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LESSONS NOT LEARNED:

Problems with Western Aid for Law Reform in Postcommunist Countries

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The fall of the Berlin Wall in 1989 and the subsequent breakup of the Soviet Union presented an unparalleled opportunity for fundamental political and economic change in more than two dozen countries. As postcommunist countries sought to attain the economic development of their Western neighbors, it became clear that the existing framework of laws and institutions would not support the desired growth. Reformers and development experts soon identified a panoply of gaps and shortcomings in financial resources, human resources, and organizational capacity, all of which appeared ripe for outside assistance.

North American and Western European governments responded rapidly to the fall of communism by creating a variety of financial and technical assistance programs for both Central and Eastern Europe and the former Soviet Union. Working through international financial institutions such as the World Bank and bilateral donor agencies such as the United States Agency for International Development (USAID) and Germany's Gesellschaft für Technische Zusammenarbeit (GTZ), among others, they have sought to ensure successful transitions to free-market economies and democratic government. A priority area for donor efforts has been the establishment of the rule of law, which donors commonly define as accountable, transparent government that equitably enforces laws and regulations through an independent judiciary to create a "level playing field" for economic actors.

Promoting the reform of commercial law has been a major focus within the broader rule of law aid endeavor. Early in the postcommunist period, it was obvious that commercial laws needed to be rewritten, replaced, or reformed to unleash market forces for growth and development. Consequently, donors provided numerous experts to help countries identify, adapt, and transplant best practices from a number of successful models. These experts have drafted countless laws and trained thousands of people in legal institutions in the recipient countries.

The results have varied widely. In some countries, little actual change has taken place other than the passage of new legislation. Even in the more successful transition countries, many of the new commercial laws that are now on the books are not effectively or consistently implemented, despite additional assistance to support and reform implementing institutions. In some cases, application of well-crafted laws has been hijacked by vested interests to attain advantages through market manipulation. Countless stakeholders have summarized the problem simply: "The new laws are fine; they're just not enforced."

Those who work in the legal reform business generally expected greater impact from this investment in new laws. Analysts, drafters, and project implementers often assumed that market forces would propel a greater level of implementation once the right laws were in place. Instead, a number of common problems repeatedly appear as counterparts in beneficiary countries have moved from legislation to implementation.

These problems have been independently identified by numerous legal reform professionals. They can be summarized as follows:

- *Lack of ownership:* Laws are often translated or adopted wholesale from another system as "hasty transplants," without the necessary careful, patient adaptation to the local legal and commercial culture and without substantial involvement by the stakeholders most directly affected, including the private sector and nongovernmental organizations (NGOs), not simply government counterparts.
- *Insufficient resources:* Law reform projects are too short term and too lightly funded to create the needed mechanisms and processes that would permit sufficient absorption through broad-based discussion and sustained participation in the process of reform.
- *Excessive segmentation:* Overly narrow diagnoses and responses to legal shortcomings produce projects that ignore systemic problems and fail to add up to an integrated, effective whole.

These are not revolutionary insights. Similar critiques were made of the law and development movement of the 1960s and 1970s. World Bank rule of law specialist Richard Messick has found a wealth of analysis documenting these same shortcomings twenty years ago.[1] Earlier critics were concerned with overemphasis on top-down, state-centered approaches, the use of "transplanted" laws, and reliance on the adoption of laws to drive change in the culture and habits of the local marketplace.

In many if not most cases, the lessons of the law and development movement have simply not been learned by practitioners in the new rule of law reform enterprise of the last two decades. Clearly, this is not due to a lack of existing research and writing on the earlier efforts or to a lack of awareness of the issues: Messick describes a number of debates in the early to mid-1990s on whether the new movement was likely to repeat the mistakes of the earlier one. It has.

If the current generation of rule of law aid specialists is aware of the problems and had access to a wealth of materials on these problems, why did they not learn from the earlier mistakes? I believe that the failure to learn has two root causes: first, rule of law aid practitioners tend to hold some core mistaken assumptions about the role of law, government, and culture in the development process; and second, the incentive structures within the legal reform industry do not encourage learning. Before turning to those root causes let me consider first in more detail the three basic problems cited above.

CORE PROBLEMS

Lack of Ownership: Whose Reforms Are They, Anyway?

The "hasty transplant syndrome" is a critical problem in legal reform assistance. It involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture. In some egregious cases, reformers simply translate a law from one language to another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not "take" in its new environment as evidenced by inadequate implementation.

The syndrome is often, rightly, seen as a flaw caused by foreign drafters who naively bring their own laws or their last drafting project and reformulate them for the new location. But this same approach is also sometimes reproduced by local drafters. In Croatia, for example, several respected drafters have translated German laws and submitted them successfully for passage based on the premise that Croatia shares the same legal tradition as Germany. Unfortunately, the transplants have been beset by problems, in part because German and Croatian legal systems and traditions have taken significant detours from their common sources over the past seventy years. The common root, modified by a multitude of different influences, does not produce the same fruit in different locations.

