

The Scaffolding for Legal Infrastructure: Developing Sustainable Approaches*

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I. INTRODUCTION

Development assistance has changed significantly in the last twenty years as legal reform programs have become a staple of comprehensive aid programs to countries in transition. In the wake of World War II, the United States and other countries contributed to the reconstruction of the physical infrastructure of Europe under the aegis of the Marshall Plan.¹

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1. The Marshall Plan, officially the Europe Recovery Program, is considered one of the most successful foreign assistance programs. From 1948 to 1951, the U.S. government provided \$12.5 billion in grants and loans to assist Europe in recovering from the devastation of World War II. Under the program, countries received substantial assistance to purchase raw materials and semi-manufactured products, food, feed and fertilizers, machines, vehicles, equipment, and fuel. MICHAEL J. HOGAN, *THE MARSHALL PLAN: AMERICA, BRITAIN, AND THE RECONSTRUCTION OF WESTERN EUROPE, 1947-1952*, at 415 (1987). The Marshall Plan also provided statistical and technical assistance through the Bureau of Labor Statistics that was directed at increasing

Under the Marshall Plan, the U.S. government assisted in modernizing mines, rebuilding canals, providing equipment for oil refineries, and providing funds for similar material assistance.² Starting in the 1960s, the idea began to take hold that technical assistance programs could also play a fundamental role in changing the trajectory of social and economic development and complement foreign assistance support for building physical infrastructure.

In the 1960s and 1970s, over a period of about ten years, the law and development movement strived to reform legal systems to assist economic development, emphasizing the reform of legal education and the legal profession in the target countries as means to achieve development objectives.³ The major proponents of the movement later proclaimed that this effort was not successful.⁴ But some commentators pointed out that this pronouncement was premature because “ten years is hardly a sufficient time in which to evaluate the success or failure of what was universally recognized to be a monumentally difficult project.”⁵ Several years after the demise of the law and development movement, rule of law programming began in earnest through assistance programs to Latin American countries in the 1980s. It then gained momentum in the 1990s as the countries of Central and Eastern Europe freed themselves of Soviet domination and the Soviet Union ceased to exist.⁶

productive efficiency and labor productivity in Western European industry. Solidelle F. Wasser & Michael L. Dolfman, *BLS and the Marshall Plan: The Forgotten Story*, 128 MONTHLY LAB. REV. 44, 44 (2005). The United States provided other technical assistance, bringing as many as 24,000 Europeans and later Japanese, Koreans, Taiwanese, and others to the United States. The funds for this assistance comprised only 1.5% of the budget of the Marshall Plan. Charles Weiss, Jr., *Eurasia Letter: A Marshall Plan We Can Afford*, 106 FOREIGN POLICY 94, 97-98 (1997).

2. Diane B. Kunz, *The Marshall Plan Reconsidered: A Complex of Motives*, 76 FOREIGN AFFAIRS, May-June 1997, at 162, 168.

3. Brian Z. Tamanaha, *The Lesson of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 473 (1995) (book review).

4. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1063; see also Kirsti Samuels, Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt 1 (World Bank Soc. Dev. Working Paper No. 37, 2006) (arguing that the Law and Development effort “was declared to be a failure”); see also Tamanaha, *supra* note 3, at 473 (noting that the crisis was ultimately rooted in disillusionment with the liberal legal model in the United States, rather than the situation in the developing world).

5. Tamanaha, *supra* note 3, at 473; see also Bryant G. Garth, *Rethinking the Process and Criteria for Success*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY 11, 14-15 (Rudolf V. Puybroek ed., 2001) (noting that although law and development efforts were considered to be failures, some projects set the stage for the efforts that took place a generation after).

6. For a good discussion of how the rule of law has been given various definitions by practitioners and scholars, see Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in

The twin goals of these programs were to develop the legal infrastructure⁷ to facilitate the transition to democracy and to support a market economy.

These efforts have been the subject of criticism,⁸ both because of a perceived lack of clarity in their ultimate goals⁹ and because of their approaches to accomplish the goals.¹⁰ Some host governments candidly admit that although they may begrudgingly listen to expensive expatriate experts advising them on how to build legal infrastructure, they are primarily interested in material assistance such as computers or other equipment. This Article explores a number of development approaches to guide the work of foreign assistance providers on how to support the emergence of the legal infrastructure of fledgling democracies with new market economies. As I discuss below, these approaches are not mutually exclusive but rather overlap and are interrelated. This Article is based on my experience over the past decade with implementing projects, primarily in Europe and Eurasia, to develop legal infrastructure.

PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 33-34 (Thomas Carothers ed., 2006). Kleinfeld summarizes the essential difference:

[T]here are two very different ways of defining the rule of law that are being discussed in parallel conversations. The first style of definition enumerates the goods that the rule of law brings to society. A society with the rule of law is a society that instantiates these goods or ends, such as law and order, a government bound by the law, and human rights. The ends are the reason why we value the rule of law and are what most people mentally measure when determining the degree to which a country has the rule of law. Another type of definition describes the institutions a society must have to be considered to possess the rule of law. Such a society would have certain institutional attributes, such as an efficient and trained judiciary, a noncorrupt police force, and published, publicly known laws.

Id. at 34-35.

7. One author defined legal infrastructure as the “entire system of rules, procedures and institutions that undergirds global financial activity.” Edward S. Knight, *Legal Infrastructure for the New Global Marketplace*, 34 INT’L LAW. 211, 212 (2000).

8. See, e.g., Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 6, at 15, 27 (“The rapidly growing field of rule-of-law assistance is operating from a disturbingly thin base of knowledge at every level—with respect to the core rationale of the work, the question of where the essence of the rule of law actually resides in different societies, how change in the rule of law occurs, and what the real effects are of changes that are produced.”).

9. Kleinfeld, *supra* note 6, at 34-35.

10. See Daniel Berkowitz, Katherine Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 164 (2003) (“[T]he impact of legal reform efforts has been at best limited.”).

II. *IF IT'S TUESDAY, THIS MUST BE BELGIUM* SYNDROME

In 1969, a film was released with the title *If It's Tuesday, This Must Be Belgium*.¹¹ The film was a spoof about tourists on a prepackaged tour in which the heroes of the film are supposed to see everything there is to see in Europe in only eighteen days. They wake up every day in a new country, not knowing where they are or what they are doing there. In the development world, consultants hired by assistance providers have similarly swooped down on unsuspecting countries with computers filled with laws from their respective countries of origin or the last consultancy on which they worked. Although some may be experts in their respective, substantive area of the law, others may be called to give counsel on areas far-removed from their experience or training. Other consultants simply do not have a firm grounding in the background or needs of the local legal landscape. The lawyers who are hired for this daunting task simply perform a search and replace function on their word processing program, substituting the name of the country for which they are drafting a new law.¹²

As countries endeavor to meet certain benchmarks such as those required by accession to the World Trade Organization (WTO), they may be inclined to have a law on whatever the subject may be sooner rather than later. The temptation may be to accept from some assistance providers the wholesale incorporation of laws into the legal framework of newly independent countries. This approach breeds contempt within the local community. As one insightful commentator stated, "legal reform

11. *If It's Tuesday, This Must Be Belgium* (Wolper Pictures 1969).

