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7 Law's Catch-22: Understanding Legal Failure Spatially

B. van Rooij

Introduction: legal failure

The assertion that state law sometimes fails is not new. Over three decades ago, Allot (1980, 55) wrote, “Laws are often ineffective, doomed to stultification almost at birth, doomed by the over-ambitions of the legislator, and the under-provision of the necessary requirements for an effective law, such as an adequate preliminary survey, communication, acceptance and enforcement machinery.” Legal failure includes the law’s in- and over-effectiveness, which may “create uncertainty, chaos, distrust, or hostility, rather than [...] regulate properly” (Cotterrell [1992, 52] summarizing Teubner 1987). In case of legal failure, state law is not able to fulfil its inherent, contradictory promises of justice, certainty, unity, social cohesion, and social control. Those who have predicted legal failure (Savigny [1831] 1975; Sumner [1906] 1960; Cotterrell 1992) and those who have noticed it around them (Pound 1917; Ehrlich [1936] 1975; Allott 1980; De Soto 2000; Otto 2000) have partly analysed it as a result of the law’s alienation from society and state law being ill-adapted to local circumstances.

The question of legal failure has also been central to professor Jan Michiel Otto’s academic work on law and development, questioning how to use the law to improve the goals of development (Otto 2009). He sought to promote a new view on the law that went beyond legal positivism and to stimulate a law that would be effective in directing positive social change. Professor Otto used the key concept of “realistic

legal certainty,” which he launched in his inaugural lecture (2002b, 2004). With it, he sought to connect the thinking of traditional lawyers to the concerns of development administration and socio-legal scholars. Traditional lawyers focused on the law’s clarity and predictability and thus on legal certainty as a core trait of a well-functioning body of law. Development administration and socio-legal scholars focused on issues of implementation and effective law in action.

This article analyses why it is so difficult (and often impossible) to adapt state law to local circumstances and what this means for the search for realistic legal certainty. It argues that there is a contradiction between the logic of modern state law and that of local norms. The logic of modern state law seeks unity and certainty and is thus not limited to a certain place and time. By contrast, the logic of local norms is geographically and temporally embedded and is thus varied and uncertain over place and time. This contradiction is one fundamental reason why state law cannot be well adapted to local circumstances and justice and may fail. This article shows that this problem is rooted in a Catch-22 situation with regard to state law’s levels of abstraction. As is often the case, state law’s levels of abstraction become dislocated; overly specific state laws no longer represent an abstraction of all local norms. This causes problems in implementing such laws locally. The logical solution would be to only make state law as abstract as necessary so as to cover lower-level norms. The problem is that the large scope of modern state law would render such abstraction meaningless and would not provide certainty and unity. The article will show that this contradiction between state law and local justice can only be reduced, not solved. It proposes reducing the contradiction through spatially-planned lawmaking and the development of case law. Spatially-planned lawmaking can occur through social scientific-based codification. For developing civil law systems currently lacking case law, they can develop it as a bottom-up source of law through legal research of published court cases.

■ Modernity, state law, and bad maps

The process of modernisation, as described by Giddens (1990), involves scale enlargement. Within this process, social relationships come to operate on a larger scale and become “disembedded” from a specific place or time. The development of modern state law has been a precondition for and result of the same process.

State law came to serve as a trust system (in the words of Giddens [1990], an “expert system”) not bound by time or place, coexisting with the personal (locally and temporally embedded) trust of pre-modern

society. The technological and societal forces driving the changes towards modernity came to full blossom in the nineteenth century and accelerated during the twentieth century. Those forces first coincided with large codification projects. Later, they occurred alongside top-down, state-led, regulatory lawmaking. These modern types of Western lawmaking arrived at colonial and other developing nations through processes of legal transplantation (Watson 1993; Nelken 2001).

Modern state law has served as a system of trust, enabling modern large-scale social relationships and providing unity and certainty. It has simultaneously become a space (in the sense of Giddens [1990]) disembedded from any specific place or time in which social interaction is possible. Modern state law has thus become a sphere outside of society that enables social relationships to operate at a larger scale. For this to be possible, the law had to loosen its relationship with society by cutting loose its local and temporal social ties. This section will show how the disembedding of modern law has led to contradictions between state law and local norms, worsening legal failure.

