

Negotiated Law

- the Use and Study of Law Data in International Development Research

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The existence of indigenous law has been seriously neglected and its nature grossly misunderstood by many development planners and workers.²

To this quotation I may add - as my belief - by many development researchers as well. And this allegation does also include misunderstanding the nature of state law and of the relations between the two categories of law. By the application of the concept of negotiated law my aim is to contribute to an understanding of especially a reformatory legislative program's possibilities and limitations with respect to bring about structural changes. Behind the idea about negotiation of law lies a certain conception of law and its function. So before elaborating this idea it is useful to take a closer look at the use of the concept of law within different movements and schools. Important concepts are on the one hand legal centralism and legal positivism. And on the other hand legal pluralism and law as process. A couple of African systems of law with different conceptions in this respect will be presented alongside two different models for con-

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² Keebet von Benda-Beckman (1990/91) *Development, Law and Gender Skewing*. The article looks at the relationship between planned development, law and gender discrimination.

flict solving: the retrospective and rule oriented model and the forward-pointing and outcome-oriented model. Parallel to these two decision models two kinds of processes could be observed overall in human interaction : Processes of regularisation and processes of situational adjustment. And in these processes law is negotiated.

The study of negotiated law

The study of negotiated law can advantageously take the traditional method within anthropology of law as a starting point, ie. the study of trouble cases. But the single conflict in each case must be treated in a broader frame if the researcher shall be able to understand what is negotiated and why planned reforms may fail to materialize. To that end the extended case study method will be presented and discussed.

Different Conceptions of Law

Different researchers have different concepts of law with different consequences for the study. Below two pairs of concepts will be explained and their utility as tools for analysis of the success or failure of reformatory legislation discussed.

Legal Centralism and Legal Positivism

Legal centralism is a state of affairs where 1) a group in power in a region claims "There is but one legal order" (as is the case in most Western countries) or 2) maintain "there should be but one legal order" (as in many of the new independent states in the third world). The concept of legal centralism is both a postulate about reality and an ideology (J.Griffiths 1986). Law systems are normative systems and a description of these systems should include their postulates or ideology about law as an empirical phenomenon³ The ideology of legal centralism is connected to the growth of the nation state. It contains a claim to exclusive validity for the one legal order centrally laid down and a claim to the monopoly of legitimate use of power. While the postulate of legal centralism as a fact is common among state officials and legal scientists in Europe, it is a coveted goal not yet reached in the new African independent states, striving to

³ Franz von Brenda-Beckman (1989): Comments on Merry, *Law and Society Review*. Vol. 22 nr5

build a nation state. The postulate of a universal law mediated by Mohammed and contained in the Quran is another example of the ideology of legal centralism.