The crux of the problem is not the origin of the law per se. Indeed, German company law may be the best model for Croatia to use. Rather it lies in the pursuit of law reform processes that generally do not permit users to participate in adapting the draft—whatever its origin—to local conditions. Donor-sponsored legislative reform projects frequently use what could be called a star chamber system in which a small working group of experts quietly drafts new legislation chosen in part by outside donors, which is then rapidly adopted by the legislature with little meaningful public comment. Lack of local input, not transplantation, is the problem. The process does not permit sufficient understanding of local needs for effective drafting to address those needs. Insufficient understanding is compounded by unnecessary speed in getting laws adopted without public input or public education. And those excluded from the process have a tendency to resist changes imposed without their knowledge or informed consent.

An additional challenge is the problematic, externally driven reform agenda. Many of the new laws are hastily produced because of donor pressures to pass laws or donor-sponsored assistance that make a new law possible. As a result, policy makers are not using a reasoned, cost-benefit, socioeconomic analysis of where the reform priorities lie but are instead responding to external needs and pressures. Reformers in several countries have reported that they have *never* seen an economic benefit analysis to support legal reforms.

One of the most striking examples of the ownership problem can be found in Albania. Albania ended almost fifty years of intense isolation to reenter the community of nations in late 1980s and early 1990s. Developed countries quickly provided assistance for Albania's transition, in part through extensive legal reforms. Albanian lawyers today often speak proudly of the new system, noting, however, that the new laws are European, not Albanian, and that they are not actually being applied. This is an extreme case of hasty transplantation on a massive scale.

A more specific example of externally driven reform priorities can be clearly seen in reform of Albania's bankruptcy laws. Albania first adopted a market-oriented bankruptcy law in 1994, which combined elements of German and U.S. statutes and principles. The law was inspired in great part by conditionalities for loans and assistance from the international financial community, not by internal need. Recently a new project was undertaken to replace this law with a purportedly better one as part of a new set of loan conditionalities, not because the commercial sector wanted the change. There is a theoretical need for a proper law.[2] Albania, however, still does not have much practical use for such a law: Bankruptcy is the unwanted handmaiden of commercial debt, and Albania still has no significant level of commercial lending. When 60 percent of Albania's gross domestic product (GDP) was lost in the mid-1990s after the collapse of a national Ponzi scheme, only one bankruptcy case was ever brought because the massive national losses resulted in very little commercial default. Even

so, Albania has dutifully acquiesced to replacement of one unused law with an arguably unneeded second law to satisfy donor priorities.

It is hard to imagine any rule of law aid specialist pursuing law reform in his or her own country in this fashion. If I assembled half a dozen recognized European or U.S. specialists to redraft the U.S. Code of Judicial Ethics and then tried to get it passed by the U.S. Congress with little or no input on the proposed draft from congressional committees, the judiciary, the bar, business interests, law schools, or other stakeholders, I would be looking for a new career rather quickly. Based on many current practices, however, that career could easily be found abroad "helping" transition countries with the same process.

Insufficient Resources: Never Enough Time or Money

It is a common complaint within the rule of law aid community that the time and money afforded to the process of reform are insufficient. Most donor-sponsored law reform projects run from two to five years, but it is also common to see tightly focused task orders of only one to two years. Some projects start with specific objectives, for example, reform of the company law. Others allow the implementer to determine need by working with local counterparts to identify priority laws and then reform them. The project will commonly require establishing a professional working group, drafting the law, getting the draft approved by the legislature, and providing some form of education to the legal community about the new law. These steps make sense, but they are not normally sufficient to produce any meaningful change, other than the passage of a new law, which may or may not be meaningful.

The resources problem also has a financial side. It is much cheaper to fund a few expatriate experts with a small local staff to draft a law than to fund a wide-ranging program of public education, institutional reform, and association building, which form the foundation for implementation.

By comparison with the most generous law reform project timeline (five years), legislative changes in the United States often require anywhere from two to seven years to move from submission of a well-written draft to passage of legislation. Preparation of a draft can easily take a year, and this after a year or more of policy debate. Although all of these processes can move more quickly, it is noteworthy that the United States, with a well-developed drafting and reform system, will often take five to ten years from inception to law.[3] In postcommunist and developing countries, where there is little or no history of deliberate policy development, public discussion, or legislative debate (in other words, democratic lawmaking processes), legal reform is expected to move much faster. And unfortunately it can.

Nondemocratic lawmaking can move more quickly than democratic lawmaking because it is not hampered by the need for cost-benefit studies of different approaches to law. Nor does it involve serious policy debate, which, once settled, must be translated into legal drafts. It usually skips public review and debate of drafts by interested stakeholders—as well as searching discussion and analysis by the legislators charged with voting the law into existence. It simply needs a strong "champion," a few efficient drafters, and a compliant legislature. For many in the industry, this is the expected, if not preferred, model. One project officer in the Balkans reportedly complained that the implementers of a legal reform project "have been working for six months and haven't passed a single law." In some projects, laws are passed in less than six months.

So what is the problem? If laws can be passed that quickly, why not just do it? The apparent efficiency of command-style, authoritarian lawmaking breaks down at the implementation level. There is wide agreement that many of these "efficient" laws that have been recently adopted in postcommunist countries are not implemented sufficiently, if at all, in a reasonable time frame. Some can sit on the books for five to ten years with little actual enactment in practice.

