# BALANCED JUSTICE AND DONOR PROGRAMS: LESSONS FROM THREE REGIONS OF THE WORLD[1]

## 1. Executive Summary

Donor organizations have been supporting justice strengthening programs for nearly twenty-five years. Over the past decade, there have been criticisms of these programs and the limited improvements they have produced despite large investments by donors and national governments. This report explores some explanations for these alleged shortcomings, reviewing experience in three case study countries: Cambodia, Guatemala, and Nigeria.

The report's focus is on criminal justice using a framework based on the concept of 'balanced justice'. The following imbalances in donors' goals, actions, and the outcomes of donors' activities were identified in the case study countries:

- *Imbalance in program elements.* While donors support many activities in their justice programs, some areas – such as prisons – receive little or no attention. Moreover, there is an occasional tendency by donors to address problems at a superficial or partial level.
- *Funding imbalances.* This is difficult to show as precise data is scarce. Absolute expenditures are not always relevant as some activities cost more than others, and some of the most important ones may cost donors very little.
- *Activity imbalances (mismatch between objectives and inputs).* These are numerous and have some common origins: donors' preference for the routines established elsewhere; a failure to internalize some obvious lessons of experience; the entry of newcomers who repeat the past mistakes of others; a tendency to avoid arduous projects; and inadequate evaluation and monitoring.
- *Imbalances between top-down and bottom-up approaches*. Donors traditionally work on the top-down, supply side, as that is both easiest for an outsider and usually is what governments prefer.
- *Implementation imbalances.* These are common and usually arise as a result of insufficient government commitment to the official reform program, and the interference of vested interests. However, donors also often opt for the easy route – settling for activities less likely to meet resistance or more likely to produce visible (if less important) results quickly.
- *Collective imbalances versus individual ones.* Where many donors are operating in the same place synergistic exchanges were not found in any of the case studies.

The imbalances found in the three case study countries are the product of a number of problems related to both government strategy and commitment, as well as donor action:

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- *Lack of a national reform strategy.* Many reform strategies either are extensive to-do lists with no sequencing, prioritization, or means of measuring outcomes, or they are so vague as to provide little guidance.
- *Lack of government commitment.* Guaranteeing government commitment is particularly difficult when it comes to reducing executive interference in judicial matters or attacking sector and government-wide corruption. Without genuine commitment, even generous assistance is unlikely to produce improvements in performance.
- *Insufficient donor coordination.* Donor coordination is rare, and where coordination mechanisms exist they tend to have modest aims.
- *Donor selection of actions based on non-contextual criteria.* Donors are influenced by their own global agendas, standard operating procedures, and back-home constituencies. This can result in donor programs that have little to do with local needs and laws.
- *Frequent change of donor focus.* Changes in focus pose problems for the longer term efforts needed to bring about institutional change.
- *Donor restrictions on their own activities.* Few donors work with prisons and, to a lesser extent with police. An aversion to work with the former is a glaring oversight given that the criminal justice chain ends with prisons, and the prisons are the most abusive part of it.

A number of problematic themes were raised by all three case studies. These relate to thematic areas underrepresented in existing programs (e.g. traditional or informal justice; transitional justice; crime prevention; and reintegration and restorative justice), and ambiguities about the role of civil society. Civil society organizations are important in pushing for reforms, implementing programs, and in monitoring progress. Yet many NGOs are overly dependent on donor funding raising questions about the former's sustainability. NGOs also face conflict of interest issues when expected to both help implement and monitor or criticize reforms.

The three case studies suggest the presence of imbalance in donor assistance to justice sector reform, with the greatest imbalance between the objectives formally pursued by donors, governments, and NGOs, and the results their programs have produced. Exaggerated, sometimes inconsistent expectations are one cause of this imbalance. Other reasons have to do with the process of reform, such as conflicting definitions of reform, lack of attention to monitoring and benchmarks, absence of donor consensus on their aims, lack of government commitment, insufficient donor coordination, failure to tailor donor and international NGO programs to local contexts, and frequent changes of donor focus.

## 2. Introduction

For the past twenty-five years, judicial or justice reform has been receiving increasing attention as a part of donor assistance to "developing countries." This is not the first time such assistance has been provided, or that the countries themselves have attempted their own reforms, but following the "failure" of the law and development movement of the 1960s and 1970s (Gardner, 1980),[2] the donors temporarily abandoned the theme, while for national governments justice reform took a back seat to other issues. [3]

[2] While Gardner, a participant, dismisses law and development as a failed project, others (Salas, 2001; Hammergren, 2007) consider this overstated. The movement clearly did not attain its formal objectives, but it paved the way for

Things began to change in the early 1980s with the democratic opening in Latin America. First in Central America and then region wide, donors supported national efforts to democratize their justice systems. This usually took the form of criminal justice reforms aimed at transforming traditional inquisitorial systems into more accusatory versions, because of the latter's presumed greater respect for human rights, transparency, and efficacy at bringing the guilty (including, and especially in the early years, state actors accused of abusing human rights) to justice.

Decades of de facto governments in most of the region's countries had also left their justice sectors (especially the courts, but even in many cases, the police) in disastrous shape – underfinanced, understaffed, demoralized and often filled with under-qualified personnel of dubious moral character. Thus a second strand in the movement, and one which would take greater importance over time was to professionalize, modernize, and increase the independent stature and powers of the courts and other sector institutions. Neglected during the early years but taking on more importance in the mid-1990s were efforts to increase access to justice among the region's poor and to use the courts and other institutions to ensure they benefited from the rights guaranteed in the post-1980s constitutions.

The movement was given a push toward world-wide expansion in the 1990s with the Washington Consensus' discovery[4] that institutions mattered and thus that efforts to help the so-called "transitional countries" (former members of the Soviet bloc) graduate to market-based economies, as well as to improve execution of structural readjustment policies in all regions, would require a strengthening of their courts and related institutions. The work of neo-institutional economists like Douglass North (1990) was particularly instrumental here. This shift also facilitated the entrance of the multilateral development banks (MDBs) for which criminal justice appeared to be part of the "political" agenda prohibited by their articles of agreement. Institutional strengthening, especially in non-criminal matters, fit more easily into their emphasis on economic growth. The subsequent elevation of poverty reduction as a principal goal also allowed them to shift to items beyond court strengthening and civil and commercial codes, and into areas like access to justice, legal assistance, and most recently, "legal empowerment of the poor." Thus, although Latin America , Eastern Europe, and the former Soviet Union constituted the beachheads for the programs, by now, bilateral and multilateral donors, international NGOs and foundations, and other international organizations are actively pursuing these programs in virtually all parts of the developing world.

Popularity does not necessarily go hand in hand with success. In recent years, donors have expressed concerns about the results of their efforts and, in effect, of the entire justice reform movement, whether nationally or externally led. What they have not recognized on their own, a

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future national and donor-assisted efforts by creating networks of legal experts with less traditional perspectives on the challenges.

[3] See Correa (1999) who also argues that in Latin America the courts and the entire sector suffered from considerable neglect through the better part of the last century because of an emphasis on economic growth. Although the law and development movement attracted local adherents in a number of countries, it was a donor project; this Gardner and others see as an explanation for its lack of success.

[4] For a collected work subtitled "Institutions Matter" laying out both the Washington Consensus principles (macro-economic and structural adjustments, cut backs in the size and economic functions of the state) and the new arguments about institutions, see Burki and Perry (1998).

growing community of external critics has been more than willing to bring up.[5] Success of course is a function of what one is trying to achieve, and as elaborated below, the movement suffers a lack of clarity and agreement on its objectives. This was not so apparent when the aim was "only" to reform the criminal justice system. It became more evident as the number of objectives associated with justice reform proliferated. If one's aim is to modernize the legal framework, create a series of new organizations, build courtrooms in rural areas, or implant an automated case tracking system, success is a good deal more likely (and can probably be declared in many cases). However, if the aim is legally empowering the poor, significantly increasing juridical security, or substantially reducing corruption or the crime rate, success may be a longer way off. Still, however the objectives are defined national governments and donors alike are now questioning the returns on often substantial investments in pursuing them. Few yet ask whether the effort is worthwhile; the issue is whether it is being advanced in a reasonably effective fashion. That is the question that gave rise to this report and is addressed below.

This is hardly the first such endeavor, but this report is distinguished by a number of unique characteristics which will make it more successful in providing answers and guidance:

- It draws on case studies from three geographic regions – Latin America, Southeast Asia, and Sub-Saharan Africa.
- It is addressed primarily to donor contributions although taking into account their relationship to government and civil society actions.
- It does not attempt its own definition of justice reform, but rather examines actions in terms of what donors and countries defined as their objectives in this area.
- It focuses more specifically on criminal justice as a common thread without implying that this is always the area most worthy of attention.
- In each of its representative countries (and regions) it reviews donor efforts as a whole, rather than focusing only on what each brought to the table.
- It is informed by an overarching concept – balanced justice – and by a common set of questions which shape the background research and this overview report.

