Legal Technical Assistance in Failed States

– Successful methods of law and development?

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ABSTRACT

The objective with law and development is to investigate and study how laws and legal institutions can be used for development; how the law can be used for social, political and economic change. This thesis is written to explain how legal technical assistance functions in theory as well as in practice. The premise for this thesis is that most actors providing legal technical assistance has too little knowledge, respect and understanding of the receiving failed state when implementing law and development projects. Legal technical assistance projects are among many international organizations and agencies a top priority. There are a large number of active projects within failed states operating as we speak and this despite the lack of knowledge by the actors in many areas. There are many actors working with legal technical assistance as a way to development and I have chosen to look more closely at the World Bank, the United Nations and SIDA. The objective with legal technical assistance varies due to the needs within the failed state, for example the projects can be implemented to strengthen the judiciary, educate lawyers or judges and increase access to courts etc.

When comparing three different law and development projects (in Yemen, Liberia and Vietnam) it was obvious that the actors, in all cases, had a poor knowledge about the receiving state. A short visit in a country does not provide anyone with a complete knowledge of the society including the legal system. It is important for the actors working with legal technical assistance to understand that every state has its own unique history. With this history comes a unique mix of economy, culture, traditions, politics and natural resources. The actors implementing these types of projects have to be more coherent to the receiving state than they are today. A country is not only an area ruled and governed by laws, it is also an area ruled by culture and ancient beliefs. I believe that the actors need to have a much better knowledge about the receiving state for the development to be sustainable. To get this genuine knowledge it is good with local consultation before and during the project to get a true picture of the failed state.

Despite this criticism against legal technical assistance I do believe that it is necessary with these types of projects as a form of legal aid to failed states, but there are many problems and difficulties to consider when implementing new laws or new legal institutions for a sustainable development.
ABBREVIATIONS

L&D – Law and Development
LFA – Legal Framework Approach
LJSSD - Legal and Judicial System Support Division
LT – Legal Transplantations
LTA – Legal Technical Assistance
RoL – Rule of Law
SIDA – Swedish International Development Agency
UN – United Nations
UNDP – United Nations Development Program
UNMIL – United Nations Mission In Liberia
UNSC – United Nations Security Council
WB – World Bank
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1. INTRODUCTION

Traditionally the study of law has a specific focus, criminal law for example, but the academic discipline of Law and Development (L&D) and Rule of Law (RoL) have not. L&D has the entire legal system as a focus. The objective with L&D is to investigate and study how laws and legal institutions can be used for further development, using law as an instrument for social, political and economic change. One of the greatest problems within the Legal Technical Assistance (LTA) in L&D projects is that the international community has a bad habit of looking at the development problems and projects from a western perspective. To understand what the L&D really is we have to understand what legal development is and how it functions.

The main question within L&D is:

- Is it possible to “transfer” or “transplant” a legal concept into a state with a different legal tradition?

1.1 Purpose and Hypothesis

The purpose of this thesis is to explain different concepts of legal assistance to failed states. I will investigate the concept of LTA and some of the different ways of assisting failed states with their L&D work. Further I will look into how these methods of LTA work in theory as well as in practice. To be able to do this I will use project reports from failed states where the World Bank (WB), Swedish International Development Agency (SIDA) and the United Nations (UN) have had L&D projects. The purpose with this thesis is also to look into the difficulties with L&D projects in failed states and whether it is possible to create a sustainable development of a legal system using LTA.

The premise for this thesis is that L&D projects most often have too little information about the failed states where they will assist with legal knowledge; its culture, its people and its former legal system. Without this understanding about the failed state it is very problematic and difficult to transplant laws and technically assist the legal system in a successful manner. It is necessary to understand how these methods of law and development works, both in theory and in practice. There is also a need to understand the difficulties with these ways of assistance and the differences between cultures and parts of the world to successfully be able to implement new laws and to assist within failed states and their legal systems.

1.2 Questions

This thesis is based on four main questions and these are the foundation of this essay and from where my conclusion will have its origin. I chose these questions to get a wide knowledge within the subject of LTA, what it is and how it functions within L&D projects. With these questions I also want to acknowledge the difficulties within L&D projects as well as provide constructive criticism for the betterment of these ways of assistance.
What is Legal Technical Assistance in Failed States?

How does these ways of assistance and reconstruction of legal systems in failed states work in theory?

How does these ways of assistance and reconstruction of a legal system in a failed state work in practice?

Is it possible to create a sustainable development with Legal Technical Assistance?

The text and the headlines follow these four main questions throughout the thesis to make it easily read and approachable. I have chosen to put my questions parallel to each other without a particular superior question. The questions I have chosen to answer and investigate are meant to give a picture of how the LTA functions today together with a future perspective with constructive criticism for an improvement within the legal aid spectra.

1.3 Method and Material

The method for this thesis is to analyze the concept of LTA as ways of assistance within L&D projects in failed states. I begin this thesis by investigate what LTA is and how it functions, both in theory and practice. To see how these ways of assistance work in practice I have used project reports from the WB, UN and SIDA. There are of course a lot more actors except these that are providing failed states with legal aid, but I have chosen these three actors to get a wide knowledge within the subject of LTA and because these three actors are among the greatest in their fields within L&D.

The thesis is both vertical and horizontal (comparative) in its nature. The answer for the first two questions is written vertically, where I am simply explaining LTA and its different ways within L&D and how they work in theory. Within question number three I compare, in a horizontal way, how LTA works in practice through three different L&D project reports chosen from different parts of the world with different cultures and religions. To compare these different projects and actors is a very complex task since all failed states are different. Therefore the actor’s ways of assistance have to be very much varied depending on the receiving state. The comparative analysis within section 3.1.4 has to be read with the knowledge of this complex situation with actors, donors and receiving states in mind. Within question number four I conclude the criticism against LTA as well as difficulties and lessons learned. Under this question I also provide suggestions and opinions, mine as well as others, for further improvement of LTA in a horizontal manner.

The material used for this thesis is literature, articles, project reports, web pages as well as lecture notes from the course Legal traditions and law and development given autumn 2006 at Örebro University by Carl-Fredrik Chöler and Richard Sannerholm. This course was what inspired me to write this thesis and made me interested in L&D and LTA. Since the material used in this thesis is secondary sources of law this thesis has to be read and understood in that manner.
1.4 Disposition

I have divided this thesis into four main chapters, including the conclusion, and within these chapters I use my questions as headlines. Underneath these headlines I have sub-headings to divide the text into smaller bits for an easily accessible material. The sub-headings are created to explain concepts and so forth for it to be more easily to find specific facts within the thesis.

Under chapter 2 I have placed the history, different concepts and ways of LTA in a vertical manner. Chapter 2 is meant to be read as an introduction to the most important sections of this thesis, chapter 3 and 4, which are the chapters for my problems, responses, analysis and the conclusion. Chapter 3 and 4 is the essence as well as the core of this thesis. Under section 3 I am presenting my chosen projects, a comparative analysis, criticism, difficulties, lessons learned and suggestions to improvements. In this way the results of my work will come forward to the reader in a clear and easily comprehensible manner within the conclusion.
2. BACKGROUND, CONCEPTS AND WAYS OF ASSISTANCE

There are many actors that are providing legal aid to different L&D projects in failed states. Most of these actors are frequently changing their ways of assistance and therefore it is not possible to precisely point out all these actors or how they legally assist in every country. This section will, due to this complex manner, provide explanations of the most important pieces of history, concepts, ways of assistance and actors within L&D.

2.1 What is Legal Technical Assistance in Failed States?

RoL promotion and L&D is among many international organizations, governments and agencies a top priority. This is evidenced by the large number of LTA projects working in failed states all over the world. There are many factors that have contributed to the rapid elevation of LTA on the international agenda. The first and most important factor is the instrumental role that laws and legal institutions is believed to play in promoting economic growth and fighting poverty within developing countries and failed states. Ever since the modern nation-state was created most countries has gone both back and forth between retreating into isolation and seeking closer integration with the rest of the world (globalization).

