# THE PRESENT STATE OF LEGISLATIVE THEORY AND A PROPOSAL FOR REMEDYING ITS SAD CONDITION

Ann Seidman*
Robert B. Seidman**

CONTENTS



* Professor of International Development and Social Change Program, Clark University, and Boston University, School of Law.
** Professor of Boston University, School of Law.

이 논문은 미국의 보스톤대학교 법과대학 교수로 재직중인 Ann Seidman (법철학)교수와 Robert B.Seidman(입법학) 교수가 공동으로 집필한 것으로 양교수는 아시아 · 아프리카의 신생국가 및 개발도상국가의 입법활동과 관련한 기술적 자문을 전개하고 있으며, 특히 최근에는 중국의 개혁 및 개방정책과 관련하여 중국 국무원 법제국이 입안하는 각종 경제개혁관계입법을 지원하는 자문위원으로 활동하고 있다. 이들 두분 교수는 부부이며, 미국의 입법이론연구의 대가로서 많은 연구업적을 쌓아 왔다. 그 중에서 입법이론연구와 관련한 몇가지 논문을 소개하면 「Justifying Legislation : a pragmatic, institutionalist approach to the memorandum of law」, 「The memorandum of law」, 「Drafting for the rule of law : maintaining legality in development countries」, 「To what extent can we use experience to decide what is law? A case study from Zimbabwe」 등이 대표적이다.

필자들은 이 논문에서 많은 제3세계국가들이 경제적, 정치적, 사회적인 목적으로 새로운 법률을 제정하고 있으나, 입법자의 입법이론적 지식의 결여로 인하여 제정된 법률이 소기의 목적을 달성하지 못하고 있다고 지적한다. 입법은 정책과 정부의 행동을 가교하는 것으로서, 여하히 추상적인 정책을 구체적인 법률의 형태로 입안할 것인가 또는 어떻게 하면 입법의도를 적절하게 입법적인 대응으로 구성할 것인가라는 문제가 바로 입법이론이라고 한다. 특히 제3세계국가에서는 종종 입안자가 입법계획의 형성을 위한 명확한 이론적 기초가 없이 사안을 규범적인 문장으로 만듦으로써 적절한 제도적인 변혁을 달성하는데 실패하고 있다고 지적한다. 이에 대하여 필자들은 바람직한 입법을 위한 유용한 입법이론의 필요성을 역설하고, 정확한 입법이론이 입법에 즈음하여 반드시 적용되어야 할 것임을 지적하고 있다. 바람직한 입법을 위한 하나의 방법론을 체계적으로 제시하고 있는 이 논문은 우리 입법의 민주화 · 과학화를 위하여 매우 유익한 시사점을 제공하고 있다고 하겠다. 이 논문을 집필하신 두 분 교수께 감사를 드린다. 〈편집위원회〉

# I. INTRODUCTORY

The world around, governments recognize that the economic transformation many of them desire demands new laws. Some seek to accomplish a transition from centrally-planned to various kinds of market economies. Other, third world countries aim to change institutions inherited from the colonial era to those more appropriate for attaining self-reliant national economies. In South Africa, the newly elected government seeks to transform its apartheid-stained institutions.

Enacted laws reflect their origins as bills. Bills serve as midwives to legislation.[1] They do not all end as laws, unchanged. They do, however, ineluctably frame the structure of the laws that emerge from the law-making process (Rubin, 1993).[2] Everywhere, bills looking to transform institutions have mainly resulted in laws that do not succeed in their trans-formational purposes. More than anything else, that reflects their drafters' lack of a legislative theory.

Legislation constitutes the bridge between policy and governmental action. How to translate the frequently abstract dictates of policy into the details of a bill that government can actually implement? How to "bridge the gap between the conceiving of ideas and the writing of legislative bills"? (Davies, 1986:135; cf. R.B.Seidman, 1975). How to frame "problems for legislative attention and [select]

---

1) The process of creating that bill we denote 'bill making', distinguishing it from the processes by which collective elected decision-makers decide to make a bill into a law (call that 'the legislative process') and the entire process of bill creation and the legislative process ('law-making').

2) It is a "fact of legislative life" that "the first version of a problem and its proposed solution often are the only articulations seriously considered during the legislative process" ; legislators tend to address new concerns by adding or deleting provisions from the original bill (Gouvin, 1994:1344).

appropriate legislative responses"? (Gouvin, 1994:1284). Like all decision-makers, for translating policy into the details of implementable legislation, the officials or others who have a hand either in formulating the legislative programme or writing the bill itself require such a guide. That guide constitutes a legislative theory.

Without an explicit theory to guide their formulation of legislative programs, drafters too often resort to either copying 'model laws' or 'international standards',[3] or drafting bills that merely define the desired future state of affairs in normative terms.[4] They frequently propose enforcement by imposing unworkable penal sanctions (Kulcsar, 1992:255), or leave the administrators to figure out how

---

3) Davies, 1986:135 ("...the most efficient mechanism, to obtain bills is plagiarism."). Both local drafters and foreign consultants deny that they copy foreign laws. Nevertheless, as often as not, without adequate research as to specific national circumstances, they do exactly that. Advised by French consultants, for example, the Lao government copied a French contract law that required notaries public to register companies; but Laos had neither a law establishing the office of notaries public nor any notaries. Two years later, Lao passed a notaries public law. To date, that has not produced any notaries. In Belize, a drafter in the Solicitor General's office copied a law, designed to protect new roads from overweight trucks, that required the weighing of trucks. Belize had no weigh station, and the law remains unimplementable. Lesotho, too, copied a similar provision from South African law; like Belize, Lesotho had no weigh station. R. B. Seidman, 1978:34.

4) Von Benda-Bechmann, 1989:133~34 "Scapegoat and Magic Charm: Law in Development Theory and Practice", 28 J. Legal Pluralism and Unofficial Law 133~34 (1989). ("The idea of legal engineering, of achieving social and economic shape through government law, still ranks foremost in the arsenal of development techniques. Law as a desired situation projected into the future is used as a magic charm. The law-maker seeks to capture desired economic and social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law-enforcement, or expressed more generally, to the implementation of policy.")

to reach their normative goal. Neither works. Absent an adequate theory to guide the bill-making process, government cannot use logic and facts (that is, reason informed by experience) in employing law to achieve the institutional transformations that lie at development's core. The alternatives appear everywhere dramatically: In China, a Cultural Revolution that substituted 'struggle' for reason: in Cambodia, the killing fields; in Yugoslavia, Rwanda, and a dozen others, ethnic cleansing; in apartheid South Africa, Argentina, East Timor, and others, government-sponsored murder, torture, and 'disappearances'. Less dramatically but as deadly, other governments followed policies dictated not by reason informed by experience, but by ideological purity, and slid into the economic abyss: Mexico, Zambia, Kenya, a host of countries choked by structural adjustment programs and blind subservience to the market Moloch.

Strangely, despite the imperative need, neither legal practitioners nor academics seriously addressed the task of formulating such a theory (Gouvin:1284 n.7).[5] This paper aims, first, to suggest some reasons for that puzzling hiatus; second, to tease out of cognate theories of law-and policy-making a useful legislative theory (in the event, an all but fruitless task); and, third, to explicate the elements which an adequate legislative theory must incorporate.

---

5) Besides his own, in the English-language literature Gouvin found only two articles concerning legislative methodology: Rubin (1991) and Seidman (1993). As Chief Technical Advisors for a five year UNDP project to assist China's Bureau of Legislative Affairs to draft 22 priority economic laws, identified in the 1989 Five year Plan, to assist in the implementation of China's Reforms and Open Policy, we have talked with over 100 consultants, many of whom have sought to assist various governments with their drafting tasks. Without exception, they have observed that they have not found a legislative theory to guide their efforts.

# Ⅱ. WHY NO LEGISLATIVE THEORY ?

In U.S. society, legal academics have the social role to research and write about law-related topics. They have written whole forests of articles about how judges do and ought to decide what the law ought to be;[6] theories of judicial decision come aplenty. They have written practically nothing about how drafters address the same issue. Four factors seem to explain that strange dearth of academic efforts to formulate a theory of bill-creating: (1) The myth that legislative drafting only translates well-formulated policies into legal language, a mere technical skill; (2) the ideological force of market-oriented economic theories; (3) the law schools' focus on law and courts as the central core of legal education and research; and (4) the pervasive impact of philosophical positivism.

## A. THE LEGISLATIVE DRAFTING MYTH

In common-law countries, history fostered the myth that legislative drafting constituted only a technical skill (Chambliss and Seidman, 1981). In 1869, to avoid contradictions and confusion in the law, Britain's newly-appointed Parliamentary Counsel required that all legislation, no matter in what ministry it originated, had to pass through a central drafting office. To ward off complaints about power-grabbing, the Counsel asserted what became a powerful, pervasive myth: Its staff simply reviewed proposed laws to ensure they assumed the proper legal form (cf. Thring, 1902). The originating ministry determined policy. The drafters merely translated those policies into the law's precise if obscure language (Luce, 1922;

6) By now, it has become well-accepted that in cases in which the parties disagree about the applicable law, by deciding that question a judge 'creates' law. See, e.g., Holmes, 1909.

