

ULTIMATELY, THE LAW MUST BE COERCIVE

REVERSING THE CULTURE OF NON-PAYMENT

by Peter L. Kahn



Enforcing court judgments may seem merely a gritty detail of the legal system, far removed from matters of high principle. Enforcement is the side of the legal system that forces people to do something they don't want to do, such as pay money they owe. After issues of due process, justice and equity have been debated and resolved, generally an action must be coerced, sometimes a very mundane action like paying back rent or the balance due on the purchase of a washing machine.

Of course, judgments are not always so mundane. Human rights litigation, if successful, typically results in an order to the state to take some action or to pay compensation to a victim or a victim's family. Enforcement is thus the unseen underside of constitutional protections. If this frequently overlooked underside of the law doesn't work well, all the debates about high principle are meaningless. If judgments can't be enforced, they are of little real value to anyone. Ultimately, the law must be coercive. If judgments can be ignored, the legal system itself becomes a laughingstock, an obstacle to the rule of law rather than its agent.

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MAKING MARKETS WORK

Effective enforcement of judgments is an important part of making markets work. Investment and trade require trust that contracts will be meaningful. Reliable judgments are also a critical factor in ensuring a safe and orderly society. Perhaps most importantly, meaningful court judgments are a bulwark against favoritism and tyranny: If the politically powerful or well-connected can scoff at the law, their voices can overwhelm those who must depend on the law for protection.

It is therefore a matter of considerable importance for this legal function to work well in countries struggling to build market economies and the rule of law. Over the last year, the IFES Global Enforcement Project has researched the enforcement of judgments in developing and transitional countries. We have tried to understand how this legal function actually works. But more importantly, we have explored the reasons why enforcement might fail and what can be done to fix it.

ARGENTINA AND MEXICO CASE STUDIES

To examine these questions, we performed case studies in Mexico and Argentina (see sidebar on p. 7) and examined several other countries, including Peru, Armenia, Georgia, Azerbaijan and France. We surveyed lawyers, judges and others with a stake in the legal system, such as businesspeople and human rights groups. We conducted extensive interviews with legal specialists and users. We analyzed the legal systems of these countries, drawing on the expertise of native lawyers, and we assembled empirical work from other researchers.

HOW WELL DOES ENFORCEMENT WORK?

The enforcement of judgments is surprisingly hard to document, though the issue is emerging as a core problem of legal reform. The evidence is not always available in court files, and so far, no other solid source of evidence has been developed. While court files generally record whether payment of a judgment has been made in full by the defendant to the plaintiff, there are other opportunities for payment that are unlikely to be recorded. Moreover, payment may not be recorded if the parties reach a negotiated settlement.

Nevertheless, the evidence from court files suggests that the enforcement system is not working effectively and that many judgments are in effect illusory. For

example, in both Argentina and Mexico, no more than about 20% of cases result in payment to the plaintiff at any point in the trial process. In other words, about 80% of cases are either abandoned by the plaintiff prior to judgment or result in some unrecorded settlement between the parties.

UNCERTAIN OUTCOMES

Why might plaintiffs abandon cases? One reason may be that the plaintiff and the plaintiff's attorney do not expect to recover enough to make continued litigation cost-effective. Court delays are also a likely reason for abandonment. In Argentina, even procedurally very simple cases, which have strong built-in advantages for plaintiffs and which typically involve only small amounts of money, like collection of a bad check, can take between one and two years to complete, not counting appeals or enforcement. A great many cases are simply not brought to court because long delays for collecting even small amounts of money and high case-filing fees make it uneconomic even to attempt recovery.

LOW RECOVERY RATES

Survey data confirm long delays and low recovery rates. Only 14% of lawyers and judges we surveyed in Argentina regard the enforcement system in that country as “very effective,” while nearly twice that number regard the system as not effective at all. The ability of the system to collect judgments from individuals, particularly relatively small debts, elicits the least confidence. In Mexico, those surveyed expressed higher confidence in the enforcement system, though evidence about delays, costs and recovery rates suggests that the Mexican and Argentine systems are about equally effective.

REGIONAL COMPARISONS

Mexico and Argentina are not unusual cases in this respect. On the contrary, they are probably quite typical of countries in Latin America. Evidence from Russia and other former Soviet countries suggests that the enforcement systems in those countries are probably even less effective. We conclude that in many countries, particularly developing countries or those in transition from communism to capitalism, a low proportion of civil and commercial judgments are effectively enforced.

WHY DOES ENFORCEMENT WORK BADLY?

There are many reasons for these low rates of enforcement. One reason, certainly, is that many defendants are in fact insolvent—they just don’t have the money to pay. However, defendants may appear insolvent while at the same time controlling sufficient assets in the informal sector, which is invisible to the legal system. Similarly, defendants may place assets beyond the reach of the legal system through fraudulent transfers to others.

Efforts to recover assets are also hampered by the creditor’s inability to access information, such as public registries and bank account information. In both Mexico and Argentina, the law forbids compelled testimony against interest by a defendant, even in a civil case. Thus, a debtor’s assets or income generally cannot be discovered by asking the debtor. This typifies an attitude in many Latin American countries widely characterized as “la cultura de no pago,” or culture of non-payment, a widespread cultural hostility to forced repayment of debts.

Finally, in all the countries we have examined, public sector employees critical to the enforcement process (frequently including judges) are hampered by a lack of incentives and meaningful monitoring and sanctions. Often these motivational and monitoring problems arise for reasons of corruption or politics that are themselves incompatible with the rule of law.

WHAT CAN BE DONE TO FIX THE ENFORCEMENT PROCESS?

One of the failings of many assistance programs in developing and transitional countries has been an eagerness to offer policy recommendations and initiate programs without an in-

depth understanding of the problem. While our research suggests a number of potential policy reforms, the primary item on the agenda must be a comprehensive assessment of how the enforcement system really works in practice. Only then can we suggest reforms that are likely to succeed in a country-specific context. Enforcement fails for reasons that extend deeply into culture, economy and politics, and superficial changes in legislation are likely to be resisted and circumvented. Better results depend on knowing more about how the enforcement process is linked to broader issues, reforms and institutions.

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Thus, the next step in addressing the enforcement question must be to develop the tools and methodology to enable reformers and donors to see enforcement issues in a real-world context. At IFES we have developed an innovative, strategic methodology to examine these issues, and we now know much more about the nature and scope of the problem than ever before. However, there is much more to learn before anyone can fully appreciate all of the issues that need to be


addressed. At a minimum, we should know more about the following:

First, we must better understand the informal sector, to ensure that this important and durable component of society in many developing countries does not undermine the rule of law and economic development.

Second, while it is pleasant for lawyers to offer advice about some “ideal” legal reform, it is politics that determines the shape of legislation. We need to understand the political stakes in enforcement and what really will drive reform programs in developing or transitional countries.

Third, we believe there is great value in trying to understand better the incentives that motivate actors in the enforcement process, including lawyers, litigants and public employees such as judges and enforcement agents.

Enforcement of judgments is critical to the operation of the legal system, as well as its credibility. By learning more about the obstacles to the enforcement of judgments, we hope to improve legal systems in countries around the world and thereby promote democracy, economic development and the rule of law.

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