Research indicates that a country’s legal system is related to its economic growth. However this does not imply that successful legal systems must conform to a Western model. It is true that some basic components seem to be important everywhere. These include the protection of property rights, institutions that cannot easily be subverted by powerful individuals, an independent judiciary and stability of rule-making. But there are also variations which can be effective in their own contexts. For instance disputes need not always be settled through formal channels. In China and East Asia, for example, informal negotiation using negotiators is common and may well have contributed to economic success.

Background
The kinds of legal reforms promoted for less developed countries have varied enormously over time. Early attempts to transplant liberal democratic Western legal models were not successful in promoting economic growth. Reformers came to understand that the situation was more complex than they had originally assumed and that the cultural and political environment had to be taken into account. The second wave of reforms focused on enabling strong state intervention. It was hoped that such a state could foster development that was less dependent on external forces. Some also hoped that resources would be distributed more equitably. But again, in practice, the promised economic growth did not materialise and, far from a fairer distribution of resources, it seemed that the power of the political and bureaucratic elite was enhanced.

Western models of regulation have a growing influence in developing countries. Promoted by the World Bank and IMF, they are assumed to lead to economic growth. But many problems arise when attempts are made to put these imported models into practice - strategies designed for a Western context often do not work well when transplanted to different economic, social and political cultures. Although this is well recognised the most common response is to simply carry on ‘as well as possible’ in the circumstances. We ask whether a more creative response might produce better results.
being invoked as a prerequisite for speedy economic growth. Since donors are always reluctant to get involved directly in politics they tend to focus instead on legal and judicial reform.

Most reformers currently promote a number of basic principles. Firstly, government itself must obey the law. In general the rules should be reasonably certain, clear and stable. They should be published so that everyone can know what they are and there must be ways of ensuring that they are applied fairly to all. An independent judiciary must operate without unreasonable delay in its proceedings and judicial sanctions must be effective.

Problems of policy transfer
Of course in practice it is very difficult to assess whether a particular system is ‘fair’ or ‘just’, especially as ideas about justice and fairness are contested. However this has not stopped many donors from advocating major reforms to developing country legal systems. These often involve trying to improve institutions such as courts, judges and law enforcers and trying to ensure that government institutions obey the law. However many such efforts fail to a greater or lesser extent. Reforms may be achieved on paper but what goes on in the real world often remains much the same. Political interference, a lack of transparency in decision-making and corruption often mean courts continue to be weak.

Bureaucratic failure is often blamed. In other words it is claimed that senior bureaucrats are so close to the ruling elite that there is no clear dividing line between politics and bureaucracy. Alternatively it may be suggested that it suits the ruling elite if reforms exist only on paper.

But there are other reasons why reforms may fail. One is a relative lack of resources such as staff and information technology. Lower education levels may affect both the decision-making ability of officials and the likelihood that the general public will be able to contribute to enforcement. Although rule-making may be cheap, implementation is expensive and labour intensive. So might more effort be put into designing rules that are relatively cheap and easy to enforce?

However, even if all the necessary institutions had been set up and there was no lack of resources, it would be still be unreasonable to expect people to behave in the same ways as their counterparts in the West. In some countries even the idea of invoking the law in one’s everyday life would be strange to most people. And traditional cultures may use very different models of rule-making and enforcement. For example lawyers may be much less important than mediators, wise men or religious authority. Society may be strongly hierarchical, family groups (rather than individuals) may be seen as the building blocks of society, customs may vary greatly from one area to another, decision-makers may have a lot of discretion and so on. Attempts to impose Western legal systems in such contexts are not likely to succeed. Instead we should give more thought as to how systems can be designed to fit their particular contexts.

Responding to difference
Reformers often note such resource constraints and cultural differences but carry on regardless with an unchanged strategy. Might a more creative response be possible? It should be noted that, in many countries where traditional law has been strong, it has not been static but has adapted to changing political and economic circumstances. It would be helpful if regulatory regimes could become identified with, or internalised by, the community. Where regulatory goals are compatible with community norms they will be easier (and therefore cheaper) to enforce.

But there may still be problems in applying sanctions where many lawbreakers simply cannot afford to pay fines. Imprisoning people for fairly minor crimes is obviously an unattractive option and not to be recommended. If social norms support the regulations then social disapproval and stigma may be effective deterrents. But in some contexts it may be worth considering introducing ‘vicarious liability’. In other words, if the offender cannot pay the fine is there someone else (who can) who might reasonably be held responsible? This method is familiar in Western business law where companies can be held responsible for acts of their employees. In a developing country context it might be considered appropriate for a member of the offender’s extended family or community to be held responsible for his or her rule breaking.

In recent years Western styles of regulation have tended to move away from detailed rules towards stating more general principles. This then gives enforcers more discretion to consider the particular circumstances when making their decisions. In less developed countries this might also seem an attractive option, especially given the high levels of discretion often found in traditional law. But where regulations are not integrated with traditional law problems may arise. Firstly, low general levels of education may mean that the necessary knowledge and expertise are in short supply. And secondly, exercising discretion provides greater opportunities for corruption.