Davies, 1986:139). For that, they needed no legislative theory. Policy, not law, counted as important (Griffiths, 1976).

That myth obscured reality: In working out the details of specific bills, drafters shaped their operative policies (Purdy, 1987: 67, 80). Nevertheless, the myth rationalized teaching drafters, not legislative theory, but forms and techniques.

The creation of the office of Parliamentary Counsel aimed at ensuring clarity and harmony in the law (Seidman, 1981). That flowed from how the ideology of the free market conceived of the uses of law.

## B. THE IDEOLOGY OF THE FREE MARKET

Free market ideologies contributed to warping legal scholarship's focus on courts by affirmatively denigrating law's function. In orthodox economic theory, free markets only result in the best social allocation of resources if all economic actors pursue their perceived economic interests. Government intervention thwarts this optimal outcome (Price, 1977; Tarascio, 1968). Law constitutes the most wide-spread form of governmental intervention.

That presented a paradox. If only to define mine and thine, no market can exist without a legal framework. Without law, one cannot have any market at all. Yet law unavoidably embodies government interferences in economic decision-making. Without law, no market; with law, no truly 'free' market: Free-market ideology resulted in a paradox. Some legal theorists met that paradox through law and economics,[7] others by denial. Rather

7) See below, text at n. 23. The paradox received its most famous attempt at resolution in the Coase Theorem. Coase, 1962. One interpretation of Coase's famous article held that it proved that the sort of law that structured a market did not matter, so long as some law existed, market actors would bargain their way around it. Buchanan, 1972.

than studying law-making in legislatures, their research focused all but exclusively on courts.

## C. THE FOCUS ON COURTS

Legal academics do most research on the law. A rich broth of history and ideology nourished yet another myth, widespread in legal academia, that courts hold stage-center (Dworkin, 1986). In the 18th Century, English courts functioned as the law's principal implementing agency (Dawson, 1960). That function married happily with liberal notions that governments functioned properly when they touched the economy only by providing the necessary legal framework for the market: Contract, property and tort laws. Competing market actors bargained, inevitably engaging in disputes which the courts resolved. Law did not primarily address market actors, but the courts, advising them how to resolve those disputes. Lawyers mainly worked in courts. With respect of legislation, that justified teaching law students nothing about legislatures and law-making, but only how courts interpreted laws already made.[8)]

Today, American and British legal academics still mainly focus on the courts' dispute settlement role (Parsons 1962; Posner 1986). They primarily train lawyers to defend their clients inside-or in the shadow of-the courthouse. Only at the margins of authoritative rules do courts address issues about what the law ought to become (Holmes 1909). Law school legislation courses mainly consider, not

8) In its LL.B. course, until recently did not introduce a course on a legislation-based subject. In 1948 W.T.S. Stallybrass, a law don and Vice Chancellor of the University stated in a speech that Oxford "has been wise in excluding from its course those branches of the Law that depend on Statute and not on precedent." Stallybrass, 1948:163, quoted in Abel-Smith and Stevens, 1967:366.

ıow to make legislation, but to construe it (See, e.g., Eskridge and ʔrickey, 1988; Nutting and Dickerson, 1978). The legal academics' ɜducational duties inevitably shape their research interests. That ɔourt-centered perspective found support in positivist philosophies.

### D. THE CONSEQUENCES OF PHILOSOPHICAL POSITIVISM

Legislation always states how people ought to behave. Bill ɔreating involves deciding what the law ought to be. Both involve ʋalue choice'. As the dominant philosophical school from the ıineteenth century until today, positivism insists on a discontinuity ɜetween values and facts: No one can prove the Ought from the Is. Hence legislation must rest, not on reason informed by experience, ıut the values of those who decide; law-making rests on power. ʟawyers claim to work with reason; legal academics study reasonable ırguments. Political scientists study power relationships.

The myth of drafters' neutrality, the court-centered law-school ɜthos, the imperatives of market-oriented economic theories, and he dictates of philosophical positivism: Combined, these explain he remarkably low level of efforts to develop legislative theory. ʔolitical scientists busied themselves, not with devising legislative heories to aid drafters, but with general theories of the law-ıaking process as a whole. Only a few sociologists and some ɔonomists even considered the problems of people's behaviors in he face of a law.

## Ⅲ. INCHOATE THEORIES ABOUT LAW-MAKING

Despite the practically complete void of theories explicitly ɜsigned to guide drafters' substantive decision-making, seemingly

at least partially-relevant theories floated about, inchoate. This section discusses (1) theories about law-making derived from notions of interest group bargaining (pluralism and public choice), and from Marxism; (2) neo-republicanism with its reliance on 'practical reason'; (3) decision-making methodologies, especially ends-means and incrementalism; and (4) the realist model and two of its too-narrow legatees, sociology of law and law and economics. Of these, only the realist model provided even a seed-bed for an adequate legislative theory.

## A. GENERALIZED DESCRIPTIONS OF THE LAW-MAKING PROCESS

Although they offered no guide to drafters engaged in creating bills, political scientists by the score did analyze the law-making process. Libertarianism's legislative theory, republicanism, proposed a 'civics class' model of the legislative process that used the free market as a metaphor for the political world. The managers of private organizations (political parties) competed for votes; having won the right to organize the Government for a stated period of time, the winners supposedly carried out their promises to the electorate. In republican theory. "Legislators are motivated to solve those [social] problems [as identified by the citizenry] out of a sense of civic duty. They do not make special deals for themselves or act solely to ensure their reelection" (Gouvin, 1994:1287n).

Law-making rarely worked as the republican ideal advertised. Former colonial masters bequeathed to the third world generally libertarian constitutions, replete with parliaments, independent judiciaries and bills of right. Nevertheless, as in the first, so in the third world : Most governments used state power to aid, not the mass, but the rich and powerful. Political scientists tumbled over each other to explain that phenomenon, and out of their variegated descriptive theories one can infer (usually with some difficulty) a

hotchpot of normative prescriptions for drafters.

## 1. Interest group theories

To explain governments' tendencies to favor the rich and powerful, ever since Madison (Federalist #10, 1864), many theorists have stressed the role of interest groups. In Madison's view, representative government and a network of checks and balances safeguarded against faction (Federalist #51). In 20th century US practice, the law-making process usually begins with a bill unsullied by empirical research (Rubin 1993; Gouvin 1994). That bill goes to a congressional committee that holds hearings at which various members of the public and experts, many invited by the committee staff, testify.[9] In principle, through these hearings the committee educates itself about the relevant facts. In reality, the hearing serves not as a search for facts, but as a forum at which different interest groups and the committee bargain over the bill's terms (Rubin, 1993; Gouvin, 1994).

U.S. political scientists (i.e., most of the world's political scientists) generalized from that experience. They held that not only in the U.S. but everywhere the law-making process rested on interest group bargaining. In effect, they read back from how U.S. institutions worked to an immutable principle of law-making: All law emerged out of a bargaining process among society's many competing interest groups (Carnoy 1984:9). From that they derived a set of normative propositions: The State should maintain a neutral framework, the famous 'level playing field,' to facilitate the political bargaining process between interest groups.[10] From pluralism, a

9) Committee staff frequently warp the hearings by engaging only experts who will support the bill (Gouvin 1994).

10) This re-introduced in a new form an old paradox (Carnoy, 1984:37): How can a state refrain from intervening in political bargaining and at the same time intervene to structure that very process?

drafter might infer two principal injunctions: To ensure (1) formally 'fair' procedures (cf. Trubeck and Galanter, 1973), and (2) bills that respond to the claims and demands of all the stakeholders (Brody, Rutherford, Vietzen and Dernbach, 1994).[11] However level the playing field, any prescription for law-making that prescribes bargaining favors the powerful. Schattschneider put it bluntly: "the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." (Schattschneider, 1960:35; cf. Mill, 1861) If all law comes from bargains dominated by the powerful, those forces in effect hold the state captive (Bachrach and Baratz 1963). No matter the trappings of liberal, electoral democracy, in the pluralist's world, to seek to change institutions to empower the poor and disinherited chases sunbeams. Public choice theories advanced no more hopeful a future.

Public choice theorists sought to analyze bargaining either between interest groups and government officials, or in which those officials acted as brokers (Fiorina 1977; Mayhew, 1974). For a 'price,' officials supplied (and implemented) the laws demanded by interest groups. The officials' 'price' depended upon their own interests: In the United States, presumably re-election; in many other countries, numbered Swiss bank accounts.

Everywhere, fractions of the oligarchy bid against each other to 'buy' the laws they wanted from officials (or to 'buy' at least officials' assistance in bargaining with opposing group interests). In this competition, the bidders' 'market' produces the most efficient outcome-even if they bid corruptly (Leff, 1954; Nye, 1967).

In effect conforming to this public choice mode, some drafting texts advise drafters to treat the instructing authorities as clients

---

11) The trials and tribulations of the Clinton administration's public health bill illustrates this model's weaknesses. The principal justification for that bill lay in the process of consultation and accommodation of interests that produced the bill. At the end of the day, the result resembled the camel, that is, a horse designed by a committee.

