufficient means available to make people obey a court order. In the new situation, a gap appeared in the legal system which was overcome by a special law concerning the execution procedure. This law created a new independent organisation charged with a task similar to what in most countries is carried out by a bailiff. This organisation works at the initiative of the party who obtained the award. The organisation is empowered to levy execution against the goods of the party against whom the award was obtained. In cases where execution conflicts exist, the court will decide at short notice. I consulted on this special law as well, and some improvements were inserted simultaneously with the adoption of the new code. In my opinion, the success of this new institution will in the end be decisive regarding the effectiveness of Russian commercial law.

### **Conclusion: What can we learn from this story?**

First, practice ought not to be burdened with unnecessary new rules where existing ones may serve well or need merely further elaboration or improvement. Detailed analyses of the real nature of the problems and the consequences for the people involved must be performed. For this task, a foreign expert is usually dependent on the information and the investigations performed by the national authorities. Thus, mutual trust is vital. It is vital as well that the foreign expert consult directly with the very persons who are working on the new legislation and who are responsible for both its content and its drafting. Otherwise, the details and sometimes even the essence of the rules will be lost. In addition, fundamental principles may be important. Thus, they should be a subject for discussion – if only to clarify their true practical significance. Of course, there is no absolute guarantee that new legislation will lead to the results which the drafters had in mind. For this reason the legislature should be prepared to introduce amendments or, as in the case of the Code of Commercial Procedure, to propose an improved version of the code itself. However, caution is required. If the practical results of the new rules do not turn out to be satisfactory, those parties involved with the practice of law should be given the opportunity and, if necessary, even be encouraged to solve the problems themselves. Only in cases where this proves to be impossible, should the legislator intervene again.

If I am not mistaken, all this is more or less in line with the precepts of the professors Seidman. But, this should not be surprising, given that those precepts are in many respects self-evident. There is no harm in propagating truisms when there is any danger that practice will neglect them as it sometimes seems to do.



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