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# Commentary: Kenneth Davidson, Promoting the Rule of Law Abroad, The Professionals' Critiques

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COMMENTARY

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THE PROFESSIONALS' CRITIQUES, a commentary on
PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE,
Thomas Carothers, Editor, Carnegie Endowment for International Peace, 2006

Promoting the Rule of Law Abroad: The Professionals' Critiques

Under grants from the US Agency for International Development, the Federal Trade Commission and the Antitrust Division of the Department of Justice have for more than a decade provided technical assistance to newly formed antitrust agencies of transitional economies and developing nations. Like Germany, Japan, the EU, the OECD, the World Bank, the United Nations and others, the US has supported these competition assistance programs are part of more comprehensive law reform assistance programs. As FTC Commissioner William Kovacic has written, the effectiveness of any competition law programs requires a functioning rule-of-law system that recognizes property rights, contract rights and a reliable judiciary. My experience as a competition law technical assistance advisor and that of those I have worked with has demonstrated not only that other branches of law must be established to have a workable free market but that an effective competition regulatory system must be integrated into the legal system. For example, judges who review decisions by competition agencies must understand the role and purpose of the competition laws and agencies. As a result, the law reform experience of the entire foreign assistance programs has direct relevance to efforts to promote competition law.

While Thomas Carothers' collection of essays book is not specifically about competition policy, it provides essential background for those who would provide technical assistance to competition policy authorities in third world and transitional economies. It is based on experiences that too rarely informs our efforts. This book is written by professionals – government technical assistance advisors, private NGO contractors, academics, and

consultants – who continue to work on projects to improve the rule-of-law of developing nations and transitional economies. What is most striking about the book is that the fundamentally negative critique of foreign legal reform programs – on which most of the authors agree – is combined with a continued dedication to the varied goals which are included under the rule-of-law label. It is designed to force the reader to think about the design of rule-of-law programs and whether those designs are likely to achieve the results that donor agencies and recipient countries intend. By examining the contradictions and failures of existing programs Thomas Carothers, of the Carnegie Endowment, and his collection of ten authors describe a litany of problems with these programs and only provide intellectual frameworks that might suggest how to implement better programs. It is therefore a book to be studied by those designing new programs, but not a map of how to implement them.

My own work, which has focused more often on competition laws and programs than on broader rule-of-law projects, confirms much of the observations of these authors. The foreign assistance people with whom I have worked sometimes seem to be completely cynical about the corruption, graft, and disregard for human rights of local officials and business owners. At informal meetings with others from the foreign aid community, these people discuss and even joke, ruefully, about the facade of freedoms, the corruption of judges, legislators, military officers, police, Presidents, and national and international businesses and the use of slavery, torture and murder. They criticize the knowing and unknowing mistakes of the organizations for whom they work, mistakes based on ignorance of local conditions, mistakes about the nature of problems, bureaucratic incompetence and empire building, personal spite and egotistical blindness, and the politics of the donor nations and donor agencies. Nevertheless, every morning these same people get up early, work hard and late to attempt tasks that seem impossible. They not only work hard, they are entrepreneurial advocates for their programs, always on the look out for a new better way to implement the program, a new person to persuade of the value of the program, local citizens or civic organizations to help or to involve in the programs. It has been an inspiration and education to work with these people.

## The Critiques

As a result, I was familiar with much of the substance of the critiques by these authors. Even so, there is much to learn from these carefully thought out essays. Several themes run through these essays. Rule-of-law is the latest, most popular label for a multitude of aid programs that have too many, not necessarily consistent, goals and strategies. The objectives of speedy trials and equal treatment may be elements of due process, but they can also be tools for efficient repression under unfair laws. The emphasis on training and assistance to the judiciary is a repeated target where that emphasis is not necessarily coordinated with assistance on training of prosecutors, police, and jailors as well as the development of effective legal assistance to the prosecuted and the poor. The perverse consequences of computerized court calendars and more heavily armed police without the implementation of human rights guarantees and effective due process procedures are easy to understand.

## Implementation Problems

The essays generally agree that focusing aid through government institutions is often ineffective because the benefits never reach those whom they were intended to help, either because of corruption or ineffectiveness of those institutions. As a result, a considerable amount of the book is devoted to advocating focusing on directly helping the intended beneficiaries of the program rather than supporting organizations that in other settings help the poor. That means finding, developing or utilizing existing dispute resolution systems to implement fair treatment. That viewpoint is based on the extremely small number of trained lawyers and judges in these countries. That small number eliminates the access of most of the population to formal dispute resolution systems because most people cannot find trained representatives, cannot pay them, and do not understand what they might be able to do for them.