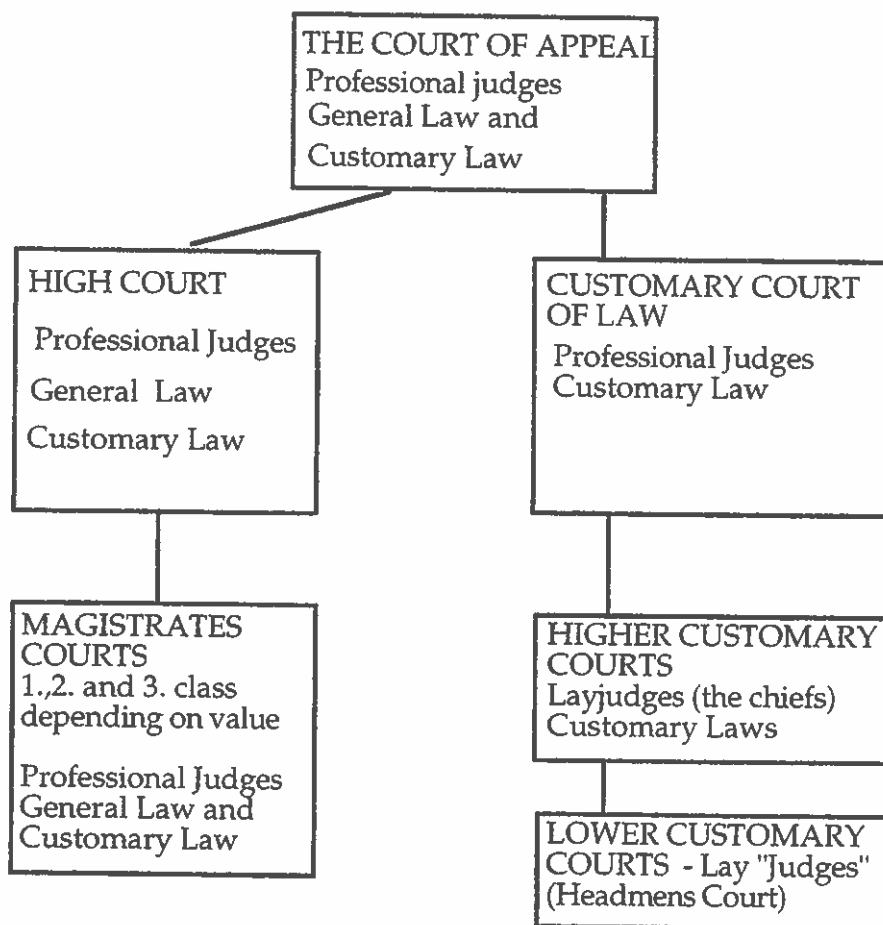
Legal positivism (in its original version, Austin 1863) asserts three principal theses: 1) About definition of law: A legal system is a collection of laws emanating from the sovereign. A law is a command backed up by a sanction. Thus customary law is not law unless it is recognised by state law. 2) About the relationship between law and morals: There is no necessary connection between law and moral although coincidence may be shown to some extent. 3) About general jurisprudence: A value free analytic study, also named analytical jurisprudence should be aimed at. The study of Law is an autonomous science, an abstraction of law from its social setting and function. The legal positivist claims that Law is the normative order of the state. The legislator generate new rules and the courts are the main means to induce compliance with the rules. It is the task of jurisprudence to give a logical coherent account of the system of law as advice to practitioners about what is considered valid law. "Positivism seeks to unify and universalize a specific and local legal tradition"(A. Griffiths, 1989). Analytical jurisprudence has a hegemonic position at universities throughout the world wherever a European legal system has been introduced.

Legal Pluralism, Customary Law and Law as Process

There are different definitions of legal pluralism (Merry, 1988). One distinction refers to jurists' legal pluralism as opposed to social science legal pluralism (J.Griffiths, 1986). A manifestation of *jurists' legal pluralism* is mixed jurisdiction of civil and customary law.⁴ The point is that customary law is recognised in state law as a source of law to be used in some cases by some courts, and in this sense legal pluralism is not inconsistent with the ideology of legal centralism. Below are two examples of mixed jurisdictions of civil and customary law, from Botswana and Zimbabwe respectively, shown (Figure 1 and 2).

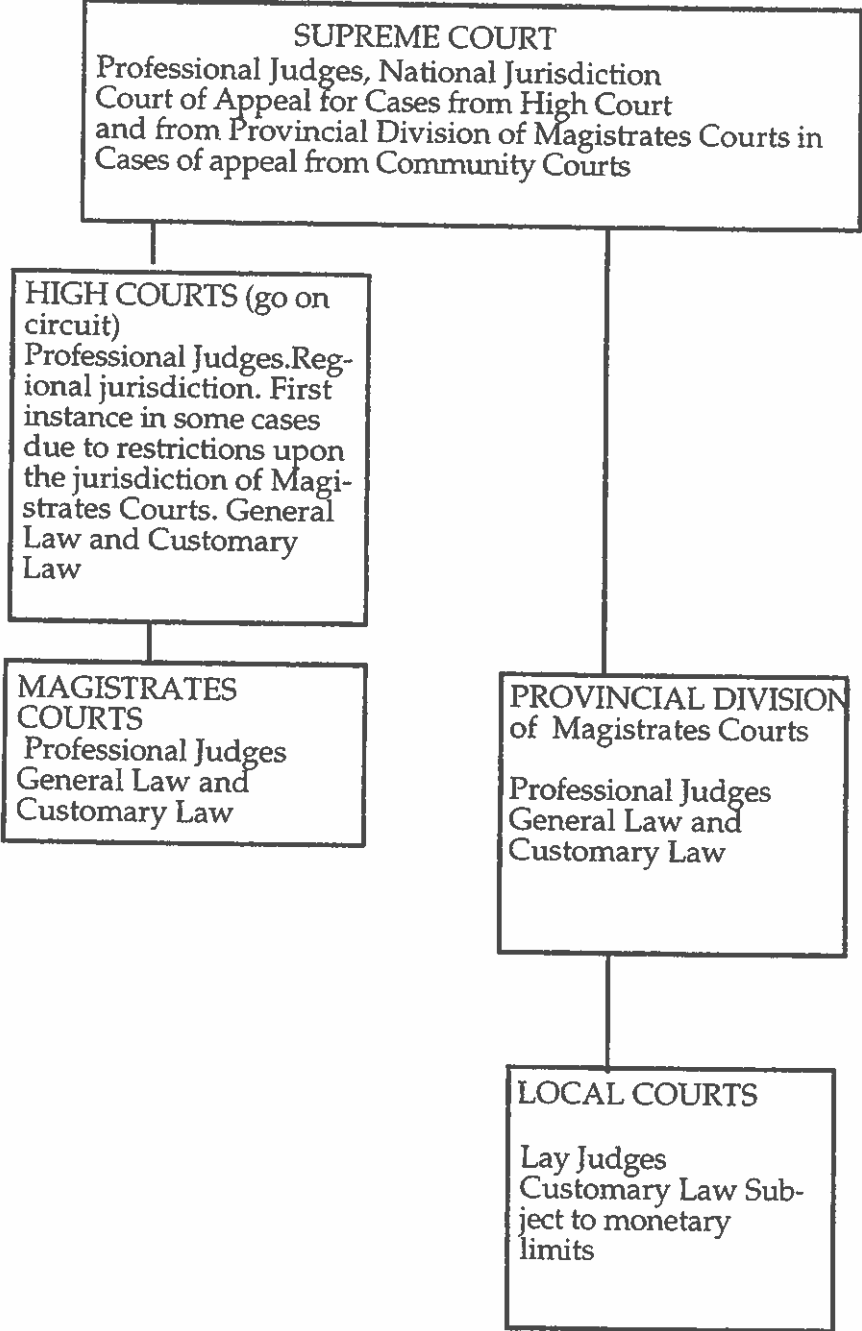
⁴ The topic at the XIITH Congress of International Academy of Comparative Law(Sydney,1986) was Mixed Jurisdiction of Civil and Customary Law.