Excessive Segmentation: Losing Focus through Hyperfocus

Segmentation is a useful tool for analysis: Divide a system into its component parts to identify gaps and problems and then work on the weak components. Applied to aid programs, this approach permits well-focused interventions, which can be very effective in a narrow sense. But it can also produce hyperfocused approaches that ignore systemic problems and fail to add up to an integrated, effective whole.

Judicial reform provides a good example of the problem of segmentation. The transition away from communism opened up the possibility of fundamental judicial reform throughout Central and Eastern Europe and the former Soviet Union. In the field of commercial law, poorly functioning, politicized courts can create serious problems for economic development by hampering business through delays and unpredictable outcomes. Consequently, numerous aid projects have been established to address weaknesses in decision making and court administration.

These programs are clearly needed. Poor court management can be addressed in a number of ways, and substantial progress can be made through adoption of new technologies in combination with modern management techniques. Judges can be educated to understand the commercial concepts now before them, so that they can make better decisions.

Though necessary, court reform and judicial education are not at all sufficient. In fact, the Achilles' heel of the system is not in the courtroom but in the enforcement division. Where court reform programs have been effective, they have resulted in faster, better, more predictable decisions that *still cannot be enforced*. In Bosnia today, for example, enforcement of a final judgment can take several years. Aid providers have helped to redraft enforcement laws, civil procedures, and court processes over the past five years, but until very recently, no one had ever spoken to enforcement officers regarding much simpler, practical problems that keep them from completing their work. The net result in Bosnia as elsewhere is no real improvement—aid providers have narrowed the ambit of reform too much and missed crucial segments. Today, enforcement issues are being addressed, but five to ten years after initial court modernization programs began. Logically, it would make sense to work on enforcement first or even simultaneously. Instead, rule of law aid providers segmented the analysis, prioritized external needs, and missed the opportunities that could have been available through a systemic approach.[4]

Another problem arises through hyperfocus on seemingly distinct areas of law that are, in fact, deeply intertwined with related laws. For example, bankruptcy is frequently treated as a stand-alone discipline despite its strong interdependence on other disciplines. Early bankruptcy reforms in Russia failed to recognize overlapping reform needs in the company law and thus ignored crucial fiduciary duty and corporate governance issues. As a result, directors of recently privatized enterprises were at times able to loot the company, transferring corporate assets to themselves directly or through shell companies, and then hiding behind an unpierceable corporate veil to maintain their gains while

shareholders and creditors lost heavily. Elsewhere, bankruptcy programs have sometimes focused on the bankruptcy law by itself, without attention to separate laws on secured transactions, the code of civil procedure, execution and enforcement laws, and other fundamental segments of the overall system. Recently, specialized work on Bosnia's lease law undermined secured transaction priorities in the bankruptcy regime because of a piecemeal approach to reform.

PROBLEM OF LEARNING (I): MISTAKEN ASSUMPTIONS

One major reason that the rule of law aid community fails to learn from the lessons of the past and of the problematic recent experience in postcommunist countries (and elsewhere) is that aid practitioners hold a set of mistaken assumptions about the importance of laws, the role of government, the impact of culture, and the level of existing knowledge about rule of law change.

Mistaken Assumption 1: New Laws Are the Answer

Underlying the core problems with many legal reform programs of the past two decades is the mistaken assumption that new laws in and of themselves are the solution. Laws, however, have no intrinsic value. They are nothing more than tools—only one of many types of tools—used for the design and implementation of socioeconomic policy. A society that wishes to improve its economic performance will inevitably use these tools, along with other policy tools, to improve the commercial climate. Having the right laws is not the same thing as having an attractive investment environment, especially if the process of policy making is not functioning effectively. One Eurasian business executive recently told me that he could personally get the laws passed that he wanted but so could his competitors. Having the "right" laws for the moment was not enough to increase his investments.

When aid providers assume that new laws are the essence of the solution, they improperly limit the scope of their assistance. Effective policy making—which results in lawmaking—is normally based on some form of social discourse between the government and numerous interest groups, which leads to selection of appropriate tools to accomplish the agreed changes. Implementation then flows from the agreement between the government and the governed. Simply reforming the tools, absent underlying policy dialogues and processes, is insufficient.

Much of the legal reform work attempted in postcommunist societies arises from an understandable but insufficient analysis of the role of law in economic development. Comparing the world's developed economies makes clear that they share common legal frameworks, including similar approaches to bankruptcy, company law, capital markets, real property, pledges of movable property, competition, and a host of other laws. Those concerned with rule of law reform have been able to assemble best practices and devise model laws based on these commonalities, all of which are useful references in the reform process.

Up to this point, the analysis is essentially sound. The breakdown occurs in moving from what is to what should be. The rule of law aid community seems to have assumed that if they simply help countries adopt the laws that have been proven to support economic development, such development would follow. Unfortunately, passage of legislation is not the same thing as implementation of policy. In some sense, this approach could be compared to a hypothetical orchard development program, in

which analysts recognize that healthy orchards all have a certain quality of apples. The analysts then fly in apples, tie them to the local trees, and momentarily assume success because the result looks like an orchard.