Instead these essays suggest that it may be more effective to seek non litigation solutions to problems faced by the poor, like workmen's compensation, unemployment insurance or public health services. These are programs that are less likely to exhaust their funds training government officials and lawyer before any benefit reaches the poor. These funds are directly earmarked for the poor. I attended a conference last year that suggested a further approach to assist the poor that also avoids both the likelihood of graft or confrontation with presumed prerogatives of powerful elites. The conference sponsored by the Center for Macro Projects and Diplomacy at Roger Williams University concerned reconstruction assistance of the infrastructure and the institutions of the former Yugoslav republics, Afghanistan, and Vietnam. I was most impressed by those NGOs who had designed programs to train individuals in skills that were immediately in demand in those countries. Teaching persons practical nursing skills, carpentry, basic reading skills and the like fill immediate needs in these societies. Unlike grants to governments for major projects these training efforts do not involve large grants of money that may be stolen by corrupt government officials or ruling elites.

## Donor Design Problems

The program design and contractor selection process used by donors have traditionally been criticized on the grounds that the funds have been inadequate or unreliable or subject to theft by corrupt officials, but this book adds to the list of elements that make programs less effective. Donor organizations (or countries) tend to provide aid to support institutions modeled on an idealized version of their own domestic law, regardless of the local legal culture. The United States, for example, assumes the effectiveness of an independent judiciary and a common law adversary system as means to achieve fair results. One essay ("Mythmaking in the Rule-of-Law Orthodoxy," by Frank Upham) takes on this simplistic model of the US separation of powers doctrine and points out that appointments to the United States Supreme Court – as the recent Roberts and Alioto appointments demonstrate – are intensely political actions that can have profound effects on the population on issues ranging from abortion rights, to criminal procedural rights, to decisions about the fairness of election procedures. Moreover, it is common for states to elect judges for a term of years. State judges must then campaign for reelection to

maintain their positions. It is doubtful that these real world facts are clearly consistent with the rule-of-law model that assumes a neutral judge applying the laws of a country evenly and fairly to all litigants.

The point is not that the American judiciary is corrupt; rather it is a complex system that overlays formal rules of decision making with layers of tradition (and controversy) which have over centuries created a workable judicial system. It is not a set of instructions in which Tab A fits into Slot B to create a judiciary. Moreover, the design of an assistance program does not necessarily take into account that the common law techniques and procedures may not fit with the civil law traditions that most developing and transitional countries have inherited; nor does the design or implementation of the program necessarily seek to integrate its efforts with parallel assistance programs from other donors who more frequently use civil law models rather than common law models.

My experiences working with the US antitrust technical assistance programs reflects some of the lack of connection between the US training programs and the legal culture of the countries receiving the assistance. The US has tried to bridge the gap between US law on the one hand and European law or the laws of the developing countries on the other by emphasizing "competition analysis" in the work of US long term advisors. This focus on general analysis of types of competitive issues is inconsistent with the civil law training of most recipients of the advice. To the extent that they are trained, they expect to find the answer to questions of legality in the words of the competition law. I have argued elsewhere that this expectation is unrealistic for competition laws where legality tends to be determined by the effects of business actions in a particular context rather a set of specific actions that can be characterized as legal or illegal. I think the evolution of European competition law shows that the US position is correct, but little effort in the aid programs is spent on explaining how and why competition law needs analytic tools that are different from most civil law statutes.

Moreover, when the US sends teams that conduct short term training sessions, those training sessions assume a variety of procedures common in American antitrust work that may have no counterparts in foreign legal systems, such as oral testimony under oath, comprehensive document requests, cross examination of witnesses, and lengthy discovery and trial proceedings. It is unclear what these foreign agencies think of this kind of training, but, as is more generally true of rule-of-law programs, the donor agencies select the training programs because it is offered for free. These programs tend to be offered on a take it or leave it basis. Foreign competition agencies frequently take what is offered but whether and what they find useful is something of a mystery. The question is of sufficient concern that the International Competition Network is in the midst of its second attempt to determine what kind of problems new competition agencies have and what kinds of assistance will be most useful. An Indian competition NGO, CRDF, has sponsored a symposium on the question of how to measure the effectiveness of various types of competition technical assistance.