■ The history of the 'disembedding' process

Pre-modern existing norms were embedded within existing contexts of time and place. First, there were real customary norms; these were unwritten and embedded in specific times and places. Second, there was customary law, which consisted of written customary norms. Writing them down made them lose their original character. It alienated them from the original **volksgeist**, as argued by Von Savigny (Savigny [1831] through Cotterrell [1992]; for this point, see also Oomen [2005]). Thus customary law, in the form of written custom, was disembedded temporally but not locally. It was still the custom of one place but became fixed over time. Third, there existed local laws and regulations as a collection of custom and customary laws. These were more abstract and had a larger scope of application in, e.g., city-states or pre-modern kingdoms. Such local laws were less temporally and locally embedded than custom or customary law. Still, their scope of application was mostly limited, so there were different local laws for different locations.

The first step towards modern disembedded law involved separating customary law and custom, disembedding law from time. This often preceded the process of modernity.

The next step involved unifying customary law, other local, written laws, and normative systems in a legal code. By transforming written local and customary law into a written code that applied to multiple, local customary legal systems, the law became dislocated from local realities.

Modern law came to operate on a much larger scale than pre-modern customary law or local law. At first, its scope was the nation-state. But modern law, in the form of international law, increasingly moved beyond state territories towards a regional or global scope. Achieving a consensus involved increasingly complex and conflicting local political goals and challenges.

The third step was the advent of regulatory law and top-down lawmaking, which completely severed the age-old ties between the state legal system and society. Law became an instrument of policymakers instead of a reflection of local norms. In developing countries, the process of legal **modernization** was mostly imported through legal transplants (Watson 1993; Nelken 2001).

In many developing nations, legal transplants originally took place under the influence of colonialism. Through the process of nation-building and **modernization**, developing nations later voluntarily imported laws and legal institutions or were obliged to do so as a condition for receiving development funding. Legal transplants shared the characteristics of codification and perhaps even more, of regulation, not being embedded locally or temporally. Similarly to modern codification and regulation, legal transplantation aided the process of modernisation by providing a system of large-scale trust. This system was **recognized** within the nation-state and used by many states worldwide. This, combined with the development of international law, caused a globalisation of law, serving as a global non-embedded system of trust.

Modern (codified, regulatory, or transplanted) state law became its own sphere, largely isolated from society. This was justified and aided by the development of legal positivism and pure legal science, both central to modern and contemporary legal thinking (Cotterrell 1992). The rapid development and impact of legal positivism provided a framework for understanding the law that was no longer embedded in a specific time or place. The concept of law was no longer dependent on locally embedded values of justice, as it had been in the natural law philosophy. Legal positivism provided a value-free, and thus locally and temporally disembedded, conception of the law. Law was what the sovereign said it was (Austin [1832] 1995). Or, more influential until this day, law consisted of legal obligation rules made according to rules of recognition (Hart 1961). Legal science was **influenced highly** by legal positivism, as it developed a value-free method of analysing the law by an inner logic distanced from local and temporal social realities. This was perhaps best represented in the common law world by Langdell's case law method (Nader 2002) and in the civil law legal systems by Kelsen's theory of pure legal science (Kelsen [1945] 1960, as summarised by Cotterrell 1992 and Harris 1997). As a result of these developments, legal science

moved away from society. This led to reactionary movements, such as the legal realists and various law and society groups. However, all in all, legal science remains dominated by legal positivism. Socio-legal studies have had a relatively small impact on mainstream legal thinking and reasoning, as well as on legal practice (Tamanaha 1997).

■ Searching for unity and certainty amidst (dis-)embedded systems

The result of the modernisation process in law is that there now exist plural normative orders (Merry 1988). On the one hand, there are the disembedded normative systems of modern state law, and on the other, there are locally and temporally embedded local normative systems. The embedded systems existed in pre-modern times and (to some extent) continue to exist in modernity. In a sense, we could say that they coexist and are stacked (Roquas 2002) on top of each other. We could analyse them as “maps,” as norms of different levels of abstraction operating at different scales (De Sousa Santos 1987). The most important aspect of scales is the difference in detail. Higher-scale maps (e.g., 1:300) cover a smaller geographical area and are more detailed and specific. By contrast, lower-scale maps (e.g., 1:300.000) cover a larger geographical area, are more abstract, and lack detail. Ideally speaking, lower-level norms (i.e., custom, customary law, and even local lawmaking) are more specific and can be compared to higher-scale maps (De Sousa Santos 1987). Lower-level norms should ideally be similar to local social contracts or conduct norms (mores) (Sumner [1906] 1960). Thus, such norms have a close relationship with the **volksgeist** (Von Savigny 1831) of what law ought to be and especially of what justice is. This is not always the case. Colonial customary law was often the result of negotiation between the colonial ruler and the ruled. Thus, it is an example of local norms which did not conform to this ideal (Starr and Collier 1987; Chanock 1989).

