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Inclusive lawmaking for a just future: five key insights for lawmakers and civil society actors [Policy brief Just Future]

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Inclusive Lawmaking for a Just Future

Five key insights for lawmakers and civil society actors

Policy brief Just Future, December 2023

Inclusive Lawmaking for a Just Future

Five key insights for better lawmaking

For lawmakers and civil society actors striving for access to justice for all and inclusive political decision-making and peace processes

1. Law-making is a political process and there will be varying perceptions about the societal problem to be addressed in the law. It is important to consider these varying perceptions from the start.
2. An inclusive, bottom-up lawmaking process takes more time than top-down lawmaking, but the eventual content of the law will resonate better with societal demands.
3. It is important to ensure coherence between pieces of legislation at sub-national, national and international levels. Procedural devices make the law better.
4. An inclusive lawmaking process will facilitate dissemination of the content of the law and ease the path towards effective implementation.
5. A new law will not have the desired effect and impact if there is no implementation plan, or if this plan is not realistic.

Introduction: What is lawmaking?

Law-making is the process of drafting and approving legislation. Laws can be made at sub-national, national or international levels. At higher levels, legislation is often more generic, whereas at sub-national level, legislation can be more tailored to particular settings. Including a specific topic in a lawmaking agenda is the start of a lawmaking process. Setting a lawmaking agenda is a subjective, political process; not all actors in society may agree on the importance and relevance of a particular topic, its framing, and the need for legislation. Powerful and knowledgeable actors may find it easier to have an impact on the lawmaking agenda than actors with less power, without technical knowledge, or without legal drafting skills. In most countries, laws can be proposed by line ministries with particular knowledge about a subject, or it can be proposed by parliamentarians. In a consultative lawmaking process, societal partners, such as civil society actors are invited to provide expert knowledge, to raise particular issues, or to lobby for the inclusion of certain items in the law. In less consultative processes, civil society actors will need to act more pro-active to ensure that their voices are being heard and reflected in the draft legislation.

Whereas the realisation of a particular piece of legislation is often seen as a major milestone, and one which is measurable in terms of evaluation frameworks, the actual proof of the pudding is in the eating. Getting a law approved does not automatically ensure the desired societal changes are realised. The law must also be effectively implemented by the executive branches and accepted by society at large.

Lobbying for lawmaking in the Just Future Alliance

The Just Future Alliance focuses particularly on fragile settings, where lawmaking procedures are often not optimal. Nevertheless, even in sub-optimal conditions a number of measures can be taken to improve the lawmaking process. Civil society actors can contribute to agenda-setting, but can also take an active role in the lawmaking process, for instance by bringing legal experts on board, or by bringing in experience from other settings, drawing on their international networks, or by commissioning research to provide a solid empirical basis on the issues at stake, and to explore whether legislation can address these issues. We hence hope that this policy brief is of use not only for lawmakers, but also for civil society actors involved in lawmaking processes. They can ask themselves to what extent the key insights are taken at heart in the process. To orient the reader, each insight is accompanied by some guiding questions as well as boxes with illustrations of these insights, drawn from empirical research in the Global South. We believe that examples from different settings can be especially useful in underlining the wider relevance and applicability of the key insights. Premises in this brief may seem to be rather basic, but research shows that they often fail to be met in full, especially in fragile contexts.

5 Key insights

1. Law-making is a political process and there will be varying perceptions about the societal problem to be addressed in the law. It is important to consider these varying perceptions from the start.

Legislating about a topic is a political decision. Some people or groups in society may have an interest in maintaining an existing status quo, others may not have a strong opinion about a topic because it does not affect them. Yet others, may have an interest in advocating for particular legislation as a vehicle for social change. The latter group will probably be most vocal and opinionated about the need for legislation. But in deciding about the need to develop or adjust legislation, it is important for lawmakers to include all voices from the beginning, rather than following the orientations of a particular interest group. Consultations with a wide range of societal actors who are affected by the legislation ensures neutrality and societal representation of the law. Although such consultations take time, they improve the quality and applicability of the law, they bring more rationality to the process, and they help to come to a more rounded analysis of the problem that the law is supposed to address. It may also turn out that legislation is not the best pathway to address a particular problem. A solid evidence base is of help in establishing whether or not legislation is the optimal way forward.

Guiding questions

- What is the problem that needs to be addressed? What are possible solutions for that problem?
- Is it likely that the law will have its supposed impact?
- Which actors will benefit from this legislation? Which actors may resist this legislation?
- Are there any alternative ways in which this issue can be addressed? If so, how?

As part of the Just Future Alliance, Cordaid has partnered with the Congolese civil society actor ADEPAE (*Action pour le Développement et la Paix Endogène*) to lobby for a national livestock law regulating the livestock sector. The rationale behind this law is that clearer legislation on governance of livestock, the pastures, and cattle routes should reduce conflicts between pastoralists and farmers. The law builds on a livestock decree which was adopted at the provincial level in South Kivu in 2019, even though implementation of this decree is still largely pending, and dissemination of its content has taken off only in 2023. It has not yet been proven whether or not the decree will be effective in reducing conflicts, and it is hence also difficult to assess whether the national legislation will have its intended impact. Many other civil society actors in South Kivu province however, do not see the law as a key to reduce conflicts and suggest building on other community-led initiatives. These opinions however were not included in the early stages of the lawmaking process and the need for legislation hence was not questioned, nor were alternative pathways considered.