Figure 1: The Administration of Justice in Botswana (1986)



In all of the courts customary law may be applied. In customary courts only customary law. There is a choice of law and forum in civil cases. The repugnancy clause introduced by the colonial power still applies as a means to nullify a lower courts' decision. Serious crimes and public law matters are treated in accordance with general law (A.Molokomme, 1986).

**Figure 2: The Administration of Justice in Zimbabwe
(Customary Courts and Local Courts Act 1990)**



Local courts are divided into Primary courts at the lowest level presided by headmen, and Community Courts presided by chiefs. These are both first instance and appellate courts. Jurisdiction only in civil cases and most conflicts within the area of family law are excluded from their jurisdiction (W. Ncube, 1989).

A social science view of legal pluralism is one which reserve the concept of legal pluralism to the replicatory nature of institutions, rules and procedures, the co-existence of legal orders that do not belong to a single system. In practice we find situations that involves a partial recognition of informal normative systems besides the formal central system and in addition normative orders not recognized (eventually not known) but in fact functioning as guide for peoples behaviour and attitudes (W. Ncube, 1989)

Customary Law

There is no general agreement about the labelling of those normative orders not originating from the state. Folk law, indigenous law, traditional law, informal law and customary law are all terms used to cover almost the same phenomena.

I prefer to use the term customary law to refer to norms generated by social practice and acceptance (Woodman, 1994). But the term customary law is used with different meanings.

It is now commonly held, that what in colonial times was said to be the content of customary law was at least partly a construction of the colonial administrators, as most of the colonies were composed of several ethnic and language groups with different customs and norms. Thus customary law was a variety of law systems but in the administration of justice it was often transformed to one common law system (Woodman, 1983). Woodman has proposed a distinction between lawyers' customary law and sociologists' customary law to describe the legal situation of that period . It is still a handy tool for analysis of the present legal situation, but with addition of the idea of law as process we may add the concept of living customary law to our tools.

How do Lawyers find Customary Law?

We have to look for rules of recognition. I take as an example an act from Zimbabwe. It is the Customary Law and Local Courts Act 1990. Article 9, Ascertainment of customary law, says:

If a court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereof as may be made and such evidence thereof as may be tendered by or on behalf of the parties, it may without derogation from any other lawful source to which it may have recourse, consult reported cases, textbooks and other sources, and may receive opinions, either orally or in writing, to enable it to arrive to a decision in the matter.

This is customary law in books, textbooks and courts records, fixed and more and more removed from customary law in action as time goes by owing to Common Law's weight on precedents. That is the use of former court decisions as obligatory guide for the settlement of new cases.