That said, even the underlying premises posed certain problems. First, while the three regions included (via the country case studies) are among those with a large share of donor involvement, for reasons of time, the former Soviet Bloc, an area where donors have been extremely active, was omitted. Moreover, it is not clear that the three countries chosen for most emphasis – Cambodia, Guatemala, and Nigeria – are fully representative of their respective regions. In the case of Guatemala, this is less problematic – programs there are similar to those donors have supported elsewhere in Central and even all of Latin America. However, Cambodia and Nigeria may be less representative; the former because of its unusual history and resultantly unique problems,[6] the latter because Nigeria is relatively "under-aided" (Agomoh; 29) as compared to many of its neighbors.

[5] There is a long list of works that might be cited here. Faundez et al (2000), Carothers (2003), Hammergren (1998a), and Salas (2001) are representative examples.

[6] As elaborated in Bang and Panjwani (2008), the most important features are the Khmer Rouge regime (1975-79) which nearly eliminated the country's professional class (including judges and other lawyers); the Vietnamese-directed government which rebuilt the justice system with non-professional staff, and the post-1992 period under a largely autocratic regime, but with substantial foreign assistance to help reconstruct the collapsed nation.

The decision not to attempt our own definition of justice reform but to focus on criminal justice is strategic and not as contradictory as it might seem. Criminal justice has been a common element in donor and national programs. It has become more important because of worldwide increases in crime rates and threats to citizen security, and thus offers a good basis for cross-national comparisons of program evolution and of its own contradictory trends and objectives.

The focus on donor contributions is unapologetic. It was the reason the work was commissioned and is obviously of concern to the donors and counterparts. As will be elaborated, donor success hinges on country will and programs, but once this is taken into account, asking whether donors are doing a good/the right job is a legitimate question, and one increasingly posed by their own back-home constituents and budgetary authorities.

The focus on overall donor contributions is preferable to the common tendency to review only the work of one donor. This relates to the reinterpretation of "balance" as described below. Whatever a balanced approach is, it is more probably achieved through the cumulative contributions of all donors than through the individual efforts of each one. However, balance so defined also requires high levels of coordination, and as discussed below, this is often lacking.

## 3. Balanced Justice and Additional Considerations in its Realization

This report concentrates on what is happening on the ground, rather than on discussions of what should be – what justice reform ought to emphasize or how well countries and donors are doing in advancing it. There are, however, several issues requiring further elaboration. Namely, the concept of balanced justice itself and the problems introduced by (i) varying definitions of reform, (ii) the state of the art as regards how to advance individual goals, (iii) the unresolved debates over contrasting strategic approaches, and (iv) the underdeveloped techniques for measuring advances. These are explained briefly below and the report will return to them in the subsequent discussions.

The concept of balanced justice was introduced by the sponsors of this project (DFID and the Open Society Justice Initiative) and because of its novelty requires further explanation. As first forwarded, it hinged on donors' hypothesized greater emphasis on the repressive elements of criminal justice (police and prosecution) as opposed to prevention, defense, and reconciliatory and restorative aspects. The contracted consultants contested the hypothesis from the start (and their arguments were born out in their fieldwork). Despite these initial negative reactions, the term is worth saving provided a broader definition is adopted. There are imbalances, but of many types, in the donors' approaches. Thus, the broadened list of potential imbalances includes the following:

- Among the various elements of the (criminal) justice system, all of which will affect its overall outcomes. This broadens the initial formulation so that the imbalances might also include an overemphasis on the elements initially believed to be neglected or on a series of other elements in the criminal justice chain.
- Between stated goals and financing. While money is not everything, differences between what donors say they are supporting and what they pay for could constitute an imbalance.

- Between stated goals and inputs or activities. This is less a matter of financing than what is actually programmed. The question is efficacy – is the set of activities incorporated in the plan likely to produce the desired results?
- Between top-down and bottom-up strategic elements. This is elaborated below as a developmental conundrum, but depending on the answers, it is a possible source of imbalances.
- Between what donors purport to do and what is implemented. Donor programs often involve more than is actually done with some activities slighted or never executed. The reasons for that gap vary, and are explored below.
- Within individual donor programs or among their collective contributions. As noted above, imbalance in individual programs should not be critical provided collective efforts cover what is needed. However, as discussed below, this is often not the case.

### *3.1 Lack of agreement on objectives of the reforms*

Determining balance or imbalance requires some notion of what is necessary. This raises a still more fundamental problem – the lack of agreement as to what justice reform programs should be promoting (whether they are promoting it correctly is covered in the next sections). While virtually everyone who works on justice or judicial reform believes they understand the concept correctly, definitions and emphases vary widely.

Although initially not given much attention, some internal contradictions were inherent almost from the start in the criminal justice reforms as the bifurcated goal of protecting rights and fighting crime. One lesson that might have been learned here, but seemingly was not, is that it is better over the long run to recognize such potential conflicts and deal with them directly, rather than turning a blind eye and trusting they will be worked out. The two goals can be accommodated but that takes a little work, and where that was not done (almost nowhere), the consequences have tended to impede the realization of both aims.

Over the past two-and-a-half decades, as the variety of actors involved in the reforms has expanded, and with them the number of objectives pursued, the potential for conflicts and contradictions has become more apparent, even within single donors or cooperating governments (Santos, 2006; Salas, 2001; Kleinfeld, 2006). As executed by all the relevant internal and external parties in any country, the reform "program" often appears as a mosaic of different activities lacking much coordination, and sometimes headed in markedly different directions (Hammergren, 2007). At the more theoretical level, discussions of the ends that should be pursued can be ranged along a spectrum from the thin rule of law model (predictability, efficiency, and order in delivery of "normal services" by state institutions) to the thick rule of law incorporating social justice, legal empowerment and a variety of conflict resolution mechanisms, including those used by indigenous communities (Tamanaha, 2004; Peerenboom, 2005).

Although probably easier to promote, the thin rule of law model is frequently criticized as favoring business and other elites and providing few benefits to the poor. The thick rule of law model, however, tends to encourage still further complexity, often adding areas that might be more appropriately supported by other programs (e.g. reform of local political structures, organization of unions and similar associations, or the development of social assistance programs

for marginalized groups) and often already are. Some of its proponents prefer to sacrifice any institutional development in favor of an immediate entrance into advocacy for individual and group rights. This thematic mission creep may be less appropriate for donor assistance, and especially for donors, like the development banks, with prohibitions on political activity. It is also a source of conflict, not only with those tending to a thinner definition, but also among the thick-model enthusiasts who draw the boundaries and select their priorities differently.[7]

Finally, an early tendency for some groups to question the "Western" or international paradigm (whether based on international human rights standards or sheer economic efficiency) has not disappeared and may be undergoing a revival in several countries. One can cite here the examples of some Brazilian judges who, in the belief that state law protects the rich, contend that it should be overridden in the interests of the poor (Ribeira, 2006), or contemporary Bolivian efforts to put traditional law and authorities on a par with the existing constitution, so that the Constitutional Court would be reconstituted to recognize both sources of law equally. The status of religiously-based law and values is also increasingly relevant in regions where it may conflict with international standards and rights.

This report does not propose to enter into this larger discussion and instead takes a more conventional approach to justice reform, focusing on areas that feature as parts of most justice reform programs. Even the report's focus on criminal justice may be subject to debate – on the one hand because other materials (civil, administrative, constitutional, etc.) may be more important to advance the well-being of citizens,[8] and on the other because there may be some underlying fundamentals (adequate judicial independence, professionalization, efficiency, access) that need to be advanced before worrying about how well criminal or civil justice is carried out. The emphasis on criminal as opposed to other areas of justice is brought up in the country case studies and is discussed further below. However, and despite the inherent arbitrariness of the choice, it arguably is the area of most concern to the widest proportion of the population – whether expressed as an interest in enhancing citizen security, reducing arbitrary attacks on basic human rights, or providing adequate protections to the poor. The second question – whether criminal justice reform makes sense without prior or parallel attention to more systemic institutional weaknesses – is more serious, and remains unresolved, but it is also an intrinsic part of the criminal justice focus, even if the earliest proponents did not recognize is as such.

### *3.2 Uncertainty about the most effective methodologies for advancing objectives*

Leaving aside the debate over objectives, there are also notable problems as to the selection of the best means to advance them. For at least the last decade, observers (Hammergren, 1998a; Carothers, 2003) have pointed to the limited knowledge base on what "works." By this they mean not how best to carry out a specific activity but which activities to choose to advance longer term goals. For example, there is the question of how to combat judicial corruption, a

[7] It is worth noting along with Peerenboom (2005) that while the thick rule of law model is usually associated with social justice, it could also be quite authoritarian and anti-poor in its content. By the same token, a thin rule of law model could reinforce social justice and human rights provided the accompanying legal framework (not part of the model) pointed decisions in that direction.