Box: Livestock lawmaking in the DRC

2. An inclusive, bottom-up lawmaking process takes more time than top-down lawmaking, but the eventual content of the law will resonate better with societal demands.

When lawmaking is done in a hierarchical way, without involvement of a wide range of societal partners and without including dissenting voices, the lawmaking process can take less time, yet the resulting law most probably will not adequately capture the interests of everybody in society and, as a result, people may not be willing to accept the content of that law. A law will be less accepted if it divides, creates tensions, or if it is seen as subjective and in the interest of some groups only. Law compliance can either be achieved in instrumental ways, or in normative ways (Tyler, 2006). In the former, people obey the law because they weigh the consequences of violation (i.e. what is the risk of being caught, what is the severity of a sanction). From this point of view, a lot of effort needs to be undertaken to ensure that the law is enforced. In fragile state settings, where government actors often do not have a strong presence, nor strong means of enforcement, this will often be a challenge. A normative approach in such cases may be more feasible: From this point of view, people either obey the law because they trust that the government imposing that law is acting in their interest (and that hence following the law is a good thing to do), or because they actually agree on the content of that law. When many people agree with the need for and contents of a law, implementation is easier. Again, in fragile state settings where trust in the government may be low, the former option may not be very effective, as trust cannot be built overnight.

Guiding questions

- Which different opinions exist about the law?
- Which different approaches have been proposed?
- How can involvement of stakeholders be more conducive to building consensus?

A more realistic option then is to ensure that as many societal actors as possible agree on the content of the law and may be willing to work together to disseminate knowledge about it, and to contribute to its implementation. This means that the lawmaking process should be as inclusive as possible, and engage representatives of different groups in society who will be impacted by the legislation. Actors who feel that their voices are represented, will be more willing to comply with and defend the law towards others, especially when they have been involved from the beginning and feel ownership about the process.

During the COVID pandemic, many countries hastily adopted emergency legislation in an effort to curb the spread of the pandemic, but many people felt their personal needs were not well taken into consideration in these emergency laws. This led to protests by groups of people who were not willing to accept the laws from a normative perspective. It required governments to impose strict rule enforcement measures, but also undermined trust in governments.

Box: *Emergency laws in COVID times*

3. It is important to ensure coherence with other pieces of legislation at sub-national, national and international levels. Procedural devices make the law better.

We are living in a world that is increasingly juridified, with more and more fields covered by legislation, at sub-national, national and international levels. It is important that the development of legislation is not done in isolation of already existing legal frameworks; that cohesion is ensured, and that there are no contradictions. A law which for instance regulates the livestock sector will certainly also touch upon issues of land governance, and hence have some overlap with land laws, or with decentralisation laws which set out jurisdiction of local authorities. This requires a good understanding of the legislation that is already available at different levels. If civil society actors or individual parliamentarians do not have a full overview of this, they can seek help from legal experts from different fields. These experts can also help to ensure the right procedures are followed in drafting legislation and to make the process less chaotic (Waldron, 2006). In fragile state contexts, such procedures may not be clearly laid out or fully respected, institutions in charge of executing the procedure may be lacking, or may not have the needed capacity. This may all impact not only on the quality of the lawmaking process, but also on the legislation that results from it.

Guiding questions

- Which relevant legal and policy frameworks exist at the international/regional and sub-regional (e.g. provincial) levels about this topic?
- How is conformity and overlap with other legislation assessed and addressed? By whom?
- How have other governments addressed this issue? To what extent does their approach work?

Timor-Leste is a relatively young country which has gone through turbulent and at times violent periods of colonisation, recolonisation, and decolonisation. New countries not only have to develop new laws, but also clear procedures on how to draft and approve those laws. Such procedures can cover for instance the way in which the legislative agenda is set, how knowledge by experts is mobilized, or how decisions on content are taken. If such procedures are not well defined, there is a risk that legal drafters have more power over the lawmaking process than would be ideal in a democracy that adheres to the rule of law. The recruitment of legal drafters then has a large impact on the content of new legislation (Almeida, 2022).

Box: *The making of laws in Timor-Leste*

4. An inclusive lawmaking process will facilitate dissemination of the content of the law and ease the path towards effective implementation.

The adoption of a piece of legislation may be seen as a major achievement by lobby and advocacy groups with an interest in the promotion of a law. But a law obtains meaning only in its

implementation stage, once its content is disseminated. Governments will usually formally publish a law, but such a publication hardly reaches ‘the general public’. Further dissemination is a task of the relevant line ministries, but they often depend on support of civil society actors. This may also entail translation of the law in local language or in more accessible vocabulary. If the lawmaking process is inclusive, more stakeholders see the importance of disseminating the content of the law to the general public. This will subsequently make it easier to effectively implement the law. The more ownership actors feel about the lawmaking process, the more likely it is they are prepared to engage in further dissemination, and the less likely it is that there will be pushbacks in the implementation stage.

