

Workshop on institutional changes for the NAFTA era: Belize, January 23 - 27 1995

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INSTITUTIONAL CHANGES FOR THE NAFTA ERA

Belmopan Convention Hotel
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WORKSHOP OUTLINE

Professors

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DAY ONE: Introductory; the function of law in resolving social problems; the problems involved in copying law from another country.

ADDITIONAL READING: Seidman and Seidman, Chapters 1 and 2.

I. Introductions: All the participants (including ourselves) should tell a little about their background: where they come from, what kind of work they do, and something about the particular problems areas of policy and law that concern them.

II. The subject-matter of the workshop:

A. As we understand it:

1. Belize is concerned with institutional change and the relevant legal underpinning required in two principal areas:
 - a. The transition of economic institutions required by the new international market economy introduced by NAFTA; and
 - b. the changes in governmental institutions required to facilitate implementation of that transition.

- 2. To those ends, the workshop confronts four principal tasks:
 - a. Identification of new institutions and capacities that Belize will need to cope with the new international market economy;
 - b. designing a legislative agenda for implementing the institutional changes appropriate to accomplish the desired transition;
 - c. formulating a research and drafting programme as a sound basis for producing the necessary legislation; and
 - d. outlining training needs for senior management personnel to ensure implementation of the programme.

- 3. To accomplish these objectives requires an agenda of steps to take, and a guide to the necessary research on the unique circumstances of Belize; that is, a methodology and a theory for implementing institutional change through law. As a central theme, the workshop will engage in a search for an adequate theory and methodology.

B. **SMALL GROUP DISCUSSION:** Do you agree with this formulation of the workshop's objectives? Would you add to or amend them in any respect?

III. The demand for new or changed institutions and laws always begins with a perception of a difficulty -- after all, we need not fix something unless it appears broken! What constitute the perceived difficulties in Belize's economic situation that occasioned this workshop?

A. That question can only be answered by the authorities and citizens of Belize; no outsider can ever define the difficulty for the people who live there.

B. **SMALL GROUP DISCUSSION:**

- 1. What perceived difficulties confront Belize in relation to NAFTA that require urgent attention in the form of legislation?

- 2. On which of these difficulties might each small group work over the next few days to help lay a sound foundation for a legislative solution?

3

[Note: If each group works on a specific bill, at the end of the workshop each will have produced at least a tentative legislative agenda for future testing by empirical research.]

IV. The role of law in resolving difficulties:

A. Different people hold different views of the way law addresses difficulties of the sort discussed; consider the possible implications these viewpoints have in terms of their potential for resolving the difficulties confronting Belize:

1. Some hold that law has the function of declaring rights and duties, to facilitate dispute resolution in courts.

2. Some hold that law merely reflects existing social and economic relations. Society determines law; law cannot change society.

3. Some hold that law can declare ideal social relations. Whether it changes existing relations to become like the ideal set forth in the law depends not on the law, but on its implementation; that is, a question of administration.

4. Some hold that all social problems ultimately depend upon behaviors. Law can only resolve social problems by trying to change the circumstances that cause those behaviors.

B. **SMALL GROUP DISCUSSION:** Which of these approaches seems the most fruitful way of conceptualizing how law can resolve the difficulties that your group must address in its bill?

V. The world around, the first response to dissatisfaction with existing institutions is to copy the relevant law of some 'model' country that appears to have solved an analogous problem 'successfully'. Is that a viable methodology for making the institutional changes needed to solve the difficulties that you have identified in Belize?

A. **SMALL GROUP DISCUSSION:**

1. Have Belize authorities ever considered as models other countries that seem to have achieved economic development (perhaps very small countries like Switzerland, Hong Kong, Luxembourg or Singapore) and tried to copy some of their laws? With what results? Why those results?

2. We have elsewhere proposed a 'Law of Non-Transferability of Law': A law that induces one sort of behavior in a specific time or place will only by accident produce similar behavior in another time or place.

- a. Do you agree with that proposition? Why or why not?
- b. Can you answer that question without considering how a law influences the behaviour of the relevant social actors?
- c. In general terms, how does law influence behaviour?