2.1.1 A short history

During the 1950’s the Modernization theory was ruling the international agenda within the judicial sphere. This theory was ruled by thoughts about the independency of former colonies, the importance of industries (every state needs them) and the countries that were underdeveloped was believed to be so because of a lack of modern structures within the legal system and the society.

During the 1960’s the Law and Development’s 1st wave was going strong within the international judicial society. This period of L&D was ruled by the thoughts of the importance for failed states to import and mimic western legal structures. It was also believed to be very important to create a legal education within failed states as well as transplanting laws from well functioning states. Max Weber was the man of the hour. He wanted the law to be modern, rational, predictable and efficient.

During the 1970’s the Dependency theory and the 2nd wave was developed and within this period a lot of criticism against the L&D was brought forward. The difficulties and problems within the failed states were believed to be found within the globalization and the international laws and concepts brought from well functioning states was said to discriminate

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1 Bergling, Per, Rule of Law on the International Agenda, Intersentia, 2006, p 7.
2 Ibid. p 1.
the already poor and non-functional states. After all this criticism against legal aid from the western world the L&D movement was pronounced dead (within the U.S. at least), but within the failed states the work towards legal development was continued.

During the 1980’s the Administration of Justice (AOJ), the 3rd wave, started. Within this period there were many ideas about supporting the criminal justice within failed states and also to support the judicial modernization (international standards and principles). The underdevelopment was believed to be a product of a high level of crime and insecurity. During this period the Berlin wall fell in 1989 and after this very important piece of history RoL became the keyword within the international agenda (instead of L&D).

During the 1990’s the Rule of Law, the 4th wave, theories started to grow strong. The concept “Washington consensus” became very much important, which were a group of theories which suggested that economic development and poverty reduction was most likely to result from private entrepreneurship rather than from the state. Economic globalization, with the western market democracy as the model, therefore became very important. Underdevelopment of states was within this period of time believed to be caused by a lack of modern laws and legal institutions. Imitating the West was the essence of the 4th wave.

During 2000 the Rule of Law’s 5th wave has moved towards thoughts of failure of the Washington consensus (post-Washington consensus). Today the majority of the international judicial society believes that globalization has a lot of negative effects within the failed states. Law is seen as an instrument for poor people and as an empowerment for good governance. Within the 5th wave local influence over the international legal aid is believed to be very important for a sustainable development within the state. Underdevelopment is seen as a cause of a lack of participation and ownership within the failed state. Today people want to see the improvements of the RoL and L&D. The West want to see the market open up to poor countries and the AIDS problem come to an end. Today the poor people are supposed to be in focus.

2.1.2 Failed States and Globalization
To really be able to grasp the concept of LTA it is necessary to investigate and understand what a failed state is and what criteria’s that has to be filled to make it a failed state. This is however not an easy task and there are a lot of different circumstances and complex problems to consider. The first thing to consider is the concept “failed state” which has a bad ring to it. No state wants to be “failed” and this is something that actors and donors of L&D projects have to consider. However, no expression is sufficiently precise for these types of states to use in this thesis. “Failed” and “non functioning” is too broad a term but “a state without government” is too narrow since it is not only the central government that has collapsed but all the other functions of the state as well. Because of the complexity of the concept “failed state”, as used in this thesis, should be understood to mean “disintegrated”, “underdeveloped” or “collapsed” state.

Starting to explain the concept of what a failed state is you can say that it is a non-functional society, a state that has lost control over the population and over the entire state as such. There are a number of territories and states which the world has witnessed slipping into chaos or completely collapsing. Usually states become failed as a result of war, severe violations of human rights, too many rebellions and other forms of systematic violence. A few and recent examples of failed states are East Timor, Bosnia and Herzegovina, Kosovo, Afghanistan, Somalia and Cambodia.6

Another important piece to understand about LTA is what causes a failed state, because without this understanding it is impossible to develop and promote the RoL. Exactly what causes a failed state is obviously unique for every state, but there are some things that many of the countries have in common. What causes a failed state is obviously not only internal problems, external influences play a great role, if not the greatest in the destruction of a state. It is easy to believe that ethnic tensions are the root cause of most of the failed states, but this is not the truth, mostly it is a symptom of a crisis that is already prevailing, such as the history of colonialism or a high degree of natural resources. Failed states are also usually the product of a collapse of the power structures which is providing law and order within a country; the state institutions, the police and judiciary, paralysis of governance, general banditry and great chaos. This collapse is generally accompanied by anarchic forms of internal violence. Within failed states the functions of government are usually suspended and its assets are destroyed or looted and experienced officials are murdered or chased out of the country.8 Within a failed state there are a variety of dangers, such as a widespread violence; trafficking of drugs, weapons, blood diamonds and human beings; piracy; uncontrolled territory; sanctuaries for terrorists; a lot of refugees; severe diseases; warlords and stateless armies.9

The word globalization reflects a widespread conception that the world rapidly is melting into one shared large space. The globalization has had both positive and negative affects of the development through out the world. Positive developments due to the globalization are the integration of a market for goods and factors of production. The negative side of the globalization is the grave damage of the environment as well as the increasing exposure of already weak countries to external shocks that may lead to banking and currency crisis. The adoption of common rules to regulate banking and financial reporting in the 1980’s created a growing ground for globalization and the concept grew even stronger after the creation of the World Wide Web. After the fall of the Berlin wall in 1989 the globalization started to gain ground for real and the 1990’s could be called the decade of globalization.10

The WB has about the globalization, in connection to economic development, stated in a speech held by Joseph Stiglitz that the globalization has been very good to some countries, with rapid economic growth and so forth, but many more countries have only seen the economic gap grow and the poverty increase. There has been one piece of solution to this huge economic gap between states which has been very much discussed during the last years, and that is the debt problem that many failed states suffers from. Increasingly attention is focused these days on the heavy burden of debt faced by the poorest countries of the world,

8 Ibid.
which is off course a big obstacle in their pursuit of development and economic growth. As an attempt to help these poor countries get back on their feet the G-8 nations agreed to what they called the cologne initiative which was a package of measures designed to reduce the debt burden of the 33 poorest countries of the world. This initiative required the nations in debt to show that they really were using these benefits for education and the health of the population. This initiative was a great start but still many of the poorest countries of the world are paying off their debts instead of spending it on health and education. In Mozambique about 30 percent of all revenue is spent on debt servicing, and this is one of the absolute poorest countries of the world.\textsuperscript{11}

2.1.3 Law and Development

The definition of L&D can be explained as the relationship between the legal system and development; the social, economic and political changes taking place in the developing countries. The field of L&D has always had a quite flexible definition and is not rigidly limited by any particular accepted theory.\textsuperscript{12} The L&D movement was in the beginning mainly focused on a few countries in Latin America and Africa, so by today’s standards it was never a really major enterprise.\textsuperscript{13}

There are two great and important paradigms that have really dominated the field of the L&D movement, the Modernization theory and the Dependency theory.\textsuperscript{14} The Modernization theory was a political development movement that arose after World War II and it lost steam in the early 1970’s.\textsuperscript{15} The objective with this movement was a free market system, the RoL and the liberal democratic institutions,\textsuperscript{16} but growth was what the movement really achieved.\textsuperscript{17} This Modernization theory is believed to be what started the anti-Vietnam war movement that grew strong within the United States in the late 1960’s and the early 1970’s.\textsuperscript{18} The Dependency theory was Marxist inspired and this theory filled the void after the collapse of the Modernization theory in the mid 1970’s. It was primarily some Latin American scholars that created the Dependency theory, within the developing world, and it was argued within this theory that the causes to underdevelopment were problems from the past and from the structure of the global capitalist system.\textsuperscript{19}

The L&D movement was pronounced dead in the 1970’s (at least by some scholars in the U.S.) but in failed states the movement continued, as a RoL movement, and has started to grow strong within the legal sphere.\textsuperscript{20} Some scholars claims that today’s RoL movement only

\textsuperscript{13} Trubek, David, \textit{The rule of law in development assistance: past, present and future}, University of Wisconsin-Madison, June 2003, p 5.
\textsuperscript{14} Tamanaha, Brian Z, \textit{The lessons of law and development studies}, American Journal (International Law), Vol. 89, 1995, p 470.
\textsuperscript{15} Ibid. p 471.
\textsuperscript{16} Ibid.
\textsuperscript{17} Trubek, David, \textit{The rule of law in development assistance: past, present and future}, University of Wisconsin-Madison, June 2003, p 3.
\textsuperscript{18} Tamanaha, Brian Z, \textit{The lessons of law and development studies}, American Journal (International Law), Vol. 89, 1995, p 471.
\textsuperscript{19} Ibid. p 477.
\textsuperscript{20} Tamanaha, Brian Z, \textit{The lessons of law and development studies}, American Journal (International Law), Vol. 89, 1995, p 474.
is a continuation of the L&D movement, but whether it is like this or not, the RoL promotion today bears close resemblance to the L&D movement, both in theory and practice. The objective is the same, to create a legal sustainable development within failed states.