In legal reform projects, passage of new laws is a "deliverable"—a measure of the success of the project—rather than a way of describing a policy outcome that is needed but not yet functioning. Projects are graded on their ability to get laws passed. Aid projects are built on the assumption that new laws will be implemented after they have been passed, with some unspecified mechanism, perhaps public education or continuing legal education (CLE) courses, providing the necessary basis for implementation. But implementation is a function of consensus on the ends and means of the law. When law reform projects fail to forge consensus, they mistakenly rely on enforcement to bring the recalcitrant into line.

Passing a law is only one step, and not necessarily the largest or most important one, in creating and implementing *policy*. If rule of law aid practitioners see themselves as engaged in a policy development and implementation process—which includes research, debate, negotiation, public education, outreach, institutional capacity building in parliament, development of skills in translating policy into legislative drafts, revision of drafts based on local political compromises, and a host of other steps—then the role of laws falls back into its proper place and allows them to build projects more likely to bring the results they have inaccurately assumed that laws alone would achieve.

Mistaken Assumption 2: Governments Are the Key to Achieving Legal Reform

The need for government involvement in legal reform programs is undebatable; the extent and nature of that involvement are not. Rule of law aid practitioners have assumed too great a role for governments in the law reform process—underemphasizing the role of the private sector and civil society—and have assumed too quickly that postcommunist governments are ready to oversee well-conceived legal reform projects. Although many postcommunist governments have made important strides in creating formal democratic institutions, too few have developed adequate mechanisms of political transparency and accountability. As a result, the input, feedback, and accountability that often characterize lawmaking processes in Western democracies are feeble or nonexistent in the postcommunist legal reform environment. One Macedonian practitioner characterized a common sentiment for her country, noting that many Macedonians see the state as "someone else's government." After 400 years under Ottoman rule and 50 years under Tito, a culture has developed for defending oneself against government, not engaging with it.

Mistaken Assumption 3: Cultural Issues Are Peripheral to Legal Reform

Rule of law aid specialists often assume that cultural issues are of peripheral importance to their work. Consequently, they lack a vital analytical component when they seek to understand why new laws are not implemented. Sometimes the resistance to implementation and acceptance comes from cultural predispositions, not some technical failure of implementing and supporting institutions.

Examples of the adverse effects of certain cultural factors can be seen in a number of judicial reform projects. Throughout the Balkans, court procedures are delayed excessively through well-developed tactics of lawyers. Failures to appear, to produce evidence, or to meet deadlines generally

result in a grant of extensions without sanctions. As a result, even simple cases can be tied up for years in court. Judicial reform projects rightfully focus on improving case and court management but do not necessarily work from a cultural understanding of those delays.

This culture of delay within the courts of some transition or developing countries arose, to some extent, during a period in which judges and attorneys for private sector litigants attempted to mitigate authoritarian rule by hobbling the state's ability to prosecute claims through the courts. Judges and lawyers won respect by protecting individuals, not by efficiently enforcing unpopular policies. This protective approach also appears in "debtor-friendly" practices that inhibit enforcement by larger concerns (banks) against less powerful, unfortunate figures (debtors). A local drafter in the Balkans has noted that certain provisions of a recently enacted enforcement law were designed to prevent rather than enforce repossession of land and personal property.

This problem is highlighted in Bulgarian literature. In the 1950s, Bulgarian author Elin Pelin published the short story titled *Andreshko,* in which the principal character became a hero through resisting enforcement. The protagonist, Andreshko, is a poor farmer who picks up a traveler while driving his horse cart back to the village. As they converse, Andreshko discovers that the traveler is an enforcement judge who is going to Andreshko's village to seize the assets of a neighbor in satisfaction of a tax lien. Torn between his legal duties and his loyalty to a friend, Andreshko decides for the friend. He pretends to take a short cut but instead drives the cart into a swamp until it is mired. He then unharnesses the horse and rides home alone, abandoning the enforcement judge. This story has been taught to schoolchildren for over forty years. Today, Andreshko is the patron saint of resistance to enforcement, the heroic defender against attachment. Overcoming his legacy will not be met simply through better written laws.

The implications of such cultural barriers are significant. Some can be addressed through public education. For example, Bulgarian legal reformers would do well to distinguish Andreshko's resistance to tax liens from liens based on a debtor's nonpayment, showing that a lack of enforcement reduces credit availability and economic growth. Likewise, overcoming court delays must include reorientation of practitioners to the economic benefits of speed, especially in suits between private parties and against the state.

Cultural considerations can also shape the way in which reforms are presented and developed. Croatia is well known among implementers for its pride in Croatian solutions. Officials and others involved in the reform process regularly announce that no foreign input into laws or policies is needed, stating, in essence, that Croatia is intellectually self-sufficient. Assistance, therefore, must be carefully provided so that it is seen as coming from local resources. When a foreign expert insists on public credit for an idea, Croatians listen, publicly reject the assistance, then wait a few years until the foreigner leaves before they use the information.

By neglecting serious study of cultural barriers and differing values, rule of law aid practitioners often find themselves at cross purposes with those they are attempting to help. The emphasis on improving enforcement mechanisms for laws—including greater utilization of police and other enforcement agents—without building consensus for the changes to be enforced ignores the fundamental fact that many of these countries have finally thrown off a strong state after years of oppressive enforcement. There is widespread, unspoken, internalized resistance to empowering the state. It should not be surprising when efforts to restore dismantled structures are not immediately welcomed.

