

DESIGNING LAW

Erling Berge

Centre of Advanced Study

Oslo

11-13 November 2002

2002-11-10

© Erling Berge 2002

1

Institutional design

What do we mean by design?

- Fitting form to function
 - In architecture?
 - In clothing?
 - In writing contracts?
 - In writing constitutions?
 - In writing laws and bylaws?

2002-11-10

© Erling Berge 2002

2

Is design suspect?

- Because designers are out of touch with the real world?
- Working from
 - First principles ?
 - Under a blue sky ?
 - On blank sheets ?

2002-11-10

© Erling Berge 2002

3

Making law

- Law from below: customary law
 - People's needs are the driving force
- Law from above: statutory law
 - Sovereigns's needs are the driving force

- Is there a role for science?

2002-11-10

© Erling Berge 2002

4

Goals

- Say something about the problems involved in designing law
- Suggest some principles to aid in designing good law
 - Designing law is taken to be the same as designing an institution. Hence, understanding institutions becomes essential.

2002-11-10

© Erling Berge 2002

5

Design of formal institutions

Consists of

- Writing law
- Mandating a bureaucracy
- Staffing the bureaucracy

2002-11-10

© Erling Berge 2002

6

Fitting form to function

- **Function:** the goals the institutions is supposed to achieve
- **Form:** the diverse combinations of legal rules, bureaucratic organisation and the goals and competences of the bureaucratic staff

FIRST IMPLICATION: we need to understand how institutions work

2002-11-10

© Erling Berge 2002

7

Learning about institutions from

- Classical institutional theory in sociology and economics
- Neo-institutional in economics, and in
- Political science, anthropology, sociology
- Philosophy, law, history, game theory, experimental psychology/ economics/ political science,

2002-11-10

© Erling Berge 2002

8

Institutions

- Rules of the game
- Humanly devised constraints
- Providing structure for human interactions (political, economic and social)
- The cost of detection of rule violations, and the enactment of punishments are essential parts of all institutions.

2002-11-10

© Erling Berge 2002

9

Organisations

- Games: rules and players
 - Institutions – organisations
- Organisations are groups of people bound by some common purpose to achieve objectives

2002-11-10

© Erling Berge 2002

10

Institutions evolve by incremental change in e.g.

- Values and priorities
- Norms of behaviour
- Conventions
- Codes of conduct
- Contracts
- Common law
- Statute law

2002-11-10

© Erling Berge 2002

11

Institutions determine the opportunities of a society.

- Organisations are created to take advantage of those opportunities.
- As organisations evolve they change the institutions. The path of change is determined by
 - A lock-in between institutions and the populations of organisations evolved to exploit the institutions
 - Feedback processes from perception of and reaction to changes in the opportunity set.

2002-11-10

© Erling Berge 2002

12

Reading de Soto 2000:

- Hernando de Soto provides empirical observations of the dysfunctional consequences of
 - Illegitimate and insecure property rights
 - Poorly enforced laws
 - Barriers to entry of markets
 - Monopolistic restrictions
- Resulting in permanent underdevelopment

2002-11-10

© Erling Berge 2002

13

5 mysteries of capital

- Missing Information
- Capital
- Political Awareness
- Missing Lessons of US History
- Legal Failure

2002-11-10

© Erling Berge 2002

14

Missing Lessons of US history

- Squatting was common
- Pre-emption: squatters improving land could recover its value or buy the land before it was offered in public sale
- Gradually the extralegal sector was recognized and integrated in to the formal system

2002-11-10

© Erling Berge 2002

15

Legal Failure (1)

- Misconceptions of current policy
 - People go to the extralegal sector to avoid paying taxes
 - Extralegal real estate exist because of inadequate surveying and mapping
 - Mandatory law is sufficient, compliance costs irrelevant
 - Existing extralegal social contracts can be ignored

2002-11-10

© Erling Berge 2002

16

Legal Failure (2)

- It is impossible to change people's conventions on how they can hold their assets, both legal and extralegal without high-level political leadership

2002-11-10

© Erling Berge 2002

17

Legitimation

- Law must build on existing social contracts
- The extralegal sector has developed their own law, their own understanding of what property is and what they can do with it
- Unless land reform builds on this, it will fail miserably as the many failed attempts at land reform already should show us

2002-11-10

© Erling Berge 2002

18

Making better formal law

- Study the various extralegal sectors
- Extract the principles used by the people
- Compare it to existing law
- Adjust formal law and insert the principles used by people
- The result is much nearer a self-enforcing system of law

2002-11-10

© Erling Berge 2002

19

The political challenge

- Changing status quo of property rights is a major political task requiring
 - Taking the perspective of the poor
 - Co-opt the elite
 - Deal with the legal and technical bureaucrats guarding the current system

2002-11-10

© Erling Berge 2002

20

Traditional law: AD 1274

- "Bears and wolves are hutable by anyone in any persons outfields except where bears are circled in their liar; this he shall promulgate publicly that it is his circle. Now, others hunt the bear, then they hunt for that one, who owns the circle and "landnam" to the landlord"

2002-11-10

© Erling Berge 2002

21

Contemporary law: AD 1981

- "All wildlife, including its eggs, nests, and lairs are inviolable except if otherwise follows from law or decisions based on law. ... "
- "The King decides which species can be hunted and within which time frames the hunting can take place. The Directorate decides the time frames of each species and within which areas hunting can take place. ... "

2002-11-10

© Erling Berge 2002

22

Design principles

Traditional

- Specific guidance to action

Contemporary

- General rules and delegation of decisionmaking power

2002-11-10

© Erling Berge 2002

23

Assumptions for design

1. Behaviour of agents are sensitive to available opportunities and incentives
2. Opportunities and incentives varies and can be varied by design to affect aggregate behaviour
3. There are some accepted criteria for what one wants to achieve by the design intervention

2002-11-10

© Erling Berge 2002

24

Some desirable principles (1)

- **Revisability**
 - People are fallible
 - Societies change
 - Learning by doing
- **Robustness**
 - Making commitments and stand by them
 - Avoid opportunistic changes of institutions
 - Adapt to new situations by appropriate changes
- **Sensitivity to motivational complexity**

2002-11-10

© Erling Berge 2002

25

Some desirable principles (2)

- **Publicity**
 - All institutions and institutional action must be in principle publicly defensible.
- **Variability**
 - Learning by doing requires and produces variability of institutions
 - Federal institutions may provide variability
 - Learning from neighbours may lead to a “race to the bottom”, where worst practice is imitated rather than best practice

2002-11-10

© Erling Berge 2002

26

Two basic ways of intervening

- Designing sanctions to alter opportunities and incentives
 - Sanctions are positive as well as negative
- Designing filters to create or eliminate agents or opportunities
 - Removing or awarding powers to agents
 - Creating or removing opportunities

2002-11-10

© Erling Berge 2002

27

Design strategy 1: deviance control

- Deviance-centred strategies aim at making compliance the self-interested alternative for everyone, also the pure egoists (aka “the knaves strategy”)

Problems:

- “Quis custodiet custodes”
- May create knaves of non-knaves

Perhaps it may do more harm than good?

2002-11-10

© Erling Berge 2002

28

Design strategy 2: complier reinforcement

- The complier-centred strategy aim at reinforcement of the behaviour of the non-egocentric thinking persons
 - Screening before sanctioning
 - Sanctioning in support of non-egocentric deliberation
 - Sanctions should be motivationally effective