

Legal Sector



**Four methods reports
have been published:**

The Political Institutions

Participation in Democratic Governance

Good Governance

Legal Sector

A summary of the four methods reports,
Digging Deeper, was published in 2003

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1 Introduction

1.1 Background and Disclaimer

The goals of Swedish development co-operation within the operational area of *democratic governance* are clear and primarily consist of the government's publications on *Democracy and Human Rights in Sweden's Development Co-operation (1997/98:76)*, *Human Rights in Swedish Foreign Policy (1997/98:89)* and *Sida's Programme of Action for Peace, Democracy and Human Rights*. The operationalisation of policy and goals into applications and inputs in the field requires continuous methodological work.

In 1999 Sida initiated four comprehensive internal projects to develop methodologies within the operational area of democratic governance. When initiating the four projects, the primary intention was to work out better methods and strategies to achieve the goals set up by Sweden's government and parliament (riksdag). The work was initially internally developmental within the division, with intention of improving the quality of development co-operation. Sida's staff turnover, their frequent moves between the field and home offices and colleagues' varied backgrounds mean that there is an ever-present need to increase competence and create an organisational memory for Sida. Virtually all members of the division for democratic governance (DESA) and many other Sida colleagues have thus participated in the methodological work during some phase of the project.

The project embraces four subsections:

- Political institutions;
- Swedish development co-operation in the legal sector
- Good governance;
- Participation in democratic governance.

The official instructions charge Sida with the assignment of reporting on the methodological work before April 30th, 2002. This was to be done in the form of a document that provides a *synthesis*, which can offer the basis for dialogue between the Swedish Foreign Ministry and Sida on the further direction of goals and reports of results of the work. Experiences and proposals should be shared with other donors and form a framework for discussions with external co-operating partners. The four project documents and the synthesis are available at Sida's division for democratic governance.

These project documents do not necessarily reflect the views of the Swedish International Development Co-operation Agency, Sida.

1.2 This Project

The committee for development co-operation in the legal arena (KUR) submitted a preliminary report on legal co-operation in Central and Eastern Europe in June 1998 (SOU1998:86). In March 1999, the committee submitted its final report (SOU 1999:32). The committee proposes among other things that Sida, as a step in drawing up a unified Swedish strategy for development co-operation in the judicial area, takes the initiative to

discuss with the Swedish actors concerned how to work out guidelines for Swedish development co-operation in the judicial area. The discussions ought to be based on a foundation, compiled by Sida, of both Swedish and international experiences and tentative strategic conclusions. It is our hope that this report will be able to serve as such a foundation.

Appended to our report are two papers produced during the work of the project by specially assigned experts. It should be pointed out that Appendix 1 both overlaps and complements parts of our main report. Certain repetitions are obvious. We have nevertheless decided to append it *in extenso* since, in our opinion, the document has an excellent structure, can easily be grasped and makes a contribution to every reader's knowledge. The views expressed in this appendix, like those in the second, are exclusively those of the authors.

2 The judicial sector's role in democratic governance

We define the legal arena in the following way. The core is made up of public mechanisms in the form of institutions, laws and other regulations dealing with both civil law and measures against crime. Its main objective is to strengthen the functioning of states governed by the rule of law, that is by legislative processes and national institutions in the judicial system like the ministries of justice and home/internal affairs, the courts, public prosecutors and the police service, prisons and correctional services, the institution of the ombudsman, legal training and similar key institutions. Lawyers are clearly included in our definition of the judicial sector. In the legal arena we also include those parts of civil society which function mainly as pressure groups to strengthen the rule of law in different respects.

The rule of law consists of four aspects, *legal security* (predictability, just trials), equality before the law (non-discrimination), *legal safeguards* (protection against violence and assault), *legal accessibility* (understandable laws, legal aid, reasonable costs, functioning institutions, reasonable processing times). In brief, it means that laws and regulations are familiar to the citizens, that they are applied in a foreseeable way by institutions open to scrutiny and control, and in a similar way for all citizens or inhabitants of a country.

The rule of law is maintained in different ways. A crucial question is how well the relationship between the executive, the legislature and the judiciary functions, so that the sharing of power is in balance. One of the judiciary's tasks is to check that the executive powers act within the framework set up by the country's constitution. This is a way of guaranteeing citizens' and residents' constitutional rights, among other things the right to life and security. The judicial system should also ensure that the safeguards, which are enshrined in the constitution, are not undermined by unconstitutional changes. To be able to perform this task requires an autonomous and independent legal system. The "UN Basic Principles on the Independence of the Judiciary", 1985, the International Bar Association's "Minimum Standards of Judicial Independence", 1982, "The Universal Charter of the Judge" by the International Association of Judges, 1999, "Guidelines on the Role of Prosecutors", 1990 and "Code of Conduct for Law Enforcement Officials",

1979 are examples of international codes intended to reinforce the professionalism and independence of the judiciary.

An autonomous and independent legal system must in turn be subject to checks and balances on its efficiency and professionalism. Such control must naturally be sensitively exercised, so that the independence of the courts is not undermined. The rule of law is of paramount importance to all citizens, particularly the poor, who do not have any private possibilities to protect their rights. The daily lives of poor people are greatly affected by how well the judicial system functions. The quality of the rule of law is a crucial question for a society's economic and social development.

A prerequisite for the guarantee of human rights is a functioning constitutional state. The right to a just and public hearing before an independent court to determine an individual's rights and duties as well as in relation to every accusation of a crime is laid down in the Declaration of Human Rights. The state is responsible for guaranteeing human rights. It is reasonable to assume as a point of departure that a democratic state is more concerned about human rights and more conscious of the significance of a balanced division of power to maintain it.

Human rights, democracy and good governance are closely interlinked and interdependent. They exist on parallel but separate tracks. The challenge is not to permit concepts to coalesce nor to rank them, but to identify and utilise the many links that exist to strengthen them.

The rule of law and particularly the judicial system are an integrated part of a well-functioning administration – *good governance*. When it comes to the question of *accountability* and *transparency* of a country's administration in a broader sense, the judicial system plays a crucial role. A well-functioning legal system is the best guarantee that citizens and residents will be able to exercise their rights. In a judicial context, "accountability" entails citizens' rights are safeguarded, that the state maintains certain standards, and that citizens and inhabitants can appeal against an administrative decision or judgement.

Support to the judicial sector is often intended to strengthen or secure a functioning administration in the area of the judiciary, for example in the courts and police, or training of their actors. The differences, for example, between building up and strengthening a statistical bureau or financial inspectorate, on the one hand, and the police service, on the other, is in many respects not particularly great. All these cases involve dealing with questions of staff policies, institutional development and building capacity.

Special attention should be made to the military in a democratic society. Political control of the military is one of the fundamental components of democracy. In this context it should particularly be stressed the importance of military always being subject to the rule of law.

Another important question is how a democratic social system gains legitimacy. An important element in legitimisation ought to be how the inhabitants are treated by the judicial system and the quality of the decisions and judgements made by the administration and the courts. It is a question of mutual reinforcement in the sense that a well-functioning legal system contributes to increased *transparency* and *accountability* in the administration as a whole, and thereby to democratic social development, at the same

time as openness and a sense of responsibility by politicians and the administration in general contribute to improved functioning of the legal system. Through transparency, participation, the judicial system's autonomy and impartiality, motivated and reasonable decisions and judgements, democracy and an economic and democratic social development are reinforced.

Common to the various concepts, which are used here, is that they assume the existence of a constitutional state, of the *rule of law*, and are components of the definition of both democracy and *good governance*. The object of *good governance*, democracy and human rights may differ, but what they have in common is the attempt to build a good society with an improved quality of life for the people who live there. Human rights focus on the individual, while democracy can be said to concern how we create a functional social community and take necessary collective decisions. Many of the cornerstones of democracy are founded on the norms of international rights like freedom of opinion, the right to participate in one's country's government directly, through freely elected representatives, or through freedom of organisation. That people's will forms the basis for the authority of the state is stipulated in the UN Declaration of Human Rights.

To have an autonomous legal system is as necessary to safeguard economic activities and enable investments as to control the administration of the state and safeguard the individual. To a transparent public sector, freedom of information and expression are central. The police and the public prosecutor have an acknowledged role in anti-corruption measures, according to the UN's behavioural code of 1979 for the officials of the judicial system, and the 1990 UN guidelines for the role of public prosecutors.

Above democratic governance has been treated with focus on the legal sector and its relations to democratic or good governance. In DESA's paper on Good Governance a more broad definition of good governance is made. It could be argued that good governance entails that responsibility and transparency are reinforced, and that real participation is fostered, which implies that the link with democracy becomes much clearer and that good governance reinforces democracy and vice versa. The implication of this is that neither of these concepts can be retained in the long term without the other. To strengthen good governance is thus in the long term to support the consolidation of democracy. DESA's definition of good governance encompasses the central characteristics of responsibility and accountability, transparency and openness, predictability, legal rights, efficiency and participation. The judiciary of a state and its civil society are integral parts of the concept of good governance.

For a systematic account of the legal sector, you are referred to the appended memo by Professor Claes Sandgren, Appendix 1, Section 9.

3 Legal development co-operation – poverty and equality

3.1 Combating poverty

First, some remarks ought to be made about the concept of poverty. Poverty is not a simple concept and it is clear that it embraces far more than poverty due to a low or non-existent income. In its report “Attacking Poverty”, 2000/01, the World Bank defines poverty as involving a low level of income and consumption, a low educational and health level, but also exposure to vulnerability and lack of power. When poor people themselves are asked about their situation, issues like fear of physical violence, general insecurity, and lack of justice are ranked higher in the list of problems. Threats against people’s right to live in freedom from fear can be seen in different ways. They can be:

- Threats from the state (torture, arbitrary deprivation of liberty);
- Threats from other states (wars, support to oppressive regimes);
- Threats from other ethnic groups (ethnic conflicts, crime, violence in the streets);
- Threats against women (rape, abuse in the family);
- Threats against children (physical and sexual assault, child labour).

The World Bank’s “Consultation with the Poor” maintains that these issues are as important to the poor as hunger, potable water and work. When the poor are asked about their situation, the police are often regarded as being uninterested, corrupt and brutal and were subject to a particularly large number of complaints by poor people. A poor farmer in Bangladesh said: “I can tolerate poverty, but I cannot accept that I cannot get justice before the law in my own country, only because I am poor”.

If they reduce the costs of transactions and encourage investments, thereby increasing growth, relevant legislation and a functional legal system also help to reduce poverty. The significance of laws and regulations that govern economic development and welfare has been emphasised by researchers of economic theory and economic history. The growth of the modern market economy is largely explained by the institutional preconditions. This theme is further discussed in Section 4.6.

One of the main goals of Swedish development co-operation is the combating of poverty. In this struggle, it is important that the judiciary is seen to be the important instrument it actually is. For success, one must – in contrast to the past – approach the judicial system from a holistic perspective, both the formal and the informal judicial systems, and determine how well these meet the needs of poor people and those who are most vulnerable. Strengthening institutions in the formal system is perhaps not sufficient in a short-term perspective without safeguarding the individual’s right to freedom from fear, injustice and discrimination.

3.2 Gender equality

Poor women very often talk about the violence and sexual assault that they are subjected to in the home and by family members. Studies from countries in southern Africa reveal that

more than 40% of the interviewed men admit to using violence against their partners. Violence, force and sexual assault of women – often young girls who are to be regarded as children in the sense of the Convention of the Rights of the Child – must be seen as critical obstacles to development. At a follow-up of the International Women's Conference held in Peking in 1995, the Special Session of the UN General Assembly in New York "Women 2000", presented figures that revealed that between 20% and 50% of all the women and girls in the world have been exposed to violence in their own families. Violence against children generally, both in institutions and in the family, is a common occurrence and is far too often permitted to continue unpunished. Many children are exposed to sexualised violence and subsequently are treated more like criminals than as victims.

Different ways of securing women's and children's basic human rights in terms of their physical integrity must be found. A functional legal system is one such way.

