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Lawmaking for development: An introduction

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Citation

Rooij, B. van, Arnscheidt, J., & Otto, J. M. (2008). Lawmaking for development: An introduction. In *Lawmaking for Development. Explorations into the Theory and Practice of International Legislative Projects* (pp. 11-22). Leiden: Leiden University Press. Retrieved from <https://hdl.handle.net/1887/20695>

Version: Not Applicable (or Unknown)
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Downloaded from: <https://hdl.handle.net/1887/20695>

Note: To cite this publication please use the final published version (if applicable).

Lawmaking for Development

Explorations into the theory and practice of
international legislative projects

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Leiden University Press

Cover design: Studio Jan de Boer, Amsterdam
Layout: The DocWorkers, Almere

ISBN 978 90 8728 046 8
e-ISBN 978 90 4850 607 1
NUR 759 / 828

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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.