Mistaken Assumption 4: The Processes of Legal Changes Are Well Understood

Rule of law aid providers often act as though they have a scientific basis for their work. They believe that a bankruptcy regime will help accelerate reallocation of productive assets in support of privatization programs, or that each country needs its own stock exchange for capital markets to develop. Millions of dollars have been spent on the basis of both beliefs, but is there any evidence to justify this? In my experience (equally unscientific), privatization cases overwhelm the courts because of their political implications, and new stock exchanges do not produce a return on investment sufficient to justify the expenditures. As Thomas Carothers has argued convincingly, the legal reform industry does not yet have a solid, scientific basis for the various approaches and ideologies used in attempting to bring postcommunist and developing countries into the world of democratic, market-oriented systems.[5]

Without better analysis, current knowledge will remain insufficient to inform changes or judge success. But even when rule of law reformers begin to establish a better knowledge base, there will be a second danger. Practitioners tend to misconceive the nature of their endeavors, believing that they are applying scientific knowledge instead of testing hypotheses. The fact is that those in the rule of law aid community are experimenters in a new discipline. They may understand what an average legal framework looks like in an advanced economy, but they are still trying to understand how those advanced economies came into being. They simply do not know whether lessons and laws can be successfully transplanted or whether there are negative side effects from their approaches.

Learning is hampered when practitioners take as proven something that is hypothetical. Such presuppositions retard and misdirect analysis. If one can honestly approach projects as experiments based on reasonable hypotheses, then one can more accurately determine whether the hypotheses are correct. Experiments do not fail; they provide information on whether a hypothesis fails under given circumstances. Perhaps this problem, as much as any other, has contributed to repetition of the mistakes of the law and development movement. Specialists in the rule of law simply did not recognize the experimental nature of their work and thus have failed to look for the wealth of existing information on earlier failed hypotheses.

PROBLEM OF LEARNING (II): LACK OF EFFECTIVE INCENTIVES

The persistent lack of learning within the world of commercial law reform projects and other rule of law assistance is not merely due to stubbornly held mistaken assumptions on the part of practitioners. Another major factor is a lack of proper incentives in the aid community for learning. Generally speaking, rewards are available for those who know, but not necessarily for those who learn. Project design and selection processes reward repetition, not innovation. Attempts to change this process have failed because they do not take into account the fact that the contractor side of the aid industry is also hampered by a counterproductive incentive structure. When lessons are actually learned, they are not shared, because the incentives only encourage production and storage of knowledge, not publication.

Incentive Problem 1: Incentives for Knowing, But Not for Learning

The legal reform industry regularly recruits and attracts experts and specialists with ten to twenty years of professional experience in both developing and transition countries. This is appropriate.

These experts are then expected to report for duty with a full understanding of what needs to be done under their terms of reference and begin doing it. This is inappropriate.

Each new assignment should require extensive preparation for the new conditions, cultural variations, and demands on the otherwise qualified specialists who will implement the project. Most will learn on the job, correcting mistakes as they go, but very few will be paid for learning as part of their job. Many mistakes could be avoided through preparation, especially structured preparation, but very little preparation is contractually permissible.

In ten years of recruiting and fielding consultants, especially for short-term work, I have generally had to fight for permission to provide those consultants with more than two days of preparation time, even when my team has assembled hundreds of pages of reports, studies, and documents for them to use in their work. In many projects, expatriate consultants can be paid only for time spent in the field, not for work done elsewhere, including the work of preparation. It is not surprising then that many of these consultants show up insufficiently prepared for the specific setting, though well versed in their subject matter specialty. As a result, much learning is done through mistakes that could have been avoided through preparation based on the wealth of published knowledge.

This problem is partly financial and partly semantic. Obviously, it costs more to pay people to engage in structured learning. In an award system based on competitive pricing, it is unlikely that many implementers will reduce their opportunity to win contracts by elevating the price to cover the cost of ongoing training for their project personnel. Contractors that keep their prices down by bidding experts with no assumed need for more learning will always have a competitive advantage in the bidding process.

The definition of expertise, then, becomes a key consideration. In many venues, an "expert" is expected to know all that should reasonably be known about a given subject. To admit that something is not known is to admit weakness. Although such caricature seems laughable, it is often the norm. Those funding the experts expect certain results without further investment in learning. Many experts are loath to admit that they do not know something about their area of expertise because it could affect a decision to hire them again, especially when they are billing maximum rates. Experts who freely admit that they need to do further study are rare, even though anyone asked to work in a new context is likely to need additional study. Perhaps it is time to reconsider what is expected from experts.

In the broader market for legal services, there are a number of incentives that motivate lawyers to participate in ongoing education and learning, which could be expected to promote continuing education with legal reform experts. First, competition makes it necessary for lawyers to stay abreast of developments lest their clients leave them for better service providers. Second, law schools update their teaching and curricula on a constant basis for similar reasons, so that baseline knowledge continues to advance. Third, there is a continuing legal education industry that meets the demand for new courses and new information, fueled in part by mandatory ongoing education requirements. None of these incentives is in place for legal reformers.

Education and training in legal reform have not, to my knowledge, been institutionalized. Although some donors or contractors offer occasional in-house seminars for their employees, and some law schools examine the impact of law in developing or transition countries, I know of no structured program for legal reformers nor of any consistently available system of continuing education in this field. Market analysis suggests that there is no such program because there is insufficient demand, and such demand is depressed because the marginal return on investment in such education is insufficient.