2.1.4 Rule of Law
The RoL era of today emerged during the wave of globalization and the post-Cold war era after the L&D movement was pronounced dead.\textsuperscript{21} The RoL concept is very vague and complicated so legal scholars have wrestled many years with defining what it really means. This is because the RoL has different meanings to different people and states and this off course put the idea of a special “rule of law consensus” in some serious doubt.\textsuperscript{22} Due to this, the RoL promoters can never beforehand know how the RoL will develop within different societies and whether there will be a good and sustainable outcome or not.\textsuperscript{23}

Even if RoL is a complex concept the UNs Secretary General has in the report \textit{The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies} written that:

\begin{quote}
"The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights and standards."\textsuperscript{24}
\end{quote}

Usually when thinking about the RoL most lawyers and legal experts probably think about what seems to be the absolute essence of the RoL in their eyes, which is the core institutions of law enforcement, which is obviously the court. Despite that the court is an important part of the RoL, it is not in any way the essence of the RoL system within a country. This is naturally because only a very small percentage of the citizens within a state have ever any direct contact with courts during their lifetime.\textsuperscript{25} Today one of the bases for the RoL promotion is the \textit{good governance} model. The good governance model focuses most on enhancing the capacity and the quality of governance and the leading actor in the promotion of this model is the World Bank\textsuperscript{26}. The Commission on Human Rights Resolution 2000/64 defined good governance as transparency, responsibility, accountability, participation and responsiveness (to the needs of the people). There are two different types of RoL: \textit{formal rule of law} (the content of the laws; laws must be prospective and clear and other general rules) and \textit{substantive rule of law} (laws that requires a particular substantive commitment; human right laws for example).\textsuperscript{27}

There are some common RoL principles that I think it is worth mentioning to fully understand the ways of the RoL and how it usually operates. The most important RoL principles is that of

\textsuperscript{22} Bergling, Per, \textit{Rule of Law on the International Agenda}, Intersentia, 2006, p 15.
\textsuperscript{24} Bergling, Per, \textit{Rule of Law on the International Agenda}, Intersentia, 2006, p 17.
the supremacy of the law and another is legal certainty. There is also the very important principle of equality before the law and effectiveness of rule of law principles. These principles that I have now mentioned is very broad principles of the RoL and to these I can add some more narrowed principles, for example a separation of powers, and this principle is as a way of fulfilling other RoL principles. Another complimenting and important principle is the protection of rights and freedoms.  

The current RoL is now approaching its second decade and the movement is still expanding, and this despite the apparently lack of a definite explanation of the RoL concept and a lack of knowledge at many levels.

2.1.5 Legal Technical Assistance

RoL promotion and the science of L&D is today an active movement in progress in many post-conflict states, but in many levels of operation there is a lack of knowledge. It is impossible for the RoL promoters to know how the RoL will actually develop in different societies and how it will be received. Per Bergling writes in his book that the RoL has to be put in a policy framework so that it can be framed in operative and clear terms before it can be exported meaningfully, and many of the actors (such as the WB) are slowly moving in this direction.

The possible ways of assistance within the legal spectra to failed states are many and varied. It goes all the way from enormous ambitious sector reform programs, such as the RoL model, to extremely small-scale civil society initiatives. The LTA that is to be used within a failed state must therefore, for a good and sustainable outcome of the project, be decided due to the receiving states specific problems. Every L&D project should, because of the failed states unique problems, be carefully thought out tailored solutions for that specific state.

The different LTA approaches that I am explaining below in the text is, because of the enormous amount of ways to legally assist a failed state, only a few examples and the most widely LTA models used by actors. This section should therefore not be read as a complete scheme over all the LTA models used by L&D actors.

The Logic Framework Approach (LFA) is one of the most popular tools among assistance providers for problems. This model can help donors and hosts to analyze the existing situation within a state during the project preparation. The LFA-model derived from the private sector management theory that was popular in the 1960’s and has since then been adopted as a principal of planning tool by a lot of the assistance providers, such as SIDA and EU. There are four main phases that the LFA-model consists of: the problem analysis (aims at identifying the problem); the stakeholder analysis (who are these problems actually impacting most); the objective analysis (what actions do you need and where will it lead); and the fourth phase is the implementation of a preferred implementation strategy.

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30 Bergling, Per, Rule of law on the international agenda, Inter sentia, 2006, p 29.
31 Ibid. p 41.
32 Ibid. p 97.
33 Ibid. p 98.
If we then look beyond the LFA-model there are other models that are being used to implement the RoL as well. One of these models is mentioned in Bergling’s book and that is simply called the Rule of Law Model and has been a typical model to re-enact laws for a long time. This model to implement RoL is a good model but also a very expensive one. In this model the four phases in the cycle is: political will; structural legal reform (support to the lawmakers for example); institutional building (law schools for example); and access creation (such as legal aid to poor people). This RoL model has been systematically used through out L&D projects from all sorts of actors and donors but has in the recent years started to get increasingly criticism. Critics have pointed out that the RoL model is constructed for an archetypical post-communism state rather than for the inherently more complex settings in which most L&D projects act. The model has also gained critic because it creates a false sense of urgency and crisis about the situation in a receiving state, even if there is not a completely dysfunctional legal institution. Because of this recent criticism there might be some indications that this often used RoL model is loosing ground among L&D actors. Other RoL tools that can be used separately or together in the recovery of failed states is mapping the justice sector, creating truth commissions, vetting and monitoring the legal systems.

Legal Transplantations (LT) is another form of LTA to failed states. In theory it is laws and rules that are fully and unchanged transplanted from one country to another. LT can be compared to organ transplantation, replacing a bad functioning heart with a well functioning one, but with laws and legal institutions. A LT is something that is not native to a given jurisdiction and that has been brought there from elsewhere. A LT is therefore referred to as a moving of a rule from one country to another, or from one people to another and is a continual massive borrowing of rules. There is continuously a discussion within international law whether it is at all possible with LT or not, and whether they can travel unchanged between countries, legal systems and cultures.

Alan Watson, Pierre Legrand, Montesquieu and Otto Kahn-Freund are only a few who has had ideas about the concept of LT and their point of views differs a lot from each other. Watson writes in the Law Quarterly Review that he believes that it is absolutely possible with LT. The ground for this opinion is that Watson has a historical approach and he refers to the influence that the old Roman law had over the world and that their legal rules were adopted in many other states even if the systems differed, both economically and politically. Legrand, Montesquieu and Kahn-Freund have quite the opposite view of LT than Alan Watson. They believe that it is in many cases completely impossible with LT. This opinion is based on the different bits and pieces that creates rules; different cultures, old traditions, how closely linked the receiving state is with the foreign power structure, wealth, geographical position.

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34 Bergling, Per, *Rule of law on the international agenda*, Intersentia, 2006, p 42.
35 Ibid. p 43.
38 Ibid. p 55-56.
40 Ibid. p 81.