Anthropologists' (sociologists') customary law is based on observations of customs and attitudes and depending on the applied methodology it gives a more or less reliable instant picture of customary law. But as the customs and attitudes change the picture becomes obsolete. "Research in customary law systems ought to take into consideration that "the target " is not static but continuously on the move... An instant picture is outdated before the print is dry....A time horizon projecting likely changes in environmental and socio-economic conditions and projecting their likely impact on customary law" (Berry, 1994 - slightly condensed.) The quotation expresses the idea of law as process. It should however be stressed that also formal law is constantly on the move. Prescriptions and precedents are only *sources of law* and even if they in the doctrine are considered as primary sources there are other recognized sources as equity (justice of the case clause): a principle of justice, a means of flexibility to the correction of the rigidity of written law.

Assumptions of law and its Functions

"The Lord said light and there was light" (Genesis, first pentateuch). A misunderstanding held by many jurists and non jurists is that legislation has an immediate effect on human behaviour. Consequently research in the functioning of special pieces of reformatory legislation have taken as a starting point a surprise about the fact that the expected effects have failed to come off

and worked with hypotheses about defect communication of the legislative message. Not quite so mechanistic is the understanding of many politicians, practitioners and researchers that law is a reliable tool for production of social change, also called Law as Social Engineering (R.Pound, 1942)⁵. Not least women's organisations have relied on the legislature to further their demands for equality between the sexes. This rather optimistic perception of the functioning of legislation is based on legal centralism and legal positivism as ideological standpoint and with stress on the origin of law in rules transmitted by the state. With a legal pluralism point of view a researcher will assume that the state regulation will come up against other norms which may or may not be inconsistent with those of the state. The human actors are thus exposed to more than one set of norms originating from different norm senders. From the point of view of judges and planners this co-existence of a number of norm systems entails conflict of laws. Conflicts between general law and customary law, and conflicts between different systems of customary law. In general law systems there may be guidelines for the choice of law: "In any case where customary law is applicable and the parties are connected with different systems of customary law, the court shall apply the Customary Law by which the parties have agreed that their obligations should be regulated, or in absence of such agreement, the Customary Law with which the case and the parties have the closest connection, and if that is not ascertainable the court should apply the system of c.l. which the court considers it would be fair and just to apply in the determination of the case."

Obviously such a wording in the Customary Law and Local Courts Act in Zimbabwe leaves room for negotiation.

Types of Negotiated Law

The term negotiated law is not my invention. The negotiability of rules and regulation is often emphasized by anthropologists in their studies of systems of legal pluralism.

In the WLSA research project on inheritance it was one of the empirical findings that reference to rules was but one input to a solution of a dispute and that in the same debate arguments were used about situational conditions which should be decisive

⁵ From Roscoe Pound stems the phrase law as social engineering, used in his article: *Law as a tool for social engineering*. 1965. This view on law is widespread among legislators and sociologists of law.

for the outcome. Negotiation of this type was more common at the lowest level of the institutional hierarchy for dispute settlements manned with lay judges than at levels manned with people trained in law (WLSA Zimbabwe, 1993). It may appear as if negotiation is also what is happening in European courts when lawyers for each part argue for opposite interpretations of legal rules but in principle one of them is right, the other is wrong. This has to do with the legal centralist ideology that there is one legal system with general applicability. The judge is supposed to be able to find what the law is. In our Nordic countries at least he is not supposed to generate new rules.

Sally Falk Moore (1978) has a description of types of arguing for ones claims, which I think could be used as a means of observation and registration of negotiating processes. Two lines of argumentation could be identified.

1) Processes of Regularization.

This kind of processes is a major category of ongoing activities in society which include all the ways in which conscious efforts are made to build or reproduce durable social and symbolic orders, to give social reality form and order and predictability. These processes of regularization are the kinds of processes which produce rules, organizations, customs, symbols and rituals etc. and seek to made them durable. A framework of shared rules and understanding and beliefs means that there is some stability and predictability in people's activities. Every instance and interaction does not have to be renegotiated in an totally open field of possibilities.

Examples of Processes of regularization's could be: insisting on the content of customary law as hitherto conceived with reference to court usage, to the words of a local authority or to common knowledge: "The heir is the eldest son."

But Processes of regularization could also be an argument for a new rule as an adjustment to new common conditions. For example by reference to the fact that many men are absent from home for long periods, as an argument for a rule giving women power to make decisions as representatives for their absent husbands. One may not find such statements in so many words but be able to deduct it from observations.