(Brody, Rutherford, Vietzen and Dernbach, 1994). A drafter should draft a bill to carry out the authorities' wishes, just as a competent attorney should draft a will to carry out the client's wishes. In practice, of course, that raises serious ethical issues. Unlike the lawyer who drafts wills, real estate deeds or contracts between private actors, the legislative drafter has a public responsibility and a corresponding ethical injunction (Purdy, 1987). Moreover, as with most private actors, so with legislators: They rarely know what sort of bill they want. Typically, they identify a problem, and leave the drafter to discover the means of resolving it. The notion that government officials really know the details of the bill they propose for anything more than the simplest bills whistles with the shrimps.

These varied versions of new social Darwinism all ended by accepting - some even celebrated - the political and economic power of the privileged, leaving for the poor only their poverty and powerlessness. They taught that law cannot transform existing institutions, at least to the extent that existing institutions favor the powerful. In consequence, none offered a guide to formulating transformatory legislation. Despite its revolutionary robes, neither did Marxist legal theory.

## 2. Marxism

Rooted in historical materialism (but cf. Resnick & Wolff 1988: 47; Burawoy 1990), Marxists viewed the world as characterized, not by the libertarians' rosy consensus, but deep-seated conflict. Capitalist political economies constitute systems of power (Samuels 1979). Everywhere, ruling class power manifests itself through such institutions as land ownership, transnational corporations and banks, courts, public corporations, ministries and cabinets. Everywhere, ruling classes shaped the law in their own interests.

To explain this, many Marxists adopted a crude metaphor: The

'basis' (the mode of production) determined the 'superstructure' (that is, ideas and culture, including the legal order) (Jessop 1982: 15). As part of the superstructure, the state serves as the executive committee of the capitalist class. That crude metaphor served Marx's and Engel's revolutionary purpose: To persuade the masses to seize state power. The revolution having succeeded, however, that metaphor did nothing to instruct the new government how to use state and law to transform the institutions that embodied ruling class power.

The basis-superstructure model implied one-way causation: First a ruling class came into being, and then it used the state and the legal order to accomplish its ends (but see Engels 1969; Seidman, R. B. 1984b). Because existing institutions and law ineluctably reflect the basis, the basis-superstructure model pours cold water on the notion that the new, revolutionary rulers can use law to transform those very institutions (Williams, 1980).[12]

Pluralists, public choice theorists and Marxists: As legislation's

---

12) Alternatively construed, Marxism held the germ of a legislative theory that a drafter might use. If one perceives the base-superstructure relationship dialectically, it becomes theoretically possible for the superstructure (including the legal order) to change the institutions that shape the base and hence the economic base itself. Had they pursued that option, Marxists might have developed a useful legislative theory. In fact, they did not. Lacking an explicit theory to guide the formulation of laws to transform institutions using reason informed by experience, some Marxist leaders sought other ways to block tendencies towards restoration of capitalist state power. Lenin turned to the dictatorship of the proletariat which, over time, rationalized others' harshly authoritarian methods; Mao urged struggle through a Cultural Revolution which, without criteria or procedures structured by the rule of law, enabled opportunists to grasp the reins of state power for personal advancement. Elsewhere in the third world, in the end, inherited institutions too often merely co-opted the new governors (cf. Nzongola-Ntalaja 1987:75).

informing principle, all celebrated not reason informed by experience, but power. In effect, they told drafters not how to develop laws to transform dysfunctional institutions, but to leave policy decisions to those in power. The neo-republicans proved no more successful.

## B. NEO-REPUBLICANISM

In the late 1980s, calling themselves 'neo-republicans', a small group of U.S. academics sought to resurrect the political theory associated with libertarianism (Sunstein, 1988; see Gouvin, 1994). The political scientists began with description and ended with prescription; the neo-republicans frankly espoused normative theory. They urged law-makers to employ deliberation in the context of solving problems for the common good (Sunstein 1988). Whatever their 'true' motives, the supporters and detractors of legislation alike must frame their discussion in terms of the public weal (Gouvin, 1994). They would know what constituted the public weal through the exercise of 'practical reason' - that is, the use of judgment or intuition in determining what constitutes a good law (see, e.g., Farber and Frickey, 1987:1645~46; Kronman, 1985: 1605~06; cf. Llewellyn, 1950:397).

'Judgment' or 'intuition,' however, provides a poor substitute for a legislative theory.[13] Neo-republicanism did little more than to tell the drafters to rely on their own 'values'. Without a theory, neo-republicanism shouted its well-meant exhortations in the face of the unhearing wind. Mainstream policy science methodologies did not even oppose the prevailing wind.

---

13) Cf. MacIntyre, 1984:69 ("...the introduction of the word 'intuition' by a moral philosopher signals that something has gone badly wrong with the argument.")

## C. METHODOLOGIES FOR DECISION

Substantive theory cannot divorce itself from methodology (a concept encompassing both the uses of theory and the agenda of steps proposed for using it). This section reviews the methodologies immanent or explicit in the several theories discussed, or proposed by practitioners of that imprecisely-defined discipline called 'policy science'.

### 1. The uses of theory

An adequate legislative theory must guide drafters in the formulation of laws to resolve social problems. Since all law takes place in a very time-and-place-specific world, that calls for empirical research into extant reality. Most theories discussed above bottomed decision not on empirical research, but on ideal-type models: In pluralist or public choice models, interest-group bargaining and the role of state officials; in the base-superstructure model, a class-dominated society. The sociological and law and economics theories likewise incorporated ideal-type models of human behavior in the face of a law. Using their ideal-type model as a metaphor for the world, all these theories' authors tended to prescribe policies in terms of that metaphor.

Law and economics perhaps did so most egregiously. Adopting neoclassical economics's competitive market model, in effect, they identified real-world situations with some market-like characteristics (and what aspects of the real world have none such?) (see, e.g., Posner, 1989). They then consulted not the real world, but their model, and prescribed for the real world the policies that the model recommended.[14] Dr. Makgetla observed

14) The drafters of the Truth-in-Lending Act (Rubin, 1993) and the Truth-in-Savings Act (Gouvin, 1994) did precisely that.

that they acted like a lover who declared his love to be a red, red rose - and then wooed her with what red, red roses enjoy: dew and well-rotted fertilizer (Makgetla, 1994; cf. Bentham, 1931:69 ["metaphors are not reasons"]).

As the realist model teaches (Fig. 1, see attached diagram), to succeed in changing the behaviors it addresses, legislation must take into account real-world constraints and resources. Ideal types do not make it. More: In effect, their use adopts an ends-means methodology.

## 2. Agendas for decision-making

Two methodologies have engendered countless legislative misfires: ends-means, and incrementalism.

a. **Ends-means**. All the theories discussed above - that is, the overwhelming majority of theories relating to legislation - employ an ends-means methodology. A policy-maker who decides by ends-means first determines the goals that the legislation should achieve, canvasses the alternative possible solutions, and chooses the one she deems the best (Rubin, 1991:283~306; Patton and Sawicki, 1986:26~38). Pluralism, for example, holds that the claims and demands of the participating interest groups should determine laws' ends. Law and economics sets its objective (an ideal-type market) without seriously considering the real world circumstances within which the legislation must function (Stokey and Zeckhauser, 1978; Posner, 1986; cf. Gouvin, 1994; Rubin, 1991). The values of high-level authorities determine a bill's ends (cf. Weber, 1949); empirical research only concerns means.[15] Perceiving ends as lying beyond empirical examination validates an authoritarian decision-

---

15) That proposition rests on positivism's assumed sharp discontinuity between facts and values.

making process: Those with power determine the ends. More: it denies any need to ensure that the law's stipulated ends respond to its addressees' circumstances.

b. **Incrementalism**. Adopting an empiricist focus, another set of theorists proposed designing legislation based on a sort of vulgar pragmatism that some called 'creeping incrementalism' (Lindblom 1959, 1963). Implicitly, they rejected the possibility of devising a theory to guide the formulation of legislation to aid efforts to transform inherited institutions.[16] To avoid the dangers of catastrophic errors, they held that good policy moved towards the identified objective the least possible amount.

Deng Xiao Ping expressed the same notion when he urged Chinese policy-makers to creep across the river by feeling the stones with their feet. That approach implied that drafters should formulate bills requiring the smallest possible changes in existing institutions. Unfortunately, however, muddling through may serve polities with no need for institutional transformation; it will not do for polities looking to re-invent themselves.

Like interest group and class-based legislative theories, both ends-means and incrementalism pandered to power. Not reason informed by experience, but the claims and demands of the powerful determine what bills the law-makers enact. Absent a successful bargain, interest groups and ruling classes turn to force to make good their claims. Neither political scientists nor policy

16) Identifying 'theory' with neoclassical economics and its political science analogues, this set of theorists (call them basic needs/structuralists) expressed a general distrust for grand theory (Seers 1970; Hirschman 1970; Seidman and Seidman, 1994:Ch. 5). Without an alternative theoretical perspective, however, they often fell back on market-oriented strategies (cf. Seers 1981:160). As Keynes observed, "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist" (quoted in Clark & Juma, 1987 : frontispiece).

theorists produced much to help drafters formulate laws looking to institutional transformation. The American realist model at least held hopes for such a guide.