There are many other aspects to women and law than the issue of violence. In legal development co-operation, however, we have chosen to focus on an issue that has not received sufficient attention. If one takes the question of violence against women seriously, it is our conviction that one is unavoidably forced to look at both the judicial system's inadequacies in its attitude towards women and the judicial system's role in the work for gender justice.

4 General inadequacies in the sector

In many countries, imperfection of the rule of law is a reality. Inadequacies are often serious and pervasive. The institutions that are supposed to safeguard people's diverse rights are often the very ones that are most mistrusted by the citizens. Generally it can be said that often the law has adopted the perspective of the rich and well-established. All laws are not just and socially relevant; often they are quite clearly discriminatory. Women's rights to own land and have the same inheritance rights as men are limited. Minority groups are subjected to special treatment. Distance exists between political rhetoric, the constitution, formal laws and current practice. The impartiality and functioning of judicial systems can be questioned in many countries. There is no extensive culture of justice. Assault by the police, lawlessness and violence is part of the daily lives of poor people.

Lack of knowledge and information make the judicial system inaccessible to large groups. Many different barriers to knowledge exist. The poor face purely economic obstacles to using the judicial system and, in addition, their own appropriate suspicions of the system also put obstacles in their way. They are simply forced to manage without a legal system even if they are involved in activities with judicial implications like, for example, small businesses, building or inheritance conflicts. The lack of a well-functioning legal system and administration contribute to increasing the costs of transactions. In its turn, lawlessness reinforces poverty. The lack of a belief in the future undermines both the will to invest and long-term thinking. In this way, mistrust and resignation are major contributors to the creation of conditions of poverty. Hope for a better future is the motor of all development. Such hope cannot be sustained in a society that often makes perpetrators of victims.

Within the system, integrity and ethics often fail. In a study in Bangladesh, Transparency International showed that 63% of those who were involved in judicial issues in the courts paid bribes to court officials. The comparable figure for Tanzania was 31%. Often the judicial system is too closely tied to the executive powers and power holders can directly or indirectly manipulate the legal machinery in different ways.

There is also often a lack of both human and material resources. In Zambia, for example, there are fewer than two judges for every 100 000 people. In Mexico, one may linger in prison for 60 weeks before one is tried by the courts. In Brazil one can be forced to sleep hanging from a rope, since there is no more room on the cold, damp floor.

It is obvious that these enormous problems cannot be solved without popular mobilisation and political struggle. It is a question of tackling and changing strong power structures.

4.1 The main problem

In the World Bank's "World Development Report 2000", where poverty is the theme, it is noted that the "rule of law", particularly upholding ownership rights, guarantees long-term security, inspires investments and reduces the costs of transactions. Increased legal security contributes to stimulating growth and thereby creates opportunities to combat poverty. The report's description of poor people's problems with the judicial system is encapsulated in the main categories of problems, that, in accordance with the above description, can be outlined as follows:

- Lack of human and material resources;
- Structural flaws (power sharing, the judicial system's autonomy, constitutional issues);
- Flaws in legislation;
- Institutional inadequacies (including actors' education and training, autonomy and integrity);
- Flaws in the education and knowledge of users;
- Other inadequacies in accessibility of the legal system (geographic proximity, costs, legal aid);
- Users' lack of trust.

The Ministry of Justice and the courts in many recipient countries have historically been weak and ineffectual in the struggle for meagre state resources. The appropriation of state resources to the judicial sector has in principle been reduced over time. Both multilateral and bilateral donors have probably given signals about such priorities and economists in finance and planning ministries have "set the agenda". As these economists became more interested in the judicial system's role in development, the budget to the judicial sector has increased. Newly aroused interest among donors has also been significant.

In the legal arena it ought above all to be of central importance to strengthen the institutions of the judicial system (judges, public prosecutors, the police, prisons, the execution service and lawyers). It is the potential of these institutions to be the final guarantor of the civil and political rights that can create security and firm norms for

economic, social and cultural development. It has also become ever clearer what an important role civil society plays for the efficiency of the legal system. An active civil society is as vital for the rule of law as the structure of the institutions that are set up to serve it. An educated public, an active press, different individual rights, like freedom of expression and association, and active non-governmental organisations are of critical importance to the development of a state governed by the rule of law and for the efficiency of established institutions. These contextual factors must be taken into account when planning all legal support. It ought to be considered whether support can be given to the formal judicial sector on condition that the recipient government increases the appropriation of resources in the state budget to the same sector.

5 Experiences

5.1 Swedish development co-operation in the legal arena

Swedish support to the judicial sector is mainly channelled through three funding sources: (i) bilateral, (ii) multilateral and (iii) through non-governmental organisations.

Support extends over a varied field from legal aid via barefoot paralegals in South Africa to the development of an administrative court in Mozambique. Generally speaking, Swedish development co-operation in the legal arena has hitherto been of a relatively limited extent, with the exception of co-operation with Central and Eastern Europe. In the area of the judicial system, it has mainly covered police co-operation. Through the Raoul Wallenberg Institute, considerable work has also been done for training in human rights issues of primarily senior officials in the area of the judicial system.

In some countries support to the building up of civilian police services has been in the forefront, for example, in South Africa, Central America and Palestine.

South Africa and Vietnam are among the countries in the South that have received most support in this area, as have Laos and Tanzania.

In Burundi and Rwanda inputs were focused on the court procedures dealing with the vast number of suspects accused of participation in genocide, and on capacity building of the judicial system itself. Among other things, one can mention support to the international organisation *Avocats sans Frontières*, which is working together with the Burundian legal community to improve professionalism.

Extensive support to this sector is occurring in Eastern Europe. Here one can not only mention support to reinforcement of narcotics detection, border police and combating corruption, but also education of lawyers and support to legislative processes.

It is difficult to measure the effect of inputs in the legal arena. Sida is starting methodological work to evaluate inputs in the area of democratic governance. Through the few evaluations of Swedish legal development co-operation that have already been done, it can be noted among other things that building simple court premises and housing for judges in rural areas in Nicaragua has had a significant effect on people's opportunities to get access to the judicial system. The input can also be said to have

strengthened the legal culture and raised the status of judges. Through human rights education of the police in South Africa, according to what the South African police themselves claim, there has been a reduction in the violation of civil rights as well as in the number of complaints from the public.

Experience of legal co-operation with Laos has hitherto not been good, among other things probably because the political interest does not exist and the lack of relevantly trained personnel in the legal arena has made the work more difficult. On the other hand, Swedish legal support to Vietnam has been successful, above all through contributing to legislation in different social areas. Swedish inputs in Vietnam have gone to support Vietnamese lawyers in their work, not to transfer foreign laws to Vietnam.

5.2 All have similar experiences

Appendix 3 catalogues the publications that form the basis for this account of experiences of legal development co-operation. This account is largely a synthesis of the international experiences presented in these documents, as these experiences ought also to be relevant to Swedish inputs in the legal arena.

Several of these experiences are common to all development co-operation, but are nevertheless emphasised, since they have either been particularly neglected in legal development co-operation or are regarded as being particularly important in this very context. Only in some cases do special methods and solutions need to be developed for the legal arena. Specific to legal development co-operation is the proximity of the legal arena to political power, its potential for reinforcing human rights and years of neglect of the importance of the legal arena for economic and social development.

5.3 The recipient's ownership is a basic precondition

All accounts based on experience point to the importance of "ownership". It is said to be more important in legal development co-operation than in any other development assistance, which should probably be seen against the background of donors' missionary zeal to "give" recipient countries a legal framework for the market economy and democracy and human rights.

At the same time, the reports point out that analyses of the preconditions for legal development co-operation to a country have often been flawed. Consequently, many measures have led to unsatisfactory results. The absolutely crucial prerequisites are that sufficient demand for measures in the legal arena exist and that the forces which, through active or passive resistance, want to prevent the measures from being implemented, are not too strong.

Demands can come from:

- Those in power in the country;
- Citizens, channelled through different organisations;
- Commerce and industry.

Demand for reforms intended to provide the country with a better functioning legal system, often comes from a few actors in the judicial system. The legal institutions and

their personnel are generally disinclined to make changes. The dogma about “autonomy” reinforces reluctance – sometimes it is perhaps justified – against initiatives for change from outsiders.

Some experiences indicate that the community of lawyers in recipient countries is not always a force to be reckoned with in the work of change. One writer explains it in this way: lawyers gain by being the only ones who succeed in achieving results in a murky or corrupt system, to which they have their own portals. Thus it is not in their interests to reform the system. Opposition to such attitudes nevertheless also emerges from the legal community in, for example, the Baltic States, Serbia and Macedonia.

That donors – often quite correctly – see an obvious need for reform and change, and elicit agreement from their interlocutors, is not a sufficient reason to begin inputs. A careful analysis of demand and opposition is required.

If analysis shows that demand is too weak or resistance to change too strong, several of the cited documents recommend that donors should be satisfied by strengthening the demand. This can be done through support to non-governmental organisations that build up demand. A free press, where criticism against the existing situation and demands for improvement can be made, is regarded as an important factor. Such processes take a long time. A clear lesson is that donors must be patient and wait until the balance between demand and opposition is such that the requisite conditions exist for reforms to be implemented.

5.4 Analysis of preconditions for legal development co-operation

Some of the particularly important questions and methodological problems for the judicial sector have been mentioned in the report “Evaluation of Programs promoting Participatory Development and Good Governance”, DAC, 1996. The evaluation is based on American experiences of six projects in the formal sector, including legislation and the court system, which are also confirmed by the recently published report “Local Perspectives: Foreign Aid to the Justice Sector”, International Council on Human Rights Policy, 2000.

The DAC evaluation model recommends following step in work with legal development co-operation:

1. A first and crucial prerequisite for legal support is the existence of a genuine desire for change among the political leadership of the partner country. This requirement is confirmed by all international experience. If it is missing, the first step must be to identify agents for change and to create alliances. Here support to civil society, including citizens’ groups, commercial and professional groups, can contribute to an increase in the pressure of public opinion for legal reforms.
2. If there is political support for change, the first step should be structural reforms which include eventual constitutional changes (are there internationally acknowledged human rights norms in the constitution?), improvements to the legislative process, independence for the courts and upgrading of the status of the ministry of justice. The introduction of objective grounds for recruitment of judges and other officials and changing compromised officials is important and is a way of solving the problem that can be classified as users’ mistrust.

3. If political support and adequate legal structures exist, the next step is to safeguard accessibility to the judicial system. This is, for example, concerned with building up a functioning legal aid system, developing alternative forms of conflict resolution, and increasing geographic accessibility.
4. First when all the above-mentioned conditions are in place, has the time come for traditional inputs to build up institutions, for instance, development of legislation, legal training, further education of the court system's personnel, improvement of the court administration and increase in the level of technical equipment.

It should be noted that DAC evaluations are based on projects in the Argentine, Colombia, Uruguay, Honduras, Philippines and Sri Lanka. Many Swedish partner countries are often not only poorer, but also have a less developed democracy and poorer judicial systems or are weighed down by inherited and authoritarian planned economies.

The methodological approach is valuable. Many of the countries to which Sweden is giving support nevertheless are so far from being able to safeguard access to justice for all, that one cannot wait with the inputs to build up institutions. Thus one ought probably to follow several lines at the same time, as presented in the conclusions below.

5.5 Tried and tested experience also holds for the legal sector

Many actors in the legal arena are unwilling to accept general development co-operation experiences, for example, on the issue of institutions and capacity building. Donors and institutions working with early legal development co-operation, appear to have thought that legal issues are very special and thus did not adequately use general experiences of planning, implementation and follow-up of development co-operation. This tendency first changed during the 1990s, but there is still a long way to go before development knowledge and specialist competence have coalesced optimally.

5.6 Analysis of links in the judicial sector is important

Law is not a limited institutional issue. Rights are also very much an issue about relations between individuals, individuals and institutions, and about norms and values that affect different parts of life. Donors have not paid sufficient attention to this complexity. They have concentrated on institutions and written laws.

