

# Participative Law-Making: A New Approach to Drafting Cooperative Law in Developing Countries\*

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## 1. Law and Development<sup>1</sup>

Law is usually thought of as something stable, a lasting order of things on which one can rely. While this is true for many important areas of the law like the law of contract, the law of succession, changing socio-economic and political conditions necessarily lead to changes of law, the e. g. law of marriage, labour law or even more obviously taxation law. Hence, the stability of legal regulations varies according to the subject matter for which the legal provisions are made and depending on the pressure of social change to which the respective subject matter is exposed.

In industrialized countries changes of law usually are made after changes of values and norms of behaviour have occurred in practice among the citizens, thus legalizing trends of development. In developing countries the sequence of change in practical behaviour and change of legal norms tends to be different. Laws are made in order to initiate and encourage changes of value systems and norms of behaviour among the citizens. In countries having experienced colonial government, the colonial masters tried to introduce their own law partly to replace and partly to supplement the autochthonous law existing in these countries, assuming that modernisation (i. e. acculturation) required »modern« legislation. However, these new imported legal norms imposed upon the people in pursuit of policies determined from above and without much regard for peoples' needs and aspirations often remained ineffective. These norms failed to reach the masses of the population which continued to live and work according to their own norms and values under their autochthonous legal system, which during colonial times was referred to as native customary law. As a result, modern (imported) and traditional (autochthonous) law co-existed parallel to each other, just as dualistic structures developed in most other spheres of life (medicine, arts, education, economy).

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1 Cf. Schaeffer, Eugène: *Aliénation – Réception – Authenticité, réflexions sur le droit de développement*, in: *Penant* no. 745, July–August–September 1974; Schaeffer, Eugène: *Droit du développement*, in: *Bulletin de l'Institut International d'Administration Publique* No. 5, 1968; Allot, Anthony: *The Past and Future Contribution of Law to Development in Africa*, in: Madlener, Kurt (Ed.): *Yearbook of African Law*, Vol. 1 (1980), Heidelberg, pp. 3 et seq.; Münkner, Hans-H.: *Law and Development, a new discipline of scientific research and teaching*, in: Madlener, Kurt (Ed.): *Yearbook of African Law*, Vol. 4 (1983), Heidelberg 1985, pp. qq et seq.

After independence the governments of the new states which had inherited the political institutions and the »modern« legal system from the former colonial powers continued to use law as an instrument for implementation of their development policy. The law-making processes (at least in theory) remained largely the same and the persons belonging to the legal profession (sollicitors, barristers, judges and law-professors) continued to apply what they had learned during their training and professional career.<sup>2</sup>

However, the objectives of government and, accordingly, the tasks of the law-makers changed. The policy now is to encourage development, to create social, economic, political and legal framework conditions which enable the citizens to pursue their own legitimate interests and to play their part in building up the country.

## 2. Special Features of Cooperative Law<sup>3</sup>

### 2.1. *Cooperatives as a special form of business organization*

Cooperative societies are a special type of business organization. Their object is to promote the economic interests of their members on a self-help basis. This is not done primarily by distributing profit made in business transactions, but by rendering services to members near cost.<sup>4</sup>

When making a cooperative law the aim of the law-makers is to provide a legal framework for economic and social activities of people, who wish to solve their own problems with their own means by way of organized self-help.

During colonial times cooperatives were mainly used as instruments to increase and improve the production of cash crops among »progressive« farmers, to organize supply, credit and marketing for such producers<sup>5</sup> and – on a smaller scale – to organize savings and credit, distribution of consumer goods and housing for urban dwellers. Today cooperatives and other self-help organization are promoted with a view to encourage development in a broader sense, i. e. to mobilize the masses of the population for

2 Cf. Bryde, Brun-Otto: *The Politics and Sociology of African Legal Development*, Hamburg 1976, pp. 78 et seq.

3 Cf. Münkner, Hans-H.: *Co-operative Law as an Instrument of Statesponsorship of Co-operative Societies*, in: *ILO Co-operative Information* 1/73, pp. 27 et seq.; Münkner, Hans-H.: *New Trends in Co-operative Law of English-speaking Countries of Africa*, Institute for Co-operative in Developing Countries, Papers and Reports No. 4, Marburg 1971; Münkner, Hans-H.: *Ten Lectures on Co-operative Law*, Friedrich-Ebert-Stiftung, Bonn 1982; Münkner, Hans-H.: *Practical Problems of Law Reform in Africa*, with particular reference to co-operative laws, in: *The Plunkett Foundation for Cooperative Studies, Year Book of Agricultural Co-operation* 1982, pp. 51 et seq.