## D. THE REALIST LEGACY: SOCIOLOGY OF LAW AND LAW AND ECONOMICS AS LEGISLATIVE THEORIES

The American legal realists focussed on how to explain behavior in the face of a rule of law. They addressed the right question; that issue must lie at the heart of a legislative theory to guide drafters in designing transformatory legislation. Unless drafters understand how law affects behaviors, they cannot draft laws likely to change them. Realism's descendants, however, wrangled about the principal factors influencing behavior. This section reviews the realist model and its most prominent descendants, the law and society and law and economics schools.

### 1. American legal realism

The realists explicitly recognized the pervasive contradiction between the behaviors that the laws prescribe ('the law-in-the-books') and actual behaviors in the face of those laws ('the law-in-action') (Llewellyn, 1934). Fig. 1 (see attached diagram) captures their notion of the general categories likely to explain social actors' behaviors in the face of existing law.

In effect, into analytical positivism's perception of the legal order the realists folded a behavioral model suggested by anthropology. Classical analytical positivism - the dominant 19th Century school of jurisprudence - had adopted Hans Kelsen's concept that lawmakers issue norms that address a set of role occupants,[17] and simultaneously

17) Sociologists denote the addressee of a norm as the role occupant.

direct agencies (administrators, courts, police) to implement them (Bentham, 1970:144; Kelsen 1961:58~64; Austin, 1834:lectures I, V). A law's addressees (in Fig. 1, denoted as 'role occupants') may constitute every member of society ("Thou shalt not commit murder"); a defined class of non-officials ("No director of a corporation may use insider knowledge for private benefit"); or an official ("The Minister shall promulgate fair and reasonable rules for the generation and distribution of electricity").

In effect, the realists combined this perception of the legal order as a system of norms (unconnected to society) with an anthropological model (Barth 1956) in which, confronted by a rule of law, role occupants choose how to behave in light of all the constraints and resources of their country-specific circumstances. The realist model thus suggests that these include four sets of factors: (a) the rule itself; (b) the sanctions the role occupant expects the law-implementing agency will impose; (c) the non-legal constraints and resources of the role-occupant's milieu; and (d) feedback from role-occupants. To generate middle-level hypotheses to explain role occupants' behaviors in the face of a rule (and thus to guide the empirical research required to warrant them), the realist model prescribes consideration of all four categories.

In this model, law appears as an interrelated system. It contains not only rules, but also, embedded in their specific social circumstances, law-making and law-implementing institutions, sanctions, and feedback and communication systems; and implementing institutions. These last include not only courts, but also administrative agencies, government corporations, the police and a myriad of others. Law-making institutions include not only legislatures, but also appellate courts, administrative agencies and others. All of these consist of sets of role occupants acting within their constantly-changing country-specific circumstances.[18]

---

18) Note that this model implicitly contests the irrebuttable assumptions held by libertarians, political science models, neo-republicanism and 'legal

The realist model helps to explain why drafters' decisions to copy laws from other seemingly successful countries so often leads to unintended consequences. Even given the same law, role occupants will most probably behave differently because their country-circumstances generally differ (Seidman, 1978; Seidman and Seidman, 1994; but see Bryde, 1976).

The realist model, however, leaves the role occupants' arena of choice - all the country-specific circumstances likely to influence their behaviors - as a residuary catch-all. The realists' descendants - principally, the law and sociology and the law and economics scholars - disagreed about what factors to include in that ambiguous category.

## 2. Law and society jurisprudence

Finding inspiration not only in realism, but also in the sociological school of jurisprudence (Ehrlich 1922) many contemporary sociologists claimed that, in general, people only obey laws that match their values and attitudes (Cranston 1987; Friedman 1969; Packer 1969:262; Sumner 1962; Roche and Gordon 1955:10; Plessy v. Ferguson 163 U.S. 537, 551). Lawrence Friedman (1969:34) added that people behave in accord with their 'legal culture,' "the values and attitudes which bind the system together." That led to yet another paradox: If people's values and attitudes conduce to agreement with a law, even without the law they will behave as the law prescribes; if not, they will not obey it. Why enact any law?

---

process' models alike: that the law-making process creates rules "consciously designed to achieve social purposes or effectuate basic social principles", addressed "universally to all individuals similarly situated", and gives courts "the principal responsibility for defining the effect of legal rules and concepts" (cf. Trubeck and Galanter, 1974:1071; Eskridge and Frickey, 1988; cf. Seidman and Seidman, 1994: Ch. 2).

In reality, values and attitudes alone usually do not explain behavior. The claim that they do often rests on the same empirical foundation as the perception of the behavior.[19] Furthermore, as the psychological theory of cognitive dissonance predicted (Festinger 1957), when law compels people to change their behaviors, in time their values and attitudes change.[20] Undoubtedly, values and attitudes do influence behavior, but as the sole explanation for behavior in the face of a rule, they leave out too many other possible factors.

### 3. Law and economics

Law and economics theorists advanced another monocausal category. Both the conservative (Posner 1986) and the "liberal" (Markowitz 1984; Calabresi & Melmud 1972) wings claimed people decide whether to obey the law only in terms of self-interest. Claiming self-interest only finds full expression in a free, competitive market, these theorists maintained that every aspect of human society - even those seemingly not related to economic concerns, like the family or adoption of children (Posner, 1989) - bears an analogy to a market. In that sense, all social problems constitute market failures, caused by 'transaction costs' : difficulties of entry, market power, externalities, sticky factor mobility, lack of information, and so forth (Stokey & Zeckhauser

---

19) For example, to 'explain' peasants' behavior, researchers may posit they conform to traditional values. To prove that hypothesis, the researchers then point to the peasants' behavior.

20) To illustrate: Contrary to predictions, (Roche and Gordon 1955:142), as laws forced US Southern schools to desegregate, bit by bit southern attitudes towards desegregation did change (Branch 1988:213). Laws against speeding alter people's driving behavior, even if they do not obey the laws exactly (Cohen & Cohen 1977:589; Robertson 1976; Little, Inc. 1970:170).

1978:120).[21]

In polities where market theory controlled policy, law and economics frequently became a dominant guide to law-making (e.g., World Bank 1989a). Critics (e.g., Makgetla and Seidman 1989; Samuels 1979; Leff 1974) objected that, as the principal explanatory category, self-interest too seems unduly restrictive. It takes an heroic stretch of the imagination to perceive all human relationships as markets.[22] To overcome the reality that many behaviors do not seem motivated by material self interest, some law and economics proponents assert that people simply maximize what they value (Michelman 1983; Adams 1982). This, however, makes the concept so general as to become useless. Neither sociological jurisprudence nor law and economics provided an adequate basis for explaining behavior in the face of a rule of law.

## SUMMARY

The third world's history reveals repeated failures of populist leaders efforts to use laws to transform institutions. At least in part, the reasons lay in the extraordinary paucity of legislative theory. Mainly it consisted of generalized statements about how existing institutions (to a surprising extent, existing U.S. institutions)

---

21) This confronted the paradox that plagued neo-classical economics: Government intervention denies efficiency; law constitutes the most common sort of government intervention; yet the ultimate guarantor of efficiency, markets, cannot exist without law. To resolve that paradox, the Coase Theorem (Coase 1960) held that (assuming no 'transaction costs') law does not affect the social allocation of resources. Without fear of interfering with efficiency, therefore, government could and should use law to remedy market imperfections.

22) In practice, law and economics scholars scurry about trying to create markets where none exist (e.g., Landes and Posner 1987; Stroup and Baden 1973:308).

conditioned legislative outcomes on interest-group or class struggles, elevated into theories that proclaimed the inevitability of that process. Implicitly, those theories told drafters that, because of their inherent nature, law-making institutions could only produce laws to bolster existing power allocations and institutional structures. Law as a device for revolutionary change became a chimera. The use of theory as metaphor and of ends-means and incrementalist methodologies, too, buttressed power and privilege. Only the legal realists addressed the right question, but their legacy ran around on the limited insights of law and society and law and economics jurisprudence.

An adequate legislative theory poses two demands: That it guide lawmakers in writing laws to use, not ethnic or nationalist bias or intuition, but reason and experience, and that it facilitate participation. When, without popular participation in governance, elites run things, at the end of the day they run things in their own interests. People-oriented development demands mass participation not only in periodic, representative elections but also in ongoing governmental decisions. An adequate legislative theory for development must guide investigations in a way that facilitates popular participation. Because it proclaims that anyone with better reasons or better data can challenge authority, only a legislative theory that rests on reason informed by experience can simultaneously facilitate participation and lead to results based on thinking with the head rather than with the blood.

## Ⅳ. THE COMPONENTS OF AN ADEQUATE LEGISLATIVE THEORY

This final part identifies the components required for a legislative theory to guide the development of a democratic law-making process capable of generating legislation designed by reason informed by

experience, with the widest possible popular participation. It first explores law's role in changing the institutional behaviors that comprise social difficulties; second, it explains why competent drafting requires competent research reports; and, third, it reviews two of the three elements of an appropriate theory.