Ad hoc measures have characterised much of the early legal development co-operation. They have often been intended to safeguard norms and competence, to foster commerce and trade. A broader analysis of links in the judicial sector has seldom been undertaken. Measures have been planned and implemented without setting the inputs in a broader context and the size and complexity of the problems have often been underestimated. Consequently, inputs have often started with an unrealistically short time-frame or without reasonable priorities, considering that the parts of the judicial sector are dependent on the functioning of the whole.

In a publication about experiences in the legal arena, the International Council for Human Rights, among other things, pointed to the need for sector analyses. Despite this, many donors seem willing to use the "windows of opportunity" that open up, to make rapid inputs without the traditional careful preparation and to take greater risks of

failure. An example concerns support to working out of a new constitution, just when political developments make it possible and require this.

5.7 Many measures are intended to promote growth

In growth-directed inputs, the following areas can be distinguished:

- Commercial law (laws that steer business in trade, industry and services) is basic, to create free exchange of goods and services, multiplicity, and competition, in an economy.
- Property law (laws that control the right to private ownership, including disposal of the proceeds created through the property and the right to transfer and mortgage proprietary rights) create the conditions for undertakings, entrepreneurship and creativity. Women's right to property is a particularly important development issue.
- Contract law (laws that guide regulation and safeguard agreements that have been entered into) contribute to reducing insecurity and the cost of conducting economic transactions. The greater the distance between buyer and seller, generally speaking, the greater is the need for established and dependable regulations.

In many partner countries, the development of the financial world is hampered by the difficulty, not to say the impossibility, of recovering debts through the courts. This makes it harder to give small-scale loans. Clear regulations about ownership, whether it is a question of premises, goods, services or patent rights, involve difficulties in mortgaging property or providing other forms of security for loans. The lack of a property register increases this difficulty.

Not least, a weak legal order is a major hindrance to investment in fixed industrial plants. Earlier, in the first decades after the end of colonialism, the political risks for investors, in the form of nationalisation and similar measures, were probably greatest. Today the risks are far more likely to be an effect of a weak or poorly functioning legal order. This primarily affects small and medium-sized companies. Large international companies in, for example, the oil business, often have direct agreements with governments through which their presence in a country is regulated in detail.

In conclusion, the reports point out that a sound legal environment can promote commerce and trade. Adequate market legislation does, however, not solve the basic questions of a country's economic development, but is just one of several important areas for political and economic reform.

5.8 Support must be extensive, long-term and sustainable

The international reports of experiences indicate that an increased consciousness about good legislation on a level with internationally accepted norms is not sufficient to guarantee the legal rights of individual citizens. Institutions in the legal arena must also be sufficiently well-established and function in an appropriate way. An important lesson is that this requires more extensive, long-term and sustainable support than was originally assumed. It appears as if donors think that the time to rapidly make use of "windows of opportunity" has passed in most recipient countries, and that long-term and sustainable inputs are required in the future.

5.9 It is difficult to reach the whole population

From the reports, one gathers that in many states consciousness of the need for full access for the whole population to a functioning legal system of the western type lies far in the future, for reasons like the political climate, the costs, and the lack of trained personnel. Even a well-functioning legal system has difficulties in serving the poor and vulnerable. These groups are hampered by geographic distance, costs and many other barriers of a cultural and linguistic nature. The poor have difficulties in dealing with the formal system and the formal system is seldom adequately designed for their day-to-day problems.

According to some observers, in many countries about 80% of the day-to-day legal problems that affect the poor are dealt with through informal systems and/or with customary law as the source. Common legal problems, which impact on the poor, are conflicts about land, theft of cattle and possessions, and inheritance and marriage issues. In many African countries, these issues are regulated by customary law. Many populations have, for example, problems with land-use rights based on custom and this system comes into conflict with modern property legislation.

With the aim of strengthening legal access for all, donors support alternative conflict resolution mechanisms of the amateur type, paralegals and similar measures.

A successful form is to support non-governmental organisations which take cases to court that set a precedent and are of principle importance for groups that cannot present their own cases in the formal courts. Organisations that focus on a single issue are regarded as the most successful.

5.10 Donors' inconsistent advice is less of a problem

Experts who recommend a more or less wholesale copying of their home country's models or judicial solutions without adequate adaptation to the recipient country's legal traditions, system and whole social order do occur and naturally cause a problem, even if everything indicates it is decreasing. Legal development co-operation has hitherto, as mentioned above, above all encompassed legislation for production and trade. The early refined models, which worked with so-called "legal transplants" in the sense that, on his own, a foreign expert would write and present a proposal for a new law, appear to have been abandoned by most donors, at least on a theoretical plane. "Legal transplant" is, however, common in modified forms with different degrees of participation of lawyers and decision makers in recipient countries. An evaluation by the Asian Development Bank on legal development co-operation, which was exclusively directed at market legislation during the 1960–1995 period, reveals – hardly surprisingly – that laws must be designed taking the historic, cultural, economic and social conditions of a specific country into account.

In general, recipient countries appear to manage to incorporate elements from other legal systems when they make their own choices, without it becoming a problem. Japan is an example of a country that succeeded in coalescing its own legal traditions with western market legislation. Economic, market-promoting legislation is presumably easier to "export" than, for example, family law and regulations on land ownership.

Experience reveals that the old classical contradictions between the Anglo-Saxon *common law* and continental European *civil law* are not the determining factor. It can be

maintained that across the various legal traditions a generally accepted concept exists, *rule of law*, which can serve as a basis for legal development co-operation. The differences are instead on the judicial and technical plane, rather than on the material.

5.11 Civil society must also be scrutinised by donors

There is a strong and well-motivated interest among donors to support the growth of an active civil society. The various non-governmental organisations – local, regional and international – do not always meet expectations concerning internal democracy, representativity and administrative competence. Demands for popular participation and support are important even when changes in the judicial system are involved. A more careful check-up of which non-governmental organisations ought to be supported is often essential.

5.12 The role of the law in violent conflicts

The impression that the international community ought to conduct legal trials of war crimes, crimes against humanity and serious violations of human rights, was first applied at the Nuremberg trials and trials in Japan after the second world war.

During the World Conference on Human Rights in Vienna in 1993, it was determined that the safeguarding of human rights is a concern of the world community. The legal process against the Chilean dictator August Pinochet in Spain and Great Britain has shown that it is more difficult and risky to be a dictator during the twenty-first century.

In Rome in 1998, 160 states decided to establish the International Criminal Court, ICC. The UN's General Assembly already identified this need after the Nuremberg and Tokyo trials, and discussions have been held ever since. The time was not ripe until 1998. The court can try genocide, war crimes and crimes against humanity. It is a complement to the national courts and can be used when national courts do not have the capacity or political will. Proceedings can be instituted by states, but the court's public prosecutor can also initiate investigation of crimes that have come to his/her attention. In such a case, the court has jurisdiction if the state where the crime was committed or the state where the victim holds citizenship is a member of the court. UN Secretary General Kofi Annan has called the establishment of the court "A giant step forward in the march towards universal human rights and the rule of law". The court has not yet started its work, since a sufficient number of countries have not yet ratified the convention on its establishment.

The war crimes tribunals in The Hague and Arusha are another expression of this change in attitude to crimes against humanity.

An important contribution from a legal perspective are the (Truth and) Reconciliation Commissions, above all in South Africa but also in the Argentine and perhaps in Nigeria. These commissions may have several aims, among other things to clarify what happened and not to suppress conflict and crimes. To find out what happened and why it did so, can many times be as important to the individual as that the perpetrators are punished or held responsible.

In both Burundi and Rwanda the governments are grappling with the fact that about 10 000 and 120 000 people respectively are still detained in expectation of trial and sentence

for suspected attacks during the genocide in Rwanda in 1994 and the internal conflicts in Burundi since 1993. For both countries, the events involve the destruction of state institutions in the judicial system, above all the courts and attorney general's office. Both countries have a lack of trained lawyers at all levels. The judicial process of dealing with the enormous number of suspects is proceeding almost unnoticed. The prisoners' human rights are violated and thus the Rwandan government has suggested the introduction of simpler mechanisms. These, so-called *Gacaca*, have their roots in old legal traditions. They cannot be said to live up to international norms in all details, when it comes to preparation and implementation of court procedures. Human rights are violated irrespective of which solution is selected, to allow prisoners to remain in prison or to conduct simpler and not entirely legally secure processes. The situation calls for a difficult balancing act.

Substantial inputs are also being made in order to build a legal system in Bosnia and Kosova. In an unconventional way, "the international community" has taken over the responsibility and the actual right to take decisions. This can be regarded as a result of the development described above, where the international community has the right and duty to take action against crimes against human rights at the cost of national sovereignty (and in the context of development co-operation, of "ownership"). It is yet too early to assess the long-term sustainability of such measures and whether local "ownership" will occur subsequently.

The UN's General Secretary's former emissary for human rights in Cambodia, Thomas Hammarberg, summarises his experiences from this country in the late 1990s in the following way:

1. It is absolutely necessary to clarify what has happened during the period of crisis, to document the assaults and hold the guilty accountable;
2. Priority must be given to building an uncorrupt, independent judicial system that functions;
3. Develop the non-governmental organisations;
4. Balance resources between state institutions and civil society so they grow in strength at the same pace;
5. Invest in education in human rights, particularly in schools and among legal personnel.
6. The quality of the political leadership is significant.

Richard Goldstone, the South African judge who led the prosecution in the war crimes tribunal of ex-Yugoslavia in the Hague, has said, "To reveal the truth, irrespective whether it occurs in the form of legal processes or truth commissions, plays a crucial role in order to avoid a repetition of the policies of atrocity."

5.13 Co-ordination of donors' inputs is often unsatisfactory

Reports of experiences continually return to the poor co-ordination between donors, an acknowledged problem in all aid. Both multilateral and bilateral donors have a significant responsibility here as does the government of the recipient country. There is probably good reason to lay special emphasis on co-ordination in assistance to the judicial sector, which cannot function if it is fragmented. We return to this point in our conclusions.

5.14 Little exchange of experiences has occurred

There has been little exchange of experiences between donors themselves or among recipients about how best to tackle different types of problems, with the possible exception of the work in the OECD's development committee DAC. Sadly, this poor exchange of experiences is not limited to this sector of development co-operation.

5.15 Hard to evaluate effects of legal development co-operation

It is maintained that it is and must be the domestic agents' actions that are of crucial significance if reform and improvement in the judicial sector actually will lead to the desired improvement as seen from the perspective of citizens or society. Reluctant domestic agents have many opportunities to delay or thwart reforms. The donors' role can, according to the reports, not be other than to support the positive forces that can and must be found. It becomes something of a circular argument to say that the links between donors' inputs and the final results consequently are weak, particularly as it is common for several donors to be involved in support to different parts of the whole.

The international reports give the impression that the difficulties in evaluating the effects are greater in this type of aid than on the average in other development co-operation sectors.

5.16 Lack of people with competence among donors

It has taken donor countries time to build up a resource base of people with the right competence to participate in this kind of development co-operation. The need for people with both professional skills in the legal arena and experience of international development co-operation could not be met at the beginning, but availability has naturally subsequently grown. Legal development co-operation is not new, but the actual expansion of legal development co-operation has occurred in the 1990s. Thus there is still a paucity of people who have both relevant professional competence and experience of assistance.

5.17 Legal development co-operation is demanding for donors

Development co-operation to the judicial sector is closely tied to political developments in the recipient country. It is observed in reports of experiences that such assistance requires more regular follow-up than several traditional development co-operation sectors. From the donors' perspective, it is personnel-intensive. To have personnel permanently stationed in the recipient country for dealing with this form of development co-operation has proved to be valuable.

None of Sida's own experiences of legal development co-operation point clearly in a direction that differs from the international experiences presented above.