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etc. Montesquieu believed that the most important factor to consider while doing a LT was to have good knowledge of the foreign political context and he created a saying that is widely used within the international law today – “l’esprit des lois” – which basically means that for a successful LT you have to consider “the spirit of the laws”.43

There is, as I have shown in the text above, a lot of criticism against LT as a form of LTA and there are many things to consider before it is possible to do a successful transplant such as cultural relativism and many other complex concepts and issues. The “Good Enough Governance” promoters are somewhat against legal transplantations. This idea is that it is impossible to transplant a totally new mentality; it is a goal set way too high and L&D projects should instead focus on the most urgent matters within a failed state and improve bits and pieces at a time.44

2.2 How does these ways of assistance and reconstruction of legal systems in failed states work in theory?

There are a great number of actors that are providing legal support to failed states in need of L&D projects and I have, due to this massive amount of actors, chosen to look at the WB, UN and SIDA as actors. The terms “actor” and “donor” are often used to describe the assistance providers and they most often refer to the entire community of the agencies that are involved in promoting legal and judicial reform projects.\(^\text{45}\)

2.2.1 Actors and Donors

A big problem with LTA projects is corruption and the greatest actor fighting this is the **World Bank**. The WB is not an organization but a multilateral development bank and is one of the greatest actors within L&D. The assistance providers operate both through loans and grants and the development banks, such as the WB, provide almost all of their support in forms of loans. This type of assistance therefore means that they have to work predominantly with national governments. The term “development project” is very much used within the international law, and within this thesis as well, but not all loans and grants are in the form of projects with a pre-decided series of actions linked to a specific larger objective. Some loans offered by the WB specify goals and objectives but not the means by which they should be achieved. Today the trend for the WB seems to be other forms of support instead of development projects, towards different forms of framework and sector support that are result oriented. This change from projects to other various forms of assistance is probably because of the high costs that come along with great development projects.\(^\text{46}\)

In WB assistance it is usually the failed state that manages the funds and executes the programs themselves. The WB as a donor is of course supervising in some extent and that is most often based on occasional visits, the recipient’s own reports about the continuing work and the financial accounting for the assistance. The responsibility of the WB projects is most often contracted to a consultancy firm; a NGO, university or some other body. This means basically that the WB is detached from the day-to-day work within the project and that a lot of the decisions within the assistance are worked out directly between the implementing body and the beneficiary.\(^\text{47}\)

Another big actor operating worldwide within L&D is the **United Nations**. The developing unit within the UN is basically the United Nations Development Program (UNDP) but on occasion even other specialized agencies. The UN as an actor, together with most of the bilateral agencies, operates mainly through grant-based approaches. In this way the UN differs from the WB. The main reasons for this grant-based approach is the flexibility it provides; if the national government of the failed state does not seem suitable for the development project the UN can choose to work and cooperate with international or local NGOs or other associations. This means that, in comparison to the WB, the UN does not have to work predominantly with the national governments and is therefore not bound by the national governments will.\(^\text{48}\) The UN is allowed to use whatever means necessary to help a

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\(^{46}\) Ibid.

\(^{47}\) Ibid. p 8.

\(^{48}\) Ibid. p 7.
state in need of aid 49 and the United Nations Charter has been the core of the international legal assistance that is governing the use of force when necessary since 1945. 50 The UN Charter was designed to be flexible to new needs, circumstances and threats, so even if a failed state does not want help from the UN with their L&D work the United Nations Security Council (UNSC) has the power to forcefully implement legal aid in various forms if there is an immediate or prevailing threat to the peace.51

The normal procedure when starting a development project is for UN to seek content from the state in question for establishing a peacekeeping mission, but sometimes the state requests it. The first phase of state building is focused on monitoring human rights and peace agreements. The UN is only in the background and not the main force behind the peace building. The second phase is when the international transitional administrators are giving executive powers to the international actors. And the third phase is called the light footprint and this means that the UN is not the executive administrators, but they are not only monitoring either. To explain it further, the UN stands back and does not take the lead in their development projects; they are monitoring, assisting and supervising. The great challenge for the UN when trying to help a failed state is to know what needs to be done and this they have to do after just a short visit to the country. 52

SIDA is the Swedish International Development Agency which is the greatest L&D actor within Sweden, operating in many parts of the world. The basic objective within this agency is to improve the living conditions for the poorest groups of people living in the world today and this has been the aim since 1962 when the first Act on international aid passed the Swedish Parliament (Government bill 1962:100). 53 Other important objectives within SIDAs legal sector consists of the governments publications on Democracy and Human Rights in Sweden’s Development Co-operation (1997/98:76), Human Rights in Swedish Foreign Policy (1997/98:89) and Sida’s Programme of Action for Peace, Democracy and Human Rights. 54

SIDA is working on a mission from the Swedish parliament and government to reduce the poverty in the world. It is the Swedish parliament and government that decides the budgets for the coming development projects; which states that will be included by the development cooperation and what kind of form the cooperation will have. An important starting point for SIDAs projects is that every failed state that needs legal aid is totally responsible for its own development. SIDA as an actor differs in this way from the UN which is not bound by the will of the national government. SIDAs mission is to create opportunities for change and development. Except from the direct cooperation with states SIDA is also handling the Swedish contribution to the UNs and EUs development co operations. The assistance that SIDA provides within a failed state is, among other things, education and legal security. SIDAs personnel do not work actively with their L&D projects on a day-to-day basis; this is contracted out to other, often Swedish but in some cases foreign, agencies which cooperate with SIDA. In this way SIDA as an actor is very much similar to the UN and the WB and as

49 see chapter VI & VII of the UN-charter.


51 Ibid. p 23.


they are operating in their projects. Since Swedish organizations, companies, authorities and experts are engaged in the projects, the development cooperation is contributing to Sweden´s development in the long run and much knowledge is gained.\(^{55}\)

Within SIDAs projects it is Sweden´s strategies for cooperation that controls the Swedish legal aid and how SIDA operates. The strategies and forms of SIDAs projects always have its starting point in the poverty reduction strategies that the receiving state has produced. Together with the failed state´s poverty reduction plan SIDA creates a plan for the project as well with objectives and budgets. When the frames for the project are clear there is a discussion about the project and what it will include and with these strategies as a starting point SIDA develops specific state plans and regional plans, how they will be supervised etc. The plans for a development project are often made by SIDAs co-workers in the receiving state, both Swedish experts stationed in the country as well as local experts. The development project is in the end executed in cooperation with SIDAs legal sector.\(^{56}\)

2.2.2 Projects in General
Legal development projects mostly work towards a special goal, for example political independence in Uganda. RoL tools that is often used within a project is mapping the justice sector, truth commissions, vetting, monitoring legal systems and prosecution initiatives (these are mostly focused on the criminal justices side of the RoL). Within the peacekeeping agreements there are specific reform activities written down to improve the RoL in post-conflict countries, for example new human rights laws, criminal laws and their use in the transitional period. There are often also recommendations to strengthen the judiciary, train law-people, reform security institutions, reform the police force, awareness campaigns on human rights, improve the prisons, increase the access to courts and introducing new functioning election laws.

As I have mentioned before the development projects can look very much different compared to each other and this is off course due to the unique problems that the failed state in need of legal aid suffers from. Some failed states are in such severe situations that there is a need for a long term L&D project as well as a big loan from a multilateral bank for a sustainable development, while other states only need assistance within some areas of the legal system to make a great improvement.