[8] As noted in the Guatemala case study, many of the integrated centers financed by the IDB in that country are less used, as initially intended, for criminal justice, than for the resolution of conflicts over child and spousal support.

problem in many countries. Despite the growing sense that drafting ethics codes and educating judges, police, prosecutors, and lawyers in their contents are not very effective, these activities remain the methods of choice for anti-corruption policies. Likewise, growing skepticism about the efficacy of new constructions and equipment in improving organizational output has not dissuaded the development banks from featuring them in their programs. Questions have also been raised about the content of specific activities – training programs which train in the wrong thing (mentioned in the Guatemala case study, but frequently observed elsewhere) or which are not combined with other actions to ensure their impact; stand-alone training absent efforts to alter institutional incentives so that it will be used; computer systems installed, but used only to their partial potential because incentives and procedures are not altered.

The critics point to two sources of these weaknesses. First, a real lack of knowledge as to what will advance certain objectives (e.g. combating institutionalized corruption). Second, a failure to use what is known or has been learned, such as sticking to ethics codes despite the mounting evidence that they are ineffective. The lack of knowledge is most dangerous when it goes unrecognized and programs are mounted solely on the basis of good intentions and wishful thinking. The failure to use what is known, if not more serious, is still less justifiable and it in turn has several explanations – a difficulty in accessing information on successful or unsuccessful ventures; funders' failure to vet proposals carefully and, if they have doubts, to ask why their authors believe they will work; and a tendency for donors to stick to programs they have already developed regardless of their suitability for a specific country. The latter is true of both small and larger actors. The major donors have often been criticized for their "canned" reform programs, but it bears mentioning that many smaller actors working off a more limited repertoire also stick to what they can do easily. As an agency contemplating judicial reform assistance in a very troubled Latin American country explained, "we will offer assistance in law revision because that is what we do" (private communication with author).

### *3.3 The unresolved debate over strategic approaches*

Although a subcategory of the methodological dilemmas, this issue is important enough to be given separate mention. It also, in its most common form, is closely linked to the disagreements over reform objectives. The debate has been recognized for over a decade, ever since USAID published its first strategic framework (Blair and Hansen, 1994) in which the authors took the agency to task for its excessive emphasis on supply-side reforms. That is, reforms aimed at strengthening institutions as opposed to facilitating or developing demands for their services. This is sometimes characterized as a top-down versus bottom-up approach and also bears a relationship to the debates over the thin and thick rule of law models. None of these characterizations adequately captures the issues at stake,[9] which in some aspects really derive from a question of objectives. Namely, whether judicial reform is intended to work its larger societal improvements by creating a stable set of institutions to resolve, impartially and equitably, conflicts over the law's interpretation and application, or whether its aim should be to "empower the poor" to advance their own interests through these or alternative mechanisms. The country case studies have found aspects of both approaches, and this report does not resolve the

[9] For example it remains unclear whether top-down means working only with the leaders of formal institutions. Those wishing to establish their bottom-up credentials often count institution-wide consultations (and "participatory planning") as demand driven, an interpretation that purists might question. Similarly, although legal assistance is usually counted on the demand side, it could be considered as altering supply.

strategic and ideological conflicts here. Nonetheless, they are worth highlighting as they affect the balance question insofar as different actors are seeking different ends and adopting their strategies accordingly.

There is another side to the strategic dilemma. It has less to do with where actors are heading than how they can best get there. Wherever one sits on the thin versus thick rule of law spectrum, there are still questions as to the most effective combination of top-down, supply-side inputs and bottom-up, demand-driven activities. It appears that even the most radical proponents of either position are beginning to recognize that the ends and the means need not coincide perfectly. A focus only on strengthening existing institutions by working with their leadership and members may be insufficient to overcome certain egregious performance flaws, and thus may benefit from pressures from outside or below. Likewise, there are limits to how much the poor or other users can be empowered without attention to the institutions through which they will work. Significant "empowerment" absent institutional change may only lead to disappointments or worse. Hence, without taking sides as to the ends that should be pursued, this report examines how the strategic approaches have been applied and the impact on program design and outcomes.

### *3.4 Lack of means for/attention to measuring progress in achieving ends*

In an era where management by results has come to the fore, judicial reform has yet to make much progress in monitoring its own performance. This has never been a sector that paid much attention to numbers, possibly because of disciplinary biases. As a lawyer once commented when presented with court performance data, "if I had any interest in math, I would not have studied law." There are also ideological aspects – the notion that "justice" is not susceptible to quantification and that by attempting to impose measurements one is turning it into a commodity. Similar objections have been raised against efforts to develop more "efficient" strategies or to consider trade-offs in values pursued. Nonetheless, just as justice may be priceless it does have a cost (as a judge once noted, "just try not paying your judges if you don't believe this") so programs can be more or less effective (or efficient) in promoting improvements in the quality of what is provided, and that should be a concern in a situation of limited funding. Measurement and quantification do pose challenges, among them the danger that what counts will be what can be counted and thus that values less susceptible to measurement will be neglected.

Although existing statistics rarely allow this, average times to disposition of cases and average caseloads can be calculated. Quality of judgments (or investigations) and the importance of what gets through the system are other matters, and might well suffer once the counting begins. Similarly there is no good measure, or even definition, of what is meant by access and what is most often used as a proxy (increase in court use or number of new courthouses built in rural or peri-urban areas) leaves much to be desired. Empowerment, like access, lacks both a definition and a measure. Such problems do not occur only on the thick model's side. The thin model's emphasis on "predictability" and its links to juridical security defy good measures as well. There are fears that other thin-model measures might produce their own distortions. For example, judges cherry picking cases to raise their apparent productivity (and so leaving the more difficult controversies behind) or, where interlocutory resolutions count, encouraging superfluous motions to demonstrate more judicial activity.[10]

[10] This already appears to be a problem in Latin America (World Bank, 2004).

Still, the many difficulties and caveats should not stand in the way of efforts to develop benchmarks or indicators of progress, in both single activities and overall reform programs. What is used now, most often developed by economists with limited feeling for the sector, has helped feed the impression of little or no progress.[11] Thus, whatever their reservations it behooves the donors, NGOs, and national leaders to develop something both more credible and more sensitive to the changes programs are intended to produce. Otherwise, we will not know whether imbalances or non-strategies are any worse than their opposites, and efforts to build a knowledge base about what works will be extremely difficult. In the absence of comparative indicators and measures, there has been an over reliance on "examples of good practices," but as Robert Solow once said, "an example is not an argument." In effect it is, just not a very scientific one, and any development program, even one in justice, needs to insert a good dose of science into its recommendations and programs.

## 4. The Cases

Before proceeding to the general findings, a short discussion is needed on the three case studies serving as the basis for this work. The countries selected – Cambodia, Guatemala, and Nigeria – represent three regions where donors commonly support justice programs. Of the three, Guatemala may be most representative of its region. Cambodia because of its extremely turbulent recent history and the near elimination of its middle class professionals by the Khmer Rouge (1975-1979), and Nigeria for its size (nearly one quarter of the population of Africa), federal organization, and relatively low assistance budget, may be less so. There are other important differences among the three that complicate comparisons. Cambodia and Guatemala are small to medium sized countries (populations of 14.5 million and 12.3 million respectively), while Nigeria's population is roughly 140 million. Legal traditions also separate them with Cambodia and Guatemala following civil law practices and Nigeria having both common and Sharia law. All three are characterized by extensive poverty, but unlike Cambodia (average per capita income of $380 in 2006) and Nigeria ($750), Guatemala reaches low middle-income status ($2,400). Ethnic diversity is a shared characteristic, but Guatemala uniquely concentrates poverty within a clearly defined category – the twenty-four indigenous groups constituting the majority of its population.

Despite these differences, the three countries share certain characteristics that collectively constitute some of the most difficult settings for reform. Namely, widespread poverty and great inequality in income distribution, often reinforcing major ethnic cleavages; a turbulent history (although only two, Guatemala and Cambodia, can be considered post-conflict countries); political systems which, while using elections, are considered to be only "partially democratic" at best and susceptible to considerable instability; high levels of corruption; and as regards the state justice sector, limited access for large sections of the population. (This may be less true for

[11] Ironically, much of this hinges on perception surveys, as in the World Bank Institute's governance indicators (Kaufman et al, 2007). While opinions can be quantified and thus subjected to macro-econometric analysis, as critics note, they are only a pale reflection of the state of institutions, are subject to change for reasons having little to do with institutional quality, and are often based on different national standards. Still, despite these and other observations on the approach's weaknesses, it is widely used by donors in evaluating progress and most recently was adopted by the U.S. Millennium Challenge Corporation (MCC) as a basis for its programming.