## A. LAW, RESOURCE ALLOCATION, INSTITUTIONS, BEHAVIORS

Groups and classes struggle to command state power because the state, through law backed by adequate enforcement, comprises an organized polity's primary means of solving constantly emerging social problems (Gouvin 1994:1283) and hence of effectuating consciously-determined social change. Third world social problems often appear in the form of distorted resource allocations (see Seidman & Seidman, 1994:Chs 1, 2): national dependence on the export of one or a few crude or labor-intensive manufactured goods produced by poorly-paid labor; increasingly heavy foreign debt burdens; skewed income distributions, with a few wealthy people capturing as much as half the national income, leaving a third to half the population on starvation's verge; low productivity; sky rocketing inflation; un- and under-employment - an endless list. However, law cannot alter resource allocations directly. No more than King Canute could command the tide to stand still can law command the economy to produce diverse products, the foreign debt burden to reduce itself, or incomes to equalize.

Law cannot directly address resource allocations; it can only address social behaviors. To change resource allocations, therefore, governments can only try to alter the social actors' repetitive patterns of behaviors that, by definition, comprise the institutions which shape them (Homans 1967): Commercial farm and mine owners and managers employing thousands of low paid migrant workers to produce exports; peasants, often women, using outmoded

technologies to produce subsistence crops; trading companies' managers purchasing crops and minerals to ship overseas, and importing machinery, equipment and luxury consumer items for those who can afford them; bank personnel lending money to finance enterprises they deem profitable. To change those behaviors, governments have only one tool: the law.[23]

It follows that an adequate legislative theory must guide the formulation of laws likely to lead to desired changes of social behaviors. Legislative theory based on reason informed by experience serves that purpose better than (no matter how ardently embraced) religious belief, ethnic fervor, or ideological purity, whether of left or right. At the same time, an adequate legislative theory describes the content of an adequate justification for particular laws.

## B. THE FUNCTION OF THEORY AND THE REQUIREMENT OF A RESEARCH REPORT

A legislative theory that adequately guides the research on which effective laws must rest simultaneously provides a structure for research reports which justify the bills. The realist model of law and behavior (Fig. 1) emphasizes that relevant role occupants' behaviors depend, not merely on the law's dictates, but also upon the constraints and resources in their environment. Without an adequate legislative theory, drafters' research cannot know what facts to gather.[24] Only a detailed knowledge of the relevant social actors' environment as described in a research report can provide

---

23) To reiterate: Law, here, is broadly conceived to include, not only legislative formally enacted by legislatures, but all the rules and regulations introduced by government agencies at all levels. See text at n. 20

24) Allison (1971) describes theory as a net which determines what facts researchers catch.

an adequate basis for assessing a bill's quality.[25] Well-designed research reports serve to structure both the drafters' research and the decision-makers' assessments of bills. In this sense, the contents of the research report becomes a surrogate for a legislative theory.

## C. THE COMPONENTS OF AN ADEQUATE LEGISLATIVE THEORY

Like every other kind, legislative theory contains three components: A methodology, a set of explanatory categories, and a perspective. To economize space, the following discusses only two of these: a problem-solving methodology and explanatory categories:[26]

### 1. A problem-solving methodology

To solve social problems through law requires a problem-solving methodology consisting of four steps, each bottomed on logical analysis coupled with relevant facts. "Problem-solving lies at the heart of the legislative enterprise"; and competent problem-solving starts with rigorously identifying the problem addressed (Gouvin, 1994:1375). A social problem consists of behaviors (supra: 27~28). For legislative purpose, therefore, the methodology requires first stating precisely whose and what behaviors comprise that social

---

25) The alternatives comprise personal experience and prejudice, both famously unreliable.

26) Perspectives concern the discretionary choices made in the course of problem-solving, policy-oriented research. In our sense of the word, large-scale explanations for the world, like Marxism, or neo-classical economics, do not constitute all of theory, but only its perspectives component. (We call these 'Grand Theory'). Some believe that Grand Theory constitutes not a large-scale explanation, but a large-scale description of the world, so accurate a metaphor that one can safely use it to dictate policy. We disagree (supra, section C(1).). Control over those discretionary choices constitutes Grand Theory's true office (Seidman and Seidman, 1994, Ch. 5).

problem, and presenting evidence to warrant those statements. (As a cause of their inadequacy for drafting purposes, ends-means and incrementalism do not require this essential first step).

As its second step, problem-solving requires analyzing the causes of the identified role occupants' problematic behaviors in the face of existing law. To jump from difficulty to solutions - as do both ends-means and incrementalism (e.g., Rubin, 1993) leads only to unsubstantiated normative prescriptions, supported mainly by unenforceable punitive sanctions (supra: 3). To avoid that usually bootless result, proposed laws must incorporate sufficiently detailed measures designed to alter or eliminate the causes of the problematic social behaviors, typically rooted in country-specific circumstances. To ground proposed laws in reason informed by experience, therefore, the legislative theory must guide the formulation of explanatory hypotheses of those causes which, in turn, will guide the search for the data required to falsify them.[27]

The third step consists of generating a proposal for solution, that is, draft legislation. The problem-solving methodology's strength rests in its requirement that the difficulty and solution remain linked logically and empirically by way of the explanatory stage.[28] To generate an adequate legislative plan, the drafters

---

27) Legislative drafters must always assess the causes of behavior in the face of existing law (including a lack of specific rules governing that behavior); in that sense, they must gather data, whether from secondary or (if not otherwise available) primary sources that enables them to evaluate alternative possible explanations for that behavior. Thus they must become as a minimum 'good consumers', able to evaluate of available data; and in cases where no relevant data exists, they need to know enough to help design methods appropriate for gathering it. This calls for a knowledge of relevant social science methods, particularly those increasingly used in the emerging evaluation profession (For a review of evaluation theories and methods, eg, see Shadish, Cook & Leviton, 1991; Smelser and Gerstein, 1986; and Cronback et al, 1980).

must consider the range of alternative solutions that logically seem likely to change or eliminate the causes of the role occupants' problematic behaviors; choose between those solutions on the basis of the available facts as to their probable relative social costs and benefits; and, finally, demonstrate empirically that the proposed law will likely effectively address each cause the warranted explanations identify.

As the realist model shows, the proposed law must effectively address the issue of implementation. Except serendipitously, a plan for legislation than does not include adequate provisions to ensure its implementation will yield only symbolic law.[29] Drafters cannot properly avoid accountability for their drafts by pleading, "We wrote a good law, but those guys failed to implement it." Instead, they must select or design appropriate institutions to implement their proposed laws; if necessary, they must ensure improvement of existing institutions' capacities by introducing new criteria and procedures, additional financial, personnel and physical resources, and training.

The final problem-solving step consists of implementing the new legislation, and monitoring and evaluating it. No legislation ever succeeds exactly as expected. The initial research may have failed to reveal all the causes of problematic behaviors; the circumstances that cause them may - indeed, as the transformation process proceeds, probably will - change. In either event, the new law's implementation

---

28) Drafters cannot possibly provide warranted facts as to what a proposed solution (law) will achieve; until the law's enactment and implementation, no facts can exist as to its consequences. However, once having provided facts that prove the validity of explanations as to the problematic behaviors' causes, drafters can then design solutions logically likely to overcome those causes.

29) Law that provides a symbol of government's proclaimed good intentions, but - without effective provisions for its implementation - remains without substance.

may lead to new problematic social behaviors. For one or both of these reasons, competent drafting requires including in the bill provisions for evaluation and feedback to the law-makers as a necessary if not sufficient condition to ensure the law's timely amendment or revision.[30]

Since problem-solving rests on explanations as the crucial link between difficulty and solution, an adequate legislative theory must provide appropriate set of categories to guide the generation of hypotheses as to possible causes of role occupants' problematic behaviors.

## 2. Categories

Legislative theory guides the search for data by guiding drafters in the formulation of hypotheses. In turn, those hypotheses provide the drafters with a 'map' of the evidence they need to falsify their explanations. The concepts ('categories', 'vocabulary') specified by the theory aim to spark off all the possible hypotheses that might help to explain the difficulty at hand. The categories appropriate for legislative theory must help drafters identify the factors likely to cause problematic social behaviors in the face of a law. In this sense, a theory's categories provide an agenda for legislative research.

The realists' model (Fig.1) suggests several categories for explaining role occupants' problematic social behaviors in the face of a rule of law: The rule; feedback; the role occupants' country-specific constraints and resources; and the implementing agency's actions. Of these, however, two (the country-specific constraints

30) Legislative drafters need the same kinds of research skills for this purpose as those they require to assess (or gather) data to test explanatory hypotheses for problematic behavior that must underpin any effort to draft a legislative solution to a social problem (see footnote 29 above).

and resources, and the implementing agency's behaviors) constitute residual categories far too ambiguous to assist researchers in identifying specific causal hypotheses. This section discusses the need to structure both of these categories of explanations more precisely for inclusion in a more adequate legislative theory.

a. **The ROCCIPI research agenda**. Outlined below, the ROCCIPI research agenda suggests sub-categories that seem to capture all the possible non-legal factors likely to influence role occupants' behaviors:

(i) The Rules. People act within a cage of laws that both constrain and enlarge the range of role-occupant choice.[31] A law's failure to induce desired behavior may reflect an inadequate formulation. Do the law's words specify precisely the desired behavior, or only provide vague guidelines? Does the law specify adequate implementation procedures backed by sufficient resources for enforcement? Does it require monitoring of the implementation process?