Nevertheless, as a result of their local specific character, lower-level norms can only apply to a certain local context. In the words of Giddens (1990), they are embedded within a certain place (and in the case of custom, within a certain time). Legal implementation requires both enforcement and invocation (Pound 1917). Since the norms are (ideally) similar to local society and justice, knowledge and invocation of such norms will be more widespread because they are locally legitimised. For the same reason (and because of the small scope of application), enforcing such norms will have low costs. Such local norms serve as the basis for social cohesion. Local norms govern the most basic building blocks of society (see Ehrlich's [1936] description of associations). The problem

with local norms in modernity is that they themselves cannot provide unity and certainty outside of their own locality, attributes necessary for non-local social relationships.

Modern state law is ideally of a lower scale (in the sense of the map metaphor) and should be more abstract. One method of abstraction involves codifying a recognised norm of custom and customary law, such as, e.g., in Ghana (Otto 2002; Ubink 2008). However, recognising locally (and in the case of custom, temporally) embedded norms at the national level leads to a state legal system with norms referencing different places (and for custom, different times). Cross-local social relationships are thus faced with different norms. Under such circumstances, maintaining cross-local relationships will be difficult since there is no mutual system of norms to build trust. The state legal system's recognition of custom and customary law does not solve this problem. State recognition of custom and customary law through abstraction thus undermines what modern state law set out to do in the first place: provide large-scale certainty and unity.

Codification is another method through which modern state law has abstracted norms from existing locally and temporally embedded norms. Codification is ideally the process of extracting local norms out of society and making them into uniform and unchanging law. In geographically larger legal systems, the abstraction of different local norms through state law would result in the norms having no meaning or power. Most states are too geographically large for state law to be made only through pure codification. Modern states share development goals that are partly based on certainty, goals such as nation-building, unity, and economic development. Thus, their legal systems cannot be so abstract as to no longer provide certainty and unity.

Therefore, in most states, lawmaking has not developed through recognizing custom or customary law, or through abstraction. Instead, most states have used non-abstract codification, choosing to codify some norms over others. This has potentially privileged certain norms, as outcomes of political processes have favoured specific interests by exerting power during the final phase of codification.

Finally, state law has completely severed its ties with local existing norms by introducing regulatory law. This type of law neither consists of abstractions of local norms nor prefers certain local norms while neglecting others. Regulation is made to carry out state policy. Therefore, it is made to a large extent through a top-down process (Sabatier 1986). Regulatory law has grown immensely in the twentieth century. In many legal areas, it has come to replace codification-based legislation. Similar to codification, regulatory law can be abstract but in many cases, it can also be highly detailed. European law is a good example of detailed

regulatory law with a large scope of application. It has detailed norms and standards on issues such as the banning of livestock vaccination against foot and mouth disease. The codified and regulatory laws and regulations of modern developed countries have spread across the globe through the process of legal transplantation. As we have seen, those laws and regulations contained many specific norms.

Worldwide, state law has thus rapidly developed. Sometimes it has provided rules abstracted from local norms. But more often, it has provided norms that are largely unrelated to the many variations of local specific norms.

State law can be (and often is) specific and thus De Sousa Santos's (1987) metaphor of maps does not fully hold true. If state law is similar to low-scale maps, it is supposed to be more abstract. What kind countrywide map provides details of small streets? Yet this is exactly what modern law has started doing. Instead of just inducing (i.e., abstracting) local specific norms, state law often provides detailed regulation applicable throughout a larger territorial sphere. The result is that the uniform state law no longer represents the ideal sum of all local norms. This is understandable, as the process of modernity has led to large spheres of uniform law. If law behaved like a map in such spheres, large-scale law would lack any kind of detail. The lack of detail would entail norms that are open to interpretation and would thus not lead to unity and certainty.