Structural Faults in Awarding Rule-of-Law Contracts

Carothers' book suggests one additional answer why the effectiveness of aid programs have not improved substantially over the half century they have been attempted. One essay suggests that the secretive bidding process for assistance contracts and the failure to publish critical assessments of rule-of-law programs restrict the ability of the donor community to learn by doing. ("Lessons Not Learned about Legal Reform," by Wade Channell.) In general, contractors and assistance organizations see their techniques and training programs as proprietary trade secrets. To the extent that they are successful, they would prefer to avoid sharing this information with organizations that are likely to compete for a contract the next time donors issue a request for proposals. Rather, if the organization has developed and recognized a new, more effective technique, they would prefer to keep the discovery private so they can include the innovation to gain an advantage in bidding on the next request for proposals. To the extent that programs actually failed in demonstrable ways, the organizations do not like this information to be known because it might suggest incompetence and could hurt their future bid applications.

The worst aspect of this dynamic is that there is very little learning despite many years of experience by numerous organizations and people. Even within organizations few resources are devoted to "lessons learned." Bid proposals tend to be written to conform to the terms of the request for proposals and rarely question the value or efficacy of the tasks being undertaken. As a result, contractors tend to go into the field with a preset number of "deliverables." Rather than study the problems in the context of the culture, the assistance experts arrive with a formula that they are expected to implement and then are expected to write reports showing that the deliverables were achieved regardless of whether those accomplishments furthered the objectives of helping individuals.

My more recent experience as a private contractor is consistent with these constraints. I was told by the sponsoring organization that I was being hired because I am an expert in training the various groups with whom I worked. Consequently, the organization would not fund more than four days of my preparation time for training programs for three different sets of people. Fortunately, I had more than two months to prepare for the training. Also, there were very good on-site technical assistance advisors who could help me learn about the local law, the current litigation of the local competition agency, the needs of the different groups and to translate both the local material into English and the material I wanted to use into the local language. The results exceeded my expectations in large part because I knew almost as much about the local competition law as the local officials and I was familiar with their recent cases.

As noted earlier, this kind of "off book" contribution of time is not unusual for technical assistance personnel. I was able to do my job only because of the extra time and effort that was contributed by the long term advisors. They worked closely with me in a way that was not specifically part of their job. Their "deliverable" was to have me come and speak. What I said and whether it had any effect was something I would have to justify in my report on my trip. In theory, I probably could have written an acceptable report before going. But what I wrote was longer, more detailed, more analytic and, I hope, more helpful than was required by the contract.

My improvised additions do not separate me from others who have worked for substantial periods of time on foreign technical assistance projects. The work is not generally highly paid so it tends to attract persons with substantial dedication to the objectives of the programs. My work differs more as a result of my writing than my efforts on the job.I have looked upon my rule-of-law consulting experiences as an opportunity to learn as much as an opportunity to teach or train. And, perhaps because I am also an academic, I feel an obligation to share what I have learned by writing. I expect some of those who read what I write to disagree with what I have said or to use it to build better models for training or implementation of programs. I welcome both of those as contributions to better future programs.

The problem is that the learning and improvisations of the individuals working on the aid programs is not generally of great interest either to the contractor or to the donor organization. The donors and the contractors' primary aim is to show that they have accomplished what their program had designated as quantifiable objectives. Learning and designing better programs are not generally included in those objectives.

Two Reports of Successful Rule of Law Changes

The book discusses in detail only two programs in which countries changed their laws in a way that seemed to be designed to promote the rule of law. At first glance, these two programs, which involve the adoption of US criminal procedure rules, seem to contradict common advice that efforts to transplant foreign law systems in their entirety will fail, especially if programs are politically controversial. On closer inspection, however, it is clear that these were not instances in which Russia and certain Latin American countries had American rules of criminal procedure imposed on them; rather they are examples of countries that had pressing internal problems that the American rules helped to solve. Americans generally played a secondary role by providing technical assistance only when they were requested to do so. Consequently, these two essays are more properly viewed as affirming the conventional wisdom that, if there is a domestic constituency for change, foreign models may be effective.

The Russian story is interesting because it seemed so unlikely that the Russian government, especially under President Putin, would adopt laws to implement constitutional declarations establishing: trial by jury for capital cases, the right to counsel after arrest and at trial, the right to habeas corpus, the right to exclude illegally gathered evidence, the right not to be subject to double jeopardy, the right not to be subject to ex post facto laws. The push for the laws to implement these changes came from a working group established by President Putin in 2000. ("The Complexity of Success in Russia," by Matthew Spence.) The leader within the commission was Elena Mizulina, a Duma Deputy. She drove the forty person commission composed of members of the President's administration, of the Ministry of Justice, of the prosecutors' offices, and of the internal security services to formulate and push for the implementing legislation in the Duma. She received little support from liberal Duma parties or from the private defense bar.