4 Cf. Münkner, Hans-H.: *Co-operative Principles and Co-operative Law*, Institute for Co-operation in Developing Countries, Papers and Reports No. 5, Marburg 1974, pp. 75 et seq.

5 For this type of »conventional co-operative societies« see, Münkner, Hans-H.: *Appropriate Management Systems for Small Farmers' Cooperatives*, in: *Quarterly Journal of International Agriculture*, Vol. 23, No. 3, July–September 1984, pp. 232 et seq.

participation with their own resources in their own development, to initiate changes in attitude and norms of behaviour, to introduce social, economic and technical innovations, to replace traditional customs by new rules, e. g. changes

- from oral to written communication,
- from decision-making by consensus to majority vote,
- from inequality of rights to equal rights,
- from uncontrolled power of leadership to democratic control,
- from the economy of affection (pooling and redistribution with solidarity limited to kinship groups) to organized group action based on economic considerations (reward in proportion to contribution).<sup>6</sup>

Cooperative law has to stabilize self-help groups by providing official recognition of such group entities as bodies corporate, to regulate the activities within the cooperative group and the business transactions of the cooperative enterprise with members and third parties. The target population for such a law are people living both in the modern and in the so-called »informal« sector and cooperatives are meant to be formed by the economically and socially weaker groups in both sectors, i. e. those who have pressing problems which they cannot solve alone but only jointly with other persons having similar problems. Hence, for cooperative law to be effective it has to be understood and accepted by the target population as useful and appropriate to meet their felt needs. A good cooperative law has to create favourable framework conditions for setting the mechanism of self-help<sup>7</sup> into action. In this regard, protection of cooperative groups against unfair practices is of major importance, while the offer of outside assistance may be counterproductive and impede rather than promote self-help.

Only if the target population is convinced that the »new« cooperative law allows them to solve their problems in a better way than under their »old« customary rules, this law will become a »law in action«, the provisions governing cooperative societies will become new local custom and the cooperative movement will turn into a popular movement. To achieve this objective, the concept underlying the law has to be explained and understood. A cooperative law has to avoid as much as possible the heavy technical language of conventional legal draftsmen, but has rather to be drafted in clear and simple terms, which can be translated into national languages. For more easy comprehension by non-lawyers, the level of abstraction should not be too high. Furthermore, the law has to be comprehensive in the sense that the text is complete and can be understood without cross-references to other texts and documents.

6 Cf. Hyden, Goran: *Beyond Ujamaa in Tanzania, underdevelopment and an uncaptured peasantry*, London, Ibadan, Nairobi 1980, pp. 18 et seq.

7 Cf. Müller, J. O.: *Conditions and Motivations for Participation in Autochthonous Self-help Organizations and Co-operatives*, in: Münkner, Hans-H.: (Ed.): *Towards Adjusted Patterns of Co-operatives in Developing Countries*, Friedrich-Ebert-Stiftung, Bonn 1984, pp. 17 et seq.

## 2.2. Problems related to government-assisted cooperatives<sup>8</sup>

When the first cooperative law in Asia was made by the British colonial government of India in 1904,<sup>9</sup> the law-makers did not use the British legislation (Industrial and Provident Societies Act) as a model, but rather developed a new formula referred to by Surridge and Digby<sup>10</sup> as the »Classical British-Indian Pattern of Cooperation«, creating a new legal framework for state-sponsored cooperatives. This type of law is still implemented in India, Malaysia, Pakistan, Singapore and Sri Lanka and used as a model in Indonesia, the Philippines and Thailand.

By taking over the role of educator, promoter, auditor, arbitrator and liquidator with regard to cooperatives, the influence of government on cooperatives was much greater than its influence on other forms of business organizations such as companies.

What was originally meant to be temporary, self-liquidating government aid aimed at helping cooperatives to be established among poor and inexperienced people, turned out later to become permanent state control over these organizations.<sup>11</sup>

In this process cooperatives, which are at least in theory conceived as private business organizations working for the benefit of their members, were turned at first in practice and later under the law into semi-public or public institutions with government support and under government control to implement governments' development policy.

Although it is a well-known fact that voluntary member support for cooperatives can only be secured in the long run if promotion of members' own interests is given priority by cooperative management and that goal-setting by the members themselves is a precondition for turning a cooperative society into an effective self-help organization,<sup>12</sup> government reserves itself the right to set the goals for cooperative societies, to control their activities and to intervene into their day-to-day work on the grounds that those in receipt of government aid also have to accept government control.