2.2.3 The Receiving State
Budgetized lending, a loan from one country to another, is money that is meant to reconstruct a legal system and the lending country has to decide where it should go and where it is most needed. The WB is the greatest actor providing loans to failed states and development projects. The positive with budgetized lending is that there is no big brother monitoring every step the failed state makes, but the bad thing with it is that budgetized lending projects is very much vulnerable to corruption since there is no close monitoring over the money given by the WB. Corruption has often been called the plague of Africa and is estimated to cost about 3% of the world´s assets, 1 000 000 000 US dollars. The direct cause of corruption is state


\(^{56}\) Ibid.
monopoly and the indirect cause of corruption is, amongst other things, low level of salaries and a lack of clear rules and laws.\footnote{Sannerholm, Richard, \textit{Course: Legal Traditions and Law and Development}, Lecture 2006-12-15: Failed states and rule of law, Örebro University, Autumn 2006.}

SIDA as well as the UN and WB are very much depending on the will of the receiving states national government to be able to create a sustainable outcome of a project. The big problem stopping the development in many failed states is the corruption that the funds for the projects create and the security issue. In states like Afghanistan and Iraq where armed conflicts is a continuing problem the task for LTA providers is doubly difficult\footnote{Stromseth/Wippman/Brooks, \textit{Can might make rights? Building the rule of law after military interventions}, Cambridge University Press, 2006, p 137.}. Failed states that have received LTA from UN have argued that any pursuit of a “universal” concept of law and justice is a challenge to their “uniqueness” and sovereignty, and even if UN is legally allowed to ignore the national government, there can not be a good and sustainable outcome without the support from the leaders of the failed state. It is easier to have local expertise cooperating with UN, WB and SIDA when implementing a development project, this for assessing country-specific needs.\footnote{Bergling, Per, \textit{Rule of law on the international agenda}, Intersentia, 2006, p 198.} In many of the projects the civil society has successfully contributed to reform and empower weak judiciaries, for example by providing various networks and training initiatives.\footnote{Ibid. p 200.}

2.2.4 Objectives
The objective with LTA varies due to the receiving state so the objectives can therefore look very different depending on the receiving state.

Objectives with LTA within the RoL in failed states can be to:

- Strengthening the judiciary
- Educate lawyers and experts
- Reform security institutions
- Reform the police force
- Awareness on human rights
- Bill of rights
- New criminal laws
- Improve the prisons
- Increase access to courts
- Introducing election laws

As an overall objective most of the L&D projects are created and implemented to reduce poverty and to create a better and more secure state for its citizens with a solid functioning economy and legal system. This basic objective can be a topic for discussion though since there is much to gain, for the WB for example, if these development projects succeed. The WB want the RoL to function because the sanctity of private property and the enforcement of contracts are critical to the modern conception of a free market, in this way it seems like
capitalism and the RoL goes hand in hand\textsuperscript{61}. Even international and national security experts want the RoL promoted to the failed states as a key to prevent terrorism, which often has its breeding grounds within fallen states\textsuperscript{62}.


\textsuperscript{62} Ibid. p 59.
3. COMPARATIVE ANALYSIS, PROBLEMS AND RESPONSES

Different actors and donors are providing LTA within many failed states all over the world so I have for this section of my thesis chosen to investigate and look closer at a few L&D projects within a few chosen states. To get a wide knowledge of how LTA works in practice I have chosen three projects, one from each of the three actors (WB, UN and SIDA), and they are all from different parts of the world. This is a complex matter due to that every state has its own problems that needs fixing and therefore the comparative analysis in section 3.1.4 have to be read with this knowledge in mind.

3.1 How does these ways of assistance and reconstruction of a legal system in a failed state work in practice?

I have chosen to investigate development projects within the states of Yemen, Liberia and Vietnam. First, under section 3.1.1, 3.1.2 and 3.1.3, I will give the background, objective and outcome of the specific projects I have chosen to compare. Under section 3.1.4 I will compare these chosen projects and make a small analysis over how legal and judicial development projects function in practice.

3.1.1 Yemen – WB

North Yemen and South Yemen had different legal regimes until their unification in 1990. The North legal system was very much based on legal traditions while the South had a distinct common law system after years of British mandate. Because of the confusing and complex situation with two types of legal systems there has been very little direct foreign investment since the unification of the state in 1990. This lack of foreign investors is one of the most important issues facing the country and its future. No money is flowing into the country and no job opportunities are created due to this difficult situation. The Yemen legal framework is also far from ideal, even if new economic, financial and business laws were created after the unification of North and South most of these rather newly enacted laws are deemed inadequate to support any form of a market based economy. A new legislation is an essential condition for the development of a well functioning legal system.63

The objectives with this WB project were to assist the government of Yemen in their legal development consisting of three components: judicial reform, legal reform and through a public awareness campaign. The judicial reform components consisted mainly of training for the judiciary (judges, judicial educators and arbitrators) and a modernization of the curriculum for future judges as well as architectural plans to rehabilitate courthouses. The judicial reform components were to be implemented by MOJ (Ministry of Justice). The legal reform components consisted mainly of assistance to the betterment of the business, economic and financial legislation (for them to be more in line with international business transactions), recruitment of expertise to deliver appropriate training within MOLPA (Ministry of Legal and Parliamentary Affairs) and to prepare other studies that might be needed to deepen the

governments understanding about the commercial, economic and business activities. The public awareness campaigns components consisted mainly of a baseline study for an awareness campaign on the role of the judiciary in the society and the RoL. Both the legal reform components as well as the public awareness campaign were to be carried out by MOLPA.  

This WB project had a time limit of four years, 1999-2003, and a total budget of $ 2.9 million. Lessons learned from previous bank experience are relatively limited in the area of legal and judicial reform, given that most WB projects have focused on one single area of the legal system. These types of reform projects have been implemented in some other states though (Russia and Bolivia for example) and one important lesson from these projects is that legal and judicial reform can never be imposed from the outside. Another important lesson learned is not to be over-ambitious and set up unattainable goals. The sustainability of the project depended on the commitment of the key participants within the project and the WB was to follow the project closely to ensure transparency and high educated individuals working with the legal and judicial reform. There has not been any consideration about the environment within the project. If the project was successful there would have been a betterment within several categories: a better knowledge within MOLPA about the business, financial and economic laws; better trained judges and arbitrators which would lead to an improvement of the performance of the entire judiciary.

In 2003, when the legal and judicial reform project had come to an end, the WB wrote an evaluation report to see if it was a successful project and to learn from its possible mistakes. The WB rated the quality at entry of the project as satisfactory despite enormous challenges in Yemen. These challenges consisted mostly of difficulties in the dialog between the WB and the government of Yemen. The severities of the non functioning dialog situation lead to that the negotiations were put on hold for six months. Despite this the WB remained engaged in the sector. The expectations of the project were very low, the Bank had doubts about whether Yemen was ready to implement the project at all, and it was viewed as experimental in its nature. The outcome of the project was, because of the way in which the objectives were written, clearly unsatisfactory. The evaluation report states that the project went well though despite the quite bad preparations. The judicial development component was rated satisfactory: 80 percent of the judges received training through the project; but the reconstruction of courthouses was not completed and the curriculum at the High Judicial Institute was not revised or updated. The legal development component was also rated satisfactory, even if there is still a severe weakness in Yemen’s legal framework. The public awareness campaign was also rated as satisfactory even though the impact of the project as a whole was viewed as modest and lower than preferred.

Major factors that affected the implementation and the outcome of the project were tasks that were put on hold because of a new minister in the government of Yemen who was not interested in any changes within the country. There was also several terrorism related incidents during 2002 which led to that it was impossible for the WB to travel to Yemen. The sustainability of the project was judged to be unlikely, the supervision of the project was due to a lack of attention judged to be unsatisfactory but the WBs performance was rated as

65 Ibid.
satisfactory. An important lesson learned is to hire a local interpreter that speaks the language, in this case Arabic.\textsuperscript{67}

3.1.2 Liberia – UN

The UN has a special unit working with development of different kinds within Liberia, United Nations Mission In Liberia (UNMIL), and this unit was created in 2003 due to the massive destruction of the country during the civil war 1989-1997. The Liberian civil war claimed the lives of nearly 150,000 people, mostly civilians, and it led to a complete breakdown of law and order and resulted in about 850,000 refugees in the bordering countries. The conflict that started the war was a confrontation between the government forces and the group NPFL (National Patriotic Front of Liberia) which was led by a former government official. UNMIL was not the first unit created by the UNSC to help stabilize Liberia, so the different attempts that were made through the years developed into UNMIL. The UNSC and the UNMIL project were given a time limit of 12 months as a start but UNMIL is still working towards a development and a betterment of the population in Liberia and have gotten the time limit extended.\textsuperscript{68}

Within UNMIL there is a Legal and Judicial System Support Division (LJSSD). This division was established in 2003 to assist Liberia’s government in a development strategy for a national legal framework, including the judicial institutions. There are a lot of challenges to overcome within the judicial system in Liberia: the culture of corruption; the lack of confidence in the judiciary by the population; the lack of qualified personnel as well as the poor, or in some cases non existing, infrastructure. There are three units created within LJSSD to address these varied weaknesses.\textsuperscript{69}

- The Monitoring Unit: has judicial monitors deployed in all of Liberia’s counties which monitors criminal and civil proceedings that comes before the court. The unite tracks criminal cases through out the justice system (from the arrest to the trial). It distribute copies of key legislation, provide advices on law and procedure, encourage co-ordination between the different justice sector institutions (such as the police and the prosecution) and assist in the transportation of detainees from the court to the prison.

