

NATIONAL CRIMINAL JUSTICE REFORM

Donor Assistance to Justice Sector Reform in Africa: Living Up to the New Agenda?

Laure-Hélène Piron[†] provides an overview of justice sector aid in Africa, and gives an assessment of its history and future direction at a time when poverty reduction has risen to the top of the donor agenda.

Donor assistance to promote justice sector reform in sub-Saharan Africa¹ has increased significantly over the last 10 years, from an estimated U.S. \$17.7 million in 1994 to over \$110 million in 2002.² As total aid commitments to the region remained stable

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during the period, this represents a shift in priorities toward legal and judicial reform, reflecting both an acknowledgement of Africa-specific developments—notably democratization and the prevalence of violent conflicts—as well as increasing interest in justice sector work globally. But is donor assistance grounded in an adequate and appropriate understanding of African realities? This article looks at some of the background to, and

challenges facing, justice sector work in Africa today.

From law reform to the rule of law

Donor policy and practice today can be contrasted with past technical approaches, for example, the American “law and development movement” of the 1960s and 1970s, focusing on legal education. In the 1980s, structural adjustment programs were widely implemented and the World Bank engaged in law reform in the economic and commercial realms to help develop legal environments favorable to investment. Typical initiatives in Africa included: supporting a new telecommunications law in Ghana; law revision, updating of case law reports and a review of commercial laws in Tanzania as part of a Financial and Legal Management Upgrading Project; and seminars on the Treaty to Harmonize Commercial Law in Africa, as part of the Togo Public Enterprises Restructuring and Privatization Project.³

Donor support for justice sector reform changed focus with the end of the Cold War and the growing trend toward multiparty democracy across the continent in the late 1980s and early 1990s. For example, Swiss government support for “rule of law”

activities began as a late response to apartheid in South Africa and to increased political repression in Rwanda in the years prior to the 1994 genocide, and led to policies on human rights and the rule of law more generally.⁴ USAID came to Africa with a “democratization” lens, inherited from its work in Latin America, and attempted to strengthen judicial independence in the face of overpowering executives and to provide assistance in drafting democratic constitutions.

The 1994 genocide in Rwanda marked a turning point. The sheer scale of assistance and the range of international and bilateral donor agencies involved multiplied in the face of the wholesale destruction of the country’s justice system and the urgent need to commence genocide trials. Pooling mechanisms were used—the UNDP set up a Trust Fund, for example, and the European Commission and others provided assistance to international NGOs specializing in legal, judicial and penal reform (these included *Avocats sans Frontières*, *Réseau des Citoyens*, *Penal Reform International*, and the *Danish Centre for Human Rights*). Activities in Rwanda ranged from building courthouses, improving prison conditions, preparing genocide case files, establishing a bar association and a body of paralegals to work with the Ministry of Justice, and reforming the police.

The new approach included support for domestic civil society organizations that demand better justice, monitor human rights,

and provide legal assistance. Ford Foundation grantees in South Africa undertook public interest litigation, exploiting loopholes in the apartheid system’s rhetorical commitment to the rule of law. These groups later played a major role in creating the country’s new constitutional structure and have since established networks to make legal services more accessible to all.⁵

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The 1990s saw the rise in importance of a new concept in aid policy—*governance*—and a concern for building effective state institutions. The *rule of law* was seen as essential for establishing a stable, predictable environment conforming to formal rules rather than patronage. By 2000, the World Bank could write about Africa: “legal reform has become a priority in many countries, and one that Africa’s development partners are beginning to assist.”⁶ Beyond addressing national legal frameworks, the range of institutional development activities funded by donors focused on increasing effectiveness and included improving physical infrastructure, supporting legal and judicial training, making legal information accessible or upgrading management systems in ministries.

In Mozambique, following a diagnostic process in the late 1990s, USAID helped establish a national judicial training center and provided support to improve the efficiency of the Maputo City Court through the provision of equipment, benchbooks, a computerized case-tracking system, and a court administrator.⁷

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The new poverty reduction agenda and legal reform: complementary or conflicting?

