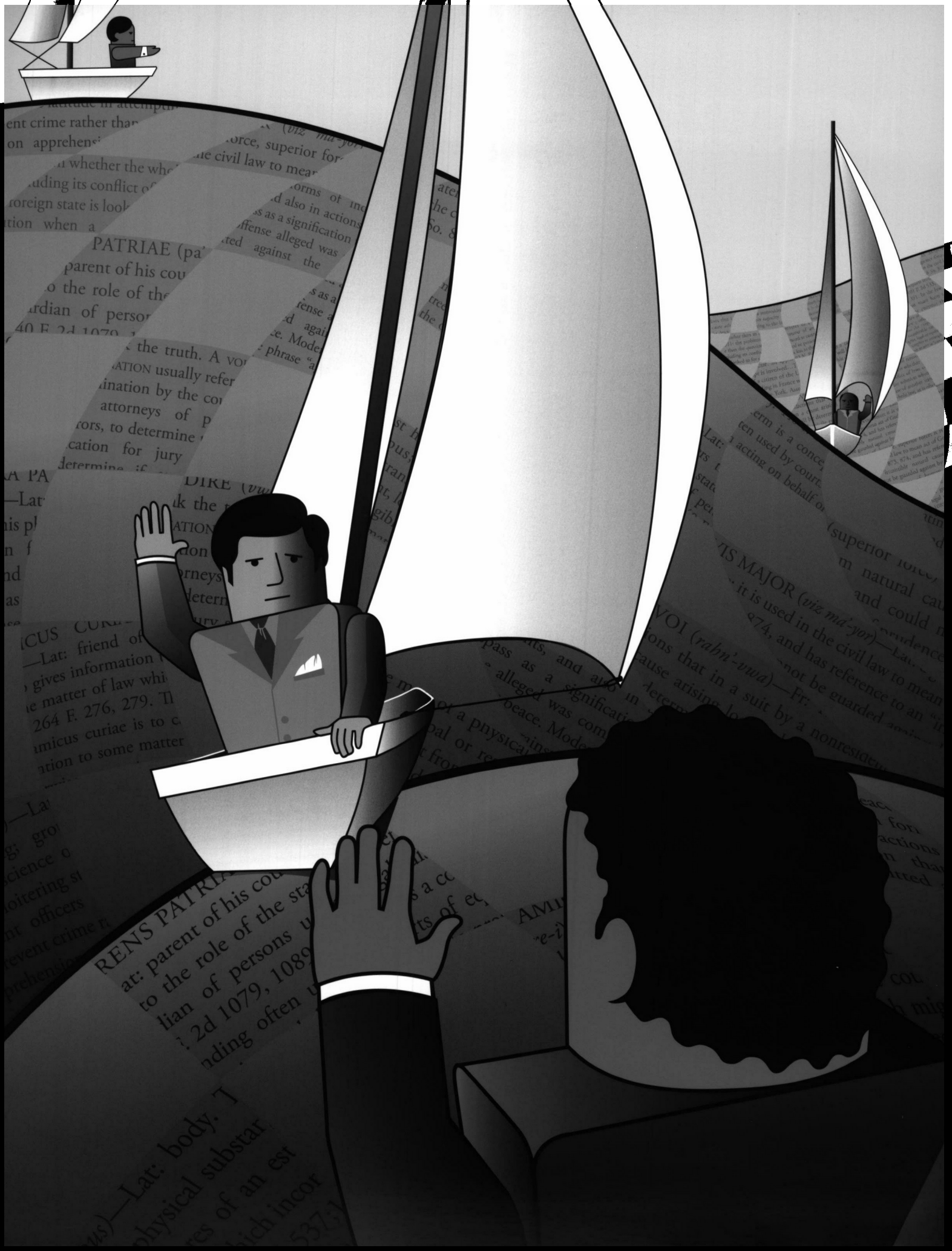

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LAW AS RELATIONSHIP:

Toward a More Effective and Ethical Legal Reform

By Wade Channell, J.D.

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Law regulates one thing and one thing only: human relationships.