12. See MARK DIETRICH, LIZBETHE HASSE & KETEVAN KVATSKHAVA, U.S. AGENCY FOR INT'L DEV., RULE OF LAW ASSISTANCE IMPACT ASSESSMENT: GEORGIA 38 (2002), available at http://pdf.usaid.gov/pdf_docs/PNADC209.pdf ("Another concern is that some laws are just translations of American, German or Dutch models resulting in complaints about a patchwork of contradictory approaches and a lack of any 'stake' by Parliament or the citizenry in the legislation."). Throughout this Article, I rely extensively on reports and assessments of projects financed by the United States Agency for International Development (USAID). Those who are directly involved with a project prepare reports for USAID and the author may sometimes present a less than disinterested view of events. See Samuels, *supra* note 4, at 13-14 (concluding that self-evaluations are "not particularly helpful in determining the effectiveness, rationale, and program strategy"). Some reports, in contrast, are refreshingly candid about the challenges and problems of a particular project. For some projects, USAID requests outside evaluators to prepare "assessments" of a project. These are supposed to be more objective and more candid, although as one expert writes, the data collected from assessments are not comparable from one country to the other because researchers have different priorities in topics, and they may simply be "impressionistic conclusions and recommendations drawing on the findings of the various assessment teams." GERALDINE DONNELLY, U.S. AGENCY FOR INT'L DEV., FROM RULE OF MEN TO RULE OF LAW IN EUROPE AND EURASIA: A SYNTHESIS OF EIGHT COUNTRY IMPACT ASSESSMENTS 11 (2004), available at http://pdf.usaid.gov/pdf_docs/PNADC210.pdf.

projects also generate resentment as they are often depicted as tools designed to impose alien legal regulatory schemes that undermine the indigenous legal culture.”¹³

Another commentator suggested that it is “staggeringly obvious” that “law reformers should not simply import laws from other countries” and that this lesson, once learned, reflects on “the weakness of many of the aid efforts.”¹⁴ Indeed, the blithe transplantation of laws from one country to another cannot be sustained over the long-term, but this approach should be distinguished from the need of local drafters to look for models from other countries to determine the most appropriate law for their country.¹⁵ For example, there was a significant effort to establish model laws, including major legislation such as the Civil Code, Joint Stock Company Law, and others, under the aegis of the Interparliamentary Assembly of the Commonwealth of Independent States. Those former republics of the Soviet Union, especially those with a thin reserve of legal talent, used these model laws as a basis for drafting their own laws. This effort was not dissimilar from the various states in the United States adapting uniform codes such as the Uniform Commercial Code and passing the codes as their own state law. Reviewing models from other countries allows a country to jumpstart its efforts to draft legislation or to adopt a legal reform approach. It also can help a country standardize its legislation with that of neighboring countries to help facilitate trade and commerce. Consequently, local drafters may be able to avoid the *If It’s Tuesday, This Must Be Belgium* syndrome if they look at texts from other countries to determine the most appropriate model for their country and try to understand the policy decisions underlying the various approaches.

Lawyers who have the background and skills for this kind of work are few and far between. As one former United Nations official working in the early days of the United States Mission in Kosovo recounts, “[r]unning failed states or nation-building is not a common task. Lawyers with the necessary skills and experience are not easily found.”¹⁶

13. Julio Faundez, *Legal Reform in Developing and Transition Countries: Making Haste Slowly*, in *COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY*, *supra* note 5, at 382.

14. Carothers, *supra* note 8, at 25.

15. KENNETH W. DAM, *THE LAW-GROWTH NEXUS* 224 (2006) (“A developing country embarking on legal reform will be wise to look at a menu of reform possibilities and undertake a serious review of what has worked and not worked in other countries, developed and developing alike.”).

16. Anthony J. Miller, *UNMIK: Lessons from the Early Institution-Building Phase*, 39 *NEW ENG. L. REV.* 9, 11 (2004).

Those foreign experts who do have the requisite background and skill can play a significant role by assisting the drafters in understanding why countries have adopted various approaches. In this way, the local drafters will have the tools to make an informed decision regarding which approach is the most appropriate for their country given its legal tradition, politics, and culture.

III. PROCESS AND PROCEDURES BUILD LEGAL INFRASTRUCTURE

There are numerous, varying approaches to supporting efforts to draft legislation within a transitional market economy. These efforts can be broadly categorized into two basic approaches. The first approach that has been utilized is to provide the country with a ready-made law compatible with international best standards. The second general approach is to support a local drafting effort to draft the best law that local drafters can draft. Those donors whose primary concern is economic development most often champion the first approach. These donors are results-oriented, wanting to show that a particular country has adopted the legislation needed for a market economy. The second approach is often suggested by donors whose primary concern is the development of the rule of law. The approaches are not, and should not be, mutually exclusive; yet, the second approach, albeit more time-consuming, lends itself to being more sustainable over the long term.

Under the first approach, the donor may hire an expert in the field to draft a state-of-the-art law that is of high legal quality and technically sound.¹⁷ In several Central Asian republics, for example, the donor community was particularly interested in establishing the basic legal infrastructure for a market economy. Many major laws were enacted in a relatively short period of time.¹⁸ The countries then could boast that they enacted the requisite laws to support their obligations under a given international instrument, such as the WTO.¹⁹ This approach depends

17. See, e.g., S.C. GILYEART, RECOMMENDATIONS FOR A NEW LEASING LAW FOR GEORGIA 2 (2004), available at http://pdf.usaid.gov/pdf_docs/PNADD354.pdf ("This report contains a Parliament-ready proposal for a new leasing law for Georgia.")

18. MOLLY HAGEBOECK, MARK DIETRICH & LIZBETH HASSE, U.S. AGENCY FOR INT'L DEV., RULE OF LAW ASSISTANCE IMPACT ASSESSMENT: KAZAKHSTAN, KYRGYZSTAN AND UZBEKISTAN 30 (2002), available at http://pdf.usaid.gov/pdf_docs/PNADC208.pdf ("[L]egislation that is in place now in all three of the countries . . . is adequate for most needs.")

19. For example, the European Bank of Reconstruction and Development (EBRD) assesses legal systems based on a two-step process, evaluating the laws on the books, in what it calls "'the extensiveness' of the legal framework" and evaluating whether these laws are implemented by courts and other state institutions. Michael Nussbaumer, *Assessing Legal Systems: A Catalyst for Reform*, BEYOND TRANSITION (World Bank), Apr.-June 2005, at 21. The EBRD has prepared assessments on the legal framework for concessions, corporate governance,

wholly on whether the host government is interested or motivated in adopting a particular law, irrespective of what a foreign expert perceives as needed.²⁰ In Kosovo, this idea was turned on its head as the United Nations Interim Administration Mission in Kosovo (UNMIK) served essentially as the viceroy for the territory.²¹ For those “reserved” competences, UNMIK could simply bring in foreign consultants to write laws that UNMIK could then pass as “regulations” with little, if any, input from local institutional structures.²²

A major pitfall of this approach is that good laws may be ignored and left unimplemented. Moreover, the entire technical expertise behind the new law may leave with the first plane to Frankfurt. Not surprisingly, some countries have tried and discarded laws that seem to have been artificially grafted onto their legal framework.²³ As a comprehensive, quantitative study on transplanted law points out, “technical assistance programs that can be implemented by having Western experts design good laws, are unlikely to produce the desired outcome, i.e. an effective legal order and economic growth and development.”²⁴ And the probability is great that laws that are passed quickly and authored by a variety of foreign experts will be inconsistent with one another.²⁵

insolvency, secured transactions, and securities markets. According to the author, these evaluations have the following salutary effects: they allow the EBRD to make better informed investment decisions, provide information to investors to make informed decisions, and provide a basis on which to engage in a policy dialog with local governments. *Id.* at 22.