Nigeria's Sharia courts which co-exist with the Westernized system on an equal footing.) Crime rates, and thus citizen security, are a concern in all three, partly the result of recent regime changes (quasi-democratic openings) and partly of weak state institutions, reputed complicity of some political and economic elites, and transnational influences. Moreover, although it is presumed that many of their citizens use less formal conflict resolution mechanisms, relatively little is known about how these work, how their results differ in terms of user satisfaction and enforcement levels, and whether they are used by default or out of preference. The formal situation of traditional justice varies considerably, however. Community justice is part of Nigeria's formal system, the lowest rung in the ladder.[12] In Guatemala, the recognition of traditional justice figures in its constitution, but so far that declaration has not been accompanied by concrete actions. In Cambodia, traditional mechanisms do not receive even formal recognition, although recently donors have begun to explore the potential for their use and strengthening, given the inadequacy and limited territorial penetration of the state structures.

Donor sponsored justice programs began in the early 1990s in Guatemala and Cambodia, and in 1999 in Nigeria. Donor entrance was motivated by regime change which in the first two in particular brought both national and international emphasis on strengthening or (in Cambodia) reinstating a rule of law. Of the three however, only Cambodia seems highly dependent on donor resources for its development plans and for those in the justice sector in particular. Both Nigeria and Guatemala arguably have the resources to finance their justice institutions and even to advance their reform considerably. That they have not done so can be attributed to government priorities and possibly to a lack of will to effect real change. In all three countries, judicial independence, whether recognized or not, is somewhat of a fiction. Political or simply executive control of judges and other sector actors remains the unofficial rule. Guatemala and Nigeria have taken some steps to reverse this situation. In Cambodia there is little sign of any effort to do so.

As the country case studies will be available separately, no further summary is given here. However, where relevant, examples from the studies are cited in the text. They are complemented by additional regional information provided by the studies' authors or from other sources.

## 5. The Attainment of Balance: Conclusions from the Three Case Studies

The initial hypothesized imbalance was not observed in the three case studies. In fact, in Cambodia one might speak of an imbalance toward legal assistance as the program preferred by most donors (although it is also conceivable that this is the most effective intervention and thus that more should be done). This might also apply in Nigeria, but not in Guatemala. As traditional legal aid programs tend to focus on getting clients' released from pretrial detention, this second theme was also not overlooked – although it was not tracked in any of these countries. As for the hypothesized emphasis on police, the multi-lateral development banks cannot work with them at all, and other donors usually face significant restriction on their involvement. In Guatemala, in the immediate post-Peace Accords period, both the U.S. and the Spanish governments provided significant, if not very effectual, support for police reform. Since then assistance levels appear to have dropped. However, police assistance need not be pro-repression, and donor work with

[12] This is a hold-over from British colonial practices which used the traditional chiefs as a source of local control.

police in Nigeria (as in Guatemala[13]) has often focused on enhancing ties with local communities and reducing abusive practices (Agomoh, 2008).

Nonetheless imbalances do abound. They are just of a different type. Going one by one through the hypothesized categories, they are discussed below:

***5.1 Imbalance in program elements***

Donors are supporting many activities within their justice and criminal justice assistance, and at some level it is hard to find anything that has been excluded. Nonetheless, every country case study identified areas receiving little or no attention, although much here depended on how the individual authors defined the larger topic and the objectives it ought to be furthering. Whether these exclusions or lesser attention is important or not depends on the definition of what reform means, and as has been noted, there is still no consensus.

Rather than imbalances there may be gaps at a deeper level of detail. Donors say they are working on everything as do governments. From the governmental standpoint, Nigeria may be the winner as regards repeated, if somewhat inconsistent, multiple-point plans for sector reform. However, both Cambodia and Guatemala have also produced apparently comprehensive expressions of intent, in the case of the latter backed by the contents of the 1992 Peace Accords and a series of extensive plans listing needed inputs. NGOs by their very nature tend to have a narrower focus, but this is hardly to be criticized. Presumably NGOs work in their areas of comparative advantage and the donors who fund them make up for the gaps in other ways.

However, whereas some topics get by with a kiss and a promise, others get far more concerted attention from donors (and governments), and even then certain critical details may be missing. The example of preference is access – where buildings and legal assistance get most donor support. There clearly are other factors conditioning access that require reform, but for one reason or another they are ignored. Moreover, in both Cambodia and Nigeria government attention to legal assistance is either nil (Cambodia) or very limited (Nigeria). What exists is largely (in Cambodia, exclusively) donor supported. A different example lies in donor emphasis in Latin America on new criminal procedure codes. As another example, mentioned in the Cambodia report, there are many aspects of court administration (how a case is processed) worthy of more attention as they feed corruption and other abuses. However, reform programs have often not identified all these needs and thus done little to resolve them. Related to this is the almost universal failure to develop good management information systems (performance statistics) to allow monitoring of progress and identification of problems. And moreover, what statistics exist do not appear to be used.

Oversights like those just mentioned might also be treated in the section below on the balance between goals and inputs. Much the same might be said of a variation on these practices so extreme it deserves special mention – the unplanned program or the program-light. In effect, an intervention without much to show for it beyond a few courses, a seminar and a publication, some study tours, or a series of grants for very small projects linked only by their common themes. Since these “programs” by their very nature involve little funding, they are problematic

[13] However as Perlin (2008) notes, U.S. Government support provided by the Departments of Justice and State targets criminal investigations of topics of interest to the U.S. (drugs, terrorism, and money laundering).

only insofar as anyone – donors, government, or NGOs – comes to believe they constitute a serious strategy for dealing with major issues.

Finally, there are some areas that are universally (and officially) under-attended: most notably prisons and traditional dispute resolution mechanisms. The former is a consequence of donor self-restraints (as discussed below) and governmental priorities. The latter, while often discussed, does not seem to have inspired any means for dealing with it. This topic is also addressed below but bears mentioning here because of its importance to large portions of the population. A formerly slighted area now receiving more attention is crime prevention through socio-economic programs, often with local communities. As discussed in a later section, here as with traditional justice, one impediment is insufficient knowledge as to "what works," and a fear that resources might be wasted on ineffectual interventions.

### *5.2 Funding imbalances*

Except for the few largely excluded areas mentioned above, there are two significant obstacles to making any judgments here. First, the case study authors were not always able to get a good accounting of how moneys were allocated. To do so would have taken far more time than was allowed, and also required digging deeper into project contents, including that of projects not technically within the justice sector realm (e.g. some preventive strategies). Second, absolute expenditures are often not a good measure of significance. Some activities simply cost more than others, and some of the most important ones may cost donors very little as they ultimately hinge on cooperating countries' willingness to change policies.

The criticism expressed by some case study authors as to large amounts spent on police, more often by governments than by donors, raises another point. By the nature of their work, police forces universally cost more than courts, public defense, or prosecution; public defense gets less than courts or prosecution; and with few exceptions (Colombia during the 1990s when a prosecutorial office was being created "over night") courts get more than prosecutors. How well the money is used is another matter, but until the nature of crime and criminal justice change, those are the standard rules of the game. Of course, donor contributions need not follow these rules, especially if national budgets already respect them. Donor funding is "additional," aimed at financing things the country would not or could not finance on its own. In point of fact, all three countries seem somewhat (Guatemala) to extremely (Cambodia) "underpoliced," on the basis of force levels (quality is another issue). As donors cannot pay salaries and cannot (as in the case of public defenders) support non-governmental alternatives, under-budgeting and thus understaffing of police (and in some cases other organizations) remain a problem.

A similar point should be made about overall budgetary allocations to the sector as a whole. In the scheme of things, well functioning justice sectors, with the exception of police, never take up a large portion of public resources. The occasional protests by court presidents that the judiciary should get as much as health or education are misguided. While the Cambodian government starves the courts of funding, in Guatemala and the rest of Latin America, the courts get more than their fair share, and if there are underruns it is in prisons, defense, prosecution and even police. Unfortunately, the public usually only cares about the latter two, and politicians do pay attention to that fact. As support for the general argument as involves all but the police and prisons, recent studies by the Council of Europe (CEPEJ, 2005 and 2006) indicate that the annual

expenditures on courts, prosecution, and legal aid by 46 European countries never reach more that 0.5 percent of the GDP, except for two countries (Bosnia and Herzegovina at 1.2 percent and Moldova at 2.3 percent). Data currently being processed by the World Bank place many Latin American court budgets (exclusive of prosecution and defense) between 0.5 and 0.8 percent of GDP.[14] While the Guatemalan judiciary's 0.23 percent is lower, it still stands up well against the European averages.

Turning to donor, as opposed to government financing, the key considerations are "additionality," leverage, and sustainability. Donors can never make up for enormous funding gaps, and that is not their role. They can encourage more reasonable spending patterns, but for the most part their contribution should be focused on using their knowledge base and funding to introduce and promote the adoption of mechanisms and practices that will produce more socially desirable results (Perlin, 2008; 1).

The problem arises when donors finance things (buildings and equipment in Guatemala or the rest of Central America for that matter) the government could easily fund, engage in piloting activities unlikely to be replicated (Cambodia's model court), duplicate each others' efforts, or fund activities likely to disappear once they leave the scene. This is where the imbalances occur – less between what is promised and what is financed, but as a part of a more rational consideration of what makes the most sense in terms of the three principal criteria. If an activity does not support something that would not otherwise be done; if it does not leverage more change; and if it is redundant or not sustainable, perhaps it should not be funded. Except for some questions about investments in infrastructure and the sustainability of legal assistance financed entirely by donors (most notably in Cambodia) the case studies lacked the details needed to reach conclusions here, but the general arguments warrant further attention by those doing the funding.

