MAKING A DIFFERENCE: THE ROLE OF THE LL.M. IN POLICY FORMULATION AND REFORM

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The field of international legal reform has experienced a period of sustained growth since the fall of the Iron Curtain. Beginning in the early 1990s, international experts from developed Western economies descended on virtually every newly independent state to offer advice on adjusting the legal system to solidify democratic trends and enhance economic growth. Today, experts from Germany, France, England, the United States, Norway and even Italy compete and collaborate to refashion the legal frameworks of former command economies in Europe and Eurasia, as well as developing countries from Africa, Asia and Latin America. Legal reform has become an industry, with hundreds of specialists addressing hundreds of laws.

For those who work in the field of international legal and regulatory reform, one of the most valuable partners imaginable is the local legal professional who has studied or worked abroad. Such counterparts improve the efficiency and effectiveness of the reform process by infusing it with a greater understanding of the policy implications under consideration and enhancing acceptance of change based on local values and priorities. In short, the cross-cultural legal professional serves as an irreplaceable bridge between what is and what can be.

This reality is founded on a greater reality: law is not simply a system of rules and regulations. It is a policy tool for changing or maintaining certain aspects of socio-economic behavior. As such, policies—and the legislative acts that flow from policies—embody the norms and values of the cultures in which they are adopted, and cannot be properly understood outside of that context. Consequently, local legal professionals with cross-cultural understanding and local sensitivities play a crucial role in reforming local policies in accordance with international standards.

Effective Policy Reform and the LL.M.

Competent international policy reform professionals rely heavily on local counterparts to understand, fashion, and implement reforms. (This is true even

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for those who impose paternalistic approaches, as further discussed below.) Local legal professionals who hold foreign Masters of Law (LL.M.) degrees are one of the most valuable resources available, along with those who have worked abroad (with or without advanced degrees). They can be, if they so choose, agents of remarkable influence.

The value of those who hold LL.M.s arises from their comparative analytical capacity, which is rooted in local realities yet informed by knowledge of other possibilities. They can be the first line of defense against the “hasty transplant syndrome,” in which well intentioned foreign experts seek to reproduce legal practices from their home countries that do not take root in local legal culture. They can guide and inform policy initiatives directly, by artfully crafting new solutions based on local reality and foreign possibility, or indirectly, by influencing those responsible for the reforms. Whatever the method, LL.M.s are important agents in the process of improving public policy.

**Agents of Understanding**

It is frequently noted that people do not understand their own language completely until they study another one. Those who take on a second language (and even more so a third or fourth), quickly find themselves learning their own grammar, syntax and linguistic assumptions better as they are forced to compare and comprehend a new perspective. The improvement encompasses more than just words or rules; it leads to new ways of thinking, improved communication and better understanding.

LL.M.s are inherently multi-lingual for several reasons. First, most who study abroad must actually learn a second language. Second, the language of law is itself a second language, not spoken by the majority of the local population in any country. It entails terms of art, professional idioms, and communication standards that are not commonly shared by speakers of the mother tongue, so much so that lawyers must often learn how to express legal concepts in “plain language.”

The LL.M. has a third level of language: comparative law. Anyone who has worked with an interpreter on legal issues understands that the interpreter must speak “law” as well as the other languages being used. It is not enough to simply translate the word “obligations”—which can have many meanings—when the word needed is “torts.” By crossing the cultural divide inherent in comparative legal studies, the LL.M. learns both words and concepts. The concepts challenge and increase understanding of the native system. As a result, the average LL.M. is likely to understand his or her own
legal system better than colleagues at home who have never undergone comparative analysis.

At the same time, the LL.M. picks up understanding of a foreign system, and in so doing becomes a bridge of understanding between the systems studied. It is no accident that foreign investors look for local lawyers who understand the investors’ home system. They know that the shared understanding will reduce or eliminate mistakes and confusion arising from translation. LL.M.s are the lawyers of choice for multinational corporations, foreign law firms, and foreign investors. They bridge both the language and the legal systems for their clients.

For reformers, this enhanced level of understanding has important implications. Good law must be rooted in the culture and values of the people affected by it; good concepts alone are not sufficient. Consequently, international reformers seek to work with those who have a comprehensive understanding of local reality. The power dynamics of vested interests, historical tensions, and even ethnic rivalries can have a critical impact on the effectiveness of legal reforms. Only the long-term local resident will understand those and be able to guide the reform process more effectively.