20. One expert evaluating a program in Egypt characterized this as follows: “The opportunity for providing technical assistance and training also depends on whether the ‘door is open or closed’ for application. . . .” GARY GOODPASTER, WILLIAM THOMAS & AHMED ABDEL-FATTAH, U.S. AGENCY FOR INT’L DEV., FINAL EVALUATION REPORT: U.S. DEPARTMENT OF COMMERCE COMMERCIAL LAW DEVELOPMENT PROGRAM IN EGYPT (CLDP) 4 (2003), *available at* http://pdf.usaid.gov/pdf_docs/PDACA136.pdf.

21. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1994). Under U.N. Security Resolution 1244 (1999), the Secretary-General was authorized to appoint a Special Representative to control the implementation of the international civil presence in Kosovo. *Id.* ¶ 6. An interim administration for Kosovo, UNMIK, was established which “will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.” *Id.* ¶ 10. The authority and range of powers of UNMIK were sweeping. *Id.* ¶ 11.

22. UNMIK Reg. 1999/1 (July 25, 1999).

23. See M. BOBUKEEVA, CTR. FOR SOC. & ECON. RESEARCH, KYRGYZ REPUBLIC, BANKRUPTCY IN KYRGYZSTAN (2003), *available at* <http://www.basis.wisc.edu/live/institutions/Bankruptcy%20Eng.pdf> (two laws and four significant amendments in nine years).

24. Berkowitz, Pistor & Richard, *supra* note 10, at 190. The authors suggest that the process of lawmaking rather than the contents of legal rules determines the effectiveness of legal institutions. *Id.* at 189.

25. JON A. LEETH & SILVY CHERNEV, U.S. AGENCY FOR INT’L DEV., RULE OF LAW ASSISTANCE IMPACT ASSESSMENT: ARMENIA 6 (2000), *available at* http://pdf.usaid.gov/pdf_docs/PNADC206.pdf (“Even though an impressive array of legislation has been adopted, by having

The second approach focuses on the process and endeavors to enlist local allies in the effort to create legal infrastructure. These allies will become experts as they are involved in the drafting effort. Their opinions on what the law should say may be different from international experts; yet the end product is motivated by a local effort, rather than one created solely by foreigners.²⁶ This approach provides resources to support local fledgling legal institutions, which are vital to the economic development of the country.²⁷ As convincingly argued by one scholar, “[t]he flow of public resources through multilateral and bilateral assistance is going to continue, and the point is that this flow of resources should be configured to support institutions, not undermine them.”²⁸

Although this approach is sound in theory, in practice it is fraught with numerous hazards. First and foremost is that this approach is subject to externalities over which the donor may have little or no control. It depends on the stability of the counterpart institutions²⁹ with which the donor deals.³⁰ Those who negotiate terms of engagement for international consultants, as in any bureaucracy, may change.³¹ One also should not minimize the human dimension and the ability of the foreign assistance provider to establish rapport with the host country’s

used the multiple approaches to legislative drafting described above in a ‘forced march’ scenario, a series of lapses and contradictions occurred which USAID is now trying to correct through a contract to rationalize the laws already passed.”); *see also* MARK DIETRICH, JOSE GARZON, ROBYN GOODKIND & MARGARET O’DONNELL, U.S. AGENCY FOR INT’L DEV., PRIORITIES AND PARTNERS: DEVELOPING THE RULE OF LAW IN BOSNIA AND HERZEGOVINA 7 (2003), *available at* <http://www.usaid.ba/Assessments/Admin%20Law%20Assessments/FINAL%20USAID%20ROL%20Report%20June%202003.doc> (finding that a “legislative hodgepodge” often results when many international organizations are involved in drafting).

26. *See* KEITH ROSTEN, NATALIJA DJURICKOVIC & LOUISE D. WILLIAMS, U.S. AGENCY FOR INT’L DEV., EVALUATION OF THE JUSTICE SYSTEM REFORM ACTIVITY—KOSOVO 42 (2006), *available at* http://pdf.usaid.gov/pdf_docs/PDACI353.pdf (recommending supporting the process, rather than controlling the result).

27. *See* DAM, *supra* note 15, at 5 (“The idea that institutions and especially legal institutions are crucial to the process of economic development is now broadly accepted in the academies and in the research departments of international financial institutions such as the World Bank.”).

28. *Id.* at 224.

29. As Kleinfeld properly points out, reform must occur not in just one institution, but across all primary institutions to succeed. Kleinfeld, *supra* note 6, at 54-55.

30. GERALD ZARR, MARY NOEL PEPYS & BILJANA PANOVA, U.S. AGENCY FOR INT’L DEV., EVALUATION REPORT OF THE MACEDONIA COURT MODERNIZATION PROJECT 7 (2005), *available at* http://pdf.usaid.gov/pdf_docs/PDACG190.pdf (“Since the first working group for the Civil Procedure Law was constituted in late 2003, the MoJ has undergone 3 changes in Ministers and senior staff in the Ministry. The changes always resulted in a new composition of the working groups and almost always started the drafting process from scratch.”).

31. FREDERICK G. YEAGER, U.S. AGENCY FOR INT’L DEV., CROATIA COMMERCIAL LAW REFORM PROJECT: FINAL REPORT 5 (2004), *available at* http://pdf.usaid.gov/pdf_docs/PDACD482.pdf.

counterparts. As one team of evaluators commented, “[s]uccessful development assistance is as much about human relations as it is about strategic planning and highly articulated project management.”³²

A lack of political will within the country may also doom any reform effort.³³ The counterpart must devote the requisite time and energy to the reform effort, but those charged with drafting new legislation may have other priorities.³⁴ Often times, there is not much depth of legal skill in a newly emerging democracy, and those who are assigned to the effort may be overcommitted. As one United States Agency for International Development (USAID) official noted in an assessment of assistance provider work in Kyrgyzstan, “The low salary level (\$150-200 per month) is one factor that makes it very difficult for these [government legal] departments to retain legal advisors who, in the

32. RICHARD N. BLUE, DAVID FISHMAN, EKATRINA GRESHNOVA, ELENA SHOKINA & VITALY CHARUSHIN, U.S. AGENCY FOR INT’L DEV., *RULE OF LAW ASSISTANCE IMPACT ASSESSMENT: RUSSIA RULE OF LAW PARTNERSHIPS 37* (2004), available at http://pdf.usaid.gov/pdf_docs/PNADC211.pdf.