We now go on to look at two specific areas of regulatory policy in developing countries – licensing and corruption. After first considering current practice and problems we look at some possibilities for change.

Licensing – the public interest
All governments need some way of ensuring that customers are protected from unscrupulous enterprises offering unsafe products and services. In Western countries the usual method is to set standards and require all businesses to comply with them. Regulatory agencies then ensure standards are being met through inspections which may be random or targeted, sometimes in response to complaints from customers.

But there is another way of providing customer protection - businesses may be required to obtain a licence before they start trading. This option is much more expensive and in industrialised countries tends to be reserved for high risk sectors. However in less developed countries licensing is much more widely used. Why is this, given it is so much more expensive?

How is licensing usually justified? Sometimes the quality of goods or services cannot be easily judged before they are bought. To help consumers make the right choice, suppliers can be made to provide information. But it may be that governments do not think people are capable of understanding the information and acting in their own
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But the higher fees are set the more
likely that an enterprise will decide to
avoid the whole process. So, if
licenses are not solely a money-
raising device but are also intended
for consumer protection, then higher
fees mean more consumers will remain unprotected. Also, if licensing is to remain an attractive alternative to
taxation, then fees will probably be flat rate. This will not be compatible with fiscal policy which requires payments to relate to, say, the number of people
an enterprise employs or its turnover.

Licensing – private interests
Do politicians have an interest in
maintaining control over who enters
the market? Widespread regulation of
market entry implies the government
has a lot of control over the economy
as a whole. Historically, rulers have
extended their power by keeping
control of key industries. That some politicians are reluctant to relinquish
such power may partly explain why
entry controls such as licensing remain so popular.

And what about public officials? Do
they also have an interest in
maintaining licensing systems? Such
systems are labour intensive so
officials may have an incentive to
protect their jobs and career
opportunities. Furthermore, when
issuing a licence calls for some
discretion on the part of the issuer,
they may have opportunities to extract
bribes from applicants.

It would seem that, in the public
interest, it would be better if many
licensing systems were dismantled and
replaced by monitoring and
policing regimes. However our
analysis of private interests indicates
that this might well be difficult to
achieve.

Corruption – the usual remedies
Corruption is a big problem for all
regulatory systems and it is not
difficult to see why. Regulatory
officials make decisions that can
enrich or impoverish others, not only
when they issue contracts and
licences, with their obvious profit-
making potential, but also when they
interpret and enforce standards. They
may interpret standards in a
prejudiced way and, when they catch
people who are breaching them, they
have the power to choose whether or
not to punish them. When grants are
negotiated or behaviour scrutinised
for compliance, the necessary face to
face contact provides further
opportunities for bribery.

Because corruption seriously affects
economic development some
governments have launched wide-
ranging assaults on it and some, such
as in Singapore and Hong Kong, are
generally considered to have been
successful. But their experience shows
that political will is essential for
success. Where this does not exist it
will be necessary to accept that
corruption is to some extent inevitable
and to focus on reducing the damage
it does, rather than eliminating it.
When working out anti-corruption
strategies it is important to be sensitive
to how the local political and cultural
environment differs from that of the
industrialised countries where most
such strategies originate.

For example, popular Western
strategies for reforming bureaucracies
include depoliticising the civil service,
removing conflicts of interests,
recruiting better staff, insisting on clear
procedures and reasoned decision-
making, better internal auditing and
monitoring, and extending external
powers of appeal and review. But
these sorts of changes need a strong
and impartial judiciary, a proactive
citizenry, adequate resources and
effective implementation. In many less
developed countries this would require
major cultural changes and the costs
would simply be too great.

However some more modest
measures can be cost effective. In
South Korea, for example, investing in
information technology to provide
public information and automatically
record transactions has made
decision-making more transparent. It
has also enabled some transactions to
be carried out electronically, so
reducing face to face contact.

Computerising the Philippines
customs service has reduced the time
taken to process cargoes from about
eight days to two hours and
presumably significantly reduced
corruption too.

How should regulators decide on the
penalties for corruption? Usually
making the penalty fit the crime
involves ensuring that the costs to
criminals outweigh the benefits, after
taking into account the likelihood of
detection. In the case of corruption
this might suggest relating the size of
the penalty to the size of the bribe.
However so much corruption goes
undetected that allowing for this would
result in penalties so severe that most
courts would refuse to apply them.

In fact it is clear that, in less
delivered countries, licensing has
another significant, purpose. Indeed
delivered this is sometimes its main purpose. It
is an important source of revenue,
particularly for local government. To
achieve this the fees payable are set
at levels above those needed to cover
administrative costs. Such a way of
raising money is easier to organise
than conventional taxation. And it may
well be that traders are less resistant
to paying taxes when they are
disguised as fees.

