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Notes for discussion on Chapter One, Making Development Work: Legislative Reform for Institutional Transformation and Good Governance

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Boston University

NOTES FOR DISCUSSION ON CHAPTER ONE
Making Development Work: Legislative Reform
for Institutional Transformation and Good Governance

I. Areas of agreement

A. though in academia and the literature, following propositions encounter opposition, the authors here -- all engaged as consultants in projects involved in formulating laws -- implicitly agree on them.

B. Propositions on which authors tend to agree:

1. that law can facilitate societal and economic change;
2. that law reform today aims primarily at healthy expansion of market-driven economies;
 - a. Note paradox: effort to use law to strengthen markets involves government intervention;
 - b. the law's details will likely determine the kind of market established.
3. that, to induce desired behaviors, governments must tailor law to country-specific circumstances;
4. that -- especially for business transactions -- the law's design should facilitate fitting the national economy into global system.
5. that, to ensure legal system's coherence and consistency with national circumstances -- a central office (usually the Ministry of Justice) should coordinate the formulation of legislation.

II. Authors disagree on four areas which tend to go to the heart of the conceptualization and implementation of legislative drafting projects designed to translate policies into effectively implementable law:

A. The uses of foreign law in the legislative drafting process = related to assumptions about law-making processes:

1. implicitly, authors adopt 3 different approaches to issues of the country-specific role of classes and class formation in the law-making process:
 - a. optimistic: law-making = bargaining among competing interest groups,

(1) as in economy, leads to optimal resource allocation; or

(2) state = neutral, leaves market actors to compete to achieve optimal resource allocation.

b. pessimistic: law-making bargaining process dominated by economically powerful classes which use it to enhance their power and privilege

c. examine how country's institutions shape law-making processes: law-makers respond to inputs, conversion and feedbacks that processes permit; as long as powerful usually have access, may dominate the outputs.

2. Issue of copying laws (models) from elsewhere:

a. Almost all argue that, although should tailor laws to country-circumstances, scarce resources limit possibilities of getting facts about those circumstances; so have little choice but to adopt laws from 'successful' developed countries and, over time, adapt to national realities.

(1) especially useful to facilitate expanded market economies = core of 'commercial law'

(2) recognize limitations; fill gaps, avoid wholesale restructuring of system; educate public about use of laws, train legal personnel (lawyers, judges).

(3) to get around obstacles of existing laws, people may develop 'informal' systems; governments may make separate contracts with large foreign investors.

(4) some suggest a need for legislative theory; but generally don't have one.

b. Since country-circumstances that influence behaviors differ, others -- especially ourselves -- argue should never copy law;

(1) instead conduct research about country-specific factors that cause problematic behaviors and design laws that logically seem likely to overcome those causes;

(2) require a legislative theory to guide

drafters as to what facts to examine as a basis for formulating laws;

(3) can learn from foreign law and experience: how same problems appear elsewhere? what causes the behaviors that comprise those problems elsewhere? What legislative solutions worked -- or didn't, and why?

B. Authors who call for a legislative theory differ on expository categories it should include to help lawmakers examine relevant country-circumstances; ie the relevant criteria for determining what facts to look at:

1. Some eg Puchalska writing about Poland, focus on historically-shaped values and attitudes as primary;

2. Others, like Trachtman guided by law and economics in looking at factors shaping financial institutions, examine transaction costs.

3. Still others, like ourselves, propose a set of explanatory categories that purport to include all possible subjective and objective factors likely to influence relevant social actors' behaviors.

C. What methodology should law-makers adopt?

1. Some seem (implicitly) to adopt an ends-means approach:

a. The policy makers set the goals;

b. Drafters, looking at the country-specific circumstances, formulate the means of achieving them.

2. We recommend a problem-solving methodology which enables drafters to structure the facts about how country specific circumstances cause the relevant social actors' behaviors that comprise the problem in a way that logically suggests a bill's detailed measures likely overcome those causes, thus solving the problem.

D. All these disputes underly the a fourth area of disagreement: what kinds of training should a legislative drafting project provide for what kinds of people?

1. Training for whom:

a. Emphasizing the courts' and law professions' primary role in resolving disputes among market actors, some (the World Bank authors have emphasized this perspective) view training of

judges and lawyers as central;

b. Others -- especially ourselves -- have urged training for drafters, ministry officials and legislators to enable them to formulate laws that translate policy into effective measures to change behaviors -- not just in market transactions, but also to provide the necessary social, political and economic infrastructure required for democratic social change and good governance.

2. What kind of training related to drafting laws, per se?

a. Some adopt the practice of drafting what they view as the essential laws, and hold seminars to explain them to relevant officials;

b. Others recommend foreign experts work together with national officials trained in legislative techniques to draft required laws.

c. We recommend a learning-by-doing process that engages legally-trained personnel to work together with relevant ministry officials to draft laws designed to change the behaviors that comprise priority social problems; and in the process, to learn and test the use of legislative theory's problem-solving methodology and explanatory categories as a guide.

III. The book does not pretend to resolve the debates; it leaves the readers, in light of their own experience, to examine and to test the utility of each author's the contribution as a guide for more effective law-making.