2) Processes of Situational Adjustment

These are reverse processes by means of which people arrange their immediate situations and express their feelings and conceptions by exploiting the indeterminacies in the situation or

by generating such indeterminacies or by redefining or reinterpreting the relationships.

An example: conflicts and negotiations about widowhood. In order to achieve immediate situational ends they use whatever areas there are of inconsistency, contradictions, conflict or open areas where norms are not yet developed (in case of introduction of new forms of property, for ex. bank accounts, pension rights)

Examples of Processes of Situational Adjustment's could be arguments ad hominem as e.g.: The heir is lazy and had not ever cared for his parents. Our daughter or our youngest son is the caring one. Another example of the same kind of processes is the often found argument for property grabbing that the widow is a witch and has caused her husband's death and hereafter should be chased away (WLSA Lesotho, 1993).

In the effort to construct as far as possible a social reality that suites their purposes people may resort to both kinds of techniques, often in the very same situation.

The concepts proposed could provide a way of looking at what is taking place in terms of its effects. That is to say the increase or decrease of the determined and fixed in social relations and cultural expressions. The fixed in social reality in fact means the continually renewed. Ideology, norms and rules may be regarded as products of what is called the regularizing processes. It is the use instance by instance of argumentation based on ideology etc. that permits the kind of reinterpretation, redefinition and manipulation which is the content of processes of situational adjustment.

The above described framework is a tool to describe data in an orderly manner and afterwards to analyse and interpret the thus described situations in order to be able to say something about the power and support behind the different actors and the socio-economic and other factors determining or influencing the outcome of the clash of the two processes.

How to Study and use Law Data in an Interdisciplinary Context. The Extended Case Study

The researcher qualified in law is inclined to focus on a review of statutes, subordinate legislation, case law, court files and records that hopefully will yield a profile of law in books and how specific issues are dealt with in the courts. But traditional

legal material and sources give little insight into the lived realities of people's lives nor do they reveal, except superficially, the inadequacies of the legal system as it operates in practice.

Projects to explore other factors that influence the social and legal position of people are often based on field research to compare the frequency of court usage by different groups of the population and macroprofiles of litigants and causes of action are generated. But this kind of research will not procure an understanding of the interrelatedness of political planning, law and people's exposure to different normsets and their preferences and actions. The use of the extended case study method may do it.

The use of Case Studies

We will first take a look at the delimitation of a case in law studies where the boundaries are easily determined. Then we take steps into the territories of other social sciences and give examples of choices of demarcation.

The case in the field of law. For a practising lawyer a case is a law suit. For a law school jurist a case study is a study of precedents - court decisions, often as they are reviewed in law journals but also based on archive material from the courts. Case study as a method of teaching law students has old roots. Its wider application in the social sciences has its origin at Harvard Law School from where it was adopted by Harvard Business School. Later on the social sciences have adopted case study as a research method.

When introducing the student to field work based on case study in the social science sense it may be serviceable to take as a starting point the traditional field of study for lawyers, **trouble-cases treated by courts and accessible in court archives or recorded in law journals** (Epstein, 1983). Which types of questions asked by a researcher can the record answer? The kind of conflicts treated. Which of the parties has brought the conflict to court. What evidence. The form that judicial reasoning takes. What result. The information drawn from the record will hardly exceed this. The next step is introduction to **the extended case method**. (van Velsen, 1979). If informations are wanted about the treatment of the case and the procedure at the legal conflict handling as well as the behaviour of all participating actors, including the audience, the study must be expanded to **observation of court hearings**. It is an important question how the judge delimit the case. It is documented in more

research projects, that in courts where the judge(s) is/are educated in law, the cases are delimited differently from the delimitation of cases in courts with lay judges. The reason may be that the two types of courts have different models for a just decision. The traditional judicial model for a correct decision is labelled the model of subsumption. It looks back in time to find actions or happenings earlier in time that are described in the system of rules as facts on which legal effects are based. Take a case where the question is whether the contending parties are married or not. Has brideprice (lobola) been payed or not? Has the marriage been registered, etc.? Those questions would be relevant. It has no interest whether drought has hindered the payment of lobola or the registration is left undone because of the danger connected with moving around in an area ravaged by civil war.

The contrast to this model is a model for conflict resolution where special weight is placed on the effects of the decision for the local society. In this case the conflict handling agent is looking ahead and takes into account other types of information besides the mentioned facts on which a legal effect can be based.