### *5.3 Activity imbalances (poor match between objectives and inputs)*

There are some significant imbalances as regards the larger program objectives and how these are converted into activities or inputs. As mentioned, access programs too often translate into infrastructure and equipment (Guatemala for the MDBs in particular) on the assumption that the principal barrier to access is physical or geographic – people can't get to services that are located too far away – or into the provision of legal assistance combined with public education and information programs (all three countries and most donors). Both are important, but they leave unattended a host of other obstacles that may undercut their impact – things affecting the quality of services (corruption, bias, inefficiency, etc.) or otherwise discouraging their use (a preference for communal mechanisms, or a fear of the consequences of antagonizing the powerful). In both Cambodia and Guatemala, there are indications that more "accessible" state services, including Cambodia's model court and Guatemala's alternative dispute resolution and justice centers, are underutilized. Clearly there is a need to explore the reasons for this underuse and either take actions to reverse it, or reconsider the value of the programs.

Questions have also been raised by other observers about the efficiency of the multiple legal aid programs financed by donors, whether implemented through NGOs or state agencies. A forthcoming World Bank diagnostic of Honduras' reforms for example shows that public (i.e.

[14] Although we lack figures for Cambodia and Nigeria, it appears that the former does nowhere near as well.

government) defenders handle an average of only 25 new cases a year, obviously far below a reasonable amount.[15] A further concern, raised in the Cambodia report, but applicable more widely, is that donor and provider preferences may overspecialize services offered, leaning toward themes (land reform, gender) which may not coincide with the most urgent actual needs. A 72,250 euro grant in Nigeria for a program to support "widows who are victims of abuse" is another possible example of such dispersion of resources (Agomoh, 2003; 36). If the problem is widespread, it arguably requires more funding. If not, perhaps the monies might more usefully go elsewhere.

Without going into more examples, two comments can be made about this apparent mismatch. First, twenty-five years of experience make it clear that there are certain nearly universal, but often ineffectual initial responses to fixing any problem in the justice area. Second, donors on the basis of their own participation in this experience are well positioned to advise against actions that never work. Why they do not do so is a good question (and some answers are provided below). However, if one must attribute blame for the mismatch, donors should get a good part of it. They should know better, and if they don't, they are not taking advantage of their privileged position and presumed vast knowledge base.

The mismatch between objectives and inputs is related to several problems discussed above and below: donors' and other participants' preference for the routines they have used elsewhere; a failure to internalize some obvious lessons of experience (or just common sense); the constant entry of newcomers who demand their "right to make their own mistakes"; participants' rather superficial review of program contents and results; a tendency for donors to respond to the "flavor of the month" within their own organizations, regardless of local needs; and inadequate evaluation and monitoring. These are all technical issues that are best addressed by the empowerment of the participants' technical experts and a willingness to debate differences among them at a technical level. As a USAID director commented several years ago, justice reform is every bit as technical as integrated pest management and if we don't recognize and act on that principle, we will soon be in trouble. We didn't and we are.

### *5.4 Imbalances between top-down and bottom-up approaches*

As discussed above, there is an unresolved debate over the relative merits of top-down and bottom-up reform, or alternatively put, between addressing supply and demand issues. In the end, all may boil down to different kinds of supply since even legal assistance, the demand mechanism par excellence, affects supply (of legal services). Still, the larger question is the extent to which reforms should develop institutional response capacities or ensure they have something to which they can respond. The answer is not known, but it is evident that donors have traditionally worked on the top-down, supply side, as that is easiest for an outsider (and usually what governments prefer), while NGOs, often supported by donors, have tended to focus on augmenting demand, especially among the poor or other historically marginalized groups. Another aspect of "bottom-up" (but possibly still supply-side) involves work with traditional or informal dispute resolution. Donors have done relatively little in this area. Some exceptions covered in the country case studies include work by DFID and others in Nigeria and by the World Bank in Cambodia.

[15] The document is not publicly available at the time of writing. The numbers come from official estimates provided by the Director of the Public Defenders Office.

For donors (and for governments), the problem with bottom-up or demand approaches is that they are potentially subversive and anti-status quo. As noted in the Cambodia case study, the government there shows a certain ambivalence about donor work with NGOs, whether in legal aid, citizen education, or advocacy, for just this reason. More generally, much depends on how the bottom-up/demand elements are organized and to what ends. Citizen education and legal assistance are usually not seen as threatening by governmental counterparts. Support for advocacy or communal justice, or efforts to get the excluded to define their own needs (as opposed to educating them in how to use what is already offered) may be perceived more so. From 1978 to 1988, the German Friedrich Naumann Foundation supported a training program for Peruvian lay justices of the peace despite Supreme Court resistance and was only able to do so because it was entirely grant funded (Hammergren, 1998b; 82). Resistance was based only on the court's dislike of the lay justice system. Had the lay judges been empowered to resolve more than minor conflicts, the court might have been joined by other, more powerful opponents.

Aside from the issue as to what will be tolerated, it is by now fairly evident that some sort of mix is required and that the remaining questions regard quantity, content, and sequencing. The case studies do not provide any answers although they do suggest that top-down is too often exaggerated or at least poorly matched with the bottom-up elements (see the Guatemala study on the underutilization of various services targeted at the poor).

One emerging conclusion is the need for better information on how the poor in particular are served by current or proposed mechanisms. Sometimes the best laid plans fail because of miscalculations in that area.[16] Surveys and studies to obtain that information, especially when grant funded, are less likely to awaken opposition, and may in the end produce programs with better impacts, and possibly with less conflict over their aims and content.

### *5.5 Implementation imbalances*

Any imbalance between objectives and inputs is frequently compounded by implementation patterns. This is especially true of counterpart implemented programs (traditional loans, but also a risk in the new sector-wide initiatives). Socially dysfunctional behavior does not arise by accident, nor is its perpetuation a mere oversight. Someone, usually political and economic elites, stands to benefit, and thus, confronted with a list of activities, some of which undercut their basic interests, it is no surprise that they give the most threatening items short shrift. All three country case studies point to this phenomenon. Cambodia may be the most egregious case, but Guatemala and Nigeria offer their own examples. However, donors operating with grants can also fall into this trap, less because of vested interests than because some things are easier to do than others and because in some areas they simply do not know what to do. Apropos of this comment, care might be taken with the new enthusiasm about preventive programs. Prevention is a great idea, but aside from the impact of deterrence (via an effective criminal justice system), reducing levels of crime and conflict is hardly a well developed art or science, even in the developed "North." How much of that art or science is well managed by development agencies is still another question.

[16] And this is not only as it involves the poor. See World Bank (2002) on the limited impact of Mexican reforms intended to speed up debt collection.

Where implementation imbalances are a product of counterpart resistance to important change, better donor coordination is one answer. Ideally, there should be an agreement among donors, government, and civil society as to the objectives sought and strategies to advance them. In its absence, donors might at least agree on where they believe they want to go, and not deviate from that path unless the counterpart can convince them, collectively, that it is in error. There is nothing wrong with buildings and equipment provided they are tied to a program of more fundamental improvements in performance. In fact, they could provide a good deal of leverage, although at present this rarely happens.[17] Training, also favored by counterparts, can play a similarly positive role, but only if it is part of a larger change program. In short, implementation imbalances exist, and are most often a function of a lack of overarching agreement on what is being pursued. Absent that vision, what gets done is what individual parties prefer, and the whole becomes substantially less than the sum of the parts.

### *5.6 Collective versus individual imbalances*

The important imbalances are collective rather than individual. Their resolution will come through higher levels of coordination around a common vision. This should leave plenty of room for donor preferences, standard operating procedures, and comparative advantage. The development banks are arguably less able to promote basic institutional change than are the bilaterals, but so long as they ally with the latter, the common project should not suffer. It actually may be worse where everyone tries to do everything, inasmuch as they will end up duplicating efforts, introducing conflicting models, and undertaking many activities that lead nowhere. However, the emerging enthusiasm for sector-wide approaches needs to be enacted with caution. If it is to work, everyone will have to tolerate a good deal more self-criticism and monitoring than has been the case in the past. An effective sector-wide approach will first off require a more honest evaluation of the status quo than anyone has been willing to attempt. In all three case study countries, it might be well if donors took on the government's visible lack of interest in basic reform, and if someone, the government or other actors, questioned the donors' motives. It will also require a common vision and strategy, similarly lacking, and a willingness to sacrifice one's own preferences to the agreed upon plan.

In the interim, a more incremental effort to promote coordination (and self-criticism) might be more realistic. Governments and donors alike have to answer to constituencies who do not understand the basic problems and who thus often ask for the impossible. Justice reform is a relatively new area, and some hope may be taken from the experience of older disciplines.