33. Despite prodding, cajoling or other ways to convince policymakers within the country to reform their system, unless they manifest the desire to go forward, the program will not gain the traction it needs. U.S. AGENCY FOR INT’L DEV., *PROGRAM FOR A LEGAL INFRASTRUCTURE FOR A MARKET ECONOMY IN KYRGYZSTAN AND TAJIKISTAN (COMMERCIAL LAW REFORM): FINAL REPORT 17* (2005), available at http://pdf.usaid.gov/pdf_docs/PDACF844.pdf (stating how the Chair of the Supreme Court of Kyrgyzstan was uninterested in efforts to reform the judiciary). And donors have generally not required conditionality on policy reform projects. See HAGEBOECK, DIETRICH & HASSE, *supra* note 18, at 41 (“[C]onditionality did not play a critical role in any of these situations, nor does it in the majority of policy reform projects, according to what recent IBRD and other research studies on conditionality are showing.”). Moreover, the kind of assistance that donors provide should depend on where the host country is found on the continuum of transition to a democracy, from consolidated authoritarian, to unconsolidated authoritarian, stuck state, unconsolidated democracy, and consolidated democracy. DONNELLY, *supra* note 12, at 44-47. “Even the greatest amount of political will is sometimes insufficient to implement lasting legal system reforms in the face of recalcitrant bureaucracies and improper but powerful external influences.” Stephen Golub, *A House Without a Foundation*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 6, 105, 113.

34. U.S. Gen. Accounting Office, *Any Further Aid to Haitian Justice System Should Be Linked to Performance-Related Conditions 5* (2000), available at <http://www.gao.gov/new.items/d0124.pdf>:

The Haitian government’s lack of a clear commitment to addressing the major problems of its . . . judicia[ry] institutions has been the key factor affecting the success of the U.S. assistance provided . . . U.S. assistance to the judicial sector has been undercut because the Haitian government has not, for instance, (1) followed through the broad reform of the judicial sector needed to address its major problems, (2) assumed ownership of many of the improvements made possible by U.S. assistance, and (3) provided the physical and human resources needed to operate the sector effectively.

private sector, can earn four to five times as much.”³⁵ In addition, there may not be any counterpart structures. The implementer may have to work with the government to develop a working group to draft certain legislation. The implementer may also have to provide support to create a “demand” for legislation through grants to nongovernmental organizations or public awareness campaigns, because reliance on a supply-driven program without a concomitant commitment from some quarter within the country will likely not take hold.³⁶ If there is not an indigenous demand for reform, building the demand will be a long-term effort requiring a sustained commitment of time and energy—usually beyond the time horizon of existing aid programs.

IV. ONE SHOE DOES NOT FIT ALL FEET

The initial question in launching a legal reform program is whether any reform is actually needed. Some donors take the time to survey the local landscape and carefully assess the needs of the recipient country. But others simply charge forward with a reform program, assuming that any reform is better than the status quo—even though it is unclear whether there is any basis for this view. Certain reform programs adopt the flavor of the week, such as judicial training or legal information, and donors fall over each other providing substantial assistance that is duplicative and cannot be absorbed by the recipient country. Some donors may have their funding delayed, and by the time they are able to launch their programs, the area has been addressed by another donor. Because they have the funding, they may have to proceed anyway and provide support for reform in an area that no longer needs it.³⁷ As one

35. U.S. AGENCY FOR INT'L DEV., ASSESSMENT OF USAID COMMERCIAL LAW AND REGULATORY REFORM ACTIVITIES IN KYRGYZ REPUBLIC 14 (2004), available at http://pdf.usaid.gov/pdf_docs/PNADD581.pdf.

36. See Mohan Gopalan Gopal, *Law-Dependent Public Goods: A Proposed Strategic Framework for a Results-Based Approach to Legal and Judicial Reform*, 100 AM. SOC'Y INT'L L. PROC. 430, 430-31 (2006). “There are a number of well-recognized reasons for the poor effectiveness of international assistance and national programs for legal and judicial reform,” including focus on the supply side rather than the demand side of the legal system. *Id.* For a good description of one implementer's efforts to stimulate demand for administrative law, see IRIS CTR., ADMINISTRATIVE LAW AND PROCEDURAL SYSTEMS (ALPS) REFORM PROJECT IN BOSNIA AND HERZEGOVINA: 3RD ANNUAL REPORT 5-9 (2006), available at http://www.usaid.ba/Assessments/Admin%20Law%20Assessments/IRIS_ALPS%202005%20Annual%20Report.doc (detailing efforts to provide advice and representation on administrative law matters to indigent clients).

37. IRIS CTR., ADMINISTRATIVE LAW AND PROCEDURAL SYSTEMS (ALPS) REFORM PROJECT IN BOSNIA AND HERZEGOVINA: ANNUAL REPORT 2003 15-16 (2003), available at <http://www.usaid.ba/Assessments/Admin%20Law%20Assessments/IRIS-LPS%202003%20Annual%20RPT>.

author astutely observed, it is possible that no reform is better than perennial reengineering.³⁸

Once it is determined that reform is needed, it is important to look at the various models from which to adapt an appropriate approach. Countries will apply varying approaches to substantive laws. For example, U.S. corporate law significantly differs from German or French corporate law, and each law works within the context of the country in which it operates. But these laws, developed over time for developed market economies, should not be grafted wholesale onto foreign legal landscapes. The local system will have to absorb any changes and “if [the reform] is too ‘alien,’ it is unlikely to succeed.”³⁹ As a former United Nations official observed, new banking laws drafted for Kosovo had little chance of being administered effectively, as they were overly complex and detailed.⁴⁰ One academic maintained that legal experts from Europe and the United States who offer advice to governments in developing legal infrastructure in transition countries may disregard the local context, because “in their own jurisdictions they can afford to take that context for granted. Where institutions are stable and have the capacity to adapt to change legal [sic], reform slips into the process of social and political change in a relatively unproblematic way.”⁴¹ Disregarding the local context will likely doom the long-term prospects for reform.

In many countries, drafters and policymakers seek out assistance from several donor agencies. Sometimes these donor agencies work together, and other times, coordination between donors is elusive. Even when there is goodwill and a willingness to cooperate, timelines may slide and the respective donors may not be in sync with one another.⁴² For example, two donors may agree on working together and design projects that complement one another. Although they are designed to

doc (detailing how the World Bank’s later entry into area of inspections threatened to moot component of administrative law project).

38.

Most pernicious, depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant “improvement” of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal environment.

Kleinfeld, *supra* note 6, at 53.

39. Miller, *supra* note 16, at 17.

40. *Id.* at 16-17.

41. Faundez, *supra* note 13, at 378.

42. YEAGER, *supra* note 31, at 5 (“A 9-month delay between the beginning of one project and the start of the sister project hindered the communications process in that complementary activities could not be coordinated.”).

start at the same time, one is substantially delayed until the other one is ready to close out. In the confusion, the local drafters are left bewildered and uncertain of which approach more appropriately applies to their situation.