THE WORLD IS AWASH IN A SEA OF LAWS. Consider consumer protection in the United States, which is regulated by twenty-two separate federal regulations,[1] in addition to fifty sets of state regulations and countless district, county, and municipal edicts. More dramatic is China's legal explosion accompanying its economic explosion. From 1979 to 1983, China passed 4,119 laws and regulations. Between 2001 and 2004, the number had grown exponentially to 94,299.[2] Local, national, regional, and international rules and regulations touch upon every aspect of human behavior and commercial activity.

These are only the *official* regulations of governmental bodies; individuals and companies constantly create their own *private* laws through contracts. Credit card applications, automobile sales agreements, medical waivers, and insurance contracts all expand the rules we live by, based on our willingness to accept them and backed by the willingness of the court system to enforce them.

Despite this all-encompassing application of law to life, the plethora of rules and regulations has a single common denominator. Law regulates one thing and one thing only: human relationships. Human rights and criminal laws place limits on how I may treat my neighbor; corporate governance codes lay out complex relationships among directors, managers, shareholders, employees, and increasingly, the surrounding community. Each—whether constitutional, regulatory, or contractual—expresses how people are expected to relate in certain situations and the consequences if they fail to do so.

Law is both a product of and contributor to human relationships. The continuum of public and private laws provides a way of setting rules of behavior within a relational context. Those relationships include both stated mutual understandings and unstated assumptions. When well formulated, laws are established through analysis, discussion, and give-and-take of parties, speaking for a larger constituency, who bargain over legitimate-but-differing needs and interests. Through this process, the rules of behavior arise from mutually acceptable forms of negotiation. When poorly formulated, a few individuals with the power to enforce can simply mandate the relational rules by fiat or exclusionary negotiations, without sufficient regard for those whose behavior and interests will be affected. Attention to relationships in lawmaking directly influences the success of later implementation and enforcement as well.

IMPLICATIONS OF LAW AS RELATIONSHIP

If it is true that law regulates relationships, then legal professionals, legislators, and legal reformers would do well to base their legal analyses on this premise. Legal reform is a substantial industry. In the developing world, legal reform is a form of technical assistance provided by numerous international financial institutions and bilateral donor organizations to help countries in transition and developing countries attain greater economic growth and democratic freedoms. The effectiveness of such assistance is highly dependent upon the extent to which it recognizes and reinforces the relational underpinnings of law.

Many countries have well-developed systems for negotiating needed reforms through purposeful involvement of varied stakeholders in a participatory process. Elsewhere, especially where the legislative process tends toward fiat, reformers can ignore large sections of the population in passing laws. Each approach sends a message about relationships between governed and government; correctly weaving a relational understanding into legal reform results in far more effective lawmaking.

Unfortunately, many legal reform efforts worldwide take a mechanistic approach to lawmaking. Laws are seen as components that can be removed and replaced to upgrade the performance of a given policy. Consequently, it does not much matter how the process is completed as long as the law is adopted, preferably on a fast-track basis with few delays from comment, review, or analysis by stakeholders or even parliaments. The point is simply to upgrade the legal framework. The paternalistic assumptions of this approach ignore the underlying social relationships that the rules should be designed to address, and regularly lead to a situation in which laws are not implemented but merely adopted.

RELATIONAL LAWMAKING

A relational approach to matters of law and policy begins with a better informed understanding that the

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purpose of reform is not to adopt laws but to change socioeconomic behavior within a system of complex relationships. Secured lending laws, for example, permit borrowers and lenders to reduce the costs and risks of credit transactions by behaving in a certain way (i.e., registering the transaction) that limits fraud and misunderstanding, which in turn leads to greater access to affordable credit. Other laws mandate behavior to avoid penalties, such as a tax code. In both cases, the regulatory regime supervises how people act: it either permits or prohibits certain behaviors by creating positive rewards and opportunities or applying negative sanctions and penalties.

Yet law is much more than the simple regulation of behavior. It arises from and defines individual and social relationships. The nature of the relationships in turn fundamentally affects how and whether the proposed behavioral regulations can be implemented or enforced as intended. Implementation arises from consensus—when people agree on what should be done, they can then implement that agreement. Enforcement is a product of agreement as well—when one party diverges from an agreed upon course of action, force may sometimes be legitimately employed to compel the recalcitrant party to honor the terms of the agreement.