The increased attention by some donors to the accessibility of justice, respect for human rights, and the accountability of institutions to the public—rather than the role of the justice sector in promoting economic growth—coincided with a shift in global donor thinking on aid. With the UN-backed Millennium Development Goals, world poverty reduction has now become the official objective of development policy.⁸ This has been associated with a commitment to changing the provision of donor aid, based on a “partnership approach” and the “ownership” of reform by local actors, aiming to improve coordination of aid, moving toward a harmonization of procedures and eventual alignment of donor assistance with national partners’ policies and systems.⁹

However, although there is a political commitment to “human rights, democracy and the rule of law” in the Millennium Declaration, human rights issues are not explicitly addressed in its more specific, quantified, and timetabled goals. Challenged to justify how justice sector support can contribute to poverty reduction, donors drew on studies to demonstrate the importance of functioning, fair, and accessible justice institutions in combating poverty. The World Bank’s 2000 *Voices of the Poor* report highlighted lawlessness and fear of crime in individual descriptions of the experience of poverty. The negative role played by the police in these accounts—corrupt and politically repressive, harassing small traders and targeting minorities—was striking.¹⁰

Lesson-learning exercises, including comparative research by the International Council on Human Rights Policy, showed the failings of donors’ approaches to date.¹¹ The council’s report set out a strategic approach with clear messages:

- *Start from the beneficiary perspective*, fostering local ownership of reform, using participatory needs assessments.
- *Adopt a rights-based approach*, emphasizing the legal enforcement of human rights claims, the role of institutions in respecting standards, and the positive duties of the police, prosecutors, courts, and others to protect the rights of victims, prisoners, and the general public.

- *Recognize that justice is a sector and not a set of separate institutions*—this requires strengthening links and improving coordination, including with civil society bodies.
- *Give priority to the needs of poor, vulnerable, and marginalized groups*, by enhancing their access to justice, tackling discrimination, ensuring minority participation, recognizing indigenous systems, and paying attention to women’s rights.
- *Improve the effectiveness of the aid relationship*, including transparency in donor agendas, recognizing the long term process of justice reform, providing flexible responses, respecting local priorities, and avoiding imported solutions.

In response, most donors are amending their policy orientations. The UK Department for International Development (DFID), with a history of support for policing activities, has radically transformed its policy, putting the experience of insecurity and injustice at the center of its analysis, and highlighting the need for a sector-wide perspective.¹² Two large-scale programs in Africa, designed to conform to this new policy, have been in place for a few years, and more are being designed. The Malawi Safety, Security and Access to Justice Programme (MaSSAJ), which started in 2002 with £35 million (U.S. \$67m.) for the first five years, and the Nigeria Access to

Justice Programme, with £30 million (U.S. \$57m.) approved in 2001 for a period of seven years, are attempting to move away from an institutional approach, emphasizing sector-wide policies and coordination, and paying particular attention to research and the perspective of the poor.

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The UNDP’s “Access to Justice for All” policy also prioritizes people’s equal ability to use justice services—regardless of their gender, ethnicity, religion, political views, age, class, disability or other sources of distinction.¹³ The World Bank too has adopted “access to justice” as one of three strategic objectives, in addition to legal and judicial reform.¹⁴ This covers improving access to existing services, expanding access by encouraging non-traditional users and the use of new dispute resolution mechanisms, or creating new legal standing. The Bank now explicitly recognizes that member states have human rights obligations and that they can be assisted in fulfilling them—a major change from earlier attitudes to human rights, described as lying outside the Bank’s mandate.¹⁵ In programming terms, this new approach is illustrated by grants in 14 African countries to support gender-responsive legal reform processes.

The new agenda in practice

But how well are donor agencies applying these new policy statements in practice? The fundamental principle of the current “aid effectiveness” agenda is that donors should promote domestic leadership and ownership of reforms. This is not easy to achieve given, first, the vast needs of Africa’s chronically under-resourced justice sector; second, the continent’s high aid-dependency (in some countries, donor funding accounts for 50 percent or more of public expenditure); and third, the gap between the resources available to donors and those of their national partners. In these circumstances, donors easily become excessively influential in deciding what to support—and governments can just as easily forgo their own responsibilities.