VI. Note an important consequence of the understanding that not merely the law, but social circumstances determine how a law's addressees ('role occupants') will behave in the face of a rule of law:

- A. Nobody can assess the likelihood of a law inducing its prescribed behaviours by looking at the face of a draft law. Whether its addressees obey a law depends not only on the law itself, but upon all the other, non-legal factors in the addressee's circumstances. In all but the most simplistic situations, one can only do that by examining the research about those circumstances as reported in a report accompanying the draft law.
- B. That implies a change in the drafter's task. In most countries, a drafter submits a bill and a brief 'memorandum of law' that usually amounts to no more than a restatement of the bill's contents in layman's English. In the case of any bill much more complicated than a prohibition on spitting on the sidewalk, everyone's assessment of the proposed law the likely turns on his or her personal, subjective values and interests. A much better way requires the drafter ought to accompany every draft law with a research report detailing the research upon which the specific measures in the bill rest. Only then can the law makers determine for themselves the quality of the bill itself. (Note: In the assigned reading, we called the research report a 'memorandum of law'. Since writing those, as the result of workshops like this, we have become persuaded that 'research report' better expresses the document's true function.)
- C. Note that the form of justification of a decision also constitutes an agenda for a decision-making process. When we here discuss the form of the research report, we also discuss the agenda required to design the relevant legislative programme.

DAY TWO: Methodologies for drafting; on the intellectual control of value choice in drafting; Grand Theory, its uses and varieties.

ADDITIONAL READING: Seidman and Seidman, Chapters 3, 4 and 5.

VII. What methodology should underlie the structuring of a research report likely to ensure that a proposed law will overcome the social problem of concern?

A. Three principal methodologies appear in the literature:

1. Ends-means
2. Creeping incrementalism.
3. Problem-solving. This consists of four steps, requiring evidence at each step:
 - a. Identifying the difficulty, which requires evidence concerning --
 - (1) the manifestation of the social problem; and
 - (2) whose (i.e., which role occupants') and what behaviours constitute the social problem.
 - b. Formulating and testing explanations as to the causes of the relevant role occupants' behaviours at issue, which involves --
 - (1) proposing hypotheses (educated guesses) as to the causes of the behavior of the relevant role occupants, including the agency responsible for implementing the existing law; and
 - (2) gathering evidence in an effort to falsify the explanatory hypotheses.
 - c. Proposing a legislative solution, which involves --
 - (1) suggesting alternative possible solutions that logically seem likely to address the causes revealed by the explanation.
 - (2) choosing between alternative possible solutions on the basis of evidence as to their likely social costs and benefits.
 - (3) monitoring the implementation of the law

6

by gathering evidence as to its social consequences.

B. **SMALL GROUP DISCUSSION:**

1. Whose and what behaviours constitute the difficulty your group has chosen?
2. If Belize cannot copy foreign law, in proposing your bill, how should your research report deal with foreign law and experience that addresses a difficulty in the foreign country analogous to the one that your bill addresses?

VIII. How might a drafter get intellectual control over the value-choices that cannot be avoided in designing legislation to resolve a social problem?

A. Three different ways dictate very different sorts of research reports and research methodologies.

1. Rely on the drafter's or the policy-maker's 'values' or 'domain assumptions'.
2. Rely on the drafter's or the policy-maker's ideal-type of the society he or she desires -- their 'vision of the desired society'.
3. Rely on grand theory.