Now that state law does have detail, a problem arises: detailed higher-level law may often be contrary to many sets of local norms and socio-economic circumstances. This has implications for the implementation of the law. Since high-level norms are opposed to lower-level norms, they do not benefit local citizens. Thus, citizens will less frequently implement (e.g., through invocation) such high-level norms (e.g., as with contract law). Macaulay's (1963) study of contract law in the business community may serve as an example, in the sense that business relations were not made according to contract law. Inner community conflicts actively avoided the legal system and only used it as a last resort. Internal norms within the business community (i.e., local norms) were deemed more important. Outside norms of the legal system were not be invoked "if you ever want[ed] to do business again." Research on Turkey's 1920s legal modernisation found that the impact of the new, transplanted, secular, state civil code had little impact on the majority of the society in which custom remained in use (Moore 1973; Merry 1988; Starr and Pool 1974). These are just two of many examples of a lack of state law invocation due to a contradiction between state law and local norms and circumstances.

Implementation through enforcement will also be more difficult. The social and economic costs of such enforcement will be higher for norms that are against local practices, customs, or circumstances. This

will lead to less enforcement to avoid high local socio-economic costs. Alternatively, if policy decisions are made to enforce high-level norms regardless of the local consequences, it will lead to over-enforcement with high local costs.

Implementation of higher-level norms has a secondary, well known, spatial implementation problem, which aggravates the problem of higher-level norms contradicting lower-level norms and circumstances: The larger the norm's scope of application, the more difficult implementation will be. With a large scope of application, the number of norm-addressees will be higher. It will thus be more difficult to let them know of the law, let alone empower them to invoke it. A lack of legal knowledge and legal experience will lead to less success invoking the law (Galanter 1974) and ultimately to less legal invocations overall. Furthermore, in terms of enforcement, the further away the level of regulation is from the regulated community, the more costly enforcement will be. Thus, the more difficult it will be to get accurate information on violations. In other words, the larger the number of norm addressees is and the larger the space in which violations of the law can occur, the more it will cost to detect violations, to execute sanctions for such violations, and to monitor compliance after enforcement. This is partly due to a lack of information because of the lack of top-down oversight, which increases along with the spatial distance between the regulation and the regulated. The lack of information will make enforcement both costly and difficult. In different enforcement regimes, this will either cause ineffective enforcement or blind over-enforcement. So the combination of a specific norm and a large scope of application will lead to less implementation.

Modern law is thus caught between two extremes. Laws that cover large jurisdictions can be adapted to local circumstances and feasibly implemented, but then require high abstraction and discretionary implementation, offering very little certainty and predictability. Alternatively, as has increasingly happened, laws that cover large jurisdictions can focus on providing certainty and unity on paper, but become too specific to be adapted to local circumstances and thus become highly challenging to implement. Following Heller's famous book, we may call this the law's Catch-22. If we make a specific certain and unitary law that looks good on paper, it has less effect in reality. If we make an abstract law that may have an effect in practice, it will neither look good on paper nor provide unity and certainty. This will result in (spatial) legal failure because of the spatial dislocation of modern state law and local norms, which cannot be fully solved because of the law's Catch-22. To illustrate this point further, the next sections look at Otto's critique of De Soto's discussion of legal failure.

■ De Soto's legal failure, balancing access and certainty

Legal failure became a “hot” topic again after the publication of the Peruvian economist De Soto's (2002) book, *The Mystery of Capital*. In his work, De Soto contends that the world's poor have an enormous amount of assets (\$9 billion) which they cannot transfer into capital. According to him, this is what keeps them poor and prohibits their development. Their assets cannot be transferred into capital because the assets are not recognised by the formal (i.e., state) legal system, but are based on ‘extra-legal law’. Therefore, “their assets cannot be readily turned into capital, [...] traded outside of the narrow legal circles where people know and trust each other, [...] used as collateral for a loan, and [...] used as a share against investment” (De Soto 2000, 6). In Otto's analysis (2002a, 2009), De Soto argues that the poor's assets have remained extra-legal due to two failures. First is the partial failure to enact reform laws that “address the needs and aspirations of the poor” (De Soto 2000, 154). Second is the unsuccessful implementation of those laws in the rare cases in which they have been enacted.