Five key challenges to improve donor support to justice reform in Africa are:

1. *Sustainable interventions.* Some of the pitfalls of current donor projects are illustrated by European and British support for an initiative to address the backlog in homicide cases in Malawi. Court backlogs had increased considerably following the 1995 introduction of a jury trial system. In 1999, donors covered the costs of accommodation, allowances, and transport for all those involved in tackling the problem—judicial, police, and prosecution personnel, legal representatives, jury members, witnesses, and a doctor. This support was to be temporary, but by 2003 an independent evaluation identified an excessive reliance on external resources. Government funding for processing homicide cases had

effectively ceased and the donor initiative had not, by then, led to the creation of an improved and sustainable mechanism for continuity after the project’s end.

2. *Adopting a sectoral approach.* One challenge in deciding how best to use aid lies in the sheer complexity of justice systems, with a multitude of institutions from both state and civil society keen to preserve their independence and benefit individually from resources that may become available. Initiatives in Uganda have shown the benefits of a sectoral approach to justice work. In the Masaka District, pilot mechanisms for inter-agency coordination between local criminal justice agencies—such as monthly meetings of a “case management committee”—have yielded low-cost improvements, which are now inspiring reform in other countries. A range of Ugandan institutions came together in 1999 to create a Justice Law and Order Sector (JLOS) with a joint strategy and investment plan approved as part of the country’s Poverty Eradication Action Plan. Donor assistance is provided in a manner that aims to respect this national leadership: through the national budget to which some donors directly contribute, or by funding only projects that fall within the national strategy. More recently, in Kenya, 11 donors established a group to adopt a similarly coordinated approach.

3. *Understanding the context.* But even if assistance is designed in a manner that backs “sector-wide” initiatives, rather than financially

unsustainable institution-based activities, donors still need to learn to go beyond “technical” solutions and understand the *context* for intended reforms. A particular difficulty lies in the inherent conservatism of justice systems and the politically sensitive changes that might be needed. In many African countries, executives remain dominant, with relatively weaker parliaments or judiciaries charged with upholding checks and balances. Justice sector reform aimed at increasing judicial impartiality or public accountability can pose a threat to the powerful: independent reviews and opinions are not welcomed when, for example, presidents attempt constitutional change to lengthen their terms in office. Police are often called on at election time to serve their political masters rather than the public. Indeed, the courts and police are often identified in surveys as among the most corrupt institutions. Clearly, tackling government-wide corruption requires that these institutions be cleaner and more effective.

Yet too often donors still fail to account for the political aspects of this work and talk of national “ownership” of democratic reform can sound naïve in such environments. Thomas Carothers cites the “politically treacherous” example of constitutional reform assistance in Zambia. Rather than following the recommendations of the (donor-supported) Constitutional Review Commission, President Frederick Chiluba imposed a provision to disqualify his main rival, Kenneth Kaunda, from the 1996 elections, and

had the Constitution approved by the National Assembly, which he controlled, thus avoiding the Commission and the need for a referendum.¹⁶ The lesson is that donors need both to promote national leadership and be politically astute.

4. *Involving non-state actors.* National ownership of reform is still often understood to refer to *government* ownership—and the considerable funding required to make significant changes often leads to state-centric assistance.

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Yet, any examination of the experience of poor and excluded persons accessing justice in Africa must conclude that formal state institutions may not be the most relevant. More than 80 percent of disputes in Africa are said to be resolved through non-state systems, such as chiefs—but only a few donors (such as the German GTZ) have taken this seriously. Malawi for example has a predominantly rural population of nine million, yet there are only about 300 lawyers, mostly in the urban centers, and only nine of the country’s magistrates have had professional training. By contrast, there are at least 24,000 customary justice forums.¹⁷ DFID’s MaSSAJ program is now piloting “primary justice” initiatives—improving linkages between

the formal and informal systems, and enhancing skills and accountability of non-state structures.