- 8 Cf. Münkner, Hans-H.: The Concept of State-sponsored Co-operation, in: Baldus, R. D., Hanel, A. and Münkner, Hans-H. (Eds.): Government Promotion of Cooperatives and other Self-help Organizations for Rural Development, German Foundation for International Development (DSE), Berlin 1981, DOK 1063 A/a S. 79-88-80, Vol. II, pp. 119 et seq.; Odede, O. and Verhagen, K.: The Organization of External Supervision as an Integral Part of Promoting Co-operative Development, in: Konopnicki, M. and Vandewalle, G. (Eds.): Cooperation as an Instrument for Rural Development, Ghent, London 1978, pp. 98 et seq.
- 9 Co-operative Credit Societies Act of India, Act X of 1904. For comments on this law and the Indian Co-operative Societies Act, 1912, Act II of 1912, see Calvert, H.: The Law and Principles of Co-operation, 5th Edition, Calcutta 1959, Brahma, Rao Bahadur K. V.: The Law of Co-operative Societies in India and Burma, Poona City 1932; Surridge and Digby: A Manual of Co-operative Law and Practice, 3rd. Edition, Cambridge 1967.
- 10 Surridge and Digby: A Manual of Co-operative Law and Practice, op. cit., p. V.
- 11 Cf. Münkner, Hans-H.: New Trends in Co-operative Law . . . , op. cit., pp. 12 et seq.; Münkner, Hans-H.: The Role of Governmental Bureaucracies in Promoting Self-help Organizations – Examples from French-speaking Africa, in: Münkner, Hans-H. (Ed.): Towards Adjusted Patterns of Cooperatives in Developing Countries, op. cit., pp. 111 et seq.
- 12 Cf. Münkner, Hans-H.: Characteristic Features and Goals of Co-operative Organizations, in: Wörz, Johannes (Ed.): Co-operation as an Instrument for Rural Development in the Third World, Witzgenhausen, 2nd. Edition 1984, pp. 29 et seq.

Where the cooperative law empowers government to guide, finance and control cooperatives, members usually try to make use of any benefits offered to them by the government through cooperatives, but refuse to participate actively with their own resources in the cooperative society which they consider as a branch of government and not as their own organization.

Hence, officialization, outside goal-setting and government control which do not allow cooperatives to work as autonomous private self-help organizations primarily for pursuing the objects determined by their members and the obligation to operate like an institution under public law, can be identified as the main reasons for failure of cooperative projects, e. g. onesided stress on increase of production versus the desire to improve the socio-economic situation as a whole and to gain self-management capabilities and access to economic (and political) power.

Where cooperatives are perceived as private business organizations and interested persons are allowed to organize themselves in cooperatives and other self-help organizations, a certain degree of autonomy and flexibility of framing the by-laws of such organizations is required. This excluded for instance the imposition of a nationwide uniform pattern for all cooperative organizations in one country.<sup>13</sup>

The usefulness of a support system for cooperatives including audit, which protects members against fraud, embezzlement and exploitation and enhances their capacity to control their organization is obvious. However, such support system can also be used as a straitjacket, if it is combined with government control carried out by cooperative officers who beyond audit and advice tend to interfere with matters of indoor management.

To summarize this point: Government assistance and government control have turned cooperative societies from private business organizations into semi-public or public institutions. Even though in the concept of cooperation and in the original cooperative laws cooperatives are seen as organizations under private law, this theoretical concept has been abandoned gradually first in practice, later in the law. As a result, the current cooperative legislation in developing countries is in many respects no longer in conformity with the concept of cooperation.

13 For the case of the Samahang Nasyon in the Philippines see Münkner, Hans-H.: *The Legal Status of Pre-cooperatives*, Friedrich-Ebert-Stiftung, Bonn 1979, pp. 52 et seq.; a similar trend can be found in Indonesia, where KUDs are a nationwide pattern.

### 3. Law-making in Developing Countries<sup>14</sup>

#### 3.1. *Conventional process of law-making*

A good and well-tested method of making a new or amending an existing law is to have a commission of experts and practitioners of the subject matter under consideration appointed by government, to ask them to study the situation and to write a report with recommendations. After submission and study of their report, government publishes a white paper with its views on the findings and recommendations of the commission. After a public debate among interested groups and in the mass media on the report and the white paper an official statement of objects and reasons for the new law is published and one or several experts are recruited to draft a bill to be tabled in the legislative assembly. This bill is passed or rejected after a thorough debate. Good examples for this method in cooperative legislation are the Indian Cooperative Credit Societies Act of 1904<sup>15</sup> and more recently Laidlaw's report to the government of Ceylon, 1970.<sup>16</sup>

This method has the following merits:

- It is based on a solid knowledge of facts, the pros and cons of proposed changes are discussed among experts and in public;
- the opinion of government is clearly expressed;
- government's policy and the concept underlying the new law are laid down in a written official statement.