- The Advisory Unit: reviews existing practices in the prosecutorial offices and courts and initiates projects to address any weaknesses and problems exposed. It provides advice and support to the Judiciary and Ministry of Justice across a range of issues. The advisory unit is also an active participant in Government-led initiatives meant to make progress within the judicial and legal reform.

- The Legal Education and Training Unit: provides training for court officials, judges and prosecutors all over Liberia. This unit has provided training for over 600 judges since 2000.\textsuperscript{70}

\textsuperscript{68} \url{http://unmil.org/content.asp?ccat=history}, 2008-05-19.
\textsuperscript{69} \url{http://unmil.org/content.asp?ccat=judicial}, 2008-05-19.
\textsuperscript{70} Ibid.
The legal and judicial division is also responding to requests for legal advices from other parts of UNMIL and they have initiated weekly radio shows that are functioning as a legal education for the Liberian public. LJSSD is also assisting in a long term justice sector development with the objective to create a judicial database and to reform the judicial scholarship program. The division has as a future goal to maintain a close relationship with the Judiciary and Ministry of Justice and to provide advices and assistance on a daily basis.\footnote{http://unmil.org/content.asp?ccat=judicial, 2008-05-19.}

Since 2003 when UNMIL got a twelve months time limit by the UN to start the development within the legal sector they have been given more time and funds to continue their work within Liberia. In September of 2007 the UNSC extended the mandate of UNMIL until September 2008, so this is not a closed project but a continuing development. UNMIL together with the UNSC and Liberia’s government has created new laws within Liberia as an attempt to secure the rights of the people within the country. In 2006 they implemented the \emph{Rape Amendment Act} since the incidents of rape of women and young girls were very high within the country. The outcome of this Act has been satisfactory according to the UNSC and UNMIL. It has been reported though that many prosecutions of cases of sexual violence has been hampered with and out of court settlements has been made between the victims and the perpetrator. In this way there is no justice created but the perpetrator of the crime is simply paying not to be prosecuted before a judge. Because of this bad functioning situation the legislature is currently reviewing the Act to establish an independent national commission on human rights.\footnote{http://unmil.org/documents/sgreports/sg16pr.pdf, 2008-05-19.}

The outcome of the support for the judicial and correctional system is rated as satisfactory but the progress continues to be slow. The entire justice system remains constrained by the severe lack of infrastructure, trained judges, capacity to process cases, low salaries, corruption, reform policy framework and a legal regime that only allows Liberian citizens to be legal practitioners and judges. Due to all these shortcomings, many Liberians have very little confidence in the justice system. UNMIL will continue to support the Liberian government’s efforts to establish a law reform commission as a sustainable mechanism for law reform and development. Within the prisons of the country there have been efforts by the UNMIL to shorten the pretrial detainee period but still there is long waiting periods for the pretrial detainees before their cases can be presented before a court.\footnote{Ibid.}

3.1.3 Vietnam – SIDA

In the year of 2001 Vietnam provided the international community with a comprehensive analysis of the problems and the needs within the legal system of their state that they wanted help with from abroad. Sweden, together with UNDP and Denmark, decided to co-finance the assistance to Vietnam and a strategy for the development until the year of 2010 was created.\footnote{http://www.sida.org/sida.jsp?d=118&a=3053&searchWords=legal%20projects, 2008-05-19.} Sweden decided to join the project in cooperation with Vietnam mostly because of the enormous poverty situation within the country. Vietnam is not a fully developed democratic society with different politic parties; it is run by one single party. Sweden has had projects within Vietnam ever since the 1960’s and the Vietnam War.\footnote{http://www.sida.org/sida.jsp?d=541, 2008-05-19.}
Since 1991 the Swedish legal sector has cooperated with Vietnam for development of the state. At the start of the cooperation the focus was mostly on the legal reform to create a way for economic reform but during the recent years there has been more of a focus towards individual human rights. In line with the Swedish policy the legal sectors cooperates with Vietnam and addresses the situation of poverty in terms of equal rights before the law and for a better access to a fair and just legal system. The objective with the cooperation is to strengthen the capacity of the Ministry of Justice in law making and implementation that are compatible with international legal standards and treaties. The SIDA project also seeks to provide improved legal knowledge amongst the public and law making skills for the legal staff as well as strengthening the regional and global cooperation between lawmakers. The objective with this project is also to develop the curriculum at the university and modernize the teaching methods by enhancing the skills of lecturers. There is a need to upgrade the libraries as well to better meet the needs of the students; with many computers linked to international law libraries and institutions abroad. Further the objective is to establish an effective legal information system for an equal access for public officials and the public at large. The goal is also to strengthen the legal aid within Vietnam to provide access for disadvantaged people to ensure that their legal rights are upheld. This objective will be reached through support to different aid agencies.\footnote{http://www.sida.org/sida/jsp/sida.jsp?d=118&a=3053&searchWords=legal%20projects, 2008-05-19.}

In the year of 2006 when a country and project evaluation was made of Vietnam the country was still a one party authoritarian state. The country is however under rapid change in many areas and human rights issues can be discussed more openly within the society. According to SIDA Vietnam is gradually adjusting to international standards and norms and taking a position on the international arena. Vietnam has due to the SIDA project ratified five of the six major UN treaties about human rights but the civil and political rights are still not fully implemented. According to the project evaluation the awareness about the need to change seems to be developing. One objective with the project was to create a law on associations. The law has not been adopted yet though but it has been much debated in media and within limited groups. The freedom of expression is still very much restricted within the country and the development trends are difficult to assess.\footnote{http://www.sida.org/sida/jsp/sida.jsp?d=118&a=32136&searchWords=project%20evaluation%20vietnam, 2008-05-19.}

Because of the SIDA project Vietnam has recognized the urgent need to modernize their legal and justice system to better protect human rights and to develop the RoL. The knowledge of the missing pieces in the Vietnam legal system is not enough though, the state is still missing a mechanism to protect the basic and civil rights in the current system. The governmental legal aid system for poor people is slowly developing through a newly adopted law that provides poor people with free legal aid. Vietnam did recently adopt two strategies for the modernization of the legal and justice system and Sweden has been involved in this process from the very beginning in 2001 by providing support in cooperation with the UNDP. There has been a continuous dialogue between Sweden and Vietnam for a long time about the need to change the entire court system to implement a more modern public prosecution system. Sweden has ever since the beginning in the 1960´s stressed the importance of developing an independent justice sector to improve the protection of human rights and to fight corruption.

Vietnam’s strategy mentions that legal reform at grass root level should be integrated in the support to the public administrative reform, but this is not yet done.  