## 6. Common Problems

As the case studies demonstrate, the imbalances are the product of a series of more basic problems. The most common problems are reviewed below, including a few unresolved dilemmas as to how reforms should be structured and what they should cover.

### *6.1 Lack of a national reform strategy*

In all three case studies, governments or agencies within them (the Supreme Court in Guatemala) had produced reform "plans" theoretically guiding their actions and those of donors. This is a

[17] This certainly was true of the IDB and World Bank infrastructure programs in Guatemala, as noted in the in-house evaluation of both. See World Bank (2008) for comments.

growing trend among all recipients of external assistance, often fomented and sometimes financed by donor agencies. However, the plans usually exist as little more than lists of things to be done, with scant indication of sequencing or priorities – in short, they are not strategies except in the loosest sense. Guatemala's is among the more sophisticated versions (but not unusual for the region). However, it is essentially an enormous shopping list in which problems and solutions tend to be defined in terms of inputs (buildings, training, and equipment), and there are no means of measuring service improvements to the clients. Guatemala also has a sector modernization program and a plan for implementing the new criminal justice system. Each of these is in the hands of a coordinating body, but none of these bodies is perceived as coordinating very effectively (Perlin, 2008; 27-33). The plans grow out of the parts contributed by the members, not out of a common vision of the problems and objectives.

While the reform plans are intended to guide donor actions, they either (as in Guatemala) provide a justification for just about anything a donor chooses to do, or (Nigeria, Cambodia) seem to be only one source, and possibly not a very important one, of donor initiatives. Cambodia's and Nigeria's plans are actually more statements of principles than reform strategies and the case studies suggest little government movement in advancing any of their objectives. Donors' recent enthusiasm for "participatory planning" may increase local buy-in, but does not necessarily resolve the other common flaws. [18] It may simply produce a longer shopping list.

Despite this skeptical view of the plans reviewed, it also needs to be recognized that the most successful donor assistance usually occurs where it supports a counterpart with a clear idea of what it wants to achieve and how it means to go about it. Sometimes this occurs almost as an accident, when the counterpart gives the responsibility for implementation to an individual whose own vision of the results shapes the program. One of the early World Bank projects in Venezuela was able to produce visible results in the performance of pilot courts working on criminal matters (World Bank, 2003). This was because the head of the implementing agency effectively redirected efforts to that end.[19] Similarly, two of three World Bank projects with provincial courts in Argentina increased court efficiency because court officials assumed control of the implementation and took the efforts in directions they considered important. In Costa Rica, both the IDB and USAID successfully implemented projects because the Supreme Court already had a vision of what it wanted. In all these cases, observers have criticized the directions taken, but the partnership was successful on its own terms.

These accidental successes are illustrative, but not a realistic model for future programs. They occur most often in the countries least needful of assistance. Ideally, in all nations, there should be a common definition of the problems to be resolved, the objectives to the pursued, and the strategic path and methodologies that will be used to advance them. The plans should start with a considerable degree of honesty – if corruption is the problem, it can hardly be overlooked. They also should be informed by international experience and standards. It is not uncommon in Latin America for justice agencies to claim overwork, when objectively speaking they are hardly doing anything (World Bank, 2008 forthcoming). Donors might consider promoting the development

[18] Getting 100 people into a room for a few days rarely produces a technically sound, strategic plan. Doubters are referred to Cass Sunstein's (2004) comments on "The Wisdom of Crowds."

[19] This information was not included in the World Bank evaluation, but was obtained by the author via interviews with project personnel.

and publication of international benchmarks as both counterparts and many of their own staff members seem unaware of their existence.[20]

### *6.2 Lack of government commitment*

Government commitment to producing change is essential to making assistance effective. Where it is absent, programmed activities may be implemented but without any broader impact. Guaranteeing government commitment is especially difficult in areas like reducing its own intervention in judicial matters or attacking sector and government-wide corruption. Here the three case studies are unfortunately fairly typical of the situation in many countries in their respective regions. Among the Central American countries that have received a sizable share of assistance – El Salvador, Guatemala, Honduras, and Nicaragua – as well as in parts of the Caribbean (Haiti and the Dominican Republic) and South America (Bolivia, Ecuador, Paraguay, and Venezuela) one of the sticking points has been the resistance of political elites to reducing their control over the appointment process for the judiciary, public ministry, and police in particular. Sometimes, as in El Salvador and the Dominican Republic, initial progress is followed by considerable backsliding. In Guatemala, Honduras, and Nicaragua there has been little progress, and thus despite considerable external assistance, efforts to advance any of the usual objectives are impeded by the perverse incentives of sector leadership.[21]

Cambodia, Nigeria, and many sub-Saharan countries seem to confront similar problems. Elsewhere in Southeast Asia, the "Singapore model" – a Court under the thumb of the executive but still expected to perform effectively, efficiently, and predictably – may provide an alternative. This is not the Western version of the rule of law, but some argue (Peerenboom, 2005) that it still constitutes an improvement over the status quo ante and may be a more realistic strategy than granting an unreformed, and in the end politicized court, more freedom to operate as it wills. In these circumstances, donors who do not mind the limitations may be able to advance programs featuring efficiency, professionalization, and even increased access and anti-corruption measures.

The more frequent situation is, nonetheless, government apathy or covert resistance to key portions of the reform program – usually those having to do with increasing institutional professionalization and independence (and not only of the courts). Donors need to consider the implications carefully, as over the medium run this involves reputational risks for them, and over the shorter run, it means that many resources (whether grants or loans) are likely to be wasted. In all three of the case study countries, and in many others, donors' willingness to cooperate with governments that do not seem to care is coming under increasing fire. Likewise their arguments that they are doing this to "stay engaged" or because their contributions do not worsen the situation, but rather lay the basis for future improvements, once the political situation changes, face ever stronger opposition. It is well known that inter-donor competition feeds these

[20] A World Bank experimental small grant program on judicial budgeting involving half a dozen Latin American countries will do just that. In an initial meeting, in June 2008, it was readily apparent that none of the country representatives had access to international statistics and thus were interpreting their own data in a vacuum. The data bases to be used by this program may be interesting to others, and include CEJA (2005) and CEPEJ (2006).

[21] In these three countries, initiatives to reduce political intervention via the introduction of merit-based selection and career systems fell short of their goals. Their supreme courts are still appointed through negotiation among political parties, and careers for lower level judges are either non-existent (Honduras and Nicaragua) or truncated (Guatemala), and thus highly susceptible to external influences.

tendencies and drives conditionality to the bottom. A donor that insists on hard choices is likely to end up without a program in the country under consideration. This then leads to the issue of donor coordination and how it might be used to provide an exit from this quandary. However, there as well, much more is needed.

### *6.3 Insufficient donor coordination*

None of the country case studies provided good examples of donor coordination. This is hardly surprisingly as it is a common criticism of these programs. It is a recognized fact that inter-donor competition discourages cooperation. Donor coordination is also a mixed blessing for local counterparts. While sometimes driven to frustration by inter-donor conflicts, counterparts also worry about donors ganging up on them in closed door meetings. Ideally coordination should occur with all donors and counterpart agencies sitting at the same table and discussing the situation with utter frankness. In reality, this does not occur and in most countries is unlikely to do so soon.

Clearly, if the situation is to change, donors need to define the purposes of donor coordination more carefully. It is indeed helpful to avoid redundancies or conflicting programs – as all three case studies characterized the benefits of existing coordination mechanisms. However, the goal needs to be raised a level or two. The obstacle largely revolves around the conflicting priorities and perverse incentives within the donor organizations. Donor staff get points for producing novel programs, concretizing programs of any type, and for disbursements. To counteract this situation, it first needs to be recognized, at the highest levels, that justice reform does have a knowledge base behind it and that this knowledge must be used to shape individual programs and for those coordinated among donors. Rules of professional courtesy may have to be overridden. No matter what the interest in maintaining good relations, and no matter what the high level contacts of the author of a proposal, if the emperor has no clothes, those with eyes need to be able to say that. Agency heads cannot be expected to understand the details of justice reform, any more than they understand the details of integrated pest management or infant malnutrition, but they should know who their experts are and rely on them. Donor coordination starts here – and it continues through empowering those experts to speak in donor coordination meetings, as no one else has the knowledge to do so. The experts in turn need to be good enough to recognize and debate legitimate differences of opinion. Donor coordination is not about holding dozens of high-level meetings; it is about ensuring that the experts are at the table, that they are empowered to discuss debatable points, and that their principals have faith in their conclusions. All three case studies featured examples of successful ad hoc coordination by experts working on specific projects, but none reported a policy to encourage this kind of action across the board.