(ii) The Requirements of Choice. Only when circumstances force role-occupants to choose do they consciously decide whether or not to obey a law. Role-occupants consciously choose whether to obey a law only when three additional categories of factors coincide:

(a) Their environment provides them the opportunity to choose to obey or disobey;[32]

(b) They have the capacity to obey, that is, they possess the skills and resources to perform the task the law prescribes; and

---

31) For example, water polluters act not only in light of the rules conventionally labelled 'water pollution law' or 'environmental law', but also property law, contract law, water law, tax law, constitutional law, and many others.

32) For example, a banker has many opportunities to embezzle other people's money; a poor person very few.

(c) They know about the rule; that is, the authorities have adequately communicated it to them.[33]

(iii) Interest. Law and economics had it at least partly right: Material incentives and disincentives plainly do influence behavior. These may include direct penalties or rewards the law provides (although role-occupants consider not only the law-in the-books, but the likelihood that implementing authorities will enforce them [Bernstein 1955; cf, Jaffe 1956: 1068]), They may also include the indirect benefits or disadvantages the law introduces.

(iv) Process. Whether role-occupants, as individuals or in collectivities, obey a law depends in part upon the process by which they reach their decision. Role occupants who make decisions in secret, for example, will likely make different decisions than if they must make public their reasons.

(v) Subjective factors ("ideology"). The sociologists, too, had it partly right: Obviously, people's world views do influence their actions. Social sentiments commonly sway role occupants' choices. More pervasively, actors' actions acquire meaning only in the context of their own subjective understandings, what Gouldner (1970) called their "domain assumptions" (see also Schutz 1965:60, 62; Weber 1949:32ff; Parsons 1949:26). To explain any particular role occupants' behavior, researchers must comprehend their commonly-held beliefs and the socially-acquired and transmitted norms (Ellickson 1986; Moore & Anderson 1965:72).

These seven categories seem to encompass all the possible

---

33) This seemingly obvious requirement raises many questions for investigation: Does the law's wording adequately communicate the law-makers' intention? (Rubin 1989:408 et seq.; Thornton 1987; Driedger 1983; Allott 1980:36~37; Ilbert 1914; Thring 1902). Does the way law-makers publicize the law ensure that its addressees know of their intention? (Seidman, R. B. 1972:680; Robertson & Teitlebaum 1973:665, 695ff; Gifford 1970:409).

factors likely to influence role occupants' behaviors, and hence to provide drafters with an adequate research agenda. (The mnemonic, ROCCIPI, helps to remember them: Rule, Opportunity, Capacity, Communication, Interest, Process and Ideology.) In considering each category,[34] law-makers should critically assess all the middle-level propositions suggested by alternative grand theories (Seidman and Seidman, Ch. 5), and incorporate the potentially most fruitful in their hypotheses. Once warranted by the evidence (or, more likely, revised in light of the evidence), the explanations thus generated logically suggest changes in laws likely to induce more desirable behavior.

b. **Ensuring effective implementation**. The Realist model teaches that the commonly heard assertion, "We have good laws, but they remain badly implemented", constitutes an oxymoron: Good law must make provision for its own effective implementation. To guide drafters in designing measures for effective implementation, an adequate legislative theory must provide categories helpful in generating hypotheses to explain agencies' 'behaviors' that contribute to their failure to implement existing laws effectively.

As the addressees of rules, in a sense implementing agencies constitute role occupants whose behavior the ROCCIPI categories may help to generate hypotheses to explain. By designation of an entire agency as a role occupant, however, too easily seduces researchers to 'explain' 'its behaviors' as those of a single rational actor (Allison 1971:32ff): For example, "the Federal Reserve Board believed that inflation required higher interest rates", or "to protect U.S. copyright owners, the President ordered an embargo of Chinese merchandise". In reality, implementing agencies

34) Sometimes, consideration of explanations in one or more category may seem superfluous. For example, law-makers usually communicate relevant rules and their contents to key role occupants, officials, in government implementing agencies.

comprise complex institutions involving the interacting behaviors of several sets of participants whose behaviors researchers can adequately explain only by understanding the agencies' detailed decision-making processes.

An input-output systems model (Fig. 2) helps to unpack those processes.[35]

Fig.2 (see attached diagram) underscores the systematic interrelationships between an implementation agency's decisions and its structures and processes (Huse 1975:37), showing how its decisions ('outputs') depend upon the way the institution's processes define: 1) the inputs (issues, facts, theories, personnel) decision-makers consider; 2) the feedbacks they receive about previous decisions' effects; and 3) the conversion processes, that is, the way they combine these elements to reach decision.

Law-makers' choice of implementing structures and processes ought to depend in main part[36] upon the substantive outputs they desire. No institution can implement an unlimited range of policies. The structure and processes of each agency may reflect the policy-makers' purposes, but their particular characteristics also influence the actual policies the agency implements.[37] That helps

---

35) The conventional input-output decision-making model explains particular decisions by examination of how particular inputs, feedbacks and conversion process worked in that instance (e.g., Huse 1975:35). Bachrach & Baratz (1963:632) argued this model fails to explain "non-decisions", issues which never even enter the system. That model ensures that research based on it never produces outputs that threaten power structures. The model in Fig. 2 aims to avoid that problem by examining the processes and structures that not only determine decisions, but what issues the system excludes and why (Seidman, R. B. 1978:194).

36) In part, they also depend upon the procedural protections desired in the decision-making process; e.g., in the criminal justice system, the privilege against self-incrimination.

to explain significant social, political and economic transformation requires fundamental alteration of existing government institutions - as undertaken by the post-revolutionary American and French governments. Lenin (1927) called for "smashing the bourgeois state". Less dramatically but more to the point, transformation requires fundamentally altering the input, feedback and conversion processes of the state's implementing institutions.

A government agency's processes consists of role occupants sometimes a great many role occupants - interacting in the face of express or implied rules that purport to define their activities. Unpacking those processes reveals which officials' behaviors explain agency decisions. Fig. 2 therefore suggests an extended research agenda to guide drafting laws to restructure state implementing institutions. Law-makers must: (1) identify the role occupants who occupy central positions in each state institution's input, feedback and conversion systems; and (2) given the existing rules addressing those role occupants, utilize the ROCCIPI categories to generate plausible hypotheses to explain their behaviors and to direct the search for evidence. On that foundation, they can then design new rules likely to ensure effective implementation.

This focus on implementing agencies' processes has significant implications for formulating and enacting laws likely to foster a democratic, participatory legal order. Above all, at every point, law-makers must try to design open, accountable implementing agencies' processes to: (1) ensure that all the people enjoy the opportunity and capacity to provide inputs and feedback to those agencies' decision-makers; and (2) incorporate criteria and procedures likely to direct the decision-makers' conversion of those inputs into outputs that serve the majority's needs. Without

---

37) That self-evidently runs counter to the oft-repeated claim that a well-designed civil service can function equally well for any government anywhere.

processes that facilitate community participation in agencies' policy-making, law-makers deprive themselves of their best potential source of information about role-occupant behavior (that is, the role-occupants themselves). Without participation, too easily the elite warp decisions in their own interest (Seidman and Seidman, Chs. 8, 9).

Together, Figs. 1 and 2, together with the ROCCIPI categories, the problem-solving methodology and an appropriate perspective, provide the components of an adequate legislative theory: An agenda to guide law-makers (including drafters) in undertaking the investigations necessary to ensure that the bills they produce will likely achieve proposed social transformations. Analysis of these categories stresses that transformatory legislation must rest on careful investigations of all the facts relating to each country's specific circumstances. At every step, the problem-solving agenda that lies at the theory's very core requires the utilization of reason informed by experience. Operationally, that requires that competent legislation come accompanied by a research report informed by an adequate perspective and structured by a problem-solving methodology and appropriate categories related to the causes of law addressees' behaviors.

## V. CONCLUSION

For the most part, neither legal theorists nor practitioners give much attention, if any, to formulating a legislative theory adequate to guide law-makers seeking to use the state and law to transform their countries' existing economic institutions. The reasons seem imbedded in the practitioners' myth that legislative drafting constitutes a mere technical skill, legal academia's focus on law as related to the courts' dispute settlement role, and on the ideological force of free market and positivist philosophies.

Further, it remains difficult to tease an adequate legislative theory out of cognate fields. Political scientists and political economists tended to elevate into the realms of theory their descriptions of existing law-making institutions' functions. Policy-making studies did much the same thing: They incorporated the authoritarian practice of contemporary institutions into ends-means and incrementalist methodologies. Only the legal realists offered sounder foundations on which an adequate theory might build.