The power of civil society actors to support legislation should not be underestimated. Civil society actors may not only be involved in the lawmaking process, they are equally important in holding governments accountable to these laws, for instance through legal mobilisation. It is important for civil society actors to be aware that lobby and advocacy efforts do not have to be limited to influencing lawmaking but can also make sense once a law is adopted.

Guiding questions

- What coalitions can be built for the dissemination of the law? (e.g., civil society, customary authorities, donors)
- What is needed for effective dissemination? (e.g. public campaigns, community gatherings). How can those needs be met?
- Do stakeholders take ownership of the law and are they willing to engage in the dissemination and implementation of the law?

In 2010, the Indonesian Ministry of Foreign Affairs took the initiative to create an integrated standard operating procedure (SOP) which - years later - later became Presidential Regulation No. 125/2016 on the Treatment of Refugees from Abroad to address coordination issues between government agencies in handling refugees. In the early stages of making this lower-level legislation, some relevant civil society actors were invited to several discussion forums to provide input on the content of the regulation (Sadjad, 2021). Thus, the initial version of the draft regulation contained the basic principles of refugee protection, non-refoulement, and some human rights guarantees such as the right to education, right to health services, rights for refugees with disabilities. The final version, despite removing rights-based provisions due to Indonesia's non-signatory status to the Refugee Convention and resistance from other ministries, still outlines the basic needs of refugees in shelters and involves more actors beyond Immigration authorities. After the regulation was adopted, civil society actors continued their advocacy to push the government to fulfill refugees' rights as well as support empowerment programs for them (Dewansyah, 2023).

Box: Refugee legislation in Indonesia (by B. Dewansyah)

5. A new law will not have the desired effect and impact if there is no implementation plan, or if this plan is not realistic

Once a law is adopted and gradually better known to the general public, the law needs effective implementation and enforcement. Whether or not this will succeed, depends to some extent on the lawmaking process. If a law is supposed to formalise an existing situation, implementation will not require a lot of effort. If a law is supposed to change a status quo, more effort will be needed for implementation. If the law refers to particular institutions that are in charge of enforcement or implementation of the law, it means that such institutions need to be supported (or even created if they did not exist before) in the execution of their new tasks. State officials need to be trained on the content of the law and how to implement and enforce it. They may require additional

(human/financial/logistical etc.) resources to be equipped for their task. To realise this, additional regulation may be required to effectuate the law, especially if the law takes the form of a framework legislation. The adoption of a piece of legislation should be seen primarily as a stepping stone towards achieving a certain objective. Whether the objective is achieved, depends on people's willingness to comply with the law and the state's capacity, willingness and effectiveness in implementation and enforcement. Careful monitoring and evaluation can be of help in assessing the impact of the law and actions needed to enhance this impact.

In 2014, the Indonesian president signed a new Village Law (no 6/2014). Under this law, villages are no longer simply seen as the lowest-level administrative unit supposed to execute top-down policy. Instead, villages receive considerable autonomy. Although the lawmaking process provides was quite inclusive, implementation appears to be challenging. In their analysis of the making of the village law, Vel et al., (2017) argue that clarity was lacking about how to actually implement the law, and how to deal with the reality of 'practical norms' in the bureaucracy. Such norms can make implementation more complicated than it may look on paper. Implementation, just like lawmaking, is a political process and involves power games between different stakeholders.

Box: *The Village Law in Indonesia*

Guiding questions

- Are resources and institutions in place to implement the law? If not, what else is needed?
- Are people sufficiently aware of the content of the law? If not, how can they be better informed?
- Is there a plan to monitor and evaluate the extent at which the law is implemented and whether it achieves its intended impact? Who is in charge of this?
- Will certain amendments be needed in the future?
- Does the law need additional regulations, or specific sub-regional legislation?

Further reading

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Background

This policy brief is part of a series of documents that result from the socio-legal research conducted by the VVI, Leiden, the Netherlands, in collaboration with KUTAFITI, Bukavu, DRC.

This policy brief has been compiled as part of the Just Future Alliance, a five-year strategic partnership, led by Cordaid, and funded by the Dutch Ministry of Foreign Affairs as part of the Power of Voices Framework. The overarching aim of this Framework is to strengthen civil society organisations so that they can lobby and advocate for achievement of the Sustainable Development Goals (SDGs) by 2030. The Just Future Alliance aims especially to strengthen the social contract in fragile settings in three interconnected outcome areas: People-centred security; Access to justice for all; and Inclusive Political decision-making and peace processes. Strong and just legal and policy frameworks can contribute to the realisation of a stronger social contract between the state and its citizens. But what is the best way to create just laws and policies? The lawmaking process is often a black box for many. This brief is one of the outcomes of the Just Future research conducted in the DRC on the livestock lawmaking process, but for wider applicability, the brief takes further inspiration from academic literature and empirical research in different settings across the world. In sum, this policy brief provides 5 key insights for lawmakers, and for civil society actors trying to influence lawmaking processes.

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Data collection at the Ruzizi Plain, South Kivu, DRC ©Rachel Sifa Katembera