### *6.4 Donor selection of actions based on non-contextual criteria*

Despite the over-sensitivity to counterpart preferences, donors are often context-blind when choosing their country activities. Donors prefer to do what they have always done or alternatively, to engage in the newest, sexy areas. Packaged or canned programs still feature in their repertoires despite criticisms of their appropriateness for every country where they work. When USAID moved into Eastern Europe with its Latin American programs, this was frequently observed, and it took some time for the programs to be modified to suit the new needs. However, all major donors and many of the minor ones fall into similar vices. Part of this is driven by their

work methods. Donors using loans and counterpart implementation find it easier to focus on infrastructure and equipment as opposed to many small consultancies. Smaller donors and international foundations and NGOs may have a very limited selection of programs and apply them wherever they go.

Mass migration toward sexy topics is another problem. The consultants for this exercise doubted the initial imbalance hypothesis because they know donors prefer to support legal assistance, and especially in hot topic areas like gender, domestic violence, or land disputes. While these are important themes, no one ever asks the beneficiaries what they need. In Cambodia in particular, the case study authors noted that the emphasis on hot topics is reducing attention to criminal law, where the most egregious abuses still occur. With the emergence of bilateral and multilateral trade agreements, U.S. government programs are now migrating toward labor and international commercial law. These are neglected areas, but not necessarily where national citizens most need help.

A comment is also merited on tied aid – funds which must be spent on services and equipment originating in the donor country. International consultancies can be very valuable, but only if they bring the right skills to the table. The frequent observation that much assistance provides the largest benefit to back-home firms and individual consultants is not to be taken lightly, however. The advice can be bad, the services over priced, and there can be other disadvantages. For example, during the early days of financing automated case tracking systems, foreign vendors' refusal to hand over the source codes kept countries dependent on their highly priced services for years. Both the Guatemala and Cambodia reports offer examples of instances where consultants from donor countries complicated matters by insisting that their back-home practices and rules be adopted, sometimes out of ignorance and other times out of apparent closed-mindedness.

### *6.5 Frequent change in donor focus*

All of the case studies referenced cases where donor programs were in transition, not because of local circumstances but because centrally-set agendas had shifted. This is understandable and not necessarily negative, but it does pose problems for the inherently longer term efforts need to produce institutional change. Cultural and value change takes time and requires many intrinsically boring details. Notwithstanding all the donor funds spent in Guatemala the country lacks reliable statistics on caseloads. It is hard to envision arming a serious program without this information, or without information on who is detained, for what, or for how long. USAID's programs may be incomplete, but the agency has stayed the course in countries and thus contributed to some positive change (Perlin, 2008). In both El Salvador and Honduras, its early efforts helped establish a set of statistics on judicial performance that all donors should be able to use in planning their programs. However, in Guatemala, it was the World Bank that promised a statistical program, and in eight years has not been able to create one (World Bank, 2008).

If the large donors have been fairly consistent, the smaller ones have been less so. This may be less damaging, but even smaller donors need to ask whether their changes in direction are advisable. This is especially true when they move into areas, like "social cohesion" where the state of the art is less developed than in judicial reform. The Cambodia case study in particular, and the other two to a lesser degree, noted the problems this poses for NGOs, forcing them to

change their usual programs to fit the donors' new demands, sometimes (Cambodia) finding that the new direction would again be reversed.

### *6.6 Donor restrictions on their own activities*

The most obvious area here is work with prisons, which only a few donors have entered, and then only gingerly. This is not an issue of reducing pretrial detention, which is best addressed through legal assistance, legal change, judicial training, and public education (to counteract the public's frequent demand that the "guilty" be locked up). It has to do instead with improving generally deplorable prison conditions, ensuring better treatment of inmates, and introducing educational and other programs to help with their reintegration. Prisons may in fact be the one area where new infrastructure really counts, and thus a natural area for the development banks as they find this an easier activity to supervise. Of course that also assumes governments will be willing to take out loans to build new prisons or to refurbish those they have.

Donors' reasons for not working with prisons, like those for not doing more work with police, largely hinge on reputational risk – a fear that "something bad will happen" in connection with a prison they have financed or with staff they have trained, and that they will get the blame. It is debatable how real those risks are, and moreover whether they might not also encompass support to a court, defense program, or prosecutors office that turns out to be riddled with corruption. And although NGO programs are generally smaller and thus less likely to produce enormous scandals, there are comparable risks there. For example, an NGO found to be a front for politicians' campaign chests or to have used donor funds to illegal or otherwise undesirable ends.

Donors' refusal to work in areas like these does constitute an imbalance. The criminal justice chain ends with the prisons, and the prisons are often the most abusive part of it. Hesitations about police programs appear to be disappearing gradually. DFID (see Agomoh, 2008) has long worked in this area, and moreover with real police experts. One further fear about donors moving into formerly forbidden terrain is their lack of sufficient expertise. Because of the real and not merely reputational risks associated with both prisons and police, it is important that donors' entrance be gradual and incorporate the necessary knowledge base.

## 7. Four Common Problematic Themes

These largely have to do with areas underrepresented in existing programs, but also include some questions about the role of civil society or NGOs. As the issues emerged in all three case studies, they are mentioned as common concerns.

### *7.1 Recognition of and work with customary dispute resolution*

In all three case study countries, a large share of the population resolve their justiciable conflicts through traditional or other informal mechanisms, by preference or for lack of choice. (In Guatemala, preference may be the principal reason as among the three countries it is the one where, as a result of reform programs, most of the population does have physical access to state institutions.) Donors have expressed interest in working with these traditional and informal fora for handling conflicts, but have generally not gone much further. The World Bank's Justice for the Poor (J4P) initiative promises to do this, but so far the initiative is new (see Bang and

Panjwani, 2008 for a discussion of current activities in Cambodia). DIFD also has some limited experience.

The problem facing donors is multifaceted. Namely, a lack of knowledge of what is entailed in this category or how well it operates; the inherent diversity of practices in a multi-cultural setting (traditional justice is not one model); a lack of clarity as to what working "to strengthen" these mechanisms would entail; a lack of methodology for doing so; unresolved issues as regards the existing legal framework; and a variety of logistical challenges as regards supervision, contacts, and selecting counterparts. Suggestions that the solution is to strengthen systems by injecting a certain respect for international human rights standards seem a bit naïve and possibly contradictory (in that they could threaten some customary values which may not coincide with the international standards). Local NGOs may be better positioned to do this work, but they, like the government leaders, are not necessarily that well informed about the systems, nor are they likely to be any better received than a group of foreigners who arrive to fix them.

Still, a national justice system automatically includes these customary and informal mechanisms, whatever the official position on them. Furthermore, in countries like Nigeria and Cambodia, they may be all that is readily available to a large share of the population. Assuming that justice can wait until the state sector arrives at the most removed villages is simply not an option, or at least, not a desirable one. However, one feasible answer is to let these mechanisms operate until such time arrives, meanwhile working to understand them better and exploring means to develop links with the state system. If governments, donors, and NGOs find this unacceptable the onus is on them to develop a better plan.

### *7.2 The role of civil society organizations*

The role of civil society organizations (CSOs) in donor and government sponsored programs has been controversial from the start. As the case studies make clear, CSOs or NGOs have been important in pushing for reform, in implementing programs, and in monitoring progress. In fact this role is so important that, as in Cambodia, donors have been more than willing to defend them against government attacks. In this sense, CSOs are full partners in the reform endeavor, albeit often dependent on donors for funding. This relationship poses certain other problems: sustainability; their tendency to push activities into areas that may be less central to reform; conflicts of interest where they wear multiple hats simultaneously (e.g. implementer and monitor or critic); and their ability to represent "the people." Sustainability is an issue that has been raised for some time. It is well recognized that in many countries CSOs could not operate without donor funding and that this in turn has increased their dependence on and tendency to follow the latter's lead. If CSOs are mainly instrumental to promoting reform, their continued survival once donors leave may be less problematic, but dependence has other negative consequences. It may (see Cambodia case study) discourage them from forming their own intra-CSO alliances; it can create conflicts of interest when they are asked to perform multiple roles; and it can cause them to promote activities pleasing to the donors but perhaps further removed from local needs (as suggested by both Agomoh, 2008, and Bang and Panjwani, 2008). Also given that CSOs are usually staffed by middle class professionals, their ability to represent popular demands and interests has been questioned.

In many countries donors could not operate without CSOs, but this fact should not stand in the way of recognizing that they are in fact another interest group, more aligned with donor objectives, but nonetheless far from representative. Over the short to medium run, this situation is unlikely to change. Donor insistence that CSOs become self-sustaining or live off the land has rarely functioned well, either leading to their disappearance or forcing them to compete as for-hire consultancy groups.

### *7.3 Relationship to transitional justice, human rights, and local advocacy*

Transitional justice (the creation of special, usually international tribunals to try past abuses, or of reconciliation mechanisms and the like) is increasingly recognized as lying in a category apart from traditional justice reform initiatives. This is because it competes for funds with more conventional efforts to set up functioning national systems and because, as some critics hold, it may stir up conflicts many citizens would rather leave alone and in any event, does not address current needs which unattended might escalate into more serious conflicts. We leave these latter issues for others to debate. There simply are not enough data to reach an objective conclusion on the various claims, pro and con, regarding the topic. As for whether transitional justice is a part of justice reform, with Perlin's partial reservations, our implicit consensus seems to be that it is not. That does not make it less important – only different, just as work in the health sector or in macroeconomic management is different but no less valuable.