Laws, regulations, and other rules work best when those subject to the laws believe them to be sufficiently legitimate. Legitimacy arises from the combination of at least three sources of basic legitimacy: substance, procedure, and representation. All of these are connected to relationship and either reinforce or undermine the purposes of lawmaking.

Substantive legitimacy is achieved when the content of the law adequately addresses the need being regulated. For example, a legitimate regulation on building standards for earthquake zones should not be based on building standards for oceanfront property outside of the zone. The substance must match the purpose so that the desired behavior—building safer buildings—will be achieved.

Procedural legitimacy arises from adequate compliance with an agreed upon system of rule making. Compliance, however, will establish legitimacy only if the procedure itself is considered legitimate; this is the essential difference between rule *of* law and rule *by* law. A government can fully comply with established procedures to enforce its will, but if the procedures are considered illegitimate, such as providing no vehicle for public input, then the substance will be difficult to enforce, even if the law itself is excellent.

Representational legitimacy is concerned with the participants in the process. Most lawmaking is done through representatives of the governed: parliamentarians, executive agencies, and specialized bodies. If those who make the laws are not considered legitimate representatives of those subject to the laws, then the laws will be considered illegitimate. Colonial governments imposed by force, for example, are generally not considered legitimate by local populations. Consequently, colonial laws—even if substantively and procedurally legitimate—are often considered illegitimate.

The importance of legitimacy can easily be seen through examples of international economic development programs.[3] Legal reform interventions are intended to establish the framework for commerce by setting up the "rules of the game" in accordance with proven international standards. The goal, frequently, can be described as the adoption of well-written laws, based on an unstated belief that substantive legitimacy is sufficient to achieve the socioeconomic behavioral goals addressed by the law.

Albania, after decades of isolation under the Hoxha regime, rejoined the international community in 1993. Europe and the United States rushed to assist in the transition to a Western-style, market-oriented, democratic system of government. By 1995, Albania had adopted a wide range of fundamental commercial regulations, such as a bankruptcy law, company law, and a commercial code. Yet few of these laws were effectively implemented. One Albanian legal professional explained that Albania had many excellent laws from France, Germany, England, and even the United States, but that these were not perceived as *Albanian* laws and, consequently, were not used.

The purpose of reform is not to adopt laws but to **change socioeconomic behavior** within a system of complex relationships.

The laws may have been substantively adequate but were adopted primarily through use of foreign drafters

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with limited local participation in the process. In fact, the system for legislative process did not require any public comment before a draft became law. One banking regulator frequently sought comments from the banking community before implementing new regulations but did so out of good will. Not all officials had such good will. From a legitimacy standpoint, process and representation were lacking.

People accept the rules of the game because they respect the system by which the rules are made.

Croatia provides examples of both proper and improper attention to legitimacy. In the late 1990s, Croatian legal experts decided to draft a new law governing associations. A national umbrella association, with more than ten thousand local associations as members, discovered the initiative and asked to be included in the process. The drafting team begrudgingly gave the association two weeks to comment on the draft before submitting it to parliament. The comments, along with requests for further discussion, were ignored, and the law was passed. The association challenged the resulting law in court, where the law was found to be unconstitutional in at least 50 percent of its provisions. At this point, legitimacy had failed at the substantive level—procedurally by rejecting meaningful participation and representationally by failing to include sufficient expertise on the drafting committee.

The national association thereafter sought to engage the drafters in a more meaningful, effective approach. First, they supplied experts from the International Center for Not-for-Profit Law (ICNL) from Budapest to assist the local experts in redrafting the law. Once satisfied, the drafting committee permitted the national association to send the draft for comment to the association's members, which by then numbered thirteen thousand associations. Yet these relatively new organizations had little understanding of how to interpret and comment on a piece of legislation, so only ten of the thirteen thousand members submitted comments. Rather than consider this process sufficient, however, the national association arranged for meetings around the country in order to explain the draft, thus eliciting hundreds of useful comments, many of which resulted in amendments to the draft. When eventually submitted to parliament, the law was readily passed and thereafter readily implemented based on the consensus and substantive quality achieved during the process.

The three-fold approach to legitimacy explored in these examples rests on a respectful approach to relationships. When lawmakers include the stakeholders who will be affected by new laws, they not only provide for greater substantive input and local ownership but they also foster healthier relationships between government and governed. Even a cursory look at the unstable regions of the world reveals a chasm between government and governed, rulers and ruled. Inclusive policy making and legislative processes provide an essential tool for reformulating societal relationships.