6 How does legal development co-operation differ from other assistance?

The reports presented above reflect a series of problems and experiences, which are largely shared in development co-operation. Are there then any points where legal development co-operation typically differs from other assistance? Some special features can be mentioned:

1. Those in power have a special relationship to the judicial system. Every change may directly affect their personal situation and privileges and perhaps in the short or long term their possibilities of staying in power. Control over the police and the courts ought to be central from the perspective of power.
2. Legal development co-operation inputs can lead to greater indirect effects in other social sectors than many other forms of assistance. It is cross-sectoral.
3. The international norms for the rule of law are well-developed. This gives greater authority, forms a natural common platform for attempts to make improvements, and thus facilitates dialogue.
4. Perhaps it can even be claimed that the different parts of the judicial system (legislature, police, attorney-general, the courts, executioners etc.) are inter-linked in a particularly strong fashion and are interdependent. The sector is characterised by the so-called “legal chain” perspective.
5. Corruption is more serious in the judicial system than in other social arenas. A corrupt judicial system thwarts the possibilities for maintaining respect for human rights and affects social development very negatively. At the same time, an incorruptible legal system is essential to combat corruption. In Italy during the 1990s, the entire political establishment fell as soon as judges and public prosecutors began to take their work seriously and apply the relevant laws.
6. It should also be mentioned here that legal development co-operation is young. The agents involved have not developed common methods and attitudes in the same way as in other sectors. This entails that co-ordination between donors also lags behind and that there are inadequacies in the experiences of the resource base.

7 Preliminary conclusions for future assistance to the legal sector

For an argument about the principles of the prerequisites for legal development co-operation, the reader is referred to the appended memorandum by Professor Claes Sandgren, Appendix 1, Section D. In sections E and F of the same Appendix there is also a review of different aspects to take into account when implementing legal development co-operation.

A careful analysis of demand, possible opposition and potential agents for change is required.

What we attempt to do below is to give a certain general framework for assistance to this sector. What can then be done in an individual country can only be determined after country and sector analyses have been done, taking both the recipient country's priorities and Sida's into account, and finally, the available resources.

7.1 Legal assistance requires genuine will from the recipient

The issue has been touched on above. When it comes to the question of ownership, which clearly is of the utmost importance, perhaps in certain circumstances one can be satisfied with a genuine will of the recipient to start the activities. Donors and recipients can under certain circumstances have different perspectives of the extent and time-frame for the process of change that is set in motion.

7.2 International norms are the point of departure

Sweden's choice of inputs and advice during implementation of inputs should in the first place be based on the internationally recognised norms (not only the human rights conventions and declarations, both global and regional, but also international agreements of a non-convention character which regulate issues like the attitudes of the judicial system's agents and general *rule of law* issues). It also ought to form the basis for dialogue and a desire to find a common view. It is not beyond the bounds of possibility that differences in values are so great that Sweden ought not to participate in work in the judicial sector. This makes great demands on judging whether one will really participate in achieving a genuine improvement for the majority of the people, or if co-operation instead supports regimes or attitudes that do not deserve such support.

7.3 The country's constitution should also form the basis

We maintain that the constitution of the country in question should form the basis and objective of work in the judicial sector. This assumes good knowledge of its contents, of the political context in which the constitution was drafted, and of any ongoing political debate about its contents and discussions of possible changes.

7.4 Present alternative judicial-technical solutions

When choices are between solutions of an organisational or judicial-technical nature, the basic principle for Swedish assistance is to present the different solutions that can be found internationally and to discuss how compatible each is with the country's own system and their advantages and disadvantages. Only if the recipient has made an enlightened choice and directly requests Swedish solutions, does one agree to present them.

In Section 4.10 the negative effects of so-called legal transplants are given. It is important to emphasise Sweden's role of catalyst and stimulator of the country's own resources.

7.5 Tested development co-operation methods should be used

The methods for choice and design of inputs that for a long time have been tried and tested in Swedish development co-operation ought to be applied. This applies particularly to institutional development and build-up of capacity. Experience shows that it is also

applicable in legal development co-operation. There are descriptions in different handbooks and guidelines in Sida.

7.6 Risks of corruption should be analysed

Greater attention must be paid to the problems of corruption and concrete experiences must be gathered.

7.7 Analysis of connections in the judicial sector should be done

The inputs Sweden makes should be well-adapted to the society's development and to how the parts of the whole legal arena function in relationship to one another. Sector analyses should be made, where possible together with other donors. A sector analysis ought to consider customary law.

We believe that the judicial sector can be suitable for future sector programme support.

7.8 Co-ordination needs to improve

The need for co-ordination of inputs from different donors in the same country is greater in legal development co-operation than in many other types of assistance. The reason is the demand that the various links in the chain should be in balance with each other. If it is possible to achieve a carefully prepared co-ordination with other donors, perhaps also simultaneous and domestically carefully prepared, successive improvements in the different areas can be attained. Another reason for donor co-ordination and co-financing is the huge cost, which is essential for substantial and durable changes.

To the extent that one talks about choosing models from other countries for legal regulation, the build-up of institutions and mandates etc., it is important that the models selected can function together without problems. A co-ordinated donor group finds it easier to jointly avoid the solutions adopted at home and to resist a natural impulse to assume that these are suited for export, but instead uses local structures and traditions as a basis for development co-operation, or finds the most suitable "loan" from one of the donors.

If the recipient country cannot manage this co-ordination itself, when necessary, Sweden should take the initiative for such co-ordination, preferably under the leadership of the recipient country, but – if this is not possible – through co-ordination between donors.

7.9 Legal development co-operation needs a long-term approach

One conclusion drawn from the experiences of legal development co-operation up to now, is that co-operation in the legal arena ought in principle to be long-term. Alternatively, donors and recipients ought to have a broad and long-term attitude. Such an attitude does not exclude making inputs well-defined in time and extent, which can then be set in a more correct context. A particular argument for a long-term perspective is that assistance to democracy and human rights, including legal development co-operation, requires great trust between donors and recipients. Such trust takes time to build up, if it has not already been established through other long-term development co-

operation. Inputs ought, therefore, in the first place to be considered in “programme countries”. Here the donor already often has a weighty voice in the dialogue, which can be needed to overcome opposition from those disinclined to change.

7.10 Many are not reached by the formal judicial system

As evidenced by the account of experiences in Section 4, the quantitatively greatest problem in the legal arena is the lack of legal safeguards for those groups, which cannot use the formal judicial system. The goal of creating accessibility to the judicial system for all is limited both by the costs and the paucity of methods and competence to do this.

One must realise that donors do not have the resources to cover more than a small part of the need. Today no tried and tested methods exist to fully or even largely meet all the needs. In addition, Sweden does not have very many people with the competence to work with the methods that are needed.

7.11 The formal judicial system should reach all

Sida regards the long-term objective for development of the judicial system in recipient countries is a legal system, based on the functioning of state/public institutions, that should be able to serve all the citizens.

With this long-term objective, inputs in the formal judicial system are required.

7.12 Sweden's competence lies primarily in the formal system

Currently Sweden is most qualified to help strengthen the rule of law through inputs in the formal judicial system. This includes state institutions, the legal community, and groups in civil society, with the aim of working for improvements of the formal judicial system. Support for judicial advice for people without law exams, so-called paralegals, and similar measures which make it easier for large groups of citizens to use the formal judicial system is included in these inputs.

The conclusion is that in the meantime, the main part of Swedish inputs ought to be made in the area where Sweden has methods and competent personnel, that is in the formal judicial system. Sida ought, however, together with recipients and other donors seek to develop strategies to increase access to the formal judicial system as well as relevant attitudes during this period.

7.13 The formal system should reach more and support the poor

Despite the above conclusion, that for the present Swedish inputs should mainly be concerned with the formal judicial system, the focus on poverty should not be given up. The selection and design of Swedish inputs should feature a will to contribute to making the formal system more adapted to poor people's needs. Introducing simplified, oral procedures; a more modern and simpler legal language; the right to use one's own language at trials; putting presentations of important laws and regulations in the local languages at the disposal of the public by the state; giving access to state subsidised legal aid, are examples of such measures in the formal judicial system. The processes that in

due course increase the formal judicial system's usefulness to the majority must always be kept in mind. Sida should try particularly to strengthen and improve the kind of institutions that the poor in the first place encounter, for example, the local police and detention cells. With this perspective, the establishment of the institution of the ombudsman and the development of a system of legal aid are important.

Care should be taken to ensure that individuals' opportunities to utilise/enjoy the use of the judicial system is emphasised in contrast to an approach that starts from the functions of the institutions seen from their own perspectives. All planning ought to start with the fact that the law is more complex than a limited institutional question. Law deals with relations between individuals, between individuals and institutions, and with norms and values that affect different parts of life. Attention must be devoted to this complexity.

Women's particular need of protection against violence and need for justice must be given a prominent position in selection, analysis and preparation of inputs. The UN's General Assembly in 1993 adopted the "Declaration on the Elimination of Violence against Women", which can serve as support.

The situation of children and youth must also be accorded special priority. The Commission for Human Rights during its session in 2000 adopted the declaration "Human Rights in the Administration of Justice, in particular Juvenile Justice" (E/CN.4/RES/2000/39), to which this refers. It may be a question of using different means to reinstate proportionality between crime and punishment and to establish special procedures for young offenders. Far too many children populate the prisons of the world, which – aside from the strongly inhumane element – is a mindless waste of human and material resources. All children – also those in detention – should be treated in a way that respects their rights in accordance with the Convention of the Rights of the Child, which has been ratified by nearly all states.

Only in cases of extreme necessity should children be imprisoned and never together with adults. Children should not either be condemned to death or lifetime imprisonment without the possibility of a reprieve. (A discussion is underway of whether it is generally in conflict with compulsory international law, *jus cogens*, to condemn children to death and the International Court of Justice in The Hague has been asked to make a guiding pronouncement.) International norms are laid down in "UN Rules for the Protection of Juveniles deprived of their Liberty", 1990. Attention should also be paid to the treatment of children as victims. "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power", which was adopted by the UN General Assembly in 1985, can provide guidance.

Changes when dealing with crime are generally often necessary. Irrespective of the nature of the offence, prisoners have the right to decent treatment with respect for their integrity and their human rights. See, for instance, "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment", adopted by the UN's General Assembly in 1988.

7.14 How can the legitimacy of the formal system be increased?

Both analyses of the sector's appearance and needs, and planning of inputs ought to be done in consultation with interested parties in the sector. The intention to reach all users

of the services of the judicial system to a notable extent is surely far too ambitious an objective, which does not prevent one from reaching other actors and interested groups. Broad collaboration in the process of identifying decision makers, lawyers and other interested parties is desirable. Such a wide-ranging discussion, which clearly demands time, can create legitimacy for change. The issue of legitimacy also is connected with how questions of legal reforms are initiated. Not unusually, individual people, for example a minister of justice or the current political constellation, are the sole agents of the will to change. When this incumbent changes, or the political constellation is altered – perhaps quite correctly after general elections – the energy for implementing the project is often dissipated.

During preparation of the work, it should be carefully considered how the proposed changes can be rooted in society, so that their legitimacy increases, and they survive personnel changes and power shifts among the country's leadership. Development of methods is required.

7.15 Customary law requires careful consideration

According to international law due regard should be had to customs or customary laws when applying national laws and regulations to the peoples concerned (Article 8.1 of the ILO convention C169 on Indigenous and Tribal Peoples Convention, 1989). A way of relating to customary law and traditional methods of conflict resolution mechanisms is required. Even here experience and knowledge are inadequate. Sida's stand is in principle the following: Customary law must be acknowledged as important for large groups of the population and can be expected to play a significant role for many years in many societies. Customary law also, obviously, plays an important role as a social stabiliser.

Efforts should be made to establish links, like the possibility to lodge an appeal, between the traditional and the formal systems of law.

Efforts should be made to counteract features in customary law which come into serious conflict with human rights, above all, discrimination of women or on the grounds of ethnicity. Methods for making these efforts should be developed. At the same time donors should evidence understanding and flexibility in their approach and avoid rigid attitudes.

On January 1st 1996, the South African government appointed the "South African Law Commission".