Development requires laws likely to carry out development's transformational imperatives. That requires the use of theory, not as a metaphor, but as a guide to the factual investigations on which competent bills must rest. An adequate legislative theory must recognize the limits as well as the possibilities of using law to change problematic behaviors. It must generate explanations warranted by investigations into the country-specific factors that explain problematic behaviors in the face of existing law. Above all, it must rest upon logic and facts, or, more abstractly, reason informed by experience.

This paper aimed to propose such a legislative theory. As the framework for research, it suggests a four-step, problem solving methodology; to guide discretionary choice in problem-solving, the use not of intuition or 'values' but in-principle-testable Grand Theory (Seidman & Seidman, Ch.5); to generate hypotheses to guide data-capturing, the realist model, the ROCCIPI research agenda, and a strong emphasis on implementation. To ensure that law-makers enact laws grounded in reason informed by experience, those drafting them must accompany their bills with reports that describe the research findings on which they rest. The quality of the research determines the quality of the bill.

Everywhere, third world peoples have proven more successful in capturing state power than in using it. Failures to use law to transform institutions and the societies those institutions define litter development's rocky road. To avoid those failures requires of

course a measure of good fortune. A country too easily can squander its good fortune, however, unless it consistently invokes democratic participation in governance, and unless it guides its practice by a legislative theory resting on reason informed by experience.

## A MODEL OF THE LEGAL SYSTEM

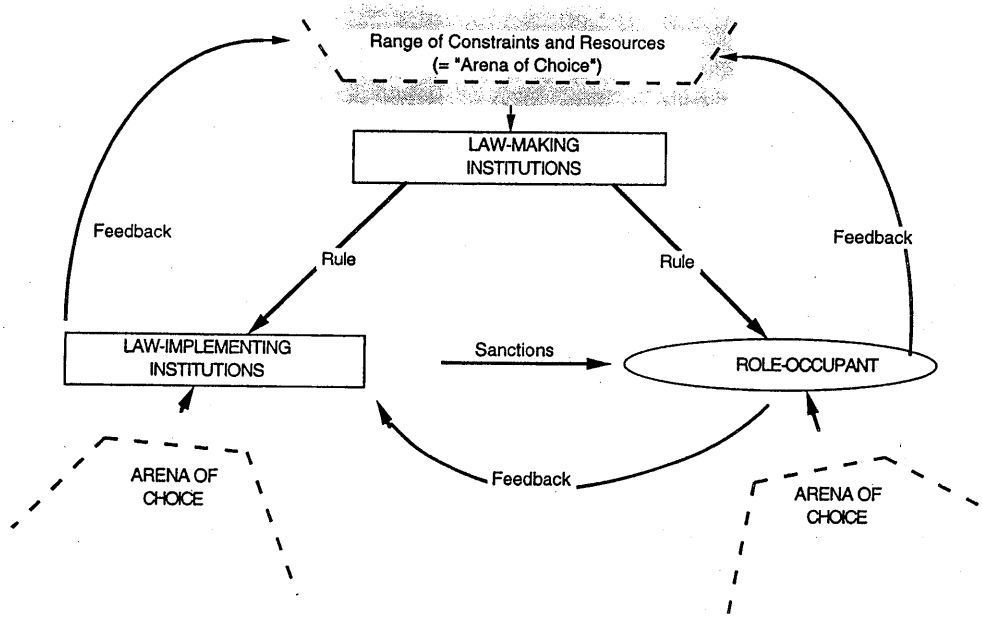


Fig. 1

## A MODEL FOR UNDERSTANDING COMPLEX ORGANIZATIONS

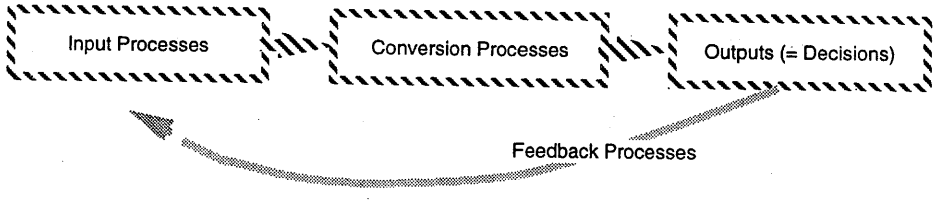


Fig. 2

## REFERENCES


Abel-Smith, Brian, and Robert Stevens. 1967. *Lawyers and the Courts*. Cambridge, Massachusetts: Harvard U. P.

Adams, John. 1982. "The Emptiness of Peasant 'Rationality': 'Demirationality' as an Alternative". 16 J. Economic Issues 663.

Allison, Graham T.. 1971. *Essence of Decision; Explaining the Cuban Missile Crisis*. Boston: Little, Brown.

Allott, Antony. 1980. *The Limits of Law*. London: Butterworths.

Austin, John. 1954. *The Province of Jurisprudence Determined: and The Uses of the Study of Jurisprudence*. London: Widenfeld and Nicolson. [First edition 1834].

Bachrach, Peter, and Baratz, Morton S.. 1963. "Decisions and Non-Decisions: An Analytical Framework". 57 American Political Science Review 632.

Barth, Fredrik. 1966. *Models of Social Organization*. Royal Anthropological Institute. Occasional Paper 23. Glasgow: The University P.

_____. 1931. *The Theory of Legislation*. (C.K.Ogden and Richard Hildreth, tr.; R. Hildreth. tr.). London: Routledge and Kegan Paul.

Bernstein, Marver H. 1955. *Regulating Business By Independent Commission*. Princeton: Princeton Univ. P.

Braybrooke, David. 1965. *The Philosophical Problems of Social Science*. New York: Macmillan.

Brody, Susan L., Jane Rutherford, Laurel A. Vietzen and John C. Dernbach. 1994. *Legal Drafting*. Boston: Little, Brown.

Bryde, Brun-Otto. 1976. *The Politics and Sociology of African Legal Deveolpment*. Hamburg: Alfred Metzner.

Buchanan, James M. 1972. "Politics, Property and Law: An Alternative Interpretation of Miller v. Schoene". 15 J. Law & Econ. 439.

Burman, Sandra B., and Barbara E. Harrell-Bond (eds.). 1979. *The Imposition of Law*. New York: Academic Press.

Calabresi, Guido, and A. Douglas Melmud. 1972. "Property Rules, Liability Rules and Inalienability: One View of the Cathedral". 85 Harv. L. Rev. 1089.

Cantori, Louis J. and Andrew Ziegler, Jr., eds. 1988. *Comparative Politics in the Post-Behavioral Era*. Boulder, CO: Lynne Rienner.

Carnoy, Martin. 1984. *The State and Political Theory*. Princeton: Princeton Univ. P.

Chambliss, William J. and Robert B. Seidman. 1981. *Law, Order and Power*. 2d ed. Reading, Massachusetts.

Clark, Norman and Calestous Juma 1987. *Long-Run Economics: An Evolutionary Approach to Economic Growth*. London: Pinter Publishers.

Coase, Ronald H. 1960. "The Problem of Social Cost". 3 J. Law and Economics 1.

Cranston, Ross. 1987. *Law, Government and Public Policy*. Melbourne: Oxford Univ. P..

Cronbach, Lee J. 1980. *Toward Reform of Program Evaluation*. San Francisco: Jossey-Bass Pub.

Davies, Jack. 1986. *Legislative Law and Process in a Nutshell*. 2d. ed.. St. Paul: West Publishing.

Dawson, J. P. 1960. *A History of Lay Judges*. Cambridge: Harvard University Press.

Dworkin, Ronald M. 1986. *Law's Empire*. Cambridge, MA: Belknap P.

Ellickson, Robert C. 1986. On Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County. 38 Stan. L. Rev. 623.

Ehrlich, Eugen. 1922. "Sociology of Law", (Isaacs, tr.) 36 Harv. L. Rev. 130.

Engels, Friedrich. 1968. Letter to C. Schmidt, 27 October 1890. In Marx and Engels 1969a:694.

Eskridge, William N., Jr., and Philip P. Frickey. 1988. *Cases and Materials on Legislation: Statutes and the Creation of Public Policy*. St. Paul: West Publishing.

Evan, William M., ed. 1962. *Law and Sociology: Exploratory Essays*. Glencoe: The Free Press.

Evan, William M. 1965. Law as an Instrument of Social Change. In Gouldner & Miller 1965:285.

Farber, Daniel A. and Philip P. Frickey. 1987. "Practical Reason and the First Amendment" 34 UCLA L. Rev. 1615.

Festinger, L. 1957. *A Theory of Cognitive Dissonance*. Illinois: Row, Peterson.

Fiorina, M. 1977. *Congress: Keystone of the Washington Establishment*. New Haven: Yale U. P.

Friedman, Lawrence. 1969. Legal Culture and Social Development. 4 Law and Soc. Rev. 29.

Gouldner, Alvin. 1970. *The Coming Crisis of Western Sociology*. N.Y.: Basic Books.

Gouvin, Eric J. 1994. "Truth in Savings and the Failure of Legislative Methodology", 62 Univ. of Cincinnati L. Rev. 1281.

Griffiths, John. 1976. "Is Law Important?" 54 N. Y. Univ. L. Rev. 339.