RELATIONSHIP AS THE BASIS FOR ENFORCEMENT

When policy making and legislative processes are based on participation by affected stakeholders, the processes both recognize and reinforce the relationships between all parties. Law and policy are generally negotiated among competing interest groups, sometimes with mutually exclusive interests. The process allows the parties to buy into the system that produces the rules.

When they perceive that they are appropriately represented, given a chance to voice their opinions, and exposed to the arguments of competing interests, parties are more likely to consider the outcome legitimate, even if it does not fully achieve their aims. In other words, they accept the rules of the game because they respect the system by which the rules are made. This has implications for implementation and enforcement of those rules.

Implementation is a product of consensus. Agreements can be implemented, but when there is no agreement, there is nothing to implement. In the Croatian case noted earlier, the second association law was readily implemented because the process produced mutual understanding and agreement among the relevant actors. In Albania, little implementation followed passage of new laws because little if any consensus had been achieved through the process.

Consensus requires understanding, and understanding requires com-

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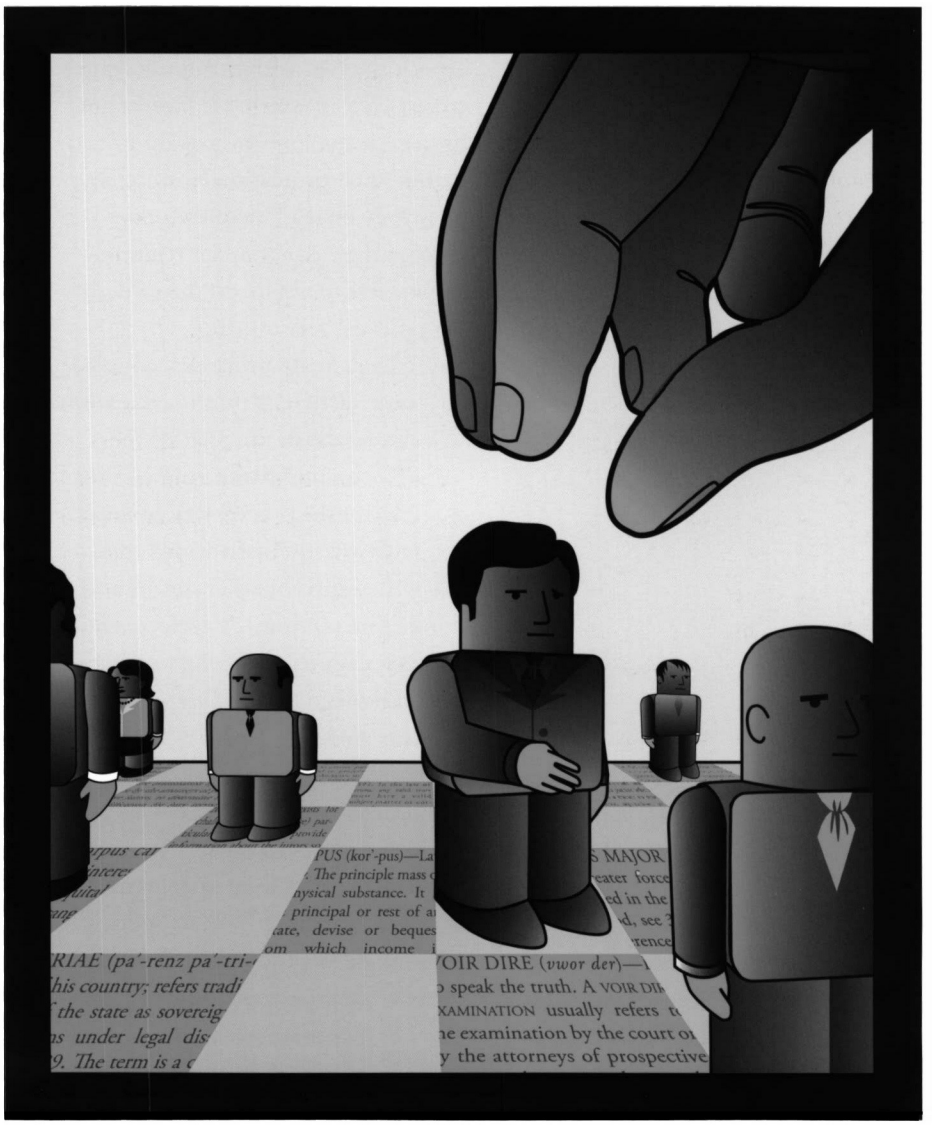
munication and participation in the process. Understanding is achieved only when there is effective communication among the parties to the agreement. For legal reform programs, this communication must often take the form of public education and outreach. During the lawmaking process, outreach is used to ensure feedback from stakeholders to inform the content of the reforms. Once a reform is passed, public education is needed to announce the changes, explain how they were legitimately achieved, and explain the practical implications of implementation, including benefits of compliance and costs of non-compliance.