The commission's mandate is:

- The repeal of obsolete or unnecessary provisions;
- The removal of anomalies;
- The bringing about of uniformity in the law in force in the various parts of the Republic;
- The consolidation or codification of any branch of the law; and
- Steps aimed at making common law more readily available.

In short, the Commission is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

The members of the commission are appointed by the president. One of the most important projects (Project no. 90) which the commission is working with is called “Customary Law: Conflicts of Law”. The project is occasioned by the fact that,

It is not always clear when customary law should be applied in real life circumstances and the realisation that both Roman-Dutch law and customary law are now major components of the state's legal system. Courts and litigants need clear and explicit choice of law rules to indicate when common law or customary law will be applicable to the facts of a particular case. A new enactment devoted exclusively to the application of customary law is now needed in order to disentangle choice of law rules. This report has attempted to achieve this purpose.

The working group has not had the opportunity to study the report, but refers to it, since information is to be found here. We cite a short summary of the report's conclusions, as an example of how one can relate to legal conflicts between modern and customary law:

The Commission has made the following recommendations which have also been incorporated into the draft bill:

- Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are necessary to bring certainty to an issue that is currently vague and confused. These guides should be precise, flexible, simple and in keeping with the way in which courts have been used to solving choice of law problems.
- The new choice of law rules should indicate that parties are free to agree on the law that best suits their needs. If no express agreement was made, courts should attempt to discern which law the parties would reasonably have expected to apply in the circumstances of the case. In order to assist courts in this inquiry, a list of factors that typically indicate the parties' expectations should be provided. No one factor on its own should be regarded as decisive in indicating the applicable law; rather, all the factors should be considered in combination in order to discover the legal system with which the case has its closest connection. (Here one notes certain similarities to the mode of thinking in international private law.)
- The procedure contained in the Black Administration Act for exempting individuals from customary law is so closely identified with colonialism and apartheid that it must now be repealed.
- The repugnancy provision no longer has a useful role to play and it should be repealed.
- Race should be irrelevant either as a criterion for applying customary law or for determining the jurisdiction of traditional courts.
- Section 23(1) of the Black Administration Act should be amended to provide that only the testator's personal interests in property may be disposed of by will, and elements of gender discrimination should be removed from the regulations governing succession to land held under quitrent tenure.
- Existing choice of law rules contained in regulations issued under the Black Administration Act itself should be deleted or amended, since they are poorly worded, conflict with proposed reforms in the customary law of marriage, or no longer serve any useful purpose.

- Section 1(3) of the Law of Evidence Amendment Act should be repealed and a new provision should be drafted to give clearer rules of choice of law. Recognition should be given to the litigants' freedom to agree on the applicable law and, in the absence of an agreement, courts should apply the law with which the case has its closest connection. (Again one notes similarities in the mode of resolving conflicts between legal systems in international private law.)

7.16 Need methods for inputs beyond the formal judicial system

Sida must carefully follow the international development of methods on a broad front to rapidly improve opportunities for all citizens to get legal service and legal safeguards. This requires innovative ideas and unconventional methods. Sida itself should participate in the development of such knowledge and increase the number of people who can work with these new methods. Development of methods projects and pilot projects should thus be undertaken alongside the above-mentioned focus on the formal judicial system. For several years, these projects are expected only to make up a limited part of legal development co-operation.

7.17 Growth-directed inputs are also needed

Within the framework for inputs in the formal judicial system, Sweden can make contributions directed both at the individual's legal security and at improving conditions for growth. Let us emphasise here that experience shows that to start with issues of a more economic nature can pave the way for inputs that are more politically sensitive.

When selecting inputs to promote growth one ought to consider the possibilities of counteracting degeneration and abuse in the market economy through similar social controls to those we have ourselves found desirable in Sweden.

It is important to have well-balanced legislation. Too sophisticated and far-reaching laws can counteract the intention. If laws cannot be implemented institutionally, development towards the functioning of the rule of law is undermined.

For development of the financial sector in partner countries Sida, for example, should give high priority to modernising regulations for the privatisation of state financial institutions, regularisation and reorganisation of market operators, and of trade in stocks and shares. In addition, measures should be introduced to serve the poor directly, for example, to help draft regulations that ease the growth of credit institutions for microloans without making inflexible demands on securities.

7.18 Special demands posed by societies affected by conflict

Legal development co-operation can contribute to channelling conflicts into legal and political passageways instead of resorting to violence. With such an approach, major parts of legal development co-operation can be described as conflict prevention in the sense that they may forestall the use of violence. This, however, requires long-term planning.

In post-conflict situations, strategic deliberations must be made on where and how foreign inputs can achieve the best results. Conflicts have a great social impact on the survivors. In the shadow of war in Rwanda the protective social network no longer functions and a

distant male relative of a dead man can stake a claim on the house and the land the widow needs so badly for her children's and her own sustenance.

Here donors of development co-operation have a special responsibility to analyse and understand the mechanisms that appear in societies affected by conflict and to assist the forces that want to work for change and respect for individual rights.

Special principles are required for the design and contents of legal development co-operation during conflicts, irrespective of whether it is a question of preventive operations or in post-conflict situations. Normally the main question is to see what can be done in the short term. This ought to lead, for example, to the donor of development co-operation financing remuneration, operational costs etc., which in the normal case do not make up part of the input of legal development co-operation. The reason for adopting such a position is clearly the need to achieve rapid results and to give positive signals to the surroundings.

In this area experiences need to be collated and analysed and lines of action need to be worked out for different situations. It is, however, clear that the role of women in conflicts and in post-conflict situations must be given much greater weight, for instance, special defence of women's rights. Rape is systematically used in conflicts, a war crime that deserves particular attention and special measures.

7.19 Differentiation required in support to the civil society

A strong civil society forms an important part of a democratic society, both as a watchdog of how the state fulfils its duties and as instigator and creator of public opinion.

Autonomous media contribute to the debate and acceptance of essential legal reforms. In co-operation with civil society, attention should be paid to the democratic structures and mandates of non-governmental organisations, as well as to their efficiency. One ought, however, to note that demands for representativity and democratic internal structures are not as crucial when non-governmental organisations act as service providers than when they have the role of mobilising popular movements.

7.20 Support to changed legislation

Where support to changing legislation is concerned, it should be noted that in many developing countries parliament often does not take a central role in the drafting of new laws, but that the executive powers initiate the genesis of most laws. Often parliament and the government are dominated by the same people. This often hangs together with the lack of a genuine functional opposition. Parliament is often not composed of separate units whose mode of functioning can be improved through internal processes. A culture of drafting laws that incorporate citizens' and inhabitants' interests must be created, as well as a culture that encourages a genuine opposition. For this, one must also support different parties outside parliament.

Sweden's competence in regard to legislative work is most suited to giving secondary views on proposals drafted by others. We have comparatively good proficiency and are not so closely tied to either the *common* or *civil law* tradition, unlike other larger countries.

7.21 International organisations working for the rule of law

Sida supports – and should continue to support – organisations which work on a broader basis for maintenance of the rule of law, like the International Commission of Jurists and their subsection the Center for the Independence of Judges and Lawyers. Other organisations that deserve continued support offer education for lawyers from developing countries or lawyers from countries in transition in Eastern and Central Europe. An example is the International Development Law Institute, IDLI, with headquarters in Rome. Another interesting organisation in this context is the Commonwealth Judicial Education Institute based in Canada.

8 Legal co-operation with central and eastern Europe

8.1 Different approach to Central and Eastern Europe

Sweden's co-operation with Central and Eastern Europe has a different starting point from traditional assistance. In the first Swedish co-operation programme, initiated by the government in 1989, priority was put on contributions that aimed at basic political and economic stabilisation. The programme was further developed in 1991 and 1995 with regard to both form and content. The inputs were soon transformed into more long-term involvement and emphasis was put on the transfer of know-how and support to institutional development.

In the programme for co-operation of 1995 (Prop. 1994/95:160) the goals for Swedish development co-operation with Central and Eastern Europe are outlined:

- To promote a security community;
- To deepen the culture of democracy;
- To support socially sustainable economic transformation;
- To support ecologically sustainable development.

It is evident that these differ from the goals for development co-operation with the South. In May 1998, the Swedish parliament adopted the government's proposal for a new co-operation programme with Eastern Europe for the period 1999–2001. The government observed that the four goals of bilateral co-operation are still relevant and proposed that they ought also to be applied during the coming programme period. After the initial phase of support to democratisation and liberation, and the second phase of support to institutional development, we now face a new phase of EU expansion and a broad European integration.

The main objective of inputs during this period should be to facilitate approaching EU membership for certain countries that are applying, and to make a special contribution to help Estonia, Latvia, Lithuania and Poland to join the EU. The government also emphasises that Swedish inputs in this area should have the primary aim of building up functional and regular neighbourly co-operation on all levels. It is a question of support during a transition period.

The judicial system is one of the areas which the Swedish government regards as strategically important to achieve democratic social development and an increased respect for human rights, which is stipulated in both “Demokrati och mänskliga rättigheter i svenskt utvecklingssamarbete” (Democracy and Human Rights in Swedish Development Co-operation) (skr 1997/98:76) and in the government bill on development co-operation in Central and Eastern Europe (1997/98:70).

The government observes that EU membership makes high demands on a well-functioning legal infrastructure and an efficient legal system. Thus its inputs in this area are of great importance for the general capacity of candidate countries to live up to the demands made by EU membership. Swedish support ought to involve both routines and methods of working like attitudes and approach. Inputs ought also to be relatively long-term and embrace the entire judicial chain.

The Swedish Ministry of Justice has also assumed a much more active role in co-operation with countries in Sweden’s vicinity than in other legal development co-operation.

8.2 Account of experiences

Sweden’s experiences of legal co-operation with Central and Eastern Europe are in the main derived from the three Baltic countries of Estonia, Latvia and Lithuania and to some degree Bosnia.

The institutional structures in these countries are – in contrast to the situation in most developing countries – well-built up, but many officials are young and have limited experience of western judicial systems.

A similarity with the situation in developing countries is that it is claimed that, to varying degrees, the legal organs are open to bribery and subject to pressure.

Since independence from the Soviet Union, the Baltic States have co-operated with many parties in the judicial sector. Thus the laws have largely been redrafted and adapted to international norms and to the demands made for membership in EU. Although constitutional reforms have been largely implemented, there still remains the need, in a number of areas, of establishing, transforming or reform the legal institutions.

In other countries in the former Soviet Union, the express desire among the holders of power to transform their countries into a constitutional state in the western sense is more unclear and in some cases non-existent. The Central European countries are probably more similar to the Baltic States.

The problem is more serious in all types of co-operation, than in the majority of Sweden’s partner countries outside Europe. Experience shows that few interpreters have specialist knowledge in judicial terminology and they are not always of the best quality.

When it comes to personnel, organisation and ideas, these countries could in the long term probably be developed into constitutional states without support from outsiders. Such support can, however, be a means of speeding up the process. These countries have limited personnel and financial resources, which clearly affects the pace of reform.

Bilateral co-operation between Sida and these countries assumes a division of costs. Because of the current budget situation, especially in Latvia and Lithuania, these countries often find it difficult to meet local expenses like remuneration, operating costs and investments. Yet the same need as in many developing countries for long-term inputs to build up the legal infrastructure does not exist.

The ability of the countries to receive and utilise the funds is a problem, but it will presumably improve, with the start of several large projects in the framework of EU integration. The problem is not only of a financial nature, but is also affected by the limited number of people who can and have the capacity to assume leadership responsibilities for the project.

There is a need for a transfer of Swedish knowledge (and thus often an influence over attitudes) in specific areas. This can probably be met by inputs within the framework of current time perspectives in co-operation with Eastern Europe.

The desire of these countries to become constitutional states is presumably also sufficiently strong to make Swedish inputs meaningful.

By taking into consideration the differences in starting points and experiences in legal development co-operation to developing countries, and legal co-operation with Central and Eastern Europe, it ought to be of mutual benefit to be able to utilise one another's experiences. One should also co-ordinate measures in respect of method development, development of the resource base, the exchange of international experiences and similar issues.