3.1.4 Comparative Analysis of the projects

All three projects that I chose had one thing in common; to assist in various ways to develop a failed states legal and judicial system for the betterment of both the country as such as well as its population. As seen in the different projects the actors work in different ways to implement their projects and every state has unique problems and backgrounds that have to be considered while starting a project. Yemen, Liberia and Vietnam have for a long time had more or less bad functioning governments but the sources of these problems are quite different. Yemen had problems before the unification of North and South due to underdevelopment, but it was after the unification in 1990 that the problems of different legal systems became too problematic for the state to deal with on their own. The government asked for a loan and LTA from the WB to be able to stabilize the legal and judicial system and to unite both the traditional legal system and the common law system. Liberia is a country that has survived a massive civil war that lasted about eight years and with over 100,000 casualties and resulted in over 800,000 refugees. This war completely destroyed the entire society of Liberia and left the population with nothing; no working legal system, no qualified legal staff, no infrastructure, no human rights and no security what so ever. Because of this mass destruction of the state and its population the UN decided to create a special mission just for Liberia that would last longer than just a couple of years, UNMIL. The history of Vietnam is very much filled with political power struggles, as in most of the states that need LTA, and the one party society has created a lot of problems within the Vietnamese society. Due to this one party leadership Vietnam is not a fully democratic society and the human rights are not completely implemented. Many other institutions within the state are also underdeveloped and there is a poor knowledge amongst the public about the legal system and their individual rights.

The main differences between the projects is that the project in Yemen had a time limit of four years, so whether or not they had created a development the project would end in 2003. Both the projects in Liberia and Vietnam is ongoing projects where SIDA and the UN will stay and assist as long as they have the funds to do so and the state is in a serious need of legal aid. Another big difference between the projects is that the WB in the Yemen project does not provide assistance in that sense, they have simply given Yemen a loan and mostly been supporting them with money rather than with actual LTA. SIDA and the UN do not work in that way, they usually have staff and legal expertise working and living in the receiving state. The main difference between the Vietnam and Liberia project is that Vietnam came and asked for help and SIDA is working in cooperation with the government to strengthen the RoL, while in Liberia the UNSC decided to start the project whether the government wanted it or not due to its severe problems and conflicts.

The objectives with the different projects are in many ways similar. All three states need to strengthen the Ministry of Justice, have public awareness campaigns to educate the public of their rights, create a legal education and training unit for the legal staff and they all need to develop modern international business laws to be able to attract foreign investors. The main focus in Vietnam is to create and implement individual human rights while in Yemen it is to


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create business and economic laws that are more in line with international standards. Liberia though has much more severe problems than both Vietnam and Yemen and the main focus in Liberia is to reconstruct the infrastructure and to fight corruption within the criminal and civil proceedings as well as actively assist within these areas of the legal system.

The outcome and the evaluation reports of the projects are written in different ways, but it is very clear that the WB project had the least impact on the receiving state of the three. Compared to Vietnam and Liberia the Yemen project had a time limit of four years, even though there were severe problems within the state and even though the government of Yemen refused to have a dialog with the Bank for about six months. This reluctant behavior of the Yemen government, I believe, should have been a signal to the WB that the state was not ready to take the loan or to start the development within the legal system towards a modernization of the financial and business laws. Within their evaluation report the WB rates many fields as satisfactory though, even if the objective was not reached, and they explain this by saying that the project was experimental in its nature and not had a good chance for a sustainable development any how.

**SIDA** works quite different from the **WB** and the **UN** and they are only implementing projects in cooperation with other organizations and with the failed state itself. The evaluation of the SIDA project within Vietnam is built a recent country report since it is an ongoing project. The situation in the Vietnam project differs from the Yemen project since Sweden and Vietnam has cooperated for a development of the state ever since the 1960’s. SIDA has therefore better knowledge of the country, with its traditions and cultures and so on. I believe that this is a recipe for success, to really know the state you will assist in both inside and out, and therefore the development is starting to show within the country. Vietnam is still a one party state though but SIDA can see a rapid change towards human rights and openness within the society. Since SIDA implemented their project in 2001 Vietnam has ratified five important human rights treaties, even if they are not fully implemented yet there is a will to develop the country. The freedom of expression was very much restricted in Vietnam when SIDA came and this is still a big problem that is not yet solved.

The UN project in Liberia is one of the largest operations in the world today and the state needs aid in nearly every aspect within the society. Even the infrastructure is totally destroyed so this project is on a whole different level than Yemen and Vietnam and it is impossible for the UN to see an end of UNMIL. Just as SIDAs project in Vietnam, UNMIL is an ongoing project so there is no specific evaluation report of the project. Therefore I build my conclusions on a recent country report. Liberia has big problems with corruption, compared to the other two states, and this has really slowed down the development within the legal and justice system. Another big problem that Liberia share with the other two states is that there is a poor confidence amongst the public in the justice system that has not yet been solved. Liberia differs from the other two states in that way that there are more serious problems to overcome than creating new business laws, so this is not given as big a focus than it is in Yemen and Vietnam. The UN states in Liberia’s country evaluation report that the project are making progress but that it is still a long way to go before we can see a clear development within the legal system. In this sense UN appears to be very realistic about the future situation, but they are still confident about that there is a possibility of a sustainable development within the country’s legal and judicial system.
3.2 Is it possible to create a sustainable development with Legal Technical Assistance?

Within this section I will provide criticism, difficulties as well as lessons learned within LTA. I will also provide constructive criticism with suggestions for improvements for the betterment of the LTA in failed states.

3.2.1 Criticism, Difficulties, Lessons Learned and Suggestions for Improvements

An important lesson learned from L&D projects is that it might be helpful with the appearance of the RoL, but it is not in any way an absolute necessity for the political development. For example, even in Communist constitutions there were a lot of thoughts about the rights of the citizens and even about the importance of legality.

Almost in no country the law is of primary importance within the society. Every society has its own unique background and history, and with this history comes a unique mix of economy, culture, politics and materials (such as natural resources). In this way the law is only the second most important influence on a country and this is indeed very important to remember. A country is not just an area ruled by laws, but also ruled by cultures, traditions and ancient beliefs. I believe that it is impossible to transplant entire laws from one country to another; the only thing you really can transplant is meaningless form of words. Due to these difficulties some of the laws that has been implemented in failed states and written in law books are completely ignored in action, and other laws has been captured but are misused. This does not mean that laws are not important; it only means that there are very few solutions to be found to problems within the law itself. To be a lawyer is not only to change societies through different newly written laws, but more important to effectuate decisions made by others.

The RoL is compatible with most economic theories and also with various political arrangements. So you can’t really say that the dependency theory is the way to go or that the modernization theory is the best path to follow. I believe that it is absolutely correct to say that the developing countries is directly linked with the legacy of colonialism and that this legacy gravely has been of importance to their disadvantaged position in the market economy; but there has also been a lot of internal factors that has contributed to this disadvantaged position.

An important insight is that most of the developing countries would benefit if they at least implement the minimum content of the RoL. With this minimum I mean for example that the government acts according to the laws, that they respects the rights of their citizens, that everyone is equal before the law and that all cases that are presented before a judge is treated fairly and neutrally. When the RoL is starting up in a development country it is, due to the reality that exists in these types of countries, of high importance to keep a close eye on the development of the laws and that someone looks critically at how they function in practice.

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80 Ibid.
81 Ibid.
82 Ibid.
83 Ibid.
One of the most important lessons learned is that implementing a RoL in developing countries does not solve all problems within that country. Implementing laws is only a secondary way to solve the problem. The most important thing to change in the country is the thoughts about rights and wrongs within its people, and also to remember that our western way is not always what is right for non-western countries.