Trust, like understanding, is fundamental to enforcement and implementation. At the most basic level, all economic transactions are founded upon some form of trust relationship. In an intimate society, such as a rural village, trust can be enforced through social sanctions. When commercial transactions are extended in a less intimate setting, where the parties have no pre-existing relationship, laws and legal systems provide proxies for trust.

This continuum of trust has an impact on economic development. Robert Cooter and Hans-Bernd Schaeffer[4] point out that in developing countries there is a trust gap that damages development. In a country such as Mozambique, for example, transactions at the village level are vibrant, with little concern for default. Likewise, a merchant in Maputo will readily enter into agreements with a trading partner in London. Yet that same merchant may not undertake a contract with a fellow merchant from a distant Mozambican city.

The apparent anomaly is actually consistent with issues of trust. In the village, direct relationships establish trust while social networks ensure compliance. In the international transaction, Mozambicans will trust British courts to enforce the contract fairly should there be a breach, even though they may not fully trust their British trading partners. Yet in Mozambique, merchants who do not know one another know that they cannot trust the local courts to fairly apply legitimate laws. This is because the proxy for the trust relationship between individuals—trustworthy laws and institutions—is insufficient. Trust is ultimately a question of the quality of relationships, whether between the parties to a transaction or between the public and the institutions of government needed to ensure compliance.

Many a legal reform initiative has floundered on the shoals of misunderstanding of market norms and social norms, which often have different aims but can easily be confused to the detriment of an otherwise well-executed reform initiative.[5] Market norms define the parameters of relationships related to transactions.



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The market requires clear rules, predictable outcomes, and high levels of performance, with specific rewards and sanctions applied for success and failure at each point along the way. These norms hold the market together. Social norms, by contrast, preserve social relationships. They are less concerned with costs and benefits and more concerned with harmony and stability in the social fabric. Market norms seek to reconcile accounts; social norms preserve relationships. One focuses on financial reparations, the other on relationship repair. Both norms are valuable; both serve important functions. Yet each can undermine the other.

Commercial laws establish rules based on market norms. However, the judges and other officials in developing or transition economies who are expected to enforce the rules often unknowingly apply social norms. This is normally due either to a lack of training about how the market works or to an excess of indoctrination about the supposed superiority of social norms. In either event, this can result in a weak and ineffective set of market rules and laws.

Trust and understanding are fundamental to enforcement and implementation.

Similar confusion creates dangers elsewhere in the economy, when political norms (a subset of social norms) are confused with market norms. Political debts are paid off through political actions, such as delivering votes or supporting a political initiative. Market debts are paid off by fulfilling the terms of the contract. In many countries, political leaders direct lending through banks in order to enhance political relationships. If the debtor fulfills the incumbent political obligations, the government may choose not to enforce the loan agreement.

Unfortunately for the bank, however, the loan agreement is set in market terms, so the bank must absorb the loss without meaningful recourse to enforcement. Banks are protected only when laws do not permit such protection from repayment but instead enable banks to enforce their commercial relationships without regard to the underlying political relationships.

Legitimate processes, coupled with sufficient public education, can establish the relationships and the understanding of those relationships necessary to create trustworthy institutions that will enforce market norms and enable economic development. Laws alone, even when substantively legitimate, cannot achieve this goal.