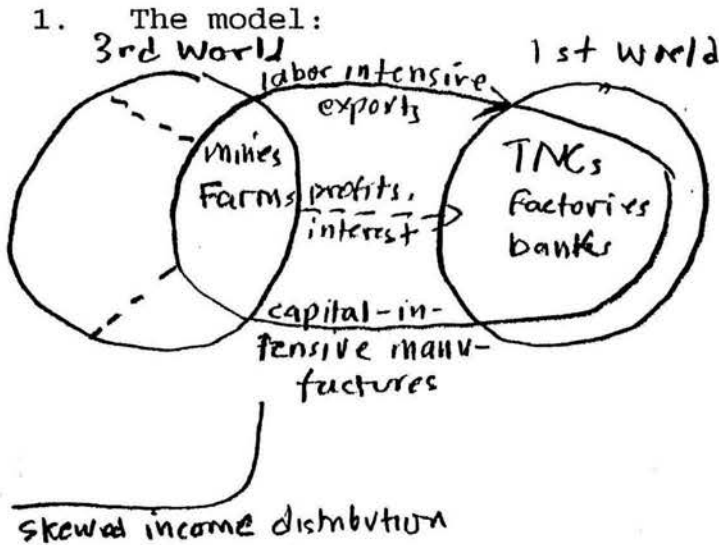
B. Two different ways of using grand theory:

1. In the ends-means approach, grand theory prescribes society's goals. To solve a policy problem, one need only determine how one's grand theory would instruct one to solve the problem in the grand theory's abstract world, and then apply that solution in the real world. Call that the use of theory as metaphor.
2. In the problem-solving approach, grand theory guides the researcher at each step: In determining what difficulty to address, in generating hypotheses to explain the difficulty, in proposing possible alternative solutions, in identifying and assigning weights to costs and benefits. Call that the use of theory as heuristic (or guide).
 - a. Grand theory here constitutes a guide because it advises the researcher where to search for useful facts. For example, if the researcher uses a particular grand theory to help generate an hypothesis to explain the

behaviour that constitutes the difficulty, that hypothesis directs his search for evidence towards particular categories of information, and away from all the other, multitudinous facts lying out there.

IX. Grand theory must address the problems of underdevelopment that confront most third world countries.

A. A model of Third World underdevelopment:



2. SMALL GROUP DISCUSSION:

- a. Does this model fit Belize's circumstances? To what extent? Where, if at all, does the problem your group is working on fit into this model?
- b. Is this a model of resource allocations or of institutional relationships -- or both?
- c. How might a Third World country use law to change the pattern of dependency suggested by the model?

B. Three general categories of grand theories offer very different explanations for Third World underdevelopment. Each of these grand theories logically lead to very different proposals for solving underdevelopment's manifold problems.

- 1. Liberal (today, neo-classical) economics.
- 2. Basic needs/structuralist theories

3. Transforming institutionalist theories.

C. **SMALL GROUP DISCUSSION:** With which of these three Grand Theories does the difficulty you are considering resonate?

DAY THREE: The function of legislative theory and the use of analytical categories in developing sound legislation; using these categories to explain the problematic behaviours that comprise your difficulties, including implementing agency behaviours; generating alternative possible legislative solutions.

ADDITIONAL READING: Seidman and Seidman, Chapters 6 and 7

X. On the use of legislative theory as a guide for translating policy solutions into draft laws:

- A. Grand theory generally speaks in high levels of abstraction. Its analytical concepts do not directly address the causes of specific behaviours in the face of a rule of law. To draft adequate legislation, however, we need a theory to guide the formulation of hypotheses that explain difficulties comprised of precisely those sorts of behaviours -- that is, legislative theory.

XI. The function of analytical categories (concepts, 'vocabulary') in generating explanatory hypotheses.

- A. Self-evidently, nobody can research all the data available; life is too short. An adequate legislative theory must provide a guide to identifying the sorts of data most likely to provide a sound basis for drafting laws likely to induce behaviours that will solve a specific social problem.

1. As in all problem-solving, hypotheses (educated guesses) as to the causes of particular role occupants' problematic behavior determine what data must be gathered to falsify them. Unless an appropriate theory guides the formulation of those hypotheses, however, they may simply reflect ungrounded prejudice, myth or 'intuition'.

- B. Every theory uses a particular set of analytical categories as its building blocks. What categories best serve a drafter concerned with behaviour in the face of a rule of law?