Legal reform practitioners do learn, but they learn individually and have few if any avenues for passing that knowledge on to others. Although they write papers and reports on lessons learned, very few people read them. The information produced is passive, awaiting discovery. There is no significant system of structured learning in which such information is actively analyzed, critiqued, and presented to those whose task is to apply the lessons.

Incentive Problem 2: High Incentives for Repetition, Low Incentives for Innovation

Within the legal reform industry, most projects are awarded through a competitive procurement system in which various service providers offer technical and cost proposals in hopes of winning work. (On occasion, donors will issue a sole source award, but this practice is quite limited and is generally reserved for less expensive projects.) Such competition helps to keep the service providers sharp. One might expect this competition to inspire creative, innovative offerings that challenge and advance industry knowledge as lessons learned from past projects are incorporated into bids for new projects. Unfortunately, this is frequently not the case.

Competition is desirable, but it is also expensive. Individual firms and consortia will often spend 5 to 10 percent of the value of a contract on their proposal effort. For larger projects, such as USAID's multimillion-dollar indefinite quantity contracts, the cost of submitting a proposal can easily run from $50,000 to $100,000. As a result, the bidders seek to keep their risks low to improve their chances of success.

The higher the cost of a proposal, the greater the strategic effort to reduce risk. This often includes careful analysis of those who have written the request for proposals or who are likely to grade the proposals, in addition to very close analysis of the tender documents. Why the emphasis on those behind the request? Successful bidders understand that those who wrote the request have biases and preferences, and that they are seeking "correct" answers that meet their expectations.

It is an open secret among contractors that a proposal should not challenge or contradict any significant assumptions incorporated into the request for proposal or espoused by those likely to be involved in awarding the contract. Instead, the recipe for success is to slavishly give back what is asked for in order to win the bid, then negotiate a different approach at the contracting stage, or simply implement based on the contractor's approach, not on the award. "Win it now and fix it later" best expresses the strategic approach of contractors.

At one level, this makes complete sense. If a buyer wishes to purchase a product through competitive bidding, then an intelligent seller will offer exactly what is being asked. If the seller truly believes that the requested product will not achieve the ends sought, it would seem appropriate to discuss the assumptions with the buyer. Indeed, donors (buyers) often expect to see innovation and new approaches in the bidding process. However, if the rest of the competitors are expected to

regurgitate the underlying assumptions, then such innovation will increase risk for any competitor breaking ranks by challenging assumptions.

In other words, the bidding process does not encourage any serious discussion of lessons learned, especially from mistakes of the past. (Indeed, to admit mistakes is to suggest that the contractor should not have been paid for the past contract and is not qualified for the next.) Bidding success is based on regurgitation and repetition—a reasonable attempt to match offer with expectations, not to encourage new thought.

There is one exception, however. Often, contractors will share insights gained from prior implementation as they pursue new contracts. Contractors will highlight these best practices or lessons learned in the proposal to set them apart from their competitors. Evaluators may then have several approaches to consider, which, if shared broadly, could enrich the overall pool of knowledge. Unfortunately, however, these innovations are not shared, because proposals are proprietary and confidential. The award takes the form of a contract to implement the statement of work in the request for proposals, which does not lead to publication of the winner's approach. Such innovations are treated as trade secrets.

Incentives for innovation would be better placed outside the bidding process. This, however, has its own difficulties. Several senior USAID project developers have tried seeking input from the consulting industry. Partly in response to the criticisms raised above and partly in an admirable quest for better input and design, they have circulated drafts for comment before issuing a final request for proposals. The results have been disappointing.

The consulting industry is unlikely to invest much time in commenting on a draft for two important reasons. First, analysis and comment cost money. Those assigned to the task must be pulled off other billable work or off analysis of actual (not draft) requests for proposals and preparation of bids. The cost will not necessarily be recovered when the draft becomes final, because the draft may never become final and the comments may not be accepted or incorporated. Although it is reasonable to expect development professionals to provide input to improve the system, it is unreasonable to expect them to do so in this way. Financial incentives are needed to cover financial losses.

A second constraint on input is that many contractors feel that any lessons they have learned can be used to give them a competitive advantage once the proposal is issued. It is therefore self-defeating to improve the overall proposal process if it reduces their competitive edge. Legal reform is a business. Although it is heavily populated by dedicated individuals who would like to see all reforms done more effectively, these individuals need jobs, and withholding valuable information until the bidding stage is perceived as one means of increasing the likelihood of continued employment.

Incentive Problem 3: High Incentives for Guarding Information

Theoretically, each new legal reform endeavor deepens the overall body of knowledge about such work. In reality, a number of people do learn something, probably even something useful, but the lessons are unlikely to be shared widely. Most donors and projects have information management or sharing directives, and these often result in the creation or enlargement of report libraries but seldom in any significant increase in knowledge among implementers.

The value of a library is not just in the quantity of volumes it stores but also in the quality of those volumes and the number of people who use them. The legal reform industry has produced thousands of reports and other materials, many of them stored in donor libraries, which are increasingly accessible on the Internet. Virtually every topic of law has been assessed, analyzed, and opined upon, but very few ever read this material. Why not?