De Soto's analysis of legal failure excellently illustrates how spatial legal failure works. On the one hand, state law is necessary as a system of trust. It provides certainty and unity, enabling large-scale social interaction. De Soto's thesis for poverty alleviation is based on making the poor part of this trust system, which should enable them to transfer their (locally embedded) assets into (locally disembedded) capital. On the other hand, the state's law is abstract and/or contradictory to local norms. Thus, state property law is not well founded in social contracts and state property rights are not locally legitimised (De Soto 2000). Without such local legitimation, De Soto argues that state law recognition projects of extra-legal rights will remain unsuccessful. State law is complicated, dominated by legal elites, and at-times unacceptable to local people, so many cannot participate in its benefits. State law recognition of extra-legal rights that is not locally embedded will remain without effect. This is because the poor will continue to find ways of protecting their locally embedded rights outside of the state legal system, as long as it is not geared towards fitting their locally embedded interests. Therefore, De Soto wishes to find a way of recognising extra-legal rights in state law and creating large-scale certainty and capitalisation, while maintaining their local embeddedness in local contracts. De Soto thus brings to light the basic contradiction between the unity and certainty of the disembedded state legal system and the accessibility and acceptability of locally embedded extra-legal norms. The reason why the legal reform that De Soto proposes has not been made often (or if so, has seldom been successful) can also largely be understood spatially.

De Soto's legal failure and Otto's critique of his analysis (Otto 2002) both serve to show that it is highly difficult, perhaps impossible, to solve the problem of spatial legal failure. De Soto has contradictory desires. He wishes extra-legal rights, which are too specific and locally and temporally embedded to be recognised in the legal sphere, to become legal rights. This would increase the poor's security, capital, and scale of participation. But the unitary logic of state law makes this impossible for one of two reasons. First, the extra-legal rights may become unitary state law rights, be transferred outside of the local sphere, and create the same problems of legitimacy and access in the existing state legal sector. In the words of Otto (2002), "The core problem [...] is that law-making, even with the best information and intentions, will always affect and change the nature of pre-existing social contracts." Alternatively, the state legal system may simply recognise extra-legal rights as they are. However, this will not make them more unified or certain, thus prohibiting the poor from transforming their assets into capital.

De Soto's analysis of legal failure shows at once the importance of spatial legal failure for present world development. In his eyes, if the legal failure can be overcome, the poor will be able to make capital out of their extra-legal assets. At the same time, it shows that the spatial problem would not be solved, either by shifting the extra-legal into the legal sphere or by abstracting specific local norms into a larger-scale legal system. The present analysis has made clear that the problems underneath the two spheres of law are spatial. It has also noted that De Soto's solution does not solve the spatial difficulties of simultaneously providing locally embedded legitimacy and access while providing cross-local certainty to form capital.

■ Case law as intermediary and source of certainty

So far our discussion has focused on the law, its implementation, and its relation to spatial realities within society. Perhaps on purpose, or perhaps because few do so in a context of legal failure, this article has so far not looked at the role of adjudication and case law. In Western European civil law systems in which the continental legal system originally developed, adjudication might not set precedent. However, it does play an important role as a source of law (Guo 2015). Case law serves as an intermediary between the state's isolated legal system and local justice throughout society. On the one hand, the process of adjudication applies abstract state norms to specific local circumstances. On the other hand, because adjudication forms an informal source of law in Western Europe, case law serves as a form in which the norm interpretations applied in local

conflicts serve as a source of state law. Cases are made into case law through legal analysis, starting with legal arguments made in lower courts and solidified by the supreme and highest courts, which seek to provide guidance on the best judicial interpretations. Legal research plays a vital and often overlooked role in this process (Guo 2015). Legal scholars in Western Europe analyse the differences in how the relevant courts interpret abstract state law (Guo 2015). In doing so, they try to find doctrines (i.e., leading types of interpretations). Such doctrines are then described in articles, monographs, and (most importantly) textbooks used by legal professionals and law students.

Case law as a source of law has an important implication for our analysis of legal failure so far. Case law makes it possible to use abstract norms while creating legal certainty and unity. Its relative flexibility and specificity means it less frequently violates local norms when compared to ordinary state law, especially regulated state law. Without case law, state law has to be much more specific in order to provide legal certainty and is more likely to conflict with local norms and lead to legal failure. So without case law as a source of law, legislators face a much tougher challenge in overcoming the law's Catch-22. Legislators must then find a way to provide both certainty and adaptability to local circumstances. A political process that provides legislators with thorough inputs on local circumstances helps them understand the local contexts their laws must fit, but the primary challenge of balancing certainty and flexibility remains unresolved.