Hirschman, Albert O., 1970. The Search for Paradigms as a Hindrance to Understanding. 22 World Politics 329.

Holmes, O.W. 1909. *The Common Law*. Boston: Little, Brown.

Homans, George Casper. 1967. *The Nature of Social Science*. N.Y. : Harcourt, Brace and World.

Huse, Edgar F. 1975. *Organization Development and Change*. St. Paul: West Publishing.

Jaffe, L. L. 1956. Book Review. 65 *Yale L. J.* 1868.

Jessop, Bob. 1982. *The Capitalist State: Marxist Theories and Methods*. New York: N. Y. U. Press.

Jones, H.W. 1968. *The Efficacy of Law*. Evanston, IL: Northwest Univ. P.

Kelsen, Hans. 1949. *General Theory of Law and State*. Cambridge, MA: Harvard Univ. P.

Klamer, Ario, Donald N. McCloskey and Robert M. Solow, eds. 1988. *The Consequences of Economic Rhetoric*. Cambridge: Cambridge U. P., 1988.

Kronman, Anthony T. 1985. "Alexander Bickel's Philosophy of Prudence", 94 Yale L. J. 1567.

Kulcsar, Kalman. 1992. Modernization and Law. Budapest: Akademiai Kiado.

Leff, Arthur A., 1974. Economic Analysis of Law: Some Realism about Nominalism. 60. *Virginia L. Rev.* 451.

Leff, N. H. 1964. "Economic Development through Political Corruption", 8 *American Behavioural Scientist* 8.

Lenin, V. H. 1927. *Imperialism. The State and Revolution*. New York: Vanguard Press.

Lindblom, Charles. 1963. *The Policy-Making Process*. Englewood Cliffs, NJ: Prentice-Hall.

_____. 1959. *The Science of Muddling Through*. Public Administration Rev. 1958:79.

Llewellyn, Karl. 1950. "Remarks on the Theory of Appellate Decision" 3 Vand. L. Rev. 395.

_____. 1934. "Some Realism about Realism". 44 Harvard L. Rev. 1222.

Lloyd-Bostock, S.M.A., 1979. "Explaining Compliance with Imposed Law". In Harrell-Bond, Barbara E., and Sandra B. Burman, eds. 1979. *The Imposition of Law*. New York: Academic Press. Page 9.

Luce, Robert, 1922. *Legislative Procedures: Parliamentary Practices and the Course of Business in the Framing of Statutes*. Boston: Houghton, Mifflin.

MacIntyre, Alisdair C.. 1984. *After Virtue* Rev. ed.; Notre Dame: University of Notre Dame Press.

Madison, James, Alexander Hamilton and John Jay. 1864. *The Federalist. A Commentary on the Constitution of the United States. A Collection of Essays*. Philadelphia: Lippincott.

Makgetla, Neva. 1992. "A Note on Gary Becker's Use of Metaphor", 26 J. Economic Issues 900.

Mayhew, D. 1974. *Congress: The Electoral Connection*. New Haven: Yale University Press.

Marasinghe, M. L. and William Conklin (eds.). 1984. *Essays on Third World Perspectives in Jurisprudence*. Salem, NH: Butterworth Legal.

Markovits, R.S. 1984. Duncan's Do Nots: Cost Benefit Analysis and the Determination of Legal Entitlements. 36 *Stanford L. Rev. 1169.*

Marx, Karl, and Friedrich Engels. 1969. *Preface to a Contribution to the Critique of Political Economy*, in 2 Selected Works (1978).

Michelman, F.I. 1983. Reflections on Professional Education, Legal Scholarship and the Law-and-Economics Movement. 33 *J. Legal Educ. 137*.

Mill, John Stuart, 1861. *Considerations on Representative Government*. London: Parker, Son & Bourn.

Mills, C. Wright. 1956. *The Power Elite*. New York: Oxford University Press.

Moore, Omar K., and Anderson, Alan R., 1965. "Puzzles, Games and Social Interaction". In Braybrooke, 1965:68.

Nutting, Charles B., and Reed Dickerson. 1978. *Cases and Materials on Legislation*. St. Paul : West Publishing.

Nye, J. S. 1967. "Corruption and Political Development", 61 American Political Science Rev. 417.

Nzongola-Ntalaja, 1987. *Revolution and Counter-Revolution in Africa - Essays in Contemporary Politics*. London: Zed Books.

Packer, Herbert. 1969. *The Limits of the Criminal Sanction*. Stanford: Stanford University Press.

Parsons, Talcott. 1962. "The Law and Social Control". In Evans 1962:56.

_____. Introduction. In Weber, 1949.

Patton, Carl V. and David S. Sawicki. 1986. *Basic Methods of Policy Analysis and Planning*.

Posner, Richard A. 1986. *An Economic Analysis of Law*. Boston: Little, Brown.

Posner, Richard A. 1987. "The Regulation of the Market in Adoptions". 67 Boston University L. Rev. 59.

Price, Catherine M. Welfare Economics in Theory and Practice. London: Macmillan.

Purdy, Roger 1987. "Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussions of Ethics and Role Problems". 11 Seton Hall Legis. J., 67.

Resnick, Stephen, and Richard Wolff. 1988. "Marxian Theory and the Rhetorics of Economics". In Klamer et al. 1988:58.

Roche, J.P. and M.M. Gordon. 1955. Can Morality be Legislated? *New York Times Magazine*, May 22.

Rubin, Edward. 1991. "Legislative Methodology: Some Lessons from the Truth-in-Lending Act". 80 Georgetown L. J. 233.

Samuels, Warren. 1979. *The Economy as a System of Power*. New Jersey: Transaction Books.

Schattschneider, A.. 1960. *The Semi-Sovereign People: A Realist's View of Democracy in America*. Fort Worth. Harcourt Brace Jovanich College Publishers.

Schutz, Alfred 1965. "The Social World and the Theory of Social Action". In Braybrooke 1965:53.

Seers, Dudley, ed. 1981. *Dependency Theory - A Critical Reassessment*. London: Frances Pinter.

_____. 1972. "The Prevalence of Pseudo-Planning". In Farber and Seers 1972:19.

Seidman, Ann and Robert B. Seidman, 1964. *State, Law and the Development Process - Problem - solving and Institutional Change in the Third World*. London : Macmillan.

Seidman, Robert B. 1985. "Foreign Private Investors and the Host Country". 19 J. World Trade L. 637.

_____. 1978. *State, Law and Development*. London: Croom Helm.

_____. 1975. "Law and Development: The Roles at the Interface of Means and Ends". 14 J. Mod. Af. Stud 567.

_____. 1981. "Law, Development and Legislative Drafting in English-Speaking Africa", 19 Journal of Modern African Studies 133.

_____. 1984. Law and Poverty. In Marasinghe and Conklin, 1984.

_____. 1978. Why Do People Obey the Law? The Case of Corruption in Developing Countries. 5 Brit. J. of L. and Soc. 45.

Shadish, William R. Jr, Thomas D. Cook, and Laura C. Leviton. 1991. *Foundations of Program Evaluation - Theory of Practices*. London: Sage Publications.

Smelser, Neil J., and Dean R. Gerstein, eds. 1986. *Behavioral and Social Science - Fifty Years of Discovery*. Washington, DC: National Academy Press.

Stallybrass, W.T.S. 1948. "Law in the Universities". 1 J. of the Soc. of Pub. Teachers of Law, NS, 147.

Stokey, Edith, and Zeckhauser, Richard. 1978. *A Primer for Policy Analysis*. N.Y.: W. W.Norton.

Stufflebeam, Daniel L., and Anthony J. Shinkfield. 1985. *Systematic Evaluation - A Self - Instructional Guide to Theory and Practice*. Hingham, MA: Kluwer - ijoff Publishing.

Sunstein, Cass. 1988. "Beyond the Republican Revival", 97 Yale L. J. 1539.

Tarascio, Vincent J. 1968. *Pareto's Methodological Approach to Economics: A Study in the History of Some Aspects of Scientific Thought*. Chapel Hill: U. of North Carolina P.

Thring, Sir Henry. 1902. *Practical Legislation: The Composition and Language of Acts of Parliament and Bureau Documents*. 2d ed. Boston: Little, Brown.

Trubeck, David and Galanter, Marc, 1974. "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the U. S." [1974] Wisc. L. Rev. 1062.

Von Benda-Bechmann, Eva. 1989. "Scapegoat and Magic Charm: Law in Development Theory and Practice", 28 J. Legal Pluralism and Unofficial Law 133.

Weber, Max. 1949. *Max Weber on the Methodology of the Social Sciences*. Trs. and eds.: Edward A. Shils and Henry A. Finch. Glencoe, Ill: Free Press.

Williams, David V., 1980. The Authoritarianism of African Legal Orders: A Review and Critique of Robert B. Seidman's The State, Law and Development. 5 Contemporary Crises 255.

World Bank. 1990a. *World Development Report 1990*. New York: Oxford Univ. P.

_____. 1989. *Sub-Saharan Africa - From Crisis to Sustainable Growth - A Long-Term Perspective Study*. Washington, DC: International Bank for Reconstruction and Development.