The problems with this method of law-making are that it is time-consuming and (relatively) expensive, it forces government to take a clear stand and demands of government to face public opinion in its legislative measures.

#### 3.2. *Short-cut to new legislation*

Under the pressure of unsolved problems which call for urgent action and the desire of politicians to achieve quick results, the conventional method of law-making is applied less and less. In order to implement government's policy quickly and without too much public debate, experts are called upon to draft new laws in collaboration with government officials within a short period of time, which usually excludes extensive empirical research. Where no qualified specialists can be found in the country, foreign experts are recruited with the help of foreign donor agencies. Such experts usually work

14 Cf. Bryde, Brun-Otto: *The Politics and Sociology . . .*, op. cit., pp. 7 et seq.; Münkner, Hans-H.: *Practical Problems of Law Reform . . .*, op. cit., pp. 51 et seq.

15 Cf. Nicholson, F. A.: Report regarding the possibility of introducing Land and Agricultural Banks into the Madras Presidency, Vol. I, 1895 and Vol. II, 1897; Ibbetson, Sir Dencil: *Approach to Legislation on Co-operative Credit*, 1904, in: *National Co-operative Union of India: Anthology of Co-operative Thought*, Vol. I, New Delhi 1975, pp. 99 et seq.

16 Cf. Report of the Royal Commission on the Co-operative Movement in Ceylon, Sessional Paper No. II – 1970, Colombo, 1970, which was not followed by the law-makers.

in seclusion with a small advisory committee. They are empowered to conduct hearings with representatives of the groups of the population which will be affected by the new law, but have to avoid too much publicity. Drafts are considered confidential until approved by high political authorities or adopted by the legislative body. Such laws are often based on theoretical concepts, devised to implement development goals set by government, making use of experience gained elsewhere and sometimes even copy models developed in other countries under different socio-economic conditions and a different legal system.

The shortcomings of such short-cut to new legislation are obvious, but in many developing countries the political authorities responsible for national development feel that they cannot afford to apply slow and costly methods of law-making and do not want to provoke too much public discussion of their development plans.

### 3.3. *Problems of law-making in developing countries*<sup>17</sup>

When studying the problems of law-making in developing countries four fundamental problem areas can be identified:

#### (a) *Limited innovative force of law-making*

This problem exists due to lack of research capacity required for an in-depth analysis of existing socio-economic structures and development trends which could be casted into new authentic legal provisions. Furthermore, conservative legal draftsmen are reluctant to break new grounds. On the other hand law-makers wish to be »modern« and to meet international standards. They are more ready to adopt foreign models and to accept advice of foreign experts than to rely on local experience and advice or to develop their own authentic solutions.

#### (b) *Lack of clear and realistic policy*

In an age of rapid development, often time and effort to arrive at a clear definition of the objects and reasons of a new law at the highest political level are not invested and accordingly, there is open or disguised lack of agreement on the concept underlying a new law, on the modes of implementation and on the contents of the law. This danger exists especially where laws or amendments of laws are made under time pressure to meet political deadlines, where laws are made without direct consultation of the people affected by the new law, where there is no official statement of government's policy on the subject matter and no public discussion of the concept underlying the new law and the draft of the law. This may result in inconsistencies or discrepancies and in case of amended laws it happens that amendments are made under a concept different from the one underlying the original Act.

<sup>17</sup> Cf. Münkner, Hans-H.: *Practical Problems of Law Reform . . .*, op. cit., pp. 55 et seq.

(c) *Ineffective laws*

Often laws are made for political reasons or are based on theoretical considerations without too much concern about their practical applicability. Such laws have become known as »phantom laws« or »laws on the books« as opposed to »laws in action«.<sup>18</sup>

(d) *Legal social engineering*

Governments try to use law as an instrument for social engineering, but do not take the measures which have been found to be essential for a law meant to be a development tool. According to the findings of research workers studying the effect of law on development<sup>19</sup> such a »development law« having as its object to change the present situation and to bring about new conditions for development have to meet certain requirements in order to become effective:

- It has to combine permanent norms with transitional provisions, which are intended to remain in force only until such time when the desired change has taken effect and will then be replaced by new provisions made to meet new conditions and requirements;
- it has to tell the citizens, what they should do and what they should avoid;
- it has to define the role of government in the development process;
- it has to be written in clear, easily understandable language, with a level of abstraction within reach of the target population;
- it has to provide for an implementation machinery, which makes it possible to bring the law to the people, to make it known, to administer the law and to protect those applying the law.