In the face of competing approaches, a comparative analysis presented to the local drafters allows the drafters to determine the most appropriate approach to adopt in their own country. If donors work together, they can together present the respective advantages and disadvantages of their approaches to illuminate the options for local drafters and policymakers so that the local drafters may decide. Allowing the local officials a variety of approaches with an understanding of why certain approaches have been adopted provides local drafters the opportunity to assume the responsibility to tailor the laws to meet the needs of their country.

V. PROVIDING A FISHING POLE—NOT JUST ONE FISH

Assistance providers should invest resources in developing the local capacity of drafters. In the United States, as in many other countries, legislative drafters are trained through extensive courses on drafting styles in major substantive areas of the law, techniques, organization, and technical sufficiency in drafting. Working on just one law without a parallel commitment to supporting local drafters is an inefficient way to reform an entire legal system. Training a cadre within the country on drafting techniques is essential to support reform of the legal system, as foreign assistance cannot even aspire to draft all of the laws for a country in transition.⁴³ Developing a local capacity is a long endeavor and the intensity of assistance must be maintained over several years to develop the skills of the local legal community.⁴⁴ If these local drafters are not responsible for the legislation, then the danger is that there will be no local acceptance of the legislation or even the expertise to explain how the legislation is supposed to operate. As one author aptly stated, “the application of laws without an understanding of their purpose is a

43. ROBERT J. REINSTEIN, U.S. AGENCY FOR INT'L DEV., FINAL REPORT: RULE OF LAW PROJECTS IN CHINA 16 (2004), *available at* http://pdf.usaid.gov/pdf_docs/PDACA912.pdf (relating that at the request of Chinese drafting committees, the implementer hosted conferences to comment on draft laws on property and torts).

44. *See* HAGEBOECK, DIETRICH & HASSE, *supra* note 18, at 68 (offering a graph showing the intensity of assistance over time for these two approaches, drafting legislation and developing a permanent national legislative drafting capacity).

potential source of international and intercultural resentment and hostility.”⁴⁵

As part of our commercial law programs in Tajikistan, we devoted considerable time and effort to increasing the technical skills of local drafters.⁴⁶ We developed courses on legislative drafting and supported training of trainers in the subject area. These trainers then implemented the training throughout the country, at both the local and national levels. We also developed a legislative drafting manual that is used throughout the country. Donors should design legal assistance projects to increase the capacity of host countries to develop their own legislation.⁴⁷

VI. IT’S GREEK TO ME

Language is a powerful tool, especially in countries in which the language of the indigenous population may have been stifled over the course of many years. Drafting should be done in the local language and not in the language of the assistance providers. If the law is drafted in English or German, then it is the property of English or German speakers. The “official” text is only as good as the skill of the translator, who may or may not have legal training. While local drafters should have access to the text of similar laws that have been translated into their language, they should also have the laboring oar to craft legislation that meets both international best standards and local requirements.⁴⁸

Nevertheless, assistance providers have insisted on drafting in English. Sometimes an English first draft of a statute may be unavoidable in a particularly new area of the law, such as banking. Usually, however, it is the result of an unwillingness to work with local drafters. When drafting in English or another foreign language is unavoidable, assistance must be provided for proper translation into the local language. At a minimum, the assistance provider must provide the services of a professional translator assisted by a local lawyer. An even better approach would allow an iterative process of translating from the

45. Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 1 U. PA. J. INT’L BUS. L. 327, 352-53 (1994).

46. U.S. AGENCY FOR INT’L DEV., *supra* note 33, at 11-12. In a sister program in Kyrgyzstan, it was not possible to provide substantial support in increasing local capacity of drafters because there was no agency or structure that was positioned to receive such assistance and use it effectively. *Id.* at 2.

47. DONNELLY, *supra* note 12, at 18 (institutionalization of legal drafting is a “key element of a successful long-term program”).

48. In Kosovo, with international assistance, the Ministry of Justice has set up a Legal Affairs Department to perform, among other functions, drafting of legislation. The lawyers are expected to draft in English. ROSTEN, DJURICKOVIC & WILLIAMS, *supra* note 26, at 19.

foreign language into the local language and then back again to the foreign language to assure that the text in the local language captures the spirit and intent of the original text. Translation into the local language should not be an afterthought.⁴⁹ As one United Nations official candidly conceded about the process in Kosovo, “[lack of translation] bred serious resentment among our legal interlocutors. UNMIK’s legal officers had staff and assistance to draft and review texts in English, but no funds or resources were available for its counterpart . . . to review the texts in the language of the governed.”⁵⁰

While it is preferable to develop a draft law in the official language, it does not undermine this effort if the language of the local drafters is a language other than the country’s official language. For example, the language of power and influence in the Soviet Union was Russian. Those who wanted to succeed and rise to a position of authority needed to communicate well in Russian. Parents could send their children to a Russian-speaking school or to a school using the local language. Not surprisingly, parents preferred Russian-speaking schools so that their children could succeed in Soviet society, and generations of Tajiks, Kyrgyz, Uzbeks, and others learned Russian as their first language. Official documents were prepared in Russian, while the regional languages of the various republics such as Kazakh, Tajik, and Azeri suffered. When these republics achieved independence in the wake of the Soviet Union’s fall, the legal community was accustomed to speaking and writing in Russian. It did not have the facility to draft in the State or official language. In those countries, it was inevitable that the drafters developed legislation in Russian and relied on others to translate the final draft into the local language. With time, however, the initial drafting effort has become more common in the official language.

VII. THE HORA IN IRAQ

The Hora is a Jewish folk dance, which, presumably, would not be particularly useful to teach in a country such as Iraq. Yet, when it comes to developing legal infrastructure in Iraq, even some of the brightest minds thought little of imposing a wholly alien U.S. financial disclosure law on postwar Iraq. As told by a *Washington Post* reporter, a former law clerk to Chief Justice William Rehnquist was found “poring over a draft

49. See Miller, *supra* note 16, at 14 (noting that UNMIK did not have staff to have legislation properly translated).

50. *Id.* at 13.

edict requiring Iraqi political parties to engage in American-style financial disclosure.”⁵¹

Assistance providers should endeavor to enlist assistance from those who are attuned not only to the language and culture, but also to the legal traditions and customs of the country receiving the assistance.⁵² There has been a general recognition that multicultural sensitivity and fluency in a foreign language are essential for business leaders. Similarly, these traits are important for those who provide assistance to developing legal infrastructure. Unfortunately, as one commentator pointed out, “[l]aw and development continues to be ethnocentric and heavily dominated by the Anglo-Saxon, common-law tradition of three countries.”⁵³ A former USAID official pointed out that as the U.S. government commenced legal infrastructure assistance programs in countries of Europe and Eurasia, it did not appreciate the “mismatch between hordes of eager American experts based in common law traditions and a relatively thin cadre of civil law experts within these countries.”⁵⁴

These efforts would have been significantly improved if those familiar with the local legal traditions had been part of the effort to develop the legal infrastructure of the target countries. Some later efforts incorporated this approach, maximizing the possibility that the reform efforts would gain traction. In Armenia, the implementing organization retained a Russian legal expert to work in Armenia on developing the Armenian Civil Code.⁵⁵ In Kosovo, the implementing organization relied on a consultant from Croatia to provide support and training to the audit section of the Judicial Inspection Unit.⁵⁶ These efforts went a long way in

51. RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ’S GREEN ZONE 4* (2006).

52. CHECCHI AND COMPANY CONSULTING, INC., U.S. AGENCY FOR INT’L DEV., NICARAGUA INSTITUTIONAL STRENGTHENING PROGRAM (1999-2005): FINAL REPORT 7 (2005), *available at* http://pdf.usaid.gov/pdf_docs/PDACD452.pdf (“The strategic selection of consultants and requirement that they spend significant time in Nicaragua to become acquainted with the applicable laws, functioning and personnel within the PDO [public defender’s office] proved to be crucial to the success of the [project] in the strengthening of the PDO.”).