At first sight these appear powerful
arguments but on closer examination
they are perhaps less so. Firstly they
assume that licensing is a better use
of scarce resources than investing in
monitoring and policing systems. Is
this true? Although licensing may
indeed prevent some would be rogue
traders from starting to operate,
others may simply decide to start up
anyway, illegally, without a licence.
Evidence suggests there are many
unlicensed traders to be found in the
informal economies of some
countries. So policing remains
necessary. Indeed it is also needed in
order to check that licensed
businesses are operating according
to the terms of their licence. And if an
applicant is to be refused a licence
then evidence will be needed to
demonstrate why they are unsuitable.

But the higher fees are set the more
likely that an enterprise will decide to
avoid the whole process. So, if
Some suggest that creating a special anti-corruption agency, independent from the police, can be effective and indeed Singapore seems to have had some success with this method. However, where the political will to push through wide-ranging reform is lacking, creating a separate agency can backfire by increasing the opportunities for corruption.

Limiting corruption – alternative methods

Conventional anti-corruption strategies as outlined above are likely to be less effective precisely where the problem is worst i.e. where the criminal justice and law enforcement systems are themselves corrupt, where resources are scarce and the political will is lacking. An alternative is to consider how institutional arrangements can be designed so as to limit opportunities for corruption or make it less profitable.

Some such reforms might mirror what is happening in industrialised countries. Others would not or would be ambiguous. Take decentralisation for example. Does this help the fight against corruption? Some commentators say it should, arguing that when decisions are made at local level they are more transparent, making corruption harder to hide. On the other hand, others suggest that when the regulatory process is centralised, paying a single (and perhaps more effective bribe) to a more powerful official may have less negative impact on the overall economy. Might this help explain the difference between Indonesia and India’s economic performance? Both countries suffer from similar levels of corruption but in the more economically successful Indonesia it is centralised. In India, in contrast, bribing takes place at many different levels of bureaucracy.

Similarly we can ask how competition between different regulatory agencies affects corruption. Some evidence suggests that such competition can reduce it. This seems to be the case in the US, for example, where local, state and federal agencies are all involved in controlling illegal drugs. On the other hand, if competition leads to more bureaucracy, corruption could well be expected to increase.

What other strategies might help? Perhaps it would be helpful if committees made decisions rather than individuals. Regularly moving bureaucrats between different offices could also reduce their opportunities for corruption. Sometimes simply reducing the amount of regulation can be effective - liberalising off-course betting in Hong Kong had this effect for example. However it is unwise to generalise from such a relatively peripheral topic to critically important issues such as health and safety or environmental protection. While unnecessary regulation is certainly unhelpful, of course it does not follow that less is always better. Another useful strategy is to use administrative sanctions rather then criminal courts where possible. Evidence suggests that bribes get much larger when courts are involved in law enforcement.

The need to contain corruption also suggests strategies that are very different from those preferred in the West. For example, in industrialised countries recent reforms have tended to increase the amount of discretion regulatory agencies have in interpreting and implementing the rules. Clearly this helps them react more sensitively to the particular circumstances of the case. But of course it also provides more opportunities for corruption. Therefore in some countries clear and unambiguous rules which offer less room to manoeuvre may be more effective.

Similarly, in Western contexts, there has been a move away from formal rules towards the issuing of guidelines. This recognises that business people themselves may often be in a better position than regulators to work out how to meet regulatory goals at least cost. But similar moves in some developing countries have been unsuccessful. People have found themselves confronted with many specific rules and procedures while knowing that these may not be enforced in practice. In fact preferable informal rules will prevail for the favoured few. Those unwilling to pay the costs of admission to this favoured circle risk being penalised through the (often unreasonable) formal rules. What seems to be needed here then are fewer and simpler formal rules rather than informal rules.

Consultation is another area where a different approach might be useful. In the West, those who will be subject to regulation are increasingly encouraged to get involved in drawing up the rules. There are obvious benefits in terms of information flows, transparency and accountability. But of course direct access to regulatory officials also increases opportunities for corruption. In the US attempts to deal with this have included making all private communications and records of all private meetings available for public scrutiny. But the necessary policing and record keeping may not be possible everywhere. In which case cutting down on consultation may be an effective, if unpalatable, alternative.

To sum up, we have argued that too much effort has been put into struggling to implement Western models of regulation against the prevailing cultural, social and political circumstances. Rather than carrying on regardless we suggest that reformers should explore how regulatory regimes can be made more compatible with their contexts since, if they could be internalized as social norms, community disapproval might well be a more effective deterrent than imposed sanctions.

This CRC Policy Brief draws heavily on the CRC Working Paper below:

No 119 Ogus, A. Towards Appropriate Institutional Arrangements for Regulation in Less Developed Countries 2005

which is available on the CRC web site at:

www.competition-regulation.org.uk/publications/working_papers/