9 Preliminary conclusions concerning Sweden's competence and capacity

Legal development co-operation, like other Swedish international assistance, takes each particular country's needs and wishes as its starting point. As a rule, there are no formal regulations that *a priori* compel Sida to use Swedish resources to meet a need or request regarded as appropriate for Swedish support. Nevertheless, it is a natural starting point to use Swedish resources first when implementing Swedish development co-operation. Swedish lawyers have considerable breadth of experience. Their level of professional competence is high. Through many years of co-operation, Sweden and Swedish experts enjoy considerable trust and respect in many of our partner countries. It is clear that this should also be tapped in legal assistance. Sida thinks that Swedish lawyers need an increased consciousness of the fact that purely professional competence alone is insufficient to create successful development projects. Thus, respect for and curiosity about experiences within the methodology of development co-operation should increase.

One of Sida's principal methods for capacity development in a recipient country is so-called institutional co-operation, i.e. co-operation between two, in this context equal, public institutions. We also foresee that this method will become one of the most important in legal assistance.

When assessing the competence and capacity of the Swedish resource base, we primarily consider two aspects:

1. Professional competence in development co-operation;
2. The allocation of resources in competition with national undertakings.

Sida is currently engaged in completing a project, “Översyn av Sidas samarbetsformer med statliga myndigheter” (Review of Sida’s forms of co-operation with public authorities). The final report of the project is also relevant to authorities in the judicial area. Both points mentioned above have been discussed within the framework of this project. The proposals are intended to simplify co-operation between Sida and the public sector through improving co-ordination, planning and simplifying methods of procurement. The main objective is of course to optimise the various areas of competence. In the proposal, Sida stipulates that the norm will be full coverage of costs in accordance with the grounds for calculation of Sweden’s Bureau of Financial Management. Sida is taking more responsibility for imparting competence in the methodology of development co-operation to the actors, and for informing them about trends and developments within international assistance. The proposals have aroused interest among Swedish authorities, not least in the legal sector. Sida has reason to hope that among judicial public authorities these simplified forms will stimulate interest in development co-operation. Sida also assumes that rapid internationalisation and the younger generations’ increasing linguistic abilities will affect the interest and opportunities for coming generations of lawyers, so they choose to work in Swedish development co-operation.

One can, however, not ignore the fact that certain factors point in another direction. The severe cutbacks in the public sector during the 1990s are today making themselves felt and many public authorities struggle to cope with their national undertakings. Under such conditions, investment in the building up of international operations probably requires clearer signs from the state. Legal development co-operation is per definition personnel-intensive. It is reasonable to expect growth to occur at a relatively slow pace, although the area has high priority from the viewpoint of development co-operation policies.

The knowledge of Sida and the legal public authorities about national, regional and international competence in the area must be kept up-to-date. Often it would, for instance, probably be an excellent idea to involve regional institutions and experts in Swedish projects.

Finally, there are reasons to maintain that it is of great importance to consider the gender balance within the Swedish resource base. All actors must continually be aware of this aspect in the different phases of development co-operation.

10 Questions for further study

Further studies appear to be relevant in two areas.

Firstly, one needs to work out methods for meaningful *sector analyses* within the legal arena.

Secondly, one needs to increase knowledge about how the *traditional legal system* relates to the modern system. By extension, such deeper knowledge should lead to strategies about how one should act in the medium term to reach the goal of justice for all. It appears to us to be possible to use developments in South Africa as a schoolbook example.

Finally, it should be mentioned that, in co-operation with the Swedish legal institutions, Sida intends to work out guidelines for Swedish development co-operation within the legal arena against the background of this report. Sida and the Swedish resource base ought to speak with one voice about the comparative advantages of utilising it within the legal sector, in the methods and forms of co-operation as well as in the final areas of priority. In this manner, all Swedish competence becomes accessible in the best possible way.

Appendices

APPENDIX 1

“Legal Development Co-operation: Conditions, Principles and Methods”,

Professor Claes Sandgren

APPENDIX 2

“Experiences from Co-operation with Vietnam”,

Erik Häggqvist

APPENDIX 3

References

Appendix 1

Legal development co-operation: Conditions, principles and methods

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This text is an attempt to paint a broad picture of Swedish legal development co-operation, emphasising the particular requirements of legal assistance, its principles and methods. This means that a considerable number of general, policy and technical issues related to legal development co-operation are left aside. The aim is not to propose policies for Swedish inputs; rather the review forms a background to Sida’s position paper.

Background, development and theory

1 Background

1.1 Background

For the past two decades a very large number of countries in the South and in eastern Europe have been undergoing a transformation. One-party states are becoming democracies and controlled economies are changing into market economies. Assets held in collective ownership – whether state or other kinds of societal ownership – are being privatised. Many economies that formerly had high inflation rates are being stabilised. Closed economies are opening to the surrounding world and becoming internationalised. There is also a form of “modernisation” of many cultures; this modernity affects the values, life style and even identity of many people. This is a process that not only embraces countries in transition in the former communist world, but also a number of countries in Africa, Asia and Latin America which have suffered from economic stagnation and/or political totalitarianism. The process opens these countries’ legal systems to far-reaching demands for reform.

1.2 Conclusions for legal development co-operation

In countries in transition, it is the issue of a transformation that requires judicial reform on a broad front. In countries in the process of liberalisation, e.g. India and in Latin America, it is largely concerned with deregulation and repromulgation of the body of laws governing the market economy. The legal system is influenced by this transformation and creates a basis for it, but can also be a means of keeping a tight rein on its negative effects. This also implies that the law will come into focus for a donor more clearly than in the past.

2 Developments

2.1 Previous developments

Judicial issues are not completely new in the context of development co-operation. The so-called Law & Development Movement, which had its beginning in the USA, was very popular in the 1960s, but only achieved limited results. The movement, which was based on a “modernisation theory” popular at the time, had an evolutionary approach to development, namely that it occurs (and ought to occur) in a chain of given steps which result in the same values and institutions as in the west. It also had ethnocentric features, that is familiarity with and respect for the culture of the rule of law, and assumed that the social context in recipient countries was imperfect. In the third world, however, there was a widespread scepticism of the values and judicial models which were characteristic of legal development co-operation at the time. This thus passed into a twilight phase, which did not prevent many developing countries from themselves cautiously trying to reform their legal systems on the basis of their own conditions and with some inspiration from industrialised countries. Though inputs for legal development co-operation have thus been in a backwater for some time, there was an upswing during the latter part of the 1980s and this trend accelerated during the 1990s.

2.2 Legal development co-operation today

Legal development co-operation continues to grow today, even if it is from a relatively low level. Vietnam is one example of these rapid developments. The UNDP was there first (1992) and soon after Sweden and France came. Apparently Vietnam now has 30 donors in the field of legal development co-operation, which implies that the country may be over-financed. In general, most donors and lenders are increasing their activities in the judicial sector. The World Bank and UNDP as well as the IDB and AsDB are very active and the IMF consistently maintains the need for judicial reforms. In the past, judicial projects were financed through grants, but in recent years an increasing number of countries have taken loans from IFIs for broad judicial programmes. Work on policy is also underway in several places – e.g. in Dfid and UNDP – even if the thinking is not nearly as sophisticated as policy development in the mature development co-operation sectors.

2.3 Legal development co-operation in eastern Europe

Significant inputs are being made in eastern Europe by EBRD, EU, the World Bank and others. Here, legal development co-operation is closely related to EU expansion, since it requires far-reaching judicial reforms in the countries in transition that are now applying for membership. Recently there has been an increase in consciousness of the sector “justice and home affairs” and the major problems that can arise in the negotiations.

Candidate countries have increasingly been forced to devise strategies for a reformation of the entire judicial sector. In other countries in transition, including Russia, and post-conflict countries, like former Yugoslavia, there is also a need for judicial reform for which knowledge and resources are lacking.

2.4 Conclusions for legal development co-operation

Developments uniformly indicate a continued expansion of legal development co-operation. Thus it is apposite for a donor to closely follow the rapid developments that are underway, systematically to make use of the experiences that have been gained and the development of competence that is undertaken.

3 Why legal development co-operation?

3.1 The importance of the institutions

Sociological research has shown how important institutions are for both economic growth and for poor and other vulnerable groups. One category of institutions is the judicial in a broad sense: both state and private organisations and the judicial framework are included. Characteristic of the market economy are the institutions – regulations and organs that are taken for granted in the west – which control the activities of the actors on the market.

3.2 The importance of the costs of transactions

The cost of transactions is typically large in the context of a developing country and as a consequence, companies are reluctant to invest or to embark on risky transactions, not least long-term commitments. This restricts economic growth. A reliable and efficient judiciary is important, since it can reduce these costs.

3.3 Globalisation

Globalisation has many dimensions. Here it is natural to point out that a country can use the law as an instrument to embrace the opportunities that globalisation offers, e.g. to participate in international trade and attract investments. It can also counteract its negative effects. Not least, many of the losses of suzerainty of weaker states that may follow in the wake of globalisation can be offset through agreements on the global plane, e.g. control of financial activity and organised crime. Human rights are also included in this pattern as an integrated part of trade treaties.

3.4 “Modern development co-operation”

Development co-operation that regards its task as creating preconditions for development has good reasons to give priority to legal development co-operation. This can lead to an increased exchange of resources and development processes within many social sectors. A well-functioning judicial system also improves the outlook for development co-operation and for other efforts being made in many sectors.

3.5 Perspective

(a) The concept of development. Already in the concept of “development” implies that a society has a minimal rule of law. If people are arbitrarily imprisoned, if “justice” can be

bought, if the spread of crime is unchecked, if it is not necessary to honour agreements or if sentences are not enforced, there is a serious problem in society. The quality of a system of justice in a society consequently has a value of its own and it has a place in the concept of development.

(b) Poverty. Human rights and freedoms are of great importance for the poorest of the poor. Such an approach emphasises the individual's own capabilities and counteracts the reduction of the poor to victims or clients. It is also the poorest who are most affected by high crime rates. Projects that include education on rights, legal aid, mechanisms of appeal, crime prevention, etc. have a clear poverty profile. The judicial framework can also help the poor to organise themselves, e.g. in water-user co-operatives and similar types of organisations. A poverty approach also has positive effects on gender equality.

(c) Human rights are to an increasing degree a general starting point for development co-operation. Such a human rights perspective assumes that a system of justice exists which can guarantee respect for these rights, i.e. regulations governing rights and institutions which ensure that the rights can have substance and form the basis of the growth of a "culture of human rights". The judicial system is particularly important for the poor, as they do not have recourse to other means of asserting their rights. Similarly, the judicial system, e.g. laws on procurement and transparency, can contribute to combating corruption; and laws, which entail a liberalisation of the economy, can remove the grounds for certain forms of corruption.

(d) Equality. Sexually related violence ought to be dealt with in a judicial way, like rape and other assault, trade in women, prostitution, child marriage, female circumcision etc. Equality in woman's economic position can also be reinforced via the judiciary, particularly through counteracting discrimination in the work place and strengthening her right to own property, including rights of inheritance. Constitutional reforms can reinforce women's position in political life.

(e) Environment. Legislation to protect the environment has with time come to be a central feature of inputs to safeguard the environment. It is not only concerned with ecological protection in a narrow sense – protection against pollution of air, water etc. – but also the legislation that regulates agriculture, industry and other environmentally sensitive commercial activities.

3.6 Conclusions for legal development co-operation

Judicial reform facilitates reforms in many sectors and in many cases, it is a prerequisite for better use of resources. Legal development co-operation can contribute to such judicial reform. It can also strengthen the judicial system in a country, which can be a great support for all those who seek to assert their rights, not least those without property, minorities and others who cannot maintain their rights in any other way.

4 The law, democracy and economy

4.1 The law and democracy

The law and democracy are related to one another. Politics and the judiciary are thus not two separate spheres. Judicial reforms are political; human rights, for instance, offer the individual greater safeguards against the state and in this way limit its powers. On the

other hand, judicial reforms in many cases are reliant on political reforms; independence for the courts, for example, requires adopting a political stance.