53. Gopal, *supra* note 36, at 431.

54. DONNELLY, *supra* note 12, at 15.

55. LEETH & CHERNEV, *supra* note 25, at iv. Drafts were also vetted in the Netherlands, which has a long civil law tradition and is one of the most recent European countries to revamp its Civil Code. *Id.*; *cf.* HAGEBOECK, DIETRICH & HASSE, *supra* note 18, at 34 (“The implied criticism of short term assistance provided by expatriates working alone was echoed by one senior advisor the U.S. had sent to Kazakhstan to assist with legislative development: ‘Whether consciously or not,’ he said, ‘we were all guilty of trying to graft Anglo-Saxon models’ onto the legislative frameworks in the region.”).

56. ROSTEN, DJURICKOVIC & WILLIAMS, *supra* note 26, at 28; *see also* ZARR, PEPYS & PANOVA, *supra* note 30, at 6 (“Much of the project’s success is due to its ability to find the best possible consultants for the task at hand. Instead of recruiting American consultants in areas

bridging the gap between the expertise of the foreign consultant and the ability of the country to assimilate the assistance.

Adding regional expertise into the mix of ideas and approaches injects perspective into the goals that the host country is trying to achieve. As the author of an evaluation of a Polish drafting program asserted:

MPs and parliamentary staff emphasized the benefits of regional training. Regional seminars and conferences . . . enabled the Poles to share with and learn from others experiencing similar problems. Such activities also helped them become more informed about the standards their laws would have to meet to be consistent with those of the Western European countries with which they are establishing new and more broadly based economic, political, and social relationships.⁵⁷

Comparative law is an effective bridge for those trying to offer ideas and guidance on developing or implementing legislation. Assistance providers who are experts in their respective fields and have a comparative law outlook are particularly effective, and if they have some language skills, they are invaluable. According to one former United Nations official:

Some exposure to this discipline would teach what I could describe as "juridical humility." By this I mean the ability to understand and appreciate that juridical concepts in the reformer's own legal system cannot be seen in isolation from the rest of that system, and can only be understood within the context of that system.⁵⁸

However, the official conceded that there are few comparative law experts.⁵⁹

where their expertise is not the most relevant for Macedonia, the project has recruited outstanding European consultants whose worth was quickly validated to the MOJ").

57. HAL LIPPMAN & JOEL JUTKOWITZ, U.S. AGENCY FOR INT'L DEV., LEGISLATIVE STRENGTHENING IN POLAND 15 (1996), available at http://pdf.usaid.gov/pdf_docs/PNABY213.pdf; see also HAGEBOECK, DIETRICH & HASSE, *supra* note 18, at 72 (suggesting that the issue of who should provide training depends on the topic of the training, that U.S. trainers and professionals are the right trainers on topics that are "totally new and so thoroughly part of another culture that it is difficult in the early stage of concept transfer for local trainers to be effective," that third-country nationals are most suited for "stimulating people in this region to try things that others in the NIS [New Independent States] have made succeed," and that local trainers are the most appropriate "when there is a big job to do and the concepts involved can be transferred through a training of trainers program").

58. Miller, *supra* note 16, at 17.

59. *Id.*

VIII. HAVE A SHERPA TO GUIDE YOU THROUGH THE LOCAL LEGAL LANDSCAPE

Sherpas are guides for those who want to make a perilous trek through the Himalaya Mountains. Similarly, one should have a local legal guide who can maneuver through the crevasses of the local legal landscape. One commentator suggests other “agents of change” to drive legal reform, such as citizens, membership organizations, human rights activists, and opposition parties.⁶⁰ Local attorneys who are not part of a governmental or even nongovernmental structure are an important component of effective assistance to build legal infrastructure in a country.

These lawyers may represent the interests of foreign assistance providers in working groups. They can interact with government entities such as the parliament or the courts, and they can generally navigate the shoals of the laws and structures of the recipient country. These lawyers should know which stakeholders need to be brought into the process of drafting laws. Local staffers know the language and culture of the country in which they live, and they are best positioned to serve as the bridge between the project and local counterparts. For example, as part of a program in Kosovo to create mediation services, the project leaders relied on Kosovar mediators to create a safe negotiating environment and mediate a broad range of disputes.⁶¹ Likewise, in our projects in Kazakhstan and Kyrgyzstan, the local attorneys assumed the laboring oar for drafting and commenting on draft legislation.⁶² Local lawyers are particularly effective if they have good training and guidance from an expatriate attorney who is conversant in local language, tradition, and culture.⁶³ Because they represent a foreign government, the local

60. Samuels, *supra* note 4, at 20.

61. PARTNERS FOR DEMOCRATIC CHANGE, U.S. AGENCY FOR INT’L DEV., FINAL PROGRAM ACCOMPLISHMENTS & LESSONS LEARNED REPORT TO U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT “SUPPORTING RULE OF LAW THROUGH ESTABLISHMENT OF MEDIATION SERVICES IN KOSOVO” 7 (2003), available at http://pdf.usaid.gov/pdf_docs/PDABZ171.pdf (“Partners’ model of working exclusively through local staff was the best strategy for dealing with this issue, as they were able to generate realistic ideas and strategies for achieving the goals of the program.”).

62. HAGEBOECK, DIETRICH & HASSE, *supra* note 18, at 34 (“U.S. firms that were in charge of these projects hired and involved local attorneys who understood the existing legislative and regulatory frameworks and could help ensure that the initial drafts were not only technically correct but also framed in a manner that was usable in Kazakhstan or Kyrgyzstan.”); see also *id.* at 71 (stating that factors that seem to be critical for the success of projects include that they are long-term, that there was a heavy local hire component, and that providers carried out their work inside the organization that they were trying to assist).

63. ZARR, PEPYS & PANOVA, *supra* note 30, at 6 (stating that to lead the legislative drafting effort, the implementing organization chose a local Macedonian lawyer, who served on seven

professional staff may be viewed by local government officials as having a separate agenda. They may be viewed with suspicion or resentment because their salaries are likely higher than the host government officials with whom they are working.⁶⁴ They are, however, in a better position to overcome this suspicion than the expatriates with whom they work because they know the language and legal culture. Consequently, they can be an effective interface between the assistance providers and the recipients.