On the issue of human rights, there are two lines of discussion. One has to do with the incorporation of "universal standards" in local legal frameworks, and the other with helping citizens access these rights. As regards the first issue, the implicit model supported by donor work is usually based on these standards, both as regards legislation and organizational arrangements. Most donor project managers are not well versed in the intricacies of human rights law, but they do tend to recognize first generation rights and such things as the importance of an independent judiciary. Clearly the three case study countries, and most countries internationally, can be counted in violation of some of these rights, but that rarely appears to be an official policy, and can simply be counted as one of the things reform seeks to address. The negative note, as mentioned above, is an incipient reaction to "universal" standards on the basis of local values. The country case studies do not include examples, but it is evident that "universality" is no longer universally recognized as such, and that over the longer run this may pose problems for donor programs.

On the topic of domestic litigation and advocacy, especially as related to human rights, the answers are less clear. A reform program clearly should set up structures to allow litigation to proceed fairly and effectively; the question is whether it should support such litigation as well. This is a fine distinction, but many donors attempt to adhere to it if for no other reason than their reluctance to get still further involved in local politics. Much of the pressure for doing more comes from local and international NGOs, as well as from those who are victims or simply have heard of a case of egregious injustice. While donors sometimes support litigation (even if by turning a blind eye to what the NGOs they are supporting are up to), a more whole-hearted entrance may be ill advised, if only because it may undercut other programs by stirring up more conflict and taking funds away from their top-down and bottom-up institutional development aims. As Perlin notes (personal correspondence), the UN plays an interesting role in pressuring around specific cases. However, this role, plus its monitoring of compliance with international

obligations, and its own project work do create some evident conflicts of interest, even if it attempts to give the different functions to separate offices.

***7.4 Relationship to reconciliatory, reintegrative, and preventive programs***

All of the country case studies mention these topics in passing, if only to notice that they receive little attention. Except for Agomoh writing on Nigeria and Perlin's thoughts on preventive programs, they have not, however, targeted any of these as areas where *justice reform* should do more. Agomoh noted not only the lack of attention to prisons, but also the absence of programs aimed at reintegrating prisoners into society. Again the question is not whether these are valuable areas of action, but simply whether justice reform programs should include them. There is a problem of in-house expertise for donors and thus their ability to design and manage these efforts. Valuable programs designed by novices are probably not a good idea as, like the anti-preventive detention measures, to which they are related, poor planning and execution could well provoke a backlash.[22]

As reintegrative programs have no other logical sector home, one answer may be to include them where there is government demand and a plan that has a chance of working. To force these programs into every justice reform may not be advisable. They could, however, be included and on the basis of successful experiments in a few countries, might then be expanded to others with an interest. In Latin American, where the procedural code reforms have introduced a new category of judges, charged with overseeing the execution of sentences, there also may be room for improving the performance of those officials and the information base on which they operate. The same codes also offer the potential for the offender to mediate restorative and reconciliatory measures with the victim, and again, without making this a major issue, some work might be done there. However, on the whole, these are very large areas, and for programs that are already stretched to the limit, might not be a useful full-scale addition at the present time.

As for preventive programs (those aimed at dissuading individuals and groups at risk in particular from criminal and other violent activities), only Perlin comments on them in any detail, but even in Guatemala, they are not well developed. This is clearly a coming trend among donor groups. USAID is pursuing it in conjunction with gangs in Central and parts of South America, and the EU seems to be favoring it world-wide. Part of DFID's Security, Justice and Growth Program (SJGP) in Nigeria also includes prevention, although largely by encouraging resolution of conflicts before they escalate (Agomoh, 2008; 36-37). Since, with the exception of DFID's SJGP, much of the prevention work involves non-justice sector agencies (health, social welfare, education), it may simply lie outside the reasonable limits of justice programs. Aside from this, there are serious reservations about the efficacy of these extra-judicial measures. As an outside reviewer of this paper noted, there is a growing literature on successful experiments at the community level, but, we would add, nothing about their roll-out nationally. Community-level prevention may be effective for locally-based infractions, but confronts serious limitations in the face of organized crime. In some cases, it may only drive such crime out of one locality

[22] These measures differ from preventive detention programs in that the latter attempt to keep people out of jail while awaiting trial, while the others collectively work to reduce the jail population and decrease recidivism. Given an apparently universal tendency to want to "lock the criminals up," it would not take many incidents with the beneficiaries of these alternatives to convince the majority that they are right. In some Latin American countries this has in fact inspired modifications to the criminal procedure codes to make them "less soft on criminals."

into another. We also remind readers of Solow's comment on the strength of the good example as scientific evidence. Something will always work somewhere; the question is how often it does and under what conditions. There is clearly room, and reason, for experimentation, but starting a large program based on what we know now may be unadvisable.

## 8. Conclusions

The three case studies and a few additional examples from other countries did suggest the presence of imbalance of the several types posited in donor assistance to justice sector reform. However, the greatest imbalance may be between the objectives formally pursued by donors, governments, and NGOs, and the results their programs have produced. At least part of this may be a consequence of overly ambitious aims. As a Peruvian expert, Luis Pásara once observed of Latin American programs, a situation that has been developing over two centuries is unlikely to be fixed in a few years. Realistic expectations are thus one way to reduce imbalances. However, the expectations are not only on the donor or counterpart side, and many observers and occasional participants also seem to place exaggerated demands on these programs. Sometimes this is because they believe things should happen faster, but more often it is because they believe the programs are not emphasizing the right things. Here unrealistic expectations arise in the multiple visions of reform. As one example, the author of this overview was once taken to task by a law school dean who contended she was not doing her job if she did not incorporate his proposed activity in her program. Contrary to what readers might expect, the dean was not asking for more social justice or human rights, but rather courses to train judges in law and economics so that they "would understand the economic consequences of their decisions." There are endless additional examples on all sides of the ideological spectrum, but the larger point is that even if reformers accomplished exactly what they proposed, they would disappoint many others.

Exaggerated expectations are not the only cause of this larger imbalance, however, and the rest can be explained by process, and thus by the series of problems set out in the prior discussion. That is, conflicting definitions of reform; lack of knowledge or poor use of what exists about how to link objectives to inputs; unresolved debates about strategies; lack of attention to monitoring and benchmarks; absence of national strategies and of donor consensus on their own aims; lack of government commitment; donors' own restrictions on what each can do; insufficient donor coordination; failure to tailor donor and international NGO programs to local contexts; frequent changes of donor focus; and certain unresolved questions about the place in these programs of customary justice, transitional justice, prevention, reintegration and restorative justice, and civil society.

Fortunately, process problems do lend themselves to resolution although doing so involves many obstacles. While uncommitted governments and one-note NGOs (interested only in their particular definition of what should be done) impede effective coordination, donors can also be their own worst enemies in promoting more effective reform because of the obstacles posed by internal operating procedures, perverse incentives, over-rigidities and at the same time, sudden changes in direction imposed by centrally set agendas, and a failure to put sufficient stock in their own expertise and experts.

Donor timeframes seem to be out of line with the reality that institutional changes takes time. Donors' emphasis on quick wins discourages attention to the details that might make the difference as to whether a program will work or not. Many of these details (building accurate information systems for monitoring the performance of institutions; making sure the enacted law is not full of infelicitous sections that will pose implementation problems; revisiting mechanisms introduced to enhance professionalization and independence to ensure they are not subverted; identifying the multitude of case processing details that may cause delay or encourage corruption) are simply not very sexy and as a result are often slighted. Nonetheless the country case studies have pointed to areas where these details have worked against the broader aims.[23]

As this report was commissioned by and for donors, it is thus not out of line to recommend that donors try to clean up their processes first. By so doing they may also be able to address more effectively the problems posed by other actors. How to conduct reform in a country whose government is simply not interested will still be a challenge, but it may be better faced by donors that collectively better understand what they are doing. This will also not eliminate the problems posed by different visions of reform, but at least the latter can be addressed more intelligently and perhaps a better consensus can thus emerge.

[23] Interestingly, the Washington Consensus' turn to a focus on institutions was caused by exactly this type of problem when it was recognized that structural readjustment policies were being enacted perversely by corrupt or simply underdeveloped organizations (Burki and Perry, 1998).

**Glossary of Acronyms**

| | |
|---|---|
| CSO | Civil Society Organization |
| DFID | Department for International Development |
| EU | European Union |
| IDB | Inter-American Development Bank (alternatively, IADB) |
| MCC | Millennium Challenge Corporation |
| MDB | Multilateral Development Bank |
| NGO | Non-Governmental Organization |
| OSJI | Open Society Justice Initiative |
| SJGP | Security, Justice and Growth Programme (DFID) |
| USAID | United States Agency for International Development |
| U.S. | United States |
| USG | Unites States Government |

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