1. A model captures the categories agreed upon by the American Legal Realists and the Sociological School of Jurisprudence as determinants of role occupants behaviour in the face of a law:



2. This still leaves a vast empty box: 'the constraints and resources of the milieu', (i.e., the circumstances surrounding a set of role occupants). How to find more detailed categories to guide the gathering of evidence for the research report as to the non-legal forces affecting behaviour in the face of a rule of law? Some possible candidates:

- a. Law and Economics teaches that we need look only at incentives and at market imperfections.
- b. Sociology of law (or at least one branch of it) teaches that we need look only at values and attitudes.
- c. Institutionalists include these sets, as well as others, in a list of seven categories: The Rule, Opportunity, Capacity, Communication, Interest, Process and Ideology. (A mnemonic, 'ROCCIPI', helps to remember these.) Broadly construed, these purport to include all the relevant factors likely to influence role occupant behaviours.

C. **SMALL GROUP DISCUSSION:** Using the triangular model; and the ROCCIPI agenda, each group should try to generate all the seemingly tenable hypotheses that might explain the role occupants' problematic behaviours that comprise the difficulties for which the groups seeks a legislative solution. These will help identify the kinds of evidence which the research report must include to provide the proposed draft bill a sound basis in fact.

XII. More frequently than not, a principal explanation for behaviour in the face of existing law consists in the behaviour of the relevant implementing agency.

A. In analyzing the behaviour of implementing agencies, your research report should avoid using a single rational actor as a metaphor for the agency.

- 1. Agencies are always complex organizations, as illustrated by the following model.



2. Implementing agencies, too, can be understood in terms of their several actors behaving in the face of the rules and regulations addressed to them

B. SMALL GROUP DISCUSSION: To what extent does implementing agency behaviour explain the difficulty your group seeks to address? Can you use the ROCCIPI agenda to generate explanatory hypotheses which might explain these implementing agency(ies) behaviors?

XIII. As the first step in developing a legislative solution logically likely to overcome the causes of perceived difficulty, your research report must generate and consider alternative possible solutions:

A. Possible sources for those alternative solutions include:

1. Foreign law and experience;
2. Scholarly or practical journals;
3. Advice of consultants
4. Your own inventiveness.

B. SMALL GROUP DISCUSSION: What range of alternate legislative solutions might you offer for the difficulty your group aims to resolve? Four cautions:

1. Remember: whatever legislative solution you consider must address the causes of the difficulty as revealed in the explanations. Do not include among alternative proposals for solution any scheme that manifestly does not address the revealed causes.
2. Every bill must be implemented. Be sure to include in your proposal for a draft bill an adequate scheme for implementation.
3. Avoid 'stuffing' your bill. Bills that range very broadly, attacking a whole host of difficulties at a single swipe become extremely difficult to enact, let alone implement.
4. Bills looking to institutional changes in countries in

11

extremely turbulent environments (i.e., all the Third World countries) frequently can do no more than give an agency some power to experiment with detailed solutions for the difficulty. As one solution for your difficulty, consider writing an 'intransitive' law (i.e., a law giving an agency the power, limited by specified criteria and procedures, to write detailed rules) .

DAY FOUR: Choosing between alternative possible solutions; choosing and designing an appropriate implementing agency; problems of monitoring implementation; organizing the research.

ADDITIONAL READING: Seidman and Seidman, Chapters 8, 9 and 10.

XIV. To justify the choice of one among the alternative solutions your group has generated to overcome the causes of the difficulty, your research report must include an estimate of the social costs and benefits likely to result from implementing each.

A. The research report must consider among others the following:

1. Out-of-pocket costs and monetary returns to government;
2. the likely consequences of the proposed solution for:
 - a. the Rule of Law, personal liberties and human rights generally, and the well-being of women, children, poor, minorities and the environment;
 - b. corruption, and the emergence or perpetuation of a 'bureaucratic bourgeoisie';
 - c. developing a participatory system of governmental decision-making;
 - d. various social strata (e.g. foreign investors, local investors, farmers, workers, people in the informal sector);
 - e. the economy generally: e.g., job creation, diversification, entry into new markets, foreign currency generation, upstream and downstream linkages, skills training, creation of wide income disparities, the acquisition of new technology, and import substitution;
 - f. the weak and those usually poorly represented in the corridors of power: Women, children,

the poor, minorities, and the interests involved in protecting the environment.