I believe that the modern law is necessary, even if it is not sufficient, for the economic development. The modern law is important to all market systems because of the global homogenization of the commercial laws that are happening throughout the world, and those countries that do not except this will be excluded from the global market, just like Yemen. If countries want to be a part of the global market system they have to implement at least the necessary international laws and they have to find a way to implement them. If a country is not interested in these modern international laws they are absolutely free not to implement them but they are doing this at their own risk. Although I am criticizing the RoL movement I believe that it is necessary with foreign investors and that it is a very important way to get money flowing into the country and to be able to get the assets needed to rebuild a post-conflict state. Some countries have been able to build up their economies without foreign investments thou, like Japan and the U.S., but it can not hurt with some foreign investors to secure the country’s economy. Foreign investors are also very much drawn to RoL countries because of the need for legal predictability, so in that way the presence of at least certain types of foreign investors may contribute to the development of the RoL through their demands for legal reforms, as seen in the Yemen project.84

A difficulty within the RoL is that its promoters know how the RoL should look like in practice, but they can’t really say what the essence of RoL is.85 As Thomas Carothers colleague whom he worked with closely in Latin America once said about the RoL promoters: “we know how to do a lot of things, but deep down we don’t really know what we are doing.”86 Another severe problem with the RoL movement is that it is believed to be perfect, but off course it is not. The RoL gets very much complicated when different states bend the RoL to fit their way of life. I believe there is not one simple and perfect answer how to help failed states with their legal development and the RoL promoters needs to be aware of this. I do not really believe that the RoL movement has all the answers and I definitely do not believe that it can fulfil all the expectations that have been invested in it as long as the rule of law movement is as narrow-minded as it is. Within the RoL nothing else matters but the RoL, and in this way I think that the promoters are really making a big mistake. There are a lot of societies where the formal laws is only secondary and where the traditional laws for example is of higher importance, and this is really important to keep in mind. A lot of the times actors is focusing only on the formal things in their improvements and they ignore the informal rules, the traditions for example. In this matter many actors and donors fail because of a lack of acknowledgement of informal rules, and this is a problem that will grow bigger if nothing is done.

Other problems and obstacles that has to be fought when an organization is trying to improve the situation in a failed state is a selfish leadership, poverty and a total lack of access to key services, such as electricity and water. When trying to help a failed state there are other

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85 Ibid.
86 Ibid. p 5.
problems as well facing the helping force. They have to have someone with them that speaks the language for example. This was commented after the reforms in Kosovo where all the laws only were available in English, and that meant that the ordinary people could not actually read them. This is a big mistake! The laws are written for the peoples benefit so they should be able to read them.

I believe in local consultation and help-to-self help. People need to be a part of their own change in a larger scale than they are being now in the RoL movement. RoL promoters have to be more coherent to the countries in which they are operating in and the aid-workers needs to study the country closely before starting a RoL project in a failed state. A quick visit to a country does not provide actors with a complete picture of the society as well as the legal system. An important thing to remember is that the RoL is a very western style system and trying to implement this western system in an African country for example can create a “clash” between the two different systems. So to avoid this “clash” maybe it would be good to make the RoL movement a lot more adjustable than it is today. Rule of law promoters needs to help the post-conflict states so that they can help themselves, they should not take on the role as some kind of “world police”. Important to have in mind is that informal, traditional, religious as well as non-state justice affect a substantial part of the world’s population, and the actors of LTA need to be aware of this and take it into consideration when starting a new project. It must be impossible to get a good oversight over all the areas within a society after almost no research at all and usually there are actually a lot of flaws in the WBs and UNs planning. A great success in the work to help failed states is local consultation. The local consultation provides a better understanding of the history of conflicts, types of victims and the patterns of discrimination.

Another important thing to have in mind when analysing L&D projects is that most of the actors, such as the WB, UN and SIDA, use contractors (a university or an NGO for example) to implement their projects. Depending on from which country the contractors comes from the strategy and ways of assistance can look very much different from each other and the evaluation and objectives can be looked upon in several ways. This is something that I believe the actors and receiving states should have in mind since the contractors in many cases are switched during a project and this often creates problems since they may come from different legal systems and different cultures.

I think that Good enough governance has a good point. We should promote the RoL as something more narrowed and not try to change everything that is bad and dysfunctional within the country at the same time. The focus should be on the main things that need to change.
4. CONCLUSION

The objective with L&D is to study and investigate how various legal institutions and laws can be used for the development of a less developed state, using law as an instrument for social, political and economic change. There is a huge gap though between how LTA works in theory and how it really functions in practice. If LTA worked in real life as it does in the minds of the actors there would not be any underdeveloped states left in the world. This is not the reality though. All over the world there are still failed states where the WB, UN and SIDA has had L&D projects but the results of the projects has not been sustainable, if there has been any results at all.

In many cases of actors implementing L&D projects in failed states there is very little knowledge about the country. There is a clear lack of understanding of the society’s unique history, economy, culture, politics and natural resources. This is quite obvious in many UN, SIDA and WB reports. In most countries of the world the law is not of primary importance to the population, traditions and so forth plays an even greater role in people’s everyday life than the legal system. With this statement I do not mean that laws are not important, I only mean that there are very few solutions to be found to a states specific problem within the law itself. A country is not only an area ruled and governed by laws, it is also an area ruled by different cultures and in many cases ancient beliefs.

LTA and the implementation of the RoL does not solve a failed states every problem, this is only a secondary way to solve conflicts, and this is an important insight that I think the actors within L&D projects need to address. RoL promoters have to be more coherent to the receiving state in which they are operating and they need more local knowledge before starting a project. A quick visit to a country does not provide anyone with a total and complete picture over the entire society including the legal system. It is just like writing an essay; you have to do a thorough research about your subject if you want the result to be really interesting and sustainable.

I do not believe that law and development projects can solve all the legal and judicial problems within Yemen, Liberia or Vietnam, no matter how long the actors stay in the country. Most of the development projects today is very narrow minded and it only focuses on the RoL and nothing else. I believe it is impossible to transplant a totally new mentality within the legal system, it is a goal set way to high. The L&D actors should not try to fix everything within a failed states non functioning legal system immediately, but focus on the most important matters that need assistance. Especially if there is a short project with a time limit, like the Yemen project, it is important to have realistic plans for the development so the state is not overwhelmed with changes.

For me it is painfully clear, after reading many project reports, that some lessons has not been learned by the L&D actors. In countless occasions in the search for material for this thesis I have come across attempts to promote the RoL by simply transplant laws to failed states from western countries. This way of L&D achieves very little and they are usually not adapted to the local environment and there is also very often a lack of public understanding of the new laws. In many parts of Africa for example there is no such thing as a court or a trial, but an
arbitrator that are solving the conflicts, so this is for many Africans a totally new type of institution.

I believe that many of the developing countries and their major problems are directly linked with the legacy of colonialism; such as their disadvantage position within the global market economy. Despite this it sometimes feels like the western world together with the L&D actors has forgotten the fact that the West has plundered most of the failed states and left them with nothing but poverty and conflicts. The WB for example is lending money to many failed states as a part of development projects, even if the Bank knows that the receiving state probably never can pay the money back. This gives me a feeling of colonialism all over again.

Another difficulty is to evaluate LTA projects. How do you really define success? How do you define failure? If the introduction of new laws as positive rules could be defined as success then many projects would easily be qualified as successful, but if the desired outcome is a specific result or impact the number of successful projects would be a lot less. In my opinion it is completely useless to see introduction of new good laws as a success if they do not have the impact that they were meant to have. Then nothing has really changed for the better. For a project to be a success I think that it should be a sustainable development within the entire society. I have not yet, during my research for this thesis, found a project report that according to my standards is a total success.

When I read the Yemen report I got horrified, even if I know that these things happen all the time within projects. Yemen took a big loan from the WB as an attempt to develop their legal system and in the evaluation the WB has written that they forgot to hire an Arabic interpreter, which resulted in an impossibility to freely speak with the local consult for the project. Basic things like this should not be allowed to happen when so much money is invested in something that important.

Despite this conclusion of my thesis I do believe that it is absolutely necessary with L&D projects as a form of legal aid to failed states and I do believe that LTA can create a sustainable development within a failed state. There are many problems to overcome and to consider though which I do not think that many actors pay attention to before starting a new project. Law is not just in institutions, but in peoples minds too, so the RoL promoters needs to acknowledge this fact for a better and sustainable development. The actors need to hire more local consultation within these projects to really understand how the state and its population functions. As the projects are implemented today by the WB, UN and SIDA I feel that it is very much a top-down organization where the big and powerful actors decide over the poor and powerless population in a failed state.

I would like to end this thesis with my opinion about the RoL movement expressed by John V. Orth:

“Foreign lawyers, speaking a different language and operating in a distinct historical and legal culture, cannot directly influence outcomes, but they can assist in the development of indigenous legal culture.”

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