Local understanding provides the basis for translating foreign concepts so that can be aligned with local values and local concerns. There are countless stories of American lawyers working with Asian counterparts who have failed to grasp that American individualism (which emphasizes individual rights and group obligations) is often at odds with Asian communalism (which emphasizes individual obligations and group rights). Rights-based reforms can create concerns for Asians about the impact on the group and particularly the family. If these concerns cannot be met in terms of communalist values, the reforms will fail, even though they may be the best solution for the common good. The cross-cultural LL.M. can negotiate these pitfalls.

Regulatory reform, which has become increasingly popular as a result of the World Bank’s *Doing Business* reports, also illuminates the need for cross-cultural understanding. The goal of *Doing Business* reforms is to reduce burdens that unnecessarily impede business. Such reforms are based on a concept of limited government and are not highly popular among regimes that believe in pervasive government involvement in business and the economy. To succeed, reformers must understand and be able to justify changes in the level of government intervention.

Simeon Djankov, leader of the *Doing Business* work, has noted that all business registrations in Guyana must be approved by the President. This law arose from colonial experience in which the colonial governor controlled the
small economy and had exclusive authority to authorize or deny various colonial endeavors. The country changed, but the law did not. As local counterparts came to understand the anachronistic foundations of the current regime, they were better equipped to reform it. Conversely, Saudi Arabia has the world’s highest fee for business registration, for the simple reason that they do not wish to permit just anyone to start a business. Saudi Arabia has yet to reform this law and is unlikely to until local policy makers adopt a different approach to economic freedom.

Local understanding permits better design and greater effectiveness of reforms. Comparative understanding provides options and directions for change. In the former Yugoslavia, court systems were designed to serve the interests of the executive in support of a state-directed economy. Upon independence, the newly formed republics inherited a judicial system that functioned very poorly in settling commercial disputes. Delays of more than seven years are not uncommon in obtaining a judgment, which is in turn unenforceable for another two or more years.

Early reform assistance, primarily from the US, tended to focus on reducing delays through better case management. Recently, Macedonia and Bosnia & Herzegovina recognized that the fundamental problem was design, not case management, and redesigned their courts to achieve a new goal: resolving commercial disputes. The understanding needed to bring about effective redesign of the courts came in great part from LL.M.s involved in the numerous court projects.

Understanding of local reality and comparative possibility is the foundation for change.

**Agents of Change**

LL.M.s are uniquely placed to bring about change in their countries. This is not simply a theoretical proposition based on the value of their cross-cultural understanding and experience. The proposition is grounded in reality: LL.M.s hold vital positions in government and business around the world, including numerous ministers of justice and foreign affairs, high court judges, parliamentarians, executives of companies, partners of leading law firms, and even a prime minister or two. This impact is in part due to the type of motivated people who seek the degree, people with a tendency toward leadership roles. It is also due to the increased understanding achieved through the LL.M. program, which empowers graduates to become leaders and embrace change.
The perspective gained from the LL.M. experience provides a starting point for change. All legal systems need to be upgraded, refined, and reformed from time to time. The intensity and direction of the reforms depend on the goals of those seeking them and the condition of the country in question. Economically wealthy countries tend toward gradual change, often through minor refinements to existing systems. Transition and developing countries frequently consider (or reject) more fundamental changes in hopes of attaining greater economic prosperity by emulating and adopting legal infrastructures that have led to success elsewhere.

Unfortunately, former colonial powers sometimes seek to limit the changes under consideration to those which complement the system of the colonial power. Portugal and France have traditionally sought to keep their former African colonies tied to them through similar legal systems. While not officially “colonialists,” U.S. specialists sometimes offer only U.S. solutions, despite the tensions of applying common law solutions to civil law problems. A better approach is needed.

Many countries today have both the need and opportunity to make fundamental changes to their legal systems. For some, such as Guinea-Bissau, the existing formal system is so superficial as to permit the choice of starting afresh. Others have reasonable well functioning German or French foundations that need to be updated and corrected. Croatia, for example, has a legal system established under the Austro-Hungarian empire (long defunct), amended partly in line with German advances, and then redirected for the 50 years of the Yugoslav era before reconsidering market-oriented changes. Among domestic legal thinkers, there is a tendency to seek German solutions, yet a failure to understand that Germany made dramatic changes in the 1950s while Croatia moved in a completely different direction, so that the historical legacy need no longer be the starting point. A number of attempts to copy Germany have failed or faltered, because the German solutions do not fit the pseudo-German root system.