ETHICS, RELATIONSHIPS, AND LAWMAKING

Trustworthy legal systems and institutions cannot be built or maintained without an undergirding support structure of ethics. Ethics—whether personal, professional, legal, governmental, or corporate—are the mainstay of the rule of law and the culture of accountability needed for economic growth and social stability. Ethics can best be understood as behavioral obligations reasonably expected by parties to a relationship. As a starting point, this means that ethical obligations depend on an underlying relationship and cannot exist properly without one. Likewise, the nature of relationships defines what can reasonably be expected.

For example, lawyers are subject to a code of ethics that provides for different obligations to different parties. To their clients, lawyers owe a duty of representation, which is strict but not absolute. Thus, a lawyer must maintain confidential information of the client, for example. The lawyer cannot, however, lie to the client's adversary about such information because the lawyer has an a priori relationship with the legal system, which forbids fraud. The lawyer must be truthful to client and adversary alike but need not be volunteer unprivileged information to an adversary unless asked. At the same time, ethical standards provide that a lawyer must reveal legal arguments that undermine the client's case because the lawyer has a duty to the court to protect the system of justice. In some cases, a lawyer must even violate protected confidences of a client if the client appears likely to commit a crime, because the lawyer has a greater duty to society. These overlapping circles of relationship—client, profession, court, society, and adversary—define the parameters of behavior and appropriate expectations within each relationship.

Ethical obligations are violated when a person betrays the reasonable expectations arising from a relationship. Judges, for example, have a professional relationship with all liti-

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gants because they represent the state, and have an obligation to preserve the relationship between the state and the litigants by deciding cases according to law. If they award a judgment based on biases or family ties, they violate that relationship.

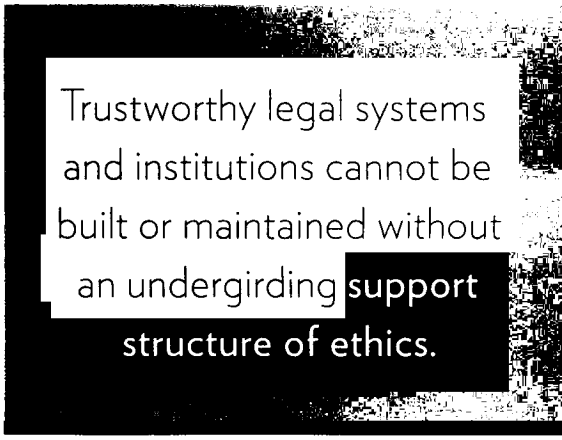
Public corruption is another form of betrayed relationships. Governments are supposed to serve the public on the basis of merit and achievement. When officials are able to consolidate power and escape accountability, they frequently turn the public trust into a font of private gain. The laws say one thing, but unless institutions enforce those laws, practice quickly veers into illicit gains from rent-seeking behavior. In a system based on might, corruption becomes an acceptable mode of operation. Lawmaking frequently is deployed in favor of vested interests, or enforcement of seemingly legitimate laws is unavailable against the politically connected.

In a system based on the concept of public service by limited, accountable government, such corruption is recognized as a betrayal of the relationship between the state and the public. When the two systems intersect in the field of donor funding and technical assistance, the donor states have a legal obligation to operate on the basis of their own systems. They have an ethical responsibility to their electorate to uphold the social consensus on standards of governance; the recipient state has no reasonable right to expect anything different. Otherwise, the donors may well encourage continuation of cycles of corruption.

CONCLUSION

Lawmaking represents one opportunity for technical assistance to break patterns of poor governance. By applying standards of legitimacy, reformers—especially domestic reformers—can introduce concepts and practices of representative government that undermine and replace systems of authoritarian rule. By introducing or insisting upon participatory processes, healthy relationships between government and governed can be established or enhanced to support an ethos of government service. By creating consensus based on public interest, lawmaking can create the foundation for implementation and appropriate enforcement of the rules of the game.

Effective and proper lawmaking is relational. It relies on legitimate substance, process, and representation, which in turn create healthier social relationships. These relationships promote implementation and enforcement in accordance with the rule of law. The ethical demands of the rule of law, in turn, require the employment of a legitimate lawmaking system. By extension, it would seem that a system of lawmaking that focuses on only one aspect of legitimacy—substance—is far more than inefficient. It is unethical. ESR



Endnotes

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