Case law's second implication for spatial legal failure is that it serves to transform local norms into state law. As we have seen, such a bottom-up process is rare in modern lawmaking, especially for regulatory law. We could conclude that case law as a source of law reduces spatial legal failure.

In many developing civil law systems, a well-functioning system of case law is not present. China serves as an example, while other developing countries as different as Indonesia or Mali present similar problems. As would be expected in a civil law system, the current Chinese legal system does not generally recognise specific legal interpretations made by courts as a source of law (Guo 2015). This makes the Chinese legal system very unlike Western European legal systems, where despite their continental roots and lack of formal precedent, court cases are vital sources of law. The Chinese one-party state has not wanted courts to create legally-binding norms. The exclusive power over lawmaking should rest with the legislator. There has been some recent change, including the Chinese Supreme People's Court issuing so-called "Guiding Cases", selecting a handful of China's lower cases as exemplary cases that should have a binding effect (Ahl 2014; Guo 2016). Yet even with this development,

China still does not have a true, bottom-up, norm-formation system that exists in legal systems that do recognise cases as sources of law. Meanwhile, Chinese legal scholars have not systematically reviewed cases. Many cases still lack elaborate motivation to serve as proper sources of legal interpretation (Guo 2016).

All of this has had several effects. First, the Chinese legal system lacks legal certainty. One study of Chinese tort law found that a Chinese legal practitioner has no way of knowing how to interpret the generally stated constitutive requirements of non-contractual civil liability. The law itself is vague on this point, as it is in most legal systems. However, where a Dutch, French, or German lawyer or judge would turn to case law and legal doctrine based on case law, a Chinese practitioner is left only with theory or foreign interpretations (Van Rooij 2000).

The lack of case law and doctrine in China has led to the responsibility for interpretation being vested in the legislators. When rules are not clear and need interpretation, legislators may issue new rules to provide further specification, which will only lead to more spatial dislocation. Alternatively, so-called formal interpretations may be issued by selected national entities, such as the National People's Congress and the Supreme People's Courts. Because such formal interpretations are not based on lower-level norms or conflict resolution, they are in no way comparable to case law. In many ways, they are similar to regular legislation.

Thus, the problem is not only a lack of legal certainty. Systems lacking case law as a source of law, such as China, will lack mechanisms to translate local norms into the legal system. Top-down legislative interpretations and specifications will only cause more contradictions between norms in the legal system and local norms. For those countries lacking a system of case law, including countries such as Mali, Indonesia, and China, setting up such a system would be an important improvement and would serve to reduce spatial legal failure.

However, De Soto's case of legal failure shows the limits of case law as a full solution to spatial legal failure. Case law may serve to bring certainty to abstract state norms and may serve as a tool to translate local norms into state law. However, it will neither bring certainty and unity to local norms nor will it make the state legal system more accessible to the local poor.

As we have seen, De Soto wishes for the poor to gain certainty of their extra-legal rights, which are embedded in local and temporal structures. State recognition of such extra-legal rights would not provide the certainty and unity they need. Case law as a source of law would not alter this.

De Soto also fears that if the extra-legal rights of the poor were translated into legal rights, then the poor would lose access because of the technical nature of the legal system. A system of case law would not solve this.

Legal doctrine is highly complex and is very much dominated by legal elites. Otto argues that De Soto's idea of formalising the poor's rights into the formal legal system will make them inaccessible. Similarly, we may fear that relying on case law to overcome the law's Catch-22 of balancing certainty and flexibility will not improve accessibility for the poor and the disenfranchised. We can thus conclude that case law may reduce spatial legal failure but cannot solve it for all of the types of problems involved.

■ Conclusion and recommendations

As professor Otto has argued, legal failure is highly complex and related to legal, political, administrative, cultural, and economic factors (2002b). A full understanding of legal failure requires understanding the interplay of these factors within the given situation of legal failure. This article has analysed an understudied aspect of legal failure, which causes and catalyses some of the more studied factors just mentioned: the spatial contradiction between unified and certain modern state law and the variation of local norms and justice. Spatial causes for legal failure need to be taken into account when studying other factors and finding solutions. If solutions for legal, political, administrative, cultural, and economic factors do not deal with the spatial contradiction involved, the basic problem of legal failure will naturally remain, asserting itself in a new manner.