LL.M.s in Croatia often look to other models, including British, French, U.S. and Norwegian, for various needed reforms. The preponderance of preference for Germanic solutions, however, continues to carry the day. Meanwhile, other former Yugoslav republics are either catching up or moving ahead of Croatia as their reformers adopt a more pragmatic approach, imported in part through the experience of their growing LL.M. population. Macedonia has revised its corporate governance regime in accordance with European standards through projects led by Dutch and Canadian specialists in concert with Macedonian experts under U.S. funding. Serbia has adopted a collateral registry system based on the model law of the European Bank for
Reconstruction and Development. Bosnia and Herzegovina invented a new judicial approach that joins vital concepts of both civil and common law. In all of these countries, other than Croatia, legal reform projects rely heavily on legal professionals who have received LL.M. degrees since independence and who use comparative analysis to find local solutions.

One of the most effective reform specialists working today holds a law degree from the Middle East and an LL.M. from Canada. An expert in secured transactions and bankruptcy, he uses his comparative knowledge to work with local counterparts to build pledge registry systems that suit their needs. The Albanian system they engineered respects Albanian sensitivities while increasing access to credit. The Bosnian system embraced internet technology to provide one of the most advanced and cheapest systems in the world. He has helped Georgia to consider the addition of mortgages to the movable pledge system, a practical and theoretical possibility that traditionalists reject unnecessarily. This ability to consider possibilities from a wide variety of sources and marry them to local values has provided a number of countries with advanced systems not available from their own tradition or the traditions of the legacy countries they normally look to.

International legal reform efforts tend to focus on comprehensive changes, from new bankruptcy systems and securities regulations to fundamental reform of judicial processes. These are important in the short term for countries in transition, but the massive efforts involved are not necessarily producing capacity for incremental changes over time. As one country after another “graduates” from such assistance, responsibility for future policy reforms falls exclusively to local legal professionals. Moreover, the flood of new legislation will take decades to understand, apply and implement, well after the foreign technical advisors are gone.

While professional reformers have given much attention to amending black letter law, less has been given to the process of legislation and policy formulation. The better systems of policy formulation produce laws through consensus of those affected by crafting agreement between disparate interests to obtain a generally acceptable approach. Whether they define consumer rights, judicial process, or securities regulation, such consensus-based laws tend to be implemented and absorbed more readily, because they respond to the recognized needs of the relevant population.

Systems that forego consensus appear to be more efficient than those that employ the often messy and time-consuming process of consensus building. They instead tend toward fiat, in which a dominant elite imposes rules without the negotiated consent of the bulk of the governed population. The legislative drafting process permits little input from affected parties, and the process of
adoption allows for little if any public comment or debate. Such laws can be conceived, drafted and adopted within a few months, but often meet prolonged and successful resistance at the implementation stage.

The majority of legal reform specialists working in other countries come from systems of consensus-based policy development and therefore can be expected to approach their work accordingly. Unfortunately, this is often not the case. Paternalism, time and budget constraints, and misguided notions of efficiency all too frequently lead to assistance projects that ignore the socio-economic underpinnings of successful policy development. The presumed efficiency of quick results soon falls victim to implementation ineffectiveness, as those whose interests were ignored in the policy process assert themselves through resistance.

The difference between implementation and enforcement is consensus. Where parties agree on the ends and means of a law or contract, they will voluntarily implement that agreement. When there is no such meeting of the minds, one party must seek to compel the other to comply, possibly through state-sanctioned force. A process that ignores the need for consensus must rely on a strong state that can enforce the laws. It is not enough that the reforms in question may in fact be well drafted and exactly what the country needs: without a sense of ownership, the excluded stakeholders are more likely to resist than embrace change.

Enter the LL.M. Professional policy reformers who understand their country’s context and culture are needed to establish and guide the long-term vision for change. This challenge can be approached from several angles. First, LL.M.s who work with foreign-funded reform projects can and should steer the reformers into a consensus-building approach. Although often hired simply to comment on a law, the LL.M. can recommend or even insist that a broader audience be engaged to ensure greater buy-in.

Second, LL.M.s can work to change the local model for legal reform. Many countries do not have effective consensus-building processes for introducing reforms or amendments. LL.M.s who understand that the proper measure of success is how long it takes to implement a law, not just to pass it, are in a privileged position of advocating more effective law-making models. They can identify legal solutions from their broad range of legal expertise, then guide the crafting and drafting of the law through a process that incorporates the opinions and input of a wide variety of relevant stakeholders. During the process, they act as conceptual translators who explain the new approach in terms of local values. By remodeling the policy process, LL.M.s can create a more stable and productive socio-economic environment.
Third, LL.M.s bring tools that may be new to their domestic legal community. Analytical skills acquired through a foreign education can be taken home and introduced to a wider community. Moreover, the LL.M. can be imported and adapted to improve the capacity of local legal professionals to introduce gradual and minor reforms. For example, many countries do not have a community of practitioners—such as a voluntary bar association—that tracks legal developments and promotes reforms. Instead, one or two professors exercise virtual monopoly control over the revision process, often based solely on theoretical principles disconnected from practical application. By creating specialized groups of practitioners to promote changes in a specific area—for example bank regulation or secured transactions—the cross-cultural professional can identify local problems, marry them to practical solutions, and advocate reform more effectively.