#### 4. Shortcomings of Current Cooperative Legislation

Many cooperative laws in the Asian region suffer from the shortcomings described earlier in this paper. Some countries still use legislation developed during British colonial administration. Where new legislation was made (e. g. in the Philippines in 1973<sup>20</sup> and in Indonesia in 1967<sup>21</sup> the principal Act is covered by a cobweb of regulations, circulars and administrative orders, so that cooperatives are no longer governed by the cooperative law but rather by administrative regulations interpreting the law in such numbers that it is impossible for the ordinary citizen and even difficult for the expert to know about all of them.<sup>22</sup>

18 E.g. the powers regarding external annual audit by government staff when such staff is not available in sufficient numbers, see also the time schedules for the formation of Samahang Nayons in the Philippines, cf. Münkner, Hans-H.: *The Legal Status of Pre-cooperatives. . . .*, op. cit., p. 55.

19 See sources quoted in note 1.

20 Presidential Decree No. 175 of 14 April, 1973.

21 The Law on the Basic Regulations for Co-operatives in Indonesia, Law No. 12 of 1967.

22 Eg. Instruction of the President of the Republic of Indonesia No. 2 of 1978 concerning village enterprise/village unit cooperative (BUUD/KUD) and about 700 pages of administrative circulars and orders made every



Processes of political bargaining and power struggle have brought about confusion of originally clear concepts by granting exemptions from basic provisions of the law and by providing special conditions for powerful groups.

In most countries applying the concept of state-sponsored cooperation there are problems of implementation. In practice and under cooperative law government powers over cooperatives have been increased steadily, however, there has not been a similar increase in staff and funds to implement such legislation. External audit of cooperatives by a government audit service is a case in point.<sup>23</sup>

In the new cooperative law of Singapore of 1979<sup>24</sup> efforts have been made to put some of the ideas on »development law« into practice.

## 5. Participative Law-making<sup>25</sup>

### 5.1. *The concept*

Usually laws are made by specialists for a certain target group. If conventional methods of law-making are applied, representatives of the target group are invited to express their views at some stage of the process (committee of enquiry, hearing, lobby, mass media). The persons for whom the law is made normally do not participate actively in the law-making process. They are supposed to make use of the law, to apply its provisions in practice and to play roles assigned to them under the law. This kind of relationship can be described as »passive participation«. Even for this passive participation the persons concerned have to know the provisions of the law and the rules assigned to them under the law, before they can apply such provisions or play such role. Whether the circumstances allow them to do this and whether they are prepared so to do is still another question.

year; for the Philippines see: Department of Local Government and Community Development, Bureau of Co-operative Development: Important Documents on Co-operative Development, Quezon City 1975, with some 200 pages of circulars on Samahang Nayons for 1973/74 alone.

23 Cf. Friedrich-Ebert-Stiftung and National Association of Training Centers for Cooperatives (NATCCO): ASEAN Symposium on Cooperative Auditing, Manila 1982, especially pp. 27 and 29.

24 Co-operative Societies Act of Singapore, 1979 (Act 17 of 1979), sections 7, 8, 30, 76, 78.

25 Cf. Münkner, Hans-H. (General Rapporteur): Comparative Study of Cooperative Law in Africa, 6 Country Reports and General Report, prepared for the International Association of Legal Science, Paris, Vol. I, General Report, pp. 157 et seq. The study is not yet published. It was completed in December 1984. See also: Münkner, Hans-H.: Comment créer un cadre juridique approprié pour les organismes d'assistance mutuelle paysanne? Le cas de la Haute-Volta, Contribution to the Colloquium on »Développement agricole et participation paysanne. Un exemple: Les politiques de l'eau«, at the Centre d'Etudes Africaines, Paris, Sorbonne-Panthéon, October 1983, in: Centre d'études juridiques et politiques du monde africain, Université de Paris I: Les politiques de l'eau en Afrique, Développement agricole et participation paysanne, Actes du Colloque de la Sorbonne, Paris 1985, pp. 291 et seq.

## 5.2. *On ineffectiveness of laws in developing countries*<sup>26</sup>

As pointed out earlier in this paper cooperative law is directed to target groups operating both in the »modern« and in the »informal« sector. In all countries of the Asian region there are autochthonous mutual aid organizations based on kinship or village groups, which exist side by side with »modern« imported models of self-help organizations in the form of cooperatives, farmers' organizations or farmers' associations. In other words, for large parts of the population autochthonous rules and norms of behaviour and modern written legislation governing socio-economic group activities exist parallel to each other.

Experience has shown that new »imported« laws remain largely ineffective because of some or all of the following reasons:

- Lack of knowledge of the law, especially if it is written in a foreign language and/or in complicated technical terms, if the texts are unavailable to the target population and/or if the target population is illiterate;
- rejection of the new law for reasons of incompatibility with the autochthonous value system and norms of behaviour;
- lack of implementation machinery.