As the Catch-22 analogy has made clear, the problem of spatial legal failure cannot be solved, only reduced. The first approach is to base spatially planned lawmaking on social scientific research. A policy choice has to be made at each level of lawmaking about which norms are to be codified or regulated at that level. In general, the higher the level and the scope of application, the more cautiously legislation should be approached. Ideally, at the highest levels, only norms that will need to be implemented uniformly throughout the large scope of application should be codified. There should be few of these norms. They could then be backed up with enough economic, political, and social implementation funds, even though they may not fit all local norms or circumstances. Higher levels of lawmaking should base their decision on what laws to make (or even better, on which to keep) on the basis of what norms are absolutely necessary to provide unity and certainty throughout their scope of application. Other norms should only be made in a more abstract sense, e.g., framework legislation, permit-based systems, and procedural laws (which can be quite specific while leaving the substantive law open). Alternatively, other norms can be left for local-level lawmakers or left in custom or customary law.

Second, legislation should once again, as much as possible, be increasingly based on and sensitive to local societal norms. Legislative drafting should be based on social scientific research (Seidman et al. 2001). Such research should find out what the existing norms are within society and make a conscious choice about which of them to codify. It should further analyse the mutual effects of existing norms and new regulatory law. Such choice or analysis should estimate the effects of norm implementation and its effects on different localities. In certain localities, local norms are opposed to or different from those chosen in codification. Thus, the estimation should be made according to how those localities will react to the legislation and what the local socio-economic costs of norm implementation will be. When legal drafts are based on and accompanied by such research, the political processes of lawmaking can benefit from a better understanding of how the proposals fit the interests of different constituents.

As we have seen, for many civil law-based developing legal systems, there exists another problem which aggravates spatial legal failure: the lack of case law as a source of law combined with the lack of doctrine development through legal science. The lack of these two factors leaves no mechanism through which local norms can have an impact on the legal system. It also places the full responsibility of providing legal certainty on the lawmaker, resulting in too much and overly specific law. Such law is too rigid and poorly adapted to local and temporal differences. But perhaps even worse, it causes legal uncertainty because of unclear legislation, whose interpretation is not guided by any legal criteria, resulting in legal uncertainty.

To solve this problem, it is imperative that civil law based systems that lack a functioning system of case law start developing it. This requires several steps. It is not easy and it will take many years to do so. First, cases and decision should be published and should include as information as possible about the motivation behind the decision. Second, there should be enough published legal decisions of a certain quality. This means that the judiciary must meet a certain level of professional standards. Then legal science must start to analyse this bulk of cases and discern what commonalities can be discovered in interpretations of certain norms. On this basis, an interpretation doctrine may be developed. Finally, legal monographs, textbooks, professional standard works, and teaching materials should be written on the basis of such interpretation doctrines. In all of this, digital technology now provides excellent tools that can ease these steps.

If these steps are followed, a new generation of legal professionals will be educated to interpret the law's uncertainty on the basis of induced doctrine. This will lead to a higher level of legal certainty, while also

lessening spatial legal failure because local norms will become part of the legal system. For large unitary legal systems such as China, perhaps several different doctrines for different parts of the country may develop, as a solution to the huge spatial challenges national norms must face.

The law's spatial dimension thus poses a challenge for legal scholarship. It demands that legal scholars seek mechanisms to integrate the abstract and specific, similarly to their colleagues in social science. In this, the work is similar to sociological integrative approaches of the last twenty years, whether it is integrating "micro and macro" (Ritzer, Alexander and Wiley; see Ritzer 1996) or "agency and structure" (Giddens and Bourdieu; see Ritzer 1996). Part of the integrative approach within legal studies consists of interdisciplinary research or multidisciplinary research collaborations with sociologists, anthropologists, political scientists, and economists. An exchange of knowledge and methods leads to a better understanding of the spatial dimension of law and how its different levels of abstraction can be integrated.

This author hopes that all of these ideas will help create a truly accessible form of realistic legal certainty that promotes the goals of development that professor Otto has argued for over the course of his career.