**Agents of Hope**

One of the most prevalent attitudes among college students in many countries is despair. They came of age in a period of great expectation after the fall of the Berlin Wall, when new economic and political models were expected to lift their countries to new levels of freedom and income. Results have been disappointing. Some countries have moved forward, but others have undergone collapse, war, or other destructive cycles. Many young people—and even their parents—have come to believe that they cannot make a difference, that the system is fixed and balanced against them.

While this may seem like a tall order, or even an irrelevant challenge, LL.M.s can be agents of hope within their societies. Through their own experience, they have come to understand that there are other options, models, and possibilities for their countries. They have experienced the reality that the past need not utterly define the future. They have been changed and thus know that change can happen.

Hope is more than wishful thinking or optimism. Optimism believes that things will get better; hope understands that we can make things better. The difference is one of agency and responsibility. Hope founded on a realistic understanding of human nature, social dynamics, and local values provides a foundation for the long term tactical and strategic planning needed to bring about reforms and create systemic capacity for reforms. Setbacks are inevitable, but they are not the end of the story.

Change takes time. Some studies have shown that people can take as long as 30 years to adjust their behavior to new economic conditions. Ingrained habits, attitudes, and ideologies can and do change, but they do so slowly.
Rapid change creates instability and reaction, even when it is beneficial. The perspective forged through cross-cultural experience suggests that LL.M.s are well positioned to understand these parameters, and to embrace the long-term disciplines needed to bring about change.

Change has enemies. Vested interests, entrenched ideologies, and poor understanding create barriers to reform. Resistance is normally both active and passive. In Macedonia, two professors who did not understand how bankruptcy works in practice were offended by some of the provisions of the new law. They attempted to pass amendments secretly through political connections. Fortunately, the effort was exposed and stopped before it caused tremendous economic damage to the country. It also highlighted the need for ongoing, systematic engagement with stakeholders to explain and inculcate new thinking and understanding.

Because change has enemies, those who wish to bring change need support. The U.S. has a mythology of the “Lone Ranger”—a single individual who stands against the powers and heroically forces reforms. Unfortunately, Superman and Rambo provide for interesting movies, but they are a poor model for reformers. Reform requires a network of like-minded and dedicated individuals who can reinforce each other’s work and encourage one another when the going gets hard.

The great Nigerian novelist Chinua Achebe describes this problem forcefully in No Longer at Ease. His story involves a young Nigerian who has won a scholarship for academic performance in his village school. In England, he adopts the liberal democratic values of British society, only to find himself alone in his beliefs when he returns home. No longer at ease because he is neither fully Nigerian nor fully British, he ultimately finds himself crushed by a system in which he no longer fits.

Achebe’s tale describes only one possibility, and not a necessary one. Reverse culture shock affects even professionals upon return from living overseas, and highlights the need for preserving newly acquired skills, approaches and even world views. This can best be accomplished by joining forces with others who hold similar values. In some countries, there are strong networks of foreign-trained attorneys, or even alumni associations in a few cases. In other countries, it may be necessary for returning LL.M.s to start an association or network, or maintain close contact with colleagues from other countries. Such groups may provide professional development opportunities, or simply a place of much needed encouragement.

Change is more than possible, it is inevitable. But change must be nurtured and directed over the long-term. The LL.M. experience provides a solid foundation for pursuing positive change.
Final Thoughts on Making a Difference

As already noted, despair is pervasive in many countries. The reasons are understandable, but not justifiable. Much of the despair arises from a mistaken assumption that individuals cannot make a difference. While it is true that one individual is unlikely to bring about immediate, pervasive reform in a country or even an organization, that does not negate the basic reality of impact. It simply demonstrates that expectations are out of place.

The reality is simple: each of us makes a difference. This is unavoidable. In every human interaction, there is an impact. We encourage or discourage those we work with. We support the status quo through inaction, or we bring about change through action. Every decision to action or inaction reinforces or opposes the dynamics of change in which we find ourselves. We do not have a choice: each of us will influence those around us.

Yet we do have a choice, not in whether to make a difference, but in what kind of difference we make. Ultimately, that is the goal and the hope of the LL.M. program—to equip the participants to make better decisions and have greater impact. That, perhaps, is the principle reason that international policy reform specialists so highly value LL.M.s.