As already noted, few practitioners have the time to research and analyze existing literature because they are paid to know and not to learn. For those who have the time, or who are paid to study, much of the available literature is not worth the effort, and many of the better documents are unavailable. Both quality and availability are influenced by incentives.

Reports are written primarily by people who are paid by those who receive the reports. The writer's job is to provide information in such a way as to meet the client's expectations. One of those expectations is implementation success that will justify ongoing or new funding. If a report points out that some aspect of a project is not successful, this may affect the flow of funding. Thus, there are very few reports detailing mistakes or failures. Where they exist, implementers know how to describe them as successes.

It would seem that the project managers of the funding organization could overcome this self-serving trend, but that too is difficult. A manager's job is to make sure that implementers stay on course, avoid mistakes, and use funds well. If that has not happened, then managers may be subject to career setbacks. Their bosses could also provide safeguards against self-serving assessments, but they too must answer to someone higher with similar expectations. In short, there is an unintended but natural "conspiracy" all along the funding chain to characterize weakness as strength and failure as success to avoid sanctions perceived as inherent in telling the truth. As long as mistakes are considered sins, almost no one is going to admit them. Hiding mistakes, rather than learning from them, is the norm.

Lessons from mistakes often may not be documented, but many other lessons are. Donor shelves are replete with excellent analyses and insightful assessments that could be useful to others pursuing the same reform goals. But very few of these documents journey from the shelves—whether physical or electronic—to a wider audience, for several reasons.

Some of the best analyses are withheld by the donors due to political sensibilities. Critical assessments that include open, honest assessments of counterparts (including government, private sector, donor, and other counterparts) are withheld or sanitized to avoid controversy. For World Bank projects, this is particularly problematic, as almost all useful analysis is deemed to belong to the government of the country being analyzed and often unavailable to the broader legal reform community. Information flow is thus cut off at the outset.

Reports prepared by contractors are a somewhat different matter. In the USAID context, all contractor work product belongs to the public, unless withheld by USAID. It is difficult to believe this, however, when trying to obtain copies from competitors. Contractors frequently treat work-for-hire under USAID projects as privileged information to be withheld from competitors, even if not being used for competition. As noted previously, such information is believed to give a competitive edge for winning additional work, and there is no perceived upside to sharing it openly if it may lower the chances of winning. Most contracts require all technical reports to be filed directly with USAID, but that does not make the information any easier to find or retrieve. Guarding information is still seen as a useful and necessary competitive strategy.

Information can be shared in numerous ways, not only through reports. One popular approach among donors and some government counterparts is to organize structured collaboration between various implementers. This often takes the form of "donor coordination meetings" among multiple donors or similar events among multiple implementers of one donor. But the more official these meetings are, the less information is exchanged. Once again, the incentives are going in the wrong direction.

Donors and their implementers compete with each other. Although they readily espouse common goals, they just as readily work at odds. Formal meetings breed formal presentations, in which each presenter puts the best face forward to impress their superiors, counterparts, and other participants. They do not admit difficulties or shortcomings in these settings, fearing the consequences of showing weakness. These consequences can be economic (contractors regularly lobby to get donors to reassign resources to them from someone else's struggling project) or simply embarrassment among peers. If the emperor has no clothes, it is pretty certain that no one will point this out during a collaboration meeting.

Despite these constraints, collaboration does occur—among friends. In my experience, the best information exchange happens among implementers, counterparts, and consultants who get to know one another informally. The relationship provides a context of trust in which individuals can openly explore their assumptions, difficulties, and challenges without concern for negative career impact. It is hard to institutionalize such trust, but considering how to encourage relationship building should be part of project design.

Incentive Problem 4: Disconnection between Performance and Awards

In a normal market for services, demand precedes and defines supply, with suppliers rewarded based on their ability to satisfy the needs of the buyers. This feedback loop allows for correction and learning as buyers communicate satisfaction and dissatisfaction to the suppliers. Legal reform is not a normal market, however, because supply and demand are not sufficiently connected.

The problems arise at various levels. First, the market is not sufficiently based on demand but is driven by suppliers of legal reform assistance. Donor nations compete to provide assistance based on their own need to influence the beneficiary for any number of reasons: altruism in improving socioeconomic conditions, self-interest in improving markets, or foreign policy concerns of rewarding collaboration. In the end, recipient countries are not generally shopping for services in a competitive market but are being offered free or subsidized assistance on a take-it-or-leave-it basis. As one Macedonian colleague put it, "How can we possibly say 'no' to a donor?"

Second, the beneficiaries are often insufficiently or incorrectly identified, so that suppliers are not necessarily getting feedback from the right parties. Legal reform projects frequently seek to satisfy only those stakeholders directly involved in the legal system: fellow lawyers, judges, and law professors. The purpose of commercial law reforms, however, is not to have better laws but to enhance socioeconomic development, which would suggest that the business sector should be involved in defining needs and priorities ("demand"). But private sector businesses are seldom an integral part of commercial law projects, except as a target group for education when lawyers and professors (who often have no business experience) complete their reforms of the business environment. Put another way, legal reformers do not learn what they ought to because they are

talking to the wrong people about what they do. Just because lawyers or judges are pleased with the reforms does not mean that the heart of the economy is beating better. Unless economic actors become the focus of the reform efforts, practitioners are merely talking to themselves.