3. For any particular proposal, of course, some of these categories may be empty boxes.

4. SMALL GROUP DISCUSSION:

a. Based on these criteria for a social cost/benefit assessment, select the proposal you believe would best serve the interests of Belize

b. Consider your preferred solution. How well does it address the different causes of the difficulty revealed by the explanations? Analyze your preferred solution in terms of the ROCCIPI categories. Will it likely induce the behaviour it prescribes?

B. The choice of an agency to implement the proposed law involves several important questions which your research report must consider in assessing the proposed bill's likely social cost and benefits. These include:

1. Should the bill rely on an old agency or establish a new one?

2. Should the agency be proactive or reactive?

3. Your research report need to analyze the structure and process of the agency in light of the ROCCIPI agenda, and explain why you believe that the agency will satisfactorily implement the new law

XV. After the bill has been enacted and implemented, as its final step problem-solving requires monitoring and evaluating the new law impact.

A. New problems invariably arise requiring revision of the law, because --

1. the implementation mechanism may prove inadequate to ensure compliance with the new law's prescriptions;

2. the research upon which the new law rests may have failed to expose all the underlying causes of the problematic behaviours; or

3. the constantly changing circumstances of the real world may have introduced new, unanticipated factors into the situation that produce unwanted

consequences.

- B. **SMALL GROUP DISCUSSION:** What provisions will you include in your new bill for monitoring the social consequences of its implementation and providing feedback to the law-making authorities? (Note the necessity of providing criteria and procedures for all aspects of the implementation and feedback process.)

XVI. Organizing the research:

- A. Up to this point, your group has only engaged in organizing already available knowledge for your research report to describe the difficulty your proposed bill will address, identify its causes, and assess its likely social costs and benefits. How would you go about conducting additional research to fill in possible gaps in presently available knowledge, and to ensure that presently available knowledge rests on fact and not myth or prejudice? How would you conduct research on foreign law and experience relevant to your bill?

1. As you gather new evidence, you may find the need to include new explanations in the research report, or to change some that you had earlier made. New or changed explanations almost invariably require revising the measures prescribed in the proposed bill.

- B. **SMALL GROUP DISCUSSION:** Discuss what new evidence for the research report might prove useful, and the steps you might take to capture it, concerning:

1. the statement of the difficulty, and whose and what behaviours constitute it;
2. the explanations for difficulty and the behaviors that comprise it (including the implementing agency's behaviour); and
3. the social cost/benefit analysis of the bill's likely impact, including an assessment of the kind of implementing agency the bill should establish.

Note: You will undoubtedly want to consider what other institutions, including individuals and non-government organizations now exist in Belize that might help to provide the necessary information, and possible measures to engage them in doing so.

DAY FIVE: Workshop discussion of the implications of this approach to the law-making process (based on small group's reports and

discussion by all the workshop participants)

XVII. **SMALL GROUP DISCUSSION:** Evaluate the theory and methodology put forward during the week. Has it helped you to develop a tentative legislative programme to address the difficulty of concern? Has it helped you to lay a sound basis for that programme? What are the strengths and the weaknesses of the methodology and the theory?

XVIII. **SMALL GROUP DISCUSSION:** a common critique of this methodology and theory holds that it is all very well, but that it requires too much time. In what way might this theory and methodology help in the typical case, where the Principal Secretary requires the drafter to produce a draft bill and supporting documentation by next Monday?

XIX. **SMALL GROUP DISCUSSION:** This methodology and theory requires the drafters to learn a great deal about the law's addressees and their circumstances. Those addressees, of course, have the greatest knowledge of those circumstances. How can you design the bill-creating and law-making process to make the entire process more participatory?

XX. **SMALL GROUP DISCUSSION:** If this way of thinking about developing legislation seems useful, what kind of programme seems required to provide needed training for senior administrators and others concerned with drafting, promulgating, implementing and monitoring the law?

XXI. **SMALL GROUP DISCUSSION:** Evaluate the workshop and its utility for solving Belize's problems in developing a legislative programme to address the new world market situation in the post-NAFTA world.