Using legislative theory to improve law and development assistance

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Introduction

After decades of hovering in the background, law[2] 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[3] 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.[4]

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.[5] 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.[6]

To address this deficit, the socio-legal concept of real legal certainty has been coined.[7] 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, religions 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.[8]

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'[9] and to believe that such internal competition is the only key to understanding lawmaking processes.[10] 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.[11] 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.[12]

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 polycommunal 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 primarilly

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 lawmakers 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.[13] 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 law*s 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 Roccipi, 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.[14]

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).[15] 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.[16] 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 bureaupolitics 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.[17] 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, Crince 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 Crince 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.