American officials who had lobbied hard for changes in the criminal procedures in the 1990s had all but given up their efforts by 2000.

How then did this energetic person get the commission and the Duma to adopt what appeared to be Western, or even American, procedural rules for criminal cases? The case was made primarily on the Russian character of the rules, not merely Russian constitutional declarations which had often been ignored, but pre-Soviet legal practices were used to support the Russian character of the implementing legislation. In the final drafting stages Americans made practical contributions to the final formulation of the laws, for example, they noted that plea bargaining is a major efficiency feature of the American system, that could be implemented with safeguards for defendant's rights. This suggestion made a big difference to the acceptability of the program which appeared to be impossibly slow and expensive. But the key to success seems to have been having the right person pushing at the right time a program that could be legitimately characterized as having indigenous roots. In that situation, the Americans could and did limit their role to technical advice and let the Russians work out their own politics.

At least one footnote should be added to this story. The author does not claim that the Russian criminal procedure is now an ideal system. He notes, for example, that there are *no effective guarantees against falsification of evidence or against police torture*. Even so the ABA/CEELI project rates the programs as the "most progressive Criminal Code" in the former Soviet countries. Consequently, it is not possible to say that the code has been implemented in what we would consider an appropriate manner.

American involvement in changes to the criminal procedure codes in Latin America was more open and direct. ("Measuring the Impact of Criminal Justice Reform in Latin America," by Lisa Bhansali and Christina Biebesheimer.) USAID made adoption of American style changes a priority item that was consistently funded. One of the more interesting aspects of the adoption of the American approach is that once adopted by a few countries, the demonstrated success seemed to create a spontaneous demand from other countries for assistance to make similar changes. The appeal of American criminal procedure rules is not apparent. The countries requesting American assistance include countries which have been dominated for centuries by economic elites, countries in which civil wars, insurrections and large violent criminal elements are continuing national problems. Perhaps the dire straits of some of these countries provided the impetus to "try something else."

This is the only essay that tries to assess the impact of legal changes on the countries that have made the changes. In view of the political instability of many of these countries, it appears to be difficult to obtain reliable statistics. Indeed the authors of this essay concede that obtaining baseline data describing the situation before the changes was even more difficult than obtaining more recent data, data which is also incomplete. Nevertheless, using the data available, the authors put together an optimistic assessment of changes in some of the most notorious abuses of criminal procedure. The presumption of innocence had little meaning in countries that frequently used pretrial detention and lacked any guarantee of speedy trials. The use of pretrial detention appears to have fallen

in all the jurisdictions surveyed, but, apart from Chile, the progress appears modest – a decline of 87 percent of pretrial defendants to 73 percent, a decline of from 54 percent to 47 percent. In some countries that adopted changes, the rates of pretrial detention appear to have risen. Only in Chile, where the rate had fallen from 59 percent of defendants held in pretrial detention to 24 percent, can one say that the rule of pretrial detention has become the exception.

On the other hand, the authors find more consistent success in obtaining speedy trials in those countries that have moved to systems that permit oral testimony. In addition, those countries that have adopted plea bargaining and alternative sentencing procedures (community service, etc.) appear to have made inroads on criminal justice systems that were so overwhelmed by the number of prisoners that they could not act with any degree of speed or fairness. The very fact that these numbers show practical success may well explain the continued growth of interest in Latin American countries in changing their criminal justice procedures. Like the experience in Russia, it also illustrates that change is more likely to be effective where there is local support and those supporters adapt the proposed programs to the perceived needs of the country adopting new rule-of-law systems.

Rethinking the Aid Process

The correlation of successful rule of law projects with open program selection processes and open reports of the results of such processes brings me back to one of the most troublesome aspects of rule-of-law aid raised by this book. The secret, or confidential, structure of the aid "industry" is a barrier to developing and delivering better aid programs. It is both harder to develop new better techniques and harder to persuade developing countries to adopt them when the methods are undisclosed and the failures and successes are not reported in a manner that helps both donors and donees to understand the problems and possible solutions. I hope that this book contributes to a rethinking of how donors view their contracting processes and that they learn to value the learning potential of failures as well as self-reported successes.

*Promoting the Rule of Law Abroad: In Search of Knowledge* is a major contribution to thinking about how to design rule-of-law and other aid programs. Like the work of William Easterly and others, it brings out of the shadows dysfunctional characteristics of many large aid programs. Each essay in its own way illustrates how "one size fits all programs" are unlikely to succeed. Programs and especially their implementation must reflect the culture and circumstances of the country for which aid is provided. To customize the programs, we must first understand the problems of the particular country and then create and implement solutions that are viable in those countries.