4.2 The law and the economy

Functioning markets and the rule of law also impact on one another in various ways. Judicial reforms are largely economic reforms. In many cases bankruptcy legislation, for instance, leads to the restructuring of (state) companies. Conversely, a number of judicial reforms require economic reforms, e.g. privatisation, while at the same time privatisation of state enterprises requires a well-functioning legal system. A close correspondence between judicial reforms and economic policies must exist. The law can play an important role for economic developments, at least if the government has sound economic policies.

4.3 Conclusions for legal development co-operation

The three spheres of politics, economy and law are closely related. Judicial reforms that do not harmonise with political and economic reforms lose a degree of efficacy. Those who design legal development co-operation must thus keep an eye on the judicial interplay with politics and the economy; otherwise there is a risk that the inputs become inoperative. There are also reasons to direct inputs to areas where the law has particular significance for economic developments; an example is the private sector in general and capital markets in particular. Within the sphere of the rule of law, one can point out that the law is central to combating discrimination and corruption.

Judicial functions and legal development co-operation

5 Attitudes to the law

5.1 Instrumental approach

To a large degree, the law is a tool of those in power; that is, it is primarily the tool of the political powers. This is how it functions in all kinds of regimes. In totalitarian regimes the law tends only to be regarded as such an instrument, and the regime as per definition good.

5.2 Intrinsic value and counterbalance

In democracies, the law also has an intrinsic value and can even provide a counterbalance that limits the authority of those in power in favour of certain basic values. Human rights fulfil such a function irrespective of whether they are laid down in the constitution or backed up by international agreements. This means that not even a popularly elected parliament can legitimately take decisions exactly as they wish. Among other things, minorities have the law to protect them.

5.3 The framework of the market economy

Law can also fulfil a third function, namely to be a framework for economic transactions. Then its aim is primarily to reduce the costs of transactions in a market economy. In such cases, regulations are typically neutral in relation to the state's interests. In the first place, in cases where they negotiate on such issues, economic actors should agree on the content of the regulations with the addition of certain protective mechanisms.

5.4 Conclusions for legal development co-operation

In all the countries now leaving one party rule and planned economies, there is a need also to deal with the instrumental approach to the law which prevailed previously. For political reasons, it is a painful process for politicians and others. The culture of the rule of law is also a restriction in the sense that the instrumental view is so deeply rooted even among lawyers that they find it difficult to liberate themselves from it. Such an approach blocks both legal development co-operation, that would like to promote reforms of the rule of law, and deregulation, that robs the state and state enterprises of a favoured position in economic life.

6 General functions

6.1 Functions

The law fulfils a number functions in all societies. One can broadly distinguish between the following functions, each of which is carried out by one or more institutions:

- Creating the law (done by law-makers and precedence setting bodies);
- Conflict-resolution (courts, arbitration councils, extra-judicial organs, direct negotiations);
- Control of the implementation of rules and agreements (police, public prosecutors, courts);
- Representatives of the parties (legal aid organisation, advocates, paralegals and other non-professional representatives);
- Execution (executive authorities, prison and correctional services, tax authorities);
- Checks on the system (ombudsmen, norm-testing organs, human rights organisations, media);
- Morale formation (all).

6.2 Conclusions for legal development co-operation

This catalogue indicates that the legal system is a whole that functions more or less well. The catalogue thereby also becomes a tool for analysis of legal support, both ex-ante and ex-post. It is a reminder that legal support should not routinely be chosen to top the list. If weaker parts of the system are found lower down on the list, this can be reason to direct attention to them, which is often important from a poverty perspective.

7 Functions of the rule of law and the market economy

If one turns to the contents of legal support, one can differentiate between two main categories of inputs, namely support to the rule of law (7.1) and inputs directed at the market (7.2).

7.1 Rule of law inputs

7.1.1 *Monitoring function*

Support to the rule of law has the aim of strengthening the constitutional state (“rechtsstaat”, “rättsstat”). Not unusually, the attempt to create “increased justice” is in

some sense regarded as a monitoring function for inputs of this type. It is a diffuse concept; but is nevertheless important when evaluating inputs of this type, with the result that one should attempt to clarify the goal for the inputs as far as possible. There are, for instance, reasons to distinguish between formal and material justice, and between the rule *of* law (more or less, security of life and property) and rule *by* law (more or less, subjection to the law). Of greatest operative value is perhaps the distinction between security of life and property, equality before the law, security before the law and accessibility of the law.

7.1.2 Functions

(a) Rule of law, or security of life and property, is a concept that is used in the most varied contexts, including development co-operation. Thus, one ought to clarify what is entailed. Lawfulness, predictability and perhaps other things may be considered. One ought also to pose the question if it is only due process which is referred to, or whether the concept of the rule of law also entails a certain minimum material standard in the form of human rights.

(b) Equality before the law is often regarded as part of the rule of law, but it also has connections with the accessibility of the law. It requires equality before the law, non-discrimination as well as equality between parties in conflict.

(c) Security before the law is directed at the individual's security. In contrast to security of life and property, security before the law is not pointedly directed against encroachment by the state. On the contrary, it demands action by the police and other state organs, against crime, damage, transgressions, and the exercise of gratuitous violence on the part of the state, etc. Here, however, there is a link to human rights: the failure on the part of the state to move against serious crimes against an individual can be a violation of the rights of an individual.

(d) Accessibility of the law ("access to justice") is a prerequisite for giving substance to regulations about security of life and property, equality before the law and security before the law. This includes reasonable costs; legal aid; clearly written and easily available laws and other legal sources and information material; rapid process; and physical access to courts and other judicial institutions.

All four functions have significance for the poor, perhaps particularly accessibility of the law. Examples in the area of rule of law inputs are constitutional reforms, criminal-political reforms, reinforcement of the courts, human rights, guarantees for freedom of expression, and transparency, combating corruption, and legal aid.

7.2 Market economy inputs

7.2.1 Functions

(a) Definition of property. Regulations should offer comprehensive property security, including non-material rights, e.g. through safeguards against confiscation, and the creation of a system for registering fixed property and businesses, etc. Through this, conditions for land reform and for credit institutions are created, which in turn form the basis for investments.

(b) Exchange of rights. Contractual rights, and rights of purchase, transport, public procurement and various other topics are included here.

(c) Entrance to and exit from the market. It encompasses the law of association, banking law, financial market law, credit legislation, bankruptcy law, fair/unfair competition law, etc.

(d) Compensation for damage. Regulations that define what is unlawful damage and that stipulate compensation to one who has suffered unlawful damage.

(e) The market structure and the actors' actions on the market. Here competitive legislation, disloyal competition and legal safeguards are meant (rental law, labour law, consumer safeguards, etc.).

Examples in the area of market economy inputs are privatisation of telephone, electricity and other state enterprises (which usually involve serious losses for the state); the capital market and mortgage system; insolvency (debt recovery, bankruptcy, collection of claims); central parts of commercial law, among others those highlighted by the World Trade Organisation (WTO); environmental protection and conflict resolution. The areas mentioned here also require competent institutions to apply the regulations, like registration authorities, free competition bodies, boards of executors, courts and arbitration councils etc. For the poorest, regulations about the right to land and other property safeguards, credit and insurance, and protective legislation are of immediate relevance.

7.3 Conclusions for legal development co-operation

Rule of law (7.1) and market economy (7.2) inputs have different directions and goals in principle, but they also interact: property safeguards, independent courts, security of life and property, equality before the law and security before the law are characteristic of the rule of law, and at the same time are prerequisites for the development of the market economy. Predictability is a common denominator. In a corresponding way, market economy reforms contribute to a strong judicial state, e.g. in the form of increased public access and freedom of expression, and greater independence from the state. Not least important is that a constitutional state must be largely financed by taxes, which is why a sound economy is an advantage in a constitutional state.

The judicial sector and legal development co-operation

8 Delimiting and defining

8.1 Definition of legal development co-operation

One can work with a judicial legal concept or with a sociological one where the latter is broader than the former. Both have their place within legal development co-operation. This also concerns traditional law, since the poorest can to a limited extent gain advantages from the official law.

No judicial areas ought to be excluded from legal development co-operation even if certain can be more delicate or less meaningful than others. It should, however, be noted that human rights, corruption, administration etc. are transverse processes and, when dealing with them, one should bear in mind that they also belong to other "spheres of development co-operation".

Institutional delimitation is also not completely clear, nor does it need to be. The institutions which can be given space within legal development co-operation – alongside the judicial organs in a narrow sense – include the following:

- a) The public sector, including the central authorities, tax authorities, registration of property etc.;
- b) Parliament, the electoral commission;
- c) Civil society (non-governmental organisations, informal conflict-resolution organisations, chambers of commerce, auditing agencies, etc.); and
- d) The media.

It should be noted that the concept of the judicial sector as well as the rule of law can have very varied substance. The UN, for example, includes media and the military in the concept of the rule of law.

Nor is the relationship to good governance unambiguous. It is simplest to see legal development and good governance as two parallel processes that partly overlap, which is why some legal support can very well be regarded as support to good governance. Examples are inputs that aim at transparency, accountability and combating corruption. Honesty and efficiency in an administration can be of particular importance for the poor.

Support to human rights can be included in legal development co-operation. It ought, however, to be observed that human rights are sometimes seen as a concept that is broader than the judicial sector. Support for human rights occurs in the most diverse projects, and particularly references are perhaps made to human rights as support for a certain project. One ought to be clear about these conceptual differences when choosing terminology and designing inputs. If one talks about human rights projects it ought to be clear whether it is the project's goal that motivates the name – projects related to (the right to) health, education, etc., can then be included – or whether it is the institutions themselves that are given support when it may be natural to draw boundaries at the human rights institutions in the strict sense.

8.2 Conclusions for legal development co-operation

Legal development co-operation requires a clear understanding of the law and the phenomena related to it. It probably does not matter so much that many of the concepts, which have just been mentioned, are used in a different sense in various contexts. Nor is it a problem that legal support is not clearly defined, as long as it is based on a sound analysis.

9 The sections of the sector

Legal development co-operation can be allocated to all parts of the judicial sector. A brief review of these sections follows.

9.1 Legal sources

Legal development co-operation is usually completely focused on the official, national body of law. Here legislation is central, possibly including the requisite preparatory work for each law. Legal precedence (judiciary) and literature (doctrine) are also legal sources.

In many areas the informal (traditional) law is of great significance, which is why planning of projects must also take the latter into account and perhaps also seek to build on the resource which it entails.

9.2 Institutions

There are a large number of “institutions” in the judicial arena that can be encompassed by legal development co-operation:

- Legislators (ministries, committees, parliament etc.);
- The courts and other organs for conflict-resolution (formal and informal);
- Executive organs (board of executors, prisons and correctional services, tax authorities);
- Representatives (advocates, bankruptcy administrators, paralegals, public prosecutors);
- The police;
- “Judicial authorities” (management of competition, registration of companies and non-material rights, property registration, consumer safeguards etc.);
- Legal aid institutions (state; private);
- Educational and research institutions;
- The legal profession as a whole (administrative jurists, company lawyers, etc.);
- Supervisory organs (Justice Ombudsman institutions, advocates, associations of advocates and other professional bodies, e.g. auditors, human rights organisations, public authorities, e.g. finance inspectorate, consumer associations, the media);
- Functionaries (personnel well-versed in the law, administrative officials, “informal decision-makers” (village headmen and the like));
- “Users” (the public seeking justice, parties in civil law conflicts, the accused, sentenced and imprisoned, victims of crimes and other plaintiffs, human rights organisations).

9.3 Infrastructure

- (a) Buildings, material, Information Technology (IT) and other equipment;
- (b) Collections of laws and sentences, literature and information systems;
- (c) Administration and methods of work.