Third, beneficiaries do not determine success or failure: donors do. Contractors fail when they do not meet various requirements for deliverables under their contracts with donor agencies. Deliverables are designed to produce certain results—drafting of new laws, for example—which in turn are supposed to produce positive socioeconomic change. A contractor can be completely successful and receive full payment even if full performance has resulted in negligible benefits. Lessons learned by contractors relate primarily to pleasing donors to ensure future contracts, which may not require significant performance adjustments. There are few, if any, direct incentives to adjust performance for greater economic impact.

This problem is exacerbated by the attenuated process of design, implementation, and evaluation of projects. Procurement regulations often prohibit those who design projects from bidding to implement those projects. Thus, potential for learning from mistakes in design is reduced. Service providers who eventually win a donor's request for proposals frequently employ professional proposal writers or home-office managers who do not participate meaningfully in the actual implementation. Implementers themselves tend to be mobile consultants who move from project to project, executing contracts for which they provided little if any input at the design stage. After their work is completed, the project will eventually be evaluated for impact by yet another team working for either the donor or a competing contractor. Measurable impact may take years to appear, by which point the designers and implementers have already moved on to other countries and projects. If any lessons are learned along the way, they may not influence future design or implementation. As already noted, such lessons are not actively captured or imparted through any system of structured learning.

NEED FOR NEW MIND-SETS AND INCENTIVE STRUCTURES

The lessons of an earlier generation of rule of law aid practitioners were lost along the way to the most recent wave of efforts. Hasty transplants and short time frames, among others, were expressly identified in the 1970s as problems, yet practitioners have had to rediscover these findings anew, with substantial waste of resources. Improving the learning curve will require reduction of learning constraints. If the theories presented above about the nature of these constraints are correct, then most of the barriers can be reduced by correcting assumptions and adjusting incentives.

The starting point for change is in the assumptions made by rule of law practitioners, because assumptions define both approach and the critiques of that approach. The legal reform community must recognize that law is only a tool for reform and not its goal. This will allow practitioners to gear their efforts more effectively toward the actual goal: socioeconomic prosperity. Prosperity will require changes in law, but as an outgrowth of a policy development process that flows from popular demand for change. By recognizing that law reforms are only one step in a more complex process, the legal reform community can begin to develop a more complete and effective analytical framework, which will allow for the design and implemention of assistance programs that are better calculated to achieve the prosperity desired.

The rule of law aid community also needs to reconsider the incentive systems of the legal reform industry and how they affect learning. Currently, the system does not actively promote learning or distribution of knowledge. Practitioners will behave differently, however, if the incentives of the industry are redesigned to favor sharing over hoarding and reward investment in learning. The community must also institutionalize the learning process on an industry basis. Legal reform is a separate subspecialty of economic development (not law) requiring a specialized body of courses and materials available for practitioners.

Changes are under way. A small but increasing number of projects are being designed with serious commitment to interacting effectively with a broader range of relevant stakeholders. Some of these newer projects also commit substantial resources to public education to ensure broader understanding and acceptance of proposed reforms. Unfortunately, a greater number of projects continue to operate under old assumptions and incentives in which interaction is limited to small working groups and public education consists of a few brochures.

More changes are needed. Postcommunist countries continue to struggle with internal and external demand for competitive commercial environments. Little will be achieved, however, unless those involved in rule of law reform can actually learn the lessons available from past efforts. Such learning will require a candid assessment of current work and a commitment to reform. This may entail a temporary increase in financial expenditure by those paying for commercial reform, but such costs should be readily recoverable from the improvements that result from finally applying the lessons that should have already been learned.

NOTES

1 Richard E. Messick, "Judicial Reform and Economic Development: A Survey of the Issues," *World Bank Research Observer,* vol. 14, no. 1 (February 1999). See particularly the discussion of the law and development movement, pp. 125–8.

2 Clearly, bankruptcy laws are needed as part of the overall framework for commercial transactions. The high priority, however, seems to be based on the need for liquidation of defunct state-owned companies, not for an efficient market-exit mechanism when commercial enterprises fail. In the case of Serbia, bankruptcy law has been seen as a solution to the political problem of putting unpaid workers out of their jobs in failed state companies by shifting the responsibility for the layoffs from the state to the judges. Judges see this and resist by delaying cases for years.

3 The United States is not the only example of this "slow" reform. Even much smaller Western democracies, such as Austria and the Netherlands, can take years from inception to passage of new laws, using well-developed, existing mechanisms and processes.

4 The systemic approach should include reevaluation of the existing system in light of existing needs. Judicial systems of many transition countries were not designed to adjudicate commercial disputes between private parties. In the former Yugoslav republics, common problems of excessive delays indicate that such delays were deliberately designed into the system, especially as the state became one of the principal debtors subject to suit. Bosnia recently replaced its system with one designed to achieve more rapid, responsible resolution of claims. Reform can result in doing the wrong things more efficiently through improved court administration and management without necessarily addressing the more important problems of design.

5 Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge,* Carnegie Working Paper no. 34 (Washington, D.C.: Carnegie Endowment for International Peace, January 2003).

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