Bryde<sup>27</sup> in his writings on law in developing countries distinguishes four ideal types of problem constellations with regard to ineffectiveness of new laws:

- (a) In remote areas, which for geographical or other reasons are cut off from national development efforts, the new laws are not known and not applied. In such areas people continue to live according to their autochthonous rules. The new law is ineffective, but this ineffectiveness does not cause any damage.
- (b) In rural areas where the masses of the population are living within their traditional social organizations, the new laws are widely unknown and often not adjusted to prevailing conditions, while the autochthonous legal structures are still more or less intact and applied. In this constellation the new laws are officially in force. Yet, only a small group of individuals who are familiar with the modern law can use the provisions of the new law to their advantage (accidental application of the new law). In this case, the new law is generally ineffective, but still effective enough to cause injustice.
- (c) In urban areas among the larger part of the population not belonging to the elites, the non-adapted modern law is officially in force but not known to the people and not effective for solving social conflicts. The autochthonous legal structures are in different stages of decay under the influences of »modernization« and accordingly also ineffective. Therefore, this large group practically lives without an effective legal system in a state of lawlessness.

26 Cf. Bryde, Brun-Otto: *The Politics and Sociology . . .*, op. cit., pp. 127 et seq.; Bryde, Brun-Otto: *Autochthonous and Imported Law in Africa with regard to its importance for an »African Cooperative«*, in: Münkner, Hans-H. (Ed.): *Towards Adjusted Patterns of Co-operatives in Developing Countries*, op. cit., pp. 132 et seq.

27 Cf. Bryde, Brun-Otto: *Autochthonous and Imported Law . . .*, op. cit., pp. 132 et seq.

- (d) Among the modernized groups living in the urban centres (e. g. the elites living in the modern sector, upper level salary earners, staff of government agencies, modern enterprises and international organizations) the new laws are applied and relatively effective.

For cooperative law the main target groups are the large groups described under (b) and (c) above. The vast majority of cooperatives are working in an environment, where autochthonous rules are still predominant and where the knowledge and effectiveness of the new »imported« cooperative laws are weak.

In the rural areas, where autochthonous social structures are still relatively strong and effective, it may be necessary to develop hybrid forms of self-help organizations, combining elements of autochthonous mutual aid groups and modern self-help organizations,<sup>28</sup> while in the urban informal sector, where the autochthonous rules have lost their impact or are difficult to enforce due to lack of effective social control, it is of vital importance to fill the legal vacuum and to develop new rules for self-help organizations. However, these rules have to be adapted to local conditions, have to be known to the local people (written in a language which they can understand) and have to be accepted by the local people as being useful, before they can become effective.

### 5.3. *The process – seven steps of participative law-making*<sup>29</sup>

The proposed method of participative law-making tries to overcome some of the major impediments to effectiveness of »new« cooperative legislation by taking the law-making process to the target population, by giving the target population and all other interested parties the chance to participate actively in the lawmaking process, to express their views on the ways in which they would be prepared to work together in cooperatives and other self-help organizations for their own benefit and – indirectly – for the benefit of the country as a whole.

Participative law-making is based on an intensive programme of dialogue with the target population on their views on development and on government's development policy, an intensive research on framework conditions to understand the problems, constraints and possibilities of self-help activities under prevailing circumstances and a free flow of information.

It is a time-consuming, cumbersome and expensive process. But on the other hand, participative law-making has clear advantages over other methods of law-making: such programme creates a common basis of understanding, brings about agreement on leading ideas for the proposed new legislation and last but not least has an immense educa-

28 Cf. Lipeb, Martial: Common and Diverging Elements of Autochthonous Self-help Organizations and Cooperatives – Possibilities and Problems of a Synthesis, in: Münkner, Hans-H. (Ed.): Towards Adjusted Patterns of Co-operatives in Developing Countries, op. cit., pp. 45 et seq.; Münkner, Hans-H.: The Legal Status of Pre-cooperatives, op. cit., pp. 20 et seq.

29 Cf. Münkner, Hans-H.: Comment créer un cadre juridique approprié pour les organismes d'assistance mutuelle paysanne . . . , op. cit.

tive effect. People start to think of a new law as their own set of rules, which will influence their living and working conditions in the future. Thus, the new law can be based on consensus of the people concerned rather than on a theoretical design.

The process of participative law-making can be subdivided into seven steps:

(1) *Dialogue with target population*

Group discussions and workshops on day-to-day problems of cooperative work have to be organized by a team of promoters at village and district level to identify the practical problems of the target population and how they are perceived by the local people, to find out what people think about government's policy regarding cooperative development and how they feel cooperatives should be promoted. The target population as a pool of resource persons is asked to make recommendations.

