Company Law Reform in the Pacific Islands

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The Foundations of Legal Reform

- Consider first the primary role of markets in economic growth.
- Law is NOT an instrument of state policy. Rather, it seeks to limit the role of the state in markets.
- Thus, law is seen as an instrument to foster private transactions.
- L&D doctrine emphasises private law to protect property and facilitate contractual exchange (property rights and enforceable contracts) supported by an independent judiciary.
Traditional Approaches to Law Reform

- Lack of ownership – sometimes laws are transplanted from developed countries without cognizance of local conditions and adaption to local needs and culture.
- Legal reform has been undertaken within donor project cycles, which are typically over no more than 3 years, while fundamental legal reform can take much longer.
- Legal reform has ignored a “big picture” approach, which fits particular laws into systemic needs.

See Wade Channell, 2005, Lessons not Learned, Problems with Western Aid in Post Communist Countries, in Thomas Corothers, ed, Democracy and Rule of Law Project, Carnegie Foundation
Traditional Rule of Law Projects

- Assume that the reforming country needs the laws of a country that is considered to have the Rule of Law.
- Reform is often implemented without any conception of how changes in the law will impact upon the reforming country.
- The result has often been failure.
Pacific Private Sector Development Initiative (PSDI)

- Reform initiative supported by Asian Development Bank (ADB) and AusAID to promote private sector development in Pacific Island countries (PICs)
- Focus Areas
  - Business law reform
  - Access to finance
  - Public enterprise reform
  - Public – private partnerships
- Features
  - Rapid response capacity
  - Maximisation of linkages between focus areas
- Process
  - Analysis – advocacy – reform – implementation
Key Business Law Reform Issues

- Investment requires long time horizons, enforceable contracts, and well protected property rights—all problem areas in PICs.
- The commercial legal framework is outdated and unsuitable for the type of business conducted in PICs.
- Land rights in the PICs are problematic.
- Collateral rights over movable property are weak and outdated.
- Contract frameworks are weak leading to poor enforcement.
Key Business Law Reform Issues (continued)

- The use of commercial law is effectively restricted to a small group of investors.
- The law often discriminates against local businesses and community groups.
- ADR mechanisms rarely exist, and arbitration does not exist or is not enforceable.
Principles for Reform

- Laws must be tailored to countries’ circumstances and needs.
- This means
  - Ensuring that laws from other countries are not simply used without significant modification;
  - Ensuring that laws do not contain unnecessary provisions;
  - Ensuring they take into account other prevailing weak capacities to administer and enforce the laws; and
  - Ensuring that use of these laws minimizes the need for recourse to the judicial system.
Reform Process
– Critical Success Factors

- Thorough analysis (economic & legal)
- Strong government ownership
- Comprehensive consultations
- Rapid response (flexibility by donors to support reform process at all times)
- Implementation
Importance of Consultations

- Government ownership
- Identification of stakeholders
- Reform champions
- Public-private steering committee
- Identification of community needs (gender, traditional structures, land, etc.)
- Capacity issues
- Implementation
The Discretion Problem

- Existing laws copied from the United Kingdom and designed for another time and place ("legislation by Xerox")
- Often, such laws place considerable discretion in hands of functionaries
- Abuses of discretions and rent-seeking behaviour
- The solution: remove discretions wherever possible
The Technology Problem

- Law reform seeks to access the new technology
- Important in PICs because of “tyranny of distance”
- Outsourcing offshore may be a solution but sovereignty and capacity issues
Case Study: Solomon Islands

- Reform Agenda
- Reform Process
- Special Features – Company Law
- Implementation
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