9.4 Legal culture

The traditions, values, ways of thinking, methods, unwritten regulations, professional standards and ethics, etc. that are features of the legal system and judiciary in a country are part of the judicial culture. One can also include the position of the legal system in society and the approach of the public and the powers that be on the system and the knowledge about it. Attention has increasingly focused on the legal culture and its significance. This factor is difficult to grasp, but important, as it can jeopardise many reforms and for this reason alone an eye ought to be kept on it in legal development co-operation.

9.5 Conclusions for legal development co-operation

The “judicial sector” is broad and heterogeneous. Those sections of the sector to receive support are often selected in a routine-like way. Goals and perspectives for inputs ought to guide the selection to some extent, which can lead to a more appropriate choice of those parts of the sector on which inputs focus. Both a poverty perspective and an egalitarian perspective naturally focus on the users and perhaps lead to attention being paid to the knowledge and attitudes of the public.

10 Judicial pluralism

10.1 Judicial normative systems

Several competitive and interactive normative systems should be taken into account in the framework of legal development co-operation:

- Domestic state law (formal law; official law, including transplanted “modern law”);
- Law, custom, judicial praxis;
- Internationally binding norms, particularly international agreements, e.g. WTO’s regulations and EU law (formal law);
- Colonial law (usually with traces of local law);
- Religious law, e.g. sharia;
- Informal law (traditional law), usually in the form of local customs;
- Socialist law, including planned economies (more an approach than legislated in the South);
- Traditions of common law and civil law;
- Norms not prescribed by law: prestige, contacts, ethnic links, family ties;
- “Non-legal”: more or less illegal methods, e.g. bribery, threats, violence (c.f. the controls exercised by the mafia).

10.2 Traditional law and the relation between normative systems

Normative systems compete, interact and affect one another. Official law and traditional law are rivals, but they also interplay with each other. Local customs and religious laws can be sources of justice for the official law, thereby giving legitimacy to both of these normative systems. The law is also continuously changing: normative systems develop, even traditional law is affected by modern influences and other impulses. Traditional African societies are more open, more inclined to change and more conflict-ridden than westerners previously believed. Many “chiefs” who judge according to traditional law wish to educate themselves in the official law. Here a possibility emerges of utilising traditional institutions to supply legal aid. It can, however, also be mentioned that traditional courts in many cases have not proved to be suitable for resolving one of the most common types of conflict, namely land conflicts.

Judicial pluralism not only depends on different normative systems. Different values, traditions and different “forms of rationality” contribute to pluralism. The same is true of the different organs that “administrate” normative systems: international organs, official courts, private and alternative forms of conflict-resolution, religious leaders, local chiefs etc.

A particular range of problems is competition between common law and civil law. Opinion is divided on the possibilities of merging both of these traditions, as in the EU, and how it should be implemented, in that case.

10.3 Conclusions for legal development co-operation

A donor can have reasons to take all normative systems and the relations between them into account. Judicial pluralism means that the formal (official law) ought not automatically to be given precedence before the informal, which may emphasise a bottom-up perspective and other “alternative perspectives”, e.g. minority rights, life-style and identity. An alternative perspective can also create awareness of judicial limitations. In certain “judicial cultures” the official law is accorded little weight by comparison with family ties, ethnic links, prestige, contacts and similar means of manipulating the law. At the same time, it is important not to be seduced by traditional and informal law. It can have repressive features and also be unserviceable to promote commerce and development.

11 Civil society

11.1 Developments

Civil society has a large role to play in legal development co-operation. It can encompass non-governmental organisations and informal groups, sometimes also the media etc. To be included in this context, it is desirable for an organisation to be independent, transparent and have democratic roots and a democratic way of working. Not infrequently, one must resign oneself to more modest demands; even in relatively developed countries in eastern Europe, where civil society has remained weak.

11.2 Judicial organisations

One can generally differentiate between two categories of non-governmental organisations in the field of legal development co-operation:

- (a) Organisations that provide social services; in this case, primarily the organisations that offer or supply legal aid are of interest;
- (b) Opinion-forming organisations; here the issue may be to monitor respect for human rights in a more general way, influence the work of legislation and international setting of norms, prosecuting pilot cases, observing trials, spreading information (about constitutional rights or new legal cases) etc.

11.3 Conclusions for legal development co-operation

Consideration of support to judicial organisations depends on several circumstances, e.g. what is permitted, the needs and resources (economic, competence etc.). Support to the former (a, above) is usually more expensive than to the latter (b, above). Judicial access may, however, improve substantially, thanks to the former. Experience of the latter category of organisation is good on the whole. There is usually no reason for donors to exclude support to civil society for the reason that bilateral legal co-operation is being undertaken with the country in question.

12 The state and the private sector

12.1 The relationship between the state and the private sector

Features of the relationship between the state and the private sector include both co-operation and rivalry. The state and civil society require, support and keep checks on each other and in some cases they compete with each other. From the viewpoint of a private actor, the state may be both the problem and the solution.

Certain functions can only be undertaken by state institutions and should be performed without being affected by irrelevant considerations. To some extent such institutions are a prerequisite for the private sector. They provide guarantees for non-governmental organisations, against injustices for instance, and also – paradoxically enough – against unfair treatment by state institutions. The state is also a guarantor of certain private mechanisms, like the carrying out of arbitration and alternative conflict-resolution mechanisms. At the same time, in certain cases the state is the supervisor of non-governmental organisations like bar associations, as well as the opposite party, in policy issues and conflicts for instance. The state can function as financier, concession granter and public prosecutor, sometimes in relation to one and the same organisation.

Conversely, private organisations are a prerequisite for the state's way of functioning. They keep an eye on and influence the state, train state personnel, inform the public about the state's work and carry out tasks on behalf of the state. Many tasks can be performed by both the state and private agencies (like education, legal aid, conflict-resolution, information dissemination, influencing public opinion).

12.2 The informal sector

The informal sector is variegated (one can differentiate between illegal, non-registered and non-reported companies and transactions). The sector is problematic from the viewpoint of legal development co-operation. On the one hand, it often functions fairly well and is extensive, in many countries being 50–75% of the economy. Legal development co-operation ought not to harm this sector, particularly as the poor work within it. On the other hand, it is a grey area with illegal aspects that can hardly be directly supported by a donor. High transaction costs inhibit the expansion of informal businesses and corruption flourishes in this grey area.

12.3 Conclusions for legal development co-operation

Legal development co-operation ought to build on the insight that while certain functions can be carried out only by the state, others can only be done by civil society. In addition, private actors can give support to the state and vice versa. State measures can sometimes be the best way of facilitating the growth of non-governmental organisations. Legal development co-operation can achieve an increased degree of efficiency if donors utilise their opportunities to combine support to the state and the private sector. Donors may even sometimes have reason to talk of the violation of human rights while at the same time giving assistance to the very institutions of the state that are responsible for the violations.

The planning of legal support is sometimes done as if the informal sector did not exist. This is a pragmatic approach to the problem, but is debatable. The long term goal ought to be to design a system of justice so that these enterprises become a part of the regular

economy. It would lay the basis for the expansion of many small businesses, thanks to lower transaction costs and thereby give the state increased revenue from taxation. It would also reduce the opportunities for corruption.

Legal development co-operation

13 Special requirements for legal development co-operation

13.1 Central powers

The law and the central powers are closely linked. A system of justice is the responsibility of the state and judicial reforms are dependent on the support of those in power. They must be built on the central state institutions which make up the core of the judiciary, like courts, prosecutors, the executive. If these conditions for support do not exist, development co-operation cannot build up a functioning judiciary.

Judicial reforms may threaten the position of those in power, for example, because the party and the state are no longer synonymous and the state's power is restricted; new centres of power may arise that compete with the political powers; respect for minorities is enforced; critical reviews become possible and the law, and thus the lawyer, each gain new roles.

13.2 Demand

Sometimes there is a lack of genuine demand for judicial reform, not only because it might lead to undesirable consequences for many of the interested parties, but also because old ways of thinking remain in post-communist societies. What has now been said is relevant not only to politicians but also to businessmen who are used to a "rent-seeking-culture" and to the legal profession which is at risk because its knowledge may become outdated. Many proponents of the profession may have 20–30 remaining years at their posts and may have good reason and opportunity to object. To the extent that re-schooling is impossible, dismissal may provide the only accessible route.

13.3 Vulnerability

Legal development co-operation projects are vulnerable not only because there may be a change for those who hold power. Unlike, for instance, the physical infrastructure, legal reforms can easily be obliterated or undermined. They are more vulnerable than many other projects also because the legislation to implement the reforms or the institutional build-up is often delayed, which is why nothing happens although a law is adopted or another measure has been taken with the help of development co-operation. Often the donor does not have a role to play in this part of the implementation nor has any insight into it.

13.4 Point of departure

For other reasons developing countries are often characterised by a lack of reliable information, poor communications and a high cost of transactions. In addition, the judicial sector is often neglected and functions poorly as a result of other sectors having higher priority. It may be characterised by small resources and low educational levels. Institutions are often so run-down that one cannot build on them, that is, the parties that

should be involved are often too weak to be able to co-operate with them. The system is more or less corrupt and compromised, and people in general have no confidence in it.

13.5 The culture of justice, etc.

The law is culturally and historically conditioned and great differences exist between different regions and countries. In many cases the developing world has rudimentary systems of justice, and informal law is central, while many east European countries can build upon a previous, often well-developed, system. Clear differences also exist between east European countries, just as between developing countries in various regions. This is not least true of legal-cultural differences (approach to the law and the role of lawyers, systems, concepts, sources of jurisprudence, the study of legislation etc.). Legal-cultural differences, like language problems and other factors, have shown themselves to lead to serious communication problems in the legal arena, even in co-operation with the east, though these countries are relatively well-developed.

13.6 Standards

Judicial reform and thus legal development co-operation has certain given points of departure. These concern international agreements that set a standard for human rights as well as the entire body of commercial law (WTO, ASEAN, international treaties, praxis, codes, *lex mercatoria* etc.) which must have a specific content to create the environment to promote trade and investment. For certain countries a “treaty” enforced by the international community exists, like the Dayton agreement for Bosnia and Hercegovina, or a more traditional form of peace accord, like in Central America. For presumptive members of the EU, the judicial content is also largely given; the system of justice must meet a “west-European standard” (c.f. Copenhagen criteria, *acquis*, etc.). In addition, there are organs that keep an eye on whether the above-mentioned standards are achieved, which is why legal development co-operation must also pay attention to the institutional side. In the third world there are, however, strong forces that question the legitimacy of the donor community to assert these standards and other “universal values”, to the extent that they conflict with traditional values and life-styles.

13.7 The process of change

When the law in the south is reformed, traditional laws may lose their functionality, without new ones becoming effective. Such a vacuum can only be avoided if judicial modernisation is undertaken with great sensitivity to the role of the traditional judiciary. Legal development co-operation in eastern Europe must also be designed to take into account that “transitional law” has particular features that in many ways are unknown to western jurists. The process of change may create space for misuse since control mechanisms are not necessarily developed at the same pace as the transition. To make the choice of the speed and sequence for judicial reforms requires specialised knowledge.

13.8 The independence of institutions

Several judicial institutions enjoy an entrenched independence that has no equivalent in other social sectors. They are also more closely linked to national sovereignty than, for instance, the social sector or the infrastructure. The courts, the public prosecutor and certain other institutions may be involved. They cannot simply be “reformed” and thus advice and dialogue may need to occur in more restrained forms than currently.

13.9 Formalisation

A formalisation of the judicial system may have advantages, in the form of higher levels of knowledge, more uniform application of justice, etc. It is not unusual for village headmen and other practitioners of traditional law to desire to raise their level of knowledge by schooling themselves in “modern law”. A formalisation can, however, also contribute to the system becoming more expensive and more complex. This may lead to para-legals being pushed aside, with the result that accessibility for the poor deteriorates.

13.10 The Swedish resource base

The Swedish resource base is more limited in the field of legal development co-operation than in most others. This is not only because the area is new, but also because many Swedish jurists do not have the relevant knowledge: they do not have much knowledge about developing countries and have not assimilated the experiences that have been gained in other areas of development co-operation. They also have limited knowledge of