(2) *Evaluation of results of dialogue*

The promoters have to analyse the findings of group discussions at the grassroots' level, bring the recommendations coming from the target population in a logical order and supplement these recommendations with the results of research into prevailing framework conditions and relate them to the government's views on cooperative development. The result of this work should be a document defining a suitable policy concerning cooperative development which could be circulated among all interested parties.

(3) *Statement of objects and reasons for the new law*

On the basis of this semi-official document a statement of objects and reasons for the new cooperative law can be drafted. However, this should not be done in seclusion, a first draft should be circulated for comments and further recommendations to be incorporated into a second draft which should be discussed in a national seminar with representatives of the cooperative movement, of government and other interested organizations. Agreement on the statement of objects and reasons would mean approval of the concept underlying the new cooperative legislation.

(4) *First draft of new law*

Once there is agreement on the concept, a specialist for cooperative legislation with one or several counterparts can elaborate a first draft of the new law in collaboration with a consultative committee.

(5) *Discussion of first draft*

The first draft of the new law should again be circulated among all interested parties for discussion, critique and recommendations. All comments and suggestions received by the authority in charge of making the new law should be compiled in a report to serve as background material for a national seminar on cooperative law.

(6) *National seminar on cooperative law*

Representatives of cooperatives, government and all interested institutions should be invited to a national seminar on cooperative law for discussion and adoption of a second draft of the law. During this seminar a debate on the concept and general methods of implementation should be followed by discussion section by section of the draft and the draft with eventual amendments should be approved as a whole.

(7) *Promulgation*

The approved second draft of the law, after vetting by legal draftsmen, can be tabled in the legislative body and channelled through the legislative process to be promulgated.

5.4. *Advantages and limitations of participative law-making*

As compared to the conventional law-making process and the technocratic short-cut to new legislation, participative law-making has the advantage of directly involving the target population in the development of a concept of cooperation and in the definition of government's role in promoting cooperatives. This may not be necessary or even suitable in more technical areas of law, where experts are called upon to propose a set of framework conditions for the life of the citizens which the policy-makers and the law-makers then cast into law and compliance with which will be enforced by an effective machinery for implementation (e. g. company law, banking law). In other fields having a direct bearing on the day-to-day life of the masses of the population (e. g. family law, cooperative law) where the provisions of the law will only become effective, if they are voluntarily accepted and applied by the target population as new local custom, it is essential for the law-makers to seek consensus with the target population on the leading ideas and even on details of the new law.

In countries having parallel (autochthonous and »modern«) legal systems

- where the law-makers have to choose whether to opt for one of these systems or to combine elements of both in a process of authentic law-making and
- where the new law is supposed to become the legal framework of a popular movement, affecting the living and working conditions of the masses of the population both in the »informal« sector and in the »modern« sector,

it is an indispensable precondition for the effectiveness of the new law that it corresponds to the needs and aspirations of the target population, that it is within reach and comprehension of the ordinary citizen, that it takes account of the current norms and value systems, constraints and social obligations of the individual and grants autonomy where diverging local customs and needs militate against uniform regulation.

The approach of participative law-making gives law-makers an opportunity to know how these matters are perceived by the target population and to frame the new law accordingly.

To involve the target population in the law-making process has strong pedagogical and psychological effects. The citizens start to perceive the new law as something real,

affecting their own lives, they start to see legal provisions as something useful, enabling them to do certain things with the protection of the law, offering them new patterns of organizing their social and economic relations with others.

However, participative law-making has as a precondition that the government of the respective country is prepared to allow public discussion on government's policy and popular participation in political debate. Without a minimum of democratic rights, relatively free flow of information and readiness of the citizens to express their views, participative law-making cannot bring positive results. Repressive, authoritarian governments will not even consider or allow this approach to law-making to be applied. Furthermore, participative law-making can only be effective, if the opinions and recommendations expressed by the target population are seriously taken into consideration by government. This means that changes of attitude among the law-makers are required. The view of the small-scale farmer, worker, craftsman as being ignorant and unable to express reasonable ideas on his own affairs has to be abandoned. The citizen at the grassroots' level has to be accepted as the specialist for survival under difficult socio-economic conditions who has clear views especially of his needs, his priorities and his capacity to take risks.

## 6. Conclusion

The lesson learned during the last 30 years of technical assistance is that development efforts have to start from the needs of the population.