IX. SETTING PRIORITIES: LEARN TO CRAWL BEFORE WALKING

Determining the priority of the legislative agenda or the sequencing of reform is essential for a comprehensive program of legal reform. In some cases, the existing laws need to be amended to support the changes brought about by a market economy. In other cases, brand new laws that were not part of the legal tradition of the recipient country must be adopted.

There is general agreement about the very first laws that a country needs to adopt after it has achieved independence. A constitution stands out as the first priority for most countries, but there are widely divergent views as to which laws should next require the attention and resources of the country. In the countries formed from the former Soviet Union, the civil code, criminal code, and criminal and civil procedural laws were given high priority. Some countries drafted these foundation laws quickly, while others were caught up in wrangling among interested government institutions, such as the power struggle between the prosecutor's office and the courts.⁶⁵

A wholly new area of the law is particularly challenging to get on the legislative agenda. For example, administrative law is an area of the law that was completely foreign to the legal landscape of the Soviet

working groups and "ha[d] been granted entrée into the Government of Macedonia decision process that would be hard for a non-Macedonian to achieve").

64. HAL LIPPMAN & JOEL JUTKOWITZ, U.S. AGENCY FOR INT'L DEV., IMPACT EVALUATION: LEGISLATIVE STRENGTHENING IN EL SALVADOR 10 (1996), available at http://pdf.usaid.gov/pdf_docs/PNABS549.pdf.

65. The number of significant laws that need to be adopted may be dizzying. For an example of a list of substantial legislative effort for only one country, Tajikistan, some of which we worked on in a USAID-sponsored project, see NICHOLAS KLISSAS, U.S. AGENCY FOR INT'L DEV., TAJIKISTAN: ASSESSMENT OF USAID COMMERCIAL LAW REFORM ACTIVITIES 2-4 (2005), available at http://pdf.usaid.gov/pdf_docs/PNADD580.pdf. For a list of some of the laws that should have been passed before or at least at the same time to support the Russian privatization process, see Bernard Black, Reinier Kraakman & Anna Tarrasova, *Russian Privatization and Corporate Governance: What Went Wrong*, 51 STAN. L. REV. 1731, 1753 (2000). The authors acknowledge that good laws may take years to write. *Id.*

Union. Administrative law is important for human rights and access to justice as well as an important driver for a market economy. Nevertheless, it was not easy to place administrative law on the radar screen of governments in republics of the former Soviet Union. Administrative law became a priority in the Republic of Georgia only because of a “confluence of program implementers who were interested in administrative law and reformist partners in the government who understood its importance.”⁶⁶ We endeavored to elicit interest for administrative law reform in Tajikistan, including preparing policy papers, sponsoring study visits, and organizing a visit to Tajikistan by Zurab Adeishvili, who was one of the authors of the Georgian law, and later a Member of the Georgian Parliament. These efforts produced only limited results, and there was still no momentum to devote resources to the development of administrative procedure law. We were able to convince a foreign adviser to the President of Tajikistan of the critical advantages to the economy and the rule of law of developing a modern administrative law system. After this foreign adviser’s meeting with the President of Tajikistan, Emomali Rakhmon, the government issued a decree, which required, among other things, various governmental agencies to make an assessment of all controls and administrative procedures and to draft a corresponding law.⁶⁷ We then supported the extensive deliberations of an official working group, which resulted in the drafting of the Code on Administrative Procedures of the Republic of Tajikistan. Although we provided expert materials from several countries, including South Korea, Germany, Latvia, and Georgia, the working group selected the code from Georgia as a model on which to base the law for Tajikistan. This law was enacted in February 2007,⁶⁸ culminating our efforts and support over three years.

Although foreign experts may recognize the need for adopting certain legislation, unless the host country understands this need, efforts to adopt a particular piece of legislation may run awry.⁶⁹ And for those countries that had little experience and adopted these new codes quickly, they soon realized that numerous amendments or even entirely new laws

66. DIETRICH, HASSE & KVATSKHAVA, *supra* note 12, at 29.

67. Government of the Republic of Tajikistan, Decree No. 50 (Feb. 2, 2005) (“Ob itogakh sotsial’no-ekonomicheskogo razvitiia Respubliki Tadjikistan v 2004 godu i zadachakh na 2005 god” [On the results of social and economic development of the Republic of Tajikistan in 2004 and tasks for 2005].).

68. Code of Administrative Procedures of the Republic of Tajikistan (Feb. 2007).

69. LEETH & CHERNEV, *supra* note 25, at 5 (“At the very least, the official assigned by the Ministry of Justice to develop the [Administrative Procedures Code] does not seem to understand the concepts.”).

were required. The sequencing of legislation or legal reform measures is a critical component of a successful assistance program.

X. LOBBYING FOR LEGISLATION

Assistance providers can provide invaluable support in drafting a law or designing other legal reform programs. However, for the law or reform to have any effect, it needs to be passed into law. The role of the donor in assuring enactment of the law is an area of considerable debate within the donor community. In practice, donors may have too great a stake in the outcome of what should be an internal political debate to remain on the sidelines. If a project is wholly devoted to developing a law in one particular area, such as bankruptcy or criminal procedure, the implementing partner would get little credit if the draft law were not passed into law. If a draft law, which may be important from the donor's point of view, is delayed or considerably revised, the implementing partner, or even the donor agency or the embassy may become directly involved in lobbying for the legislation.

One of the most important initial strategic decisions in order to advance any new legislative initiative is determining with which partner the implementer will work. If there is an officially sanctioned group, then the decision is relatively easy. Often the donor will choose an area that needs reform based upon what it assesses as the need, but often there is not a clear choice of where to anchor the effort. One author described how efforts at criminal procedural reform in Russia underwent several false starts because there was no clear partner with whom to cooperate. The method of U.S. influence, "requires either luck or very intimate knowledge of potential political openings in the host government to identify those with whom to work."⁷⁰

With any major change in the law, there will inevitably be opposition. During the drafting stage, foreign assistance can be effective in encouraging drafters to reach out to stakeholders, to publicize and distribute draft legislation, to elicit comment, and to try to understand from which quarter there may be support or opposition to the law. Once the drafting is complete, the local counterparts need to assume responsibility for supporting the legislation through passage as political considerations come to the fore.⁷¹ Sometimes there may not be a clear

70. Matthew Spence, *The Complexity of Success in Russia*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 6, at 217, 241.

71. RICHARD N. BLUE & BRIAN LEDUC, U.S. AGENCY FOR INT'L DEV., RULE OF LAW ASSISTANCE IMPACT ASSESSMENT: BULGARIA 14 (2004), available at http://pdf.usaid.gov/pdf_docs/PNADC207.pdf:

demarcation as to when assistance providers should pull back on their efforts, defer to their local counterparts, and allow locals to lead the effort to enact the legislation.