5. *Improving donor habits and incentives.* Ultimately, few efforts are likely to succeed unless donors pay closer scrutiny to the way in which aid is delivered. In the words of Thomas Carothers, rule of law aid providers “tend to underestimate the challenges” and “seem determined to repeat mistakes made in other places.”¹⁸ Examples of bad practice that could easily have been avoided abound, such as, in several West African countries, where training for court stenographers was provided before systems had been established to guarantee their positions and salaries.

Why is this the case? A recent review of Swedish governmental aid concludes that “[m]any actors in the legal arena are unwilling to accept general development co-operation experiences.”¹⁹ Even if the tendency to copy laws or attempt the wholesale importation of legal systems from abroad is on the decline, many of the lessons and policy imperatives learned along the way are still undermined in the actual implementation due to the dominance of legal experts from North America or Western Europe who do not necessarily possess either a background in development or experience of Africa. These skills are needed, however, if the challenges listed above are to be met. Even better would be greater reliance on African experts and starting from locally developed initiatives.

Incentive structures within donor agencies too can affect the quality and timeliness of aid. There is often pressure to spend money quickly—sometimes on large conferences or other events viewed as prestigious for senior colleagues at headquarters, or on study tours to the donor country for diplomatic or other political reasons, even when experience from other developing countries might be more relevant. Delays are caused for internal bureaucratic reasons, for example when donor agency staff move on to new assignments at key stages in project development. The broader incentive schema within the aid system too can be counter-productive. Rivalries still arise between different “models” offered by donors based on their own domestic legal and judicial systems. Simple regular sharing of information regarding funded activities with government and other donors does not always happen.

Looking into the future, justice sector reform in Africa must be seen as a pro-poor, long term, developmental endeavor that contributes to the realization of human rights. However, significantly more effort needs to be put into providing aid in a manner that takes into account good development practice, and in elaborating the tricky concept of national ownership, grounded in a proper understanding of African realities. If these approaches were carried out more fully, donors would truly be living up to the new agenda.

Notes

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1 The term “justice sector” is used here in a broad sense, comprising not just the judiciary, lawyers, and justice and interior ministries, but also police, prosecutors, prisons systems, human rights bodies, non-state mechanisms (e.g. chiefs), and civil society organizations involved in justice work.

2 Source: OECD DAC country commitments for legal and judicial development in Sub-Saharan Africa. These figures should be taken as indicative only.

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5 Stephen Golub, “Battling Apartheid, Building a New South Africa” in Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice: the Law-Related Work of Ford Foundation Grantees Around the World*, Ford Foundation, New York, 2000.

6 World Bank, *Can Africa Claim the 21st Century?*, World Bank, Washington, D.C, 2000, 71.

7 Office of Democracy and Governance, USAID *Achievements in Building and Maintaining the Rule of Law*, Occasional Papers Series, November 2002, 136-8.

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11 International Council on Human Rights Policy, *Local Perspectives: Foreign Aid to the Justice Sector*, Geneva, 2000. See also Harry Blair and Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-supported Rule of Law Programmes*, USAID Program and Operations Assessment Report no. 7, 1994, and K. Biddle, I. Clegg, and J. Whetton, “Evaluation of ODA/DFID Support to the Police in Developing Countries: Synthesis Study,” School of Social Sciences and International Development, University of Wales, Swansea, 1998.

12 Department for International Development, *Justice and Poverty Reduction: Safety, Security and Access to Justice for All*, London, 2000.

13 United Nations Development Programme (UNDP) *Access to Justice for All and Justice Sector Reform*, BDP Policy Note presented at UNDP Access to Justice Workshop, Oslo, March 2002.

14 Legal Vice Presidency, *Legal and Judicial Reform: Strategic Directions*, World Bank, Washington D.C., 2003, 45

15 Legal Vice Presidency, 46.

16 Thomas Carothers, *Aiding Democracy Abroad: the Learning Curve*, Carnegie Endowment for International Peace, Washington, D.C., 1999, 162-3.

17 Wilfred Schärf, “Non-state Justice Systems in Southern Africa: How Should Government Respond,” paper prepared for the UK Department for International Development, 2003.

18 Carothers, 176.

19 Swedish International Development Co-operation Agency (Sida), *Swedish Development Cooperation in the Legal Sector*, Sida, 2002, 12.