In case cooperatives are seen as private business organizations for the promotion of the economic and social needs of their members and not as semi-public or public institutions serving as development tools in the hands of government, this means that the decision to form or join a cooperative society, goal-setting for and management of cooperatives, choice of leadership and control, should be left to the members of such organizations. For many decades, state-sponsored and state-controlled cooperatives have created the image of the cooperative society as an inefficient, stagnant, often corrupt institution with largely nominal membership, minimizing active participation and resource commitment, as branches of government distributing certain goods and offering certain services and subsidies on behalf of government but without taking roots among the people. Ambitious (and often unrealistic) goals set for cooperatives by development planners have led to overregulation, overpromotion and overintervention, thus bringing the cooperatives even further away from the people whom they should serve.

The approach of participative law-making could offer an opportunity to break the deadlock of steadily increasing government's intervention and control on the one hand and indifference, apathy or distrust of nominative membership vis-à-vis »their« cooperatives on the other, and to come to a new start, where cooperatives are seen again primarily as private business organizations of their members, where a clear line is drawn between government controlled public welfare programmes and programmes for pro-

moting the development of self-managed, self-financed and self-controlled cooperatives, serving first and foremost the interests of their members and thereby contributing indirectly to the overall development of the country. In dialogue with the target population it will be possible to identify areas where government aid is necessary and welcome and measures of government intervention and control which are met with distrust.

Participative law-making means to go to some extent back to the conventional method of making laws in a long process spread over years with thorough discussion on concept, details and format of the new law. The innovation of the proposed new approach is to develop the concept of the new law and the decision on the choice between autochthonous rules, »modern law« and hybrid forms composed of elements of both systems in dialogue with the target population.

What is needed for this process apart from the approval of the government authorities is:

- Time for group discussions at all levels and for research into the prevailing socio-economic framework conditions,
- a team of dynamic promoters and research workers in charge of organizing group discussions, workshops and seminars as well as conducting research,
- funds to finance salary, travel and per diem of the promoters and research workers, cost of organizing discussion groups, workshops and seminars and expenditure for producing, printing and disseminating information.

Where the necessary funds are not available, foreign aid organizations could step in by providing funds to recruit and to equip a team of promoters and research workers and/or to allow the team of promoters/research workers to travel and to operate at various levels in all parts of the country, to provide one or several local or foreign experts to act as resource persons and to contribute the technical know-how of drafting legal texts. Such contribution of a foreign aid organization could help to overcome the problem of financing the relatively expensive law-making process, but the foreign aid organizations should keep as much as practicable away from carrying out the work. Time, political backing and manpower has to be provided by the respective country itself.

This approach of participative law-making can bring about an authentic, solid and durable legal framework which is known to and accepted by the target population. Such law based on dialogue and research into local conditions would be solid and lasting in the sense that it does not depend on the views of one person or of a few persons (e. g. a foreign expert or a minister) but would be based on the joint effort of the people concerned, a law *of* the people rather than *for* the people.<sup>30</sup>

30 The new Co-operative Societies Act of Upper Volta/Burkina Faso was prepared during the period of 1977 and 1983 by applying the method of participative law-making, cf. Ordonnance No. 83-021/CSP/PRES/DR du 13 mai 1983 portant statut des organisations à caractère coopératif et pré-coopératif en Haute-Volta.

## ABSTRACTS

### **Participative Law-Making: A New Approach to Drafting Cooperative Law in Developing Countries**

By *Hans-H. Münkner*

After a short introduction to the problems of law and development in countries having parallel (autochthonous and imported) legal systems and the identification of cooperative law as a special field of legislation, where the requirements of the target populations both in the informal and in the »modern« sector of the economy have to be met, different forms of law-making in developing countries are reviewed: the conventional process of law-making, administrative short-cuts to new legislation and a proposed new form of participative law-making.

The shortcomings of current cooperative legislation are discussed against the background of general problems of law-making in developing countries.

The proposed participative approach to making new laws by taking the law-making process to the target population may help to solve the problem of ineffectiveness of »modern« laws in developing countries. In the main part of the paper the concept of participative law-making and a seven-step process of implementation are described and suggestions are made how this new approach to law-making in a field of law affecting the socio-economic conditions of the masses of the population can be carried out with the help of foreign aid organizations.

### **Traditional Rulers and the Operation of Local Administration in the Republic of Benin**

By *S. Bamidele Ayo*

The role of Traditional Rulers in government at the local level has recently generated much academic debate. There are advocates of formal politico-administrative roles for Traditional Rulers in the management of local affairs; on the other hand there are those who believe that Traditional Rulers have outlived their usefulness and as such have nothing to contribute to the business of local government. This latter group has even advocated the abrogation of the institution of Traditional Rulership in Africa.

This paper examines the attitudes of successive governments in the Republic of Benin to the institution of Traditional Rulership, particularly their role in the operation of grass-root administrative machineries. According to the analysis in the paper, formal participation of Traditional Rulers in local Administration in the Republic of Benin ended with