As soon as the drafting efforts mature into a law ready to submit to parliament, assistance providers should preferably not assume the primary burden of lobbying for legislation. They should assume a supportive role, because the local drafters should be the primary interface with the legislature. The assistance provider should step into the background and provide information or other support only as questions arise. Local staff members, those I refer to as Sherpas, can play a particularly significant role in this stage because they have the language and legal skills to explain the underlying purposes of the proposed law or how it works with other existing legislation. Members of the legislature may view an active expatriate role as legislative imperialism and, on that basis alone, may reject the legislative initiative. The possible exceptions are those instances where the legislation in question is part of an international agreement, such as accession to the WTO. In those instances, members of parliament may benefit from an exchange with international experts in order to learn the importance of proposed legislation in the country's efforts to accede to an international treaty.

XI. LAWS ARE JUST WORDS UNLESS IMPLEMENTED

Laws are merely idle words on paper unless they are implemented. As one expert evaluating a project in Georgia stated, “[d]rafting and enacting a new law is one thing, implementing it is another.”⁷² Any comprehensive program of legal reform must include a substantial component on implementation of the legislation. As one author asserted with respect to new bankruptcy laws, they are “worthless if not enforced

[N]o foreign donor (with the possible exception of the EU with respect to harmonization of laws) has a sufficient level of power, authority, or political engagement to determine the final outcome of what has to be an internal political process. Bulgarians have learned from all kinds of western exposure about good law, but until very recently, few had the kind of in depth practical experience that a seasoned senior attorney, legislative staff person, or legal scholar in the west brings to the debate and process of law making. The outcomes of the legislative process will continue to be marked by substandard performance, according to one European embassy observer, whether by design, a result of inexperience, or the muddled outcome of a quasi democratic process is impossible for an outsider to tell.

72. DIETRICH, HASSE & KVATSKHAVA, *supra* note 12, at 3; *see also* Kleinfeld, *supra* note 6, at 49 (“The problem . . . is seeing the creation of such laws, training programs, and clinics as ends in themselves.”).

predictably, transparently, and equitably.”⁷³ As one scholar properly pointed out, “enforcement is usually more important than the details of substantive law in creating the conditions for economic development.”⁷⁴ Once the laws are enacted, the major challenge is the lack of infrastructure and the political will to enforce them.⁷⁵

In the United States and Europe, training on substantial changes in the law begins even before the legislation goes into effect. Judges, lawyers, prosecutors, law professors, and other legal professionals need to be informed of and prepared for major changes. Designing a continuing legal education system in an established democracy is difficult enough; trying to meet the needs of a whole new generation of legal and other professionals is a daunting task. One judge commented about building training capacity within the Republic of Georgia:

We realize that we must have strong institutions that are able to implement the numerous changes from the old Soviet system. But we also have learned that our institutions are only as strong as the people who serve in them. We recognize that successful legal reform cannot occur without lawyers and judges who understand the advantages of a system based on the rule of law.⁷⁶

Sometimes entire new categories of professionals need to be trained. For example, bankruptcy legislation requires the training of bankruptcy trustees and independent appraisers. Commentaries on the new law need to be written, and new forms may need to be developed. Many assistance programs focus efforts on the judiciary as they play the critical role in interpreting and applying legislation. As one author pointed out, in addition to new legislation, “[d]eveloping countries also require institutions capable of supporting and applying the new legislation. In particular, the judiciary, the neglected or suppressed institution . . . is crucial.”⁷⁷

Any effective implementation effort must include a substantial public awareness program. As one expert suggested, the “chasm between enactment and implementation of laws” needs to be addressed by public

73. Knight, *supra* note 7, at 218; *see also* Faundez, *supra* note 13, at 373 (“The task that most national governments face today is ensuring that the laws they have so effortlessly enacted are rigorously applied, [and] fairly interpreted. . .”).

74. DAM, *supra* note 15, at 24.

75. Black, Kraakman & Tarrasova, *supra* note 65, at 1755.

76. Lado Chanturia, *Legal Training in a Transitional Democracy*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY, *supra* note 5, at 307.

77. Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT'L LAW. 875, 888 (1999).

education, institutional strengthening, and consideration of the existing incentive structures.⁷⁸ Donors and other observers have become increasingly interested in this essential aspect of building legal infrastructure in developing countries. The European Bank for Reconstruction and Development (EBRD) has begun to assess the extent to which courts and other governmental institutions are implementing existing legislation, even though the EBRD concedes that trying to assess the extent of implementation is “methodologically very challenging.”⁷⁹

These efforts need to be monitored and evaluated, even though legal reform is “difficult to measure and evaluate.”⁸⁰ The adoption of a new law is merely the beginning of a long iterative process. These approaches provide the broad parameters of how an assistance program can effectively support the drafting and implementation of legislation in order to support democratic reforms and an emerging market economy.

XII. CONCLUSION

Legal infrastructure has become a staple of international assistance programs for developing countries—possibly just as important as building roads or other physical infrastructure. But unlike physical infrastructure, where the results are visible (“look at that bridge”), legal infrastructure is difficult to quantify (“look at that judge who can fairly interpret and apply the law”). Besides the perception challenge, there is the problem of time. Although the goal of these assistance efforts is sustainable change, many of these legal reform efforts last only a couple of years or not much longer. This is not much time for a serious effort at forging fundamental changes in the legal landscape of a country in transition. Developing legal infrastructure is a long and arduous process requiring years to make systemic changes. Given these constraints, these programs need to concentrate their efforts on tried approaches that maximize the chances for fundamental change based on a wealth of experience. This Article has presented ten markers to guide foreign donors efficiently to support efforts to create sustainable change in legal infrastructure.

Building legal infrastructure requires an active partner who is willing to engage the donor community in a dialogue to produce a strategy of reform. As shown in this Article, wholesale implantation of foreign legal structures is unlikely to produce sustainable change.

78. DONNELLY, *supra* note 12, at 17-18. The author also maintains that “[l]egal education is the sustainability element of all ROL [rule of law] programs.” *Id.* at 25.

79. Nussbaumer, *supra* note 19, at 21.

80. Faundez, *supra* note 13, at 370.

Relying on exemplary models of reform may be a useful guide to jumpstart the process, as long as these models are molded to fit the specific context of the target country. The donor needs to select a competent provider who can not only navigate the shoals of the legal landscape but also bring a comparative law perspective to the legal reform process. Legal reform initiatives calibrated according to the legal and cultural traditions of the target country are much more likely to succeed than raw implants from the donor community. All of these initiatives rely on indigenous legal institutions and on the local people to fill those institutions.

Working to develop legal structure is not a sport for the short-winded, especially because the donor community must rely on local professionals and local legal institutions, both of which may not be particularly well-developed. Certainly it is vastly easier to present a ready-made law or reform and expect the target country to implement it, but that approach is not likely to produce sustainable results. Investment in supporting local institutions and training local professionals is more likely to lead to sustainable changes. Sound laws and developed legal institutions are only the beginning of the process to advance reform. Legal institutions need to be filled with people who know how to apply, interpret, and enforce the legal regime. So with any complex assistance effort, there are no assurances of success because there are factors beyond the control of assistance providers that can derail any well-laid plans. For a country in transition, the challenges can be especially daunting. Nevertheless, following the approaches in this Article can significantly increase the possibility of sustainable change.