If furthermore an understanding is wanted of the individual choices and actions made by judges and parties the researcher will have to conduct **interviews with the participants in the process.**

Within research with the aim of describing and understanding the legal and social status of women , researchers in women's law are advised to take a further step and further expand the case⁶. But the recommendation is not confined to women's law studies. Further questions would be: How is the judgment followed up? Has it been respected or neglected? What are the factors influencing one or another outcome of the judgement? Are there alternatives to the legal conflict handling and if so what are the differences and similarities between the different kinds of problem handling..

These questions lead to **focus on the agents of informal conflict handling** and men's and women's options and choices between formal and informal conflict handling agencies. At this stage the difficult question of when to stop filling new data into the case arises. New kinds of activities and new actors must be included in the study and a further step may be considered rele-

⁶ The large research project Women and Law in Southern Africa (WLSA) has in the course of the research process gone from a legalistic approach to an approach very similar to an extended case study method.

vant in order to get a whole picture of the legal and social status of the group of actors studied.

Extension of the field of study with "trouble-less-cases"

It is the common trouble-less cases of normal practice that usually constitute the normative frame of reference by which trouble-cases are being judged. Adequate attention to them would moreover provide guidelines for probe into the illuminating prehistory of many trouble-cases (Holleman, 1973).

Trouble-less cases may be the praxis of key-informants which are in contact with legal transactions with no conflicts between the parties (e.g. administration of the estate of a deceased person, a marriage contract, a bargain in real estate). An extended case may be built up around some of the cases the practitioner is referring to for comparison with trouble-cases within the same field. Trouble-less-cases may also be studied as a daily praxis between people without interference of a third party. Trouble-cases within the topic for research have background in trouble-less coexistence within the same field. The researcher may ask why the same kind of activities among the same actors are enacted now in peace now in conflict.

Defining the Boundaries of a Case Study

A case is a unit of analysis. The case method provides the raw data for analysis. The kind and range of data needed will vary with the problem being investigated. Take the recorded case (trouble-case) as a starting point. The concept "Semi-autonomous social field" (SASF) may be a help demarcation (Sally Falk Moore, 1983). The semi-autonomous social field is characterised as a frame around a rule generating and a rule upholding activity. The concept has been a useful tool in studies of conflicts between sets of norms. The researcher may study whether internal and external norms are conflicting or consistent and look at choices made by the actors. Which norms guide the sense of obligation and duties and on which do people base their claim for rights. But a reference to experiences with the actual use of the concept as a tool of analysis is needed. With a starting point in an actual research the eyes get opened to the difficulties with the delimitation of the semi-autonomous field. The problem is not only that the actors may at the same

time be present in more than one field. One must add that it looks as if the boundaries are elastic. The actor carries parts of the rules generated in one field with her into another. Figuratively the fields could be seen as amoebas in motion covering each other to a varying degree. In situations of overlapping the actor makes a choice. The choice is influenced by external pressures working on the actor in the actual situation. But the more or less conscious choice will also be influenced by her earlier experiences in another context as part in close relations with mutual expectations to each other. To be able to make sensible suppositions about people's use or want of use of formal legal rights the researcher will have to include research in where the respondents feelings of loyalties and expectation of access to resources are placed.

Conclusion

The idea that legal innovation can effect social change has often proved wrong. The idea of negotiated law is used to obtain a better understanding of the difficulties meeting reformative legislative programs. It is a condensed expression for a situation where actors with different interests and different insight in the area of interest argue their points of view and act on the basis of different systems of norms. By taking the actor's perspective into consideration a copious picture of the concurrent factors may be obtained.

The influence of the legislators' norms on the local structures and the behaviour of the local population depends to a degree on the local position of the representatives of the state power. Reform programs are administered by personnel distant from the central authorities where they are contemplated. Reform programmers that want structural change wish to influence the attitudes and behaviour of part of the population. "Officers at the lowest level of organisation are influenced 1) by the organisation and 2) by their clients. In the interaction between street level bureaucrats and their clients rules and regulations are interpreted and applied - often in a way that differs from the interpretation given at a higher level. Since in development projects the organisation typically depends on its clients for success, some clients may develop strong bargaining positions" (Benda-Beckman, 1990/91). Representatives for the central administration are more dependent of the central power than the personnel of the local courts.

By the study of the different situations of negotiation it is not sufficient to rely on the usual legal sources of the lawyer. They will not render a sufficient perception of all the forces in power, but they may be a practical point of departure. However additional platforms of negotiation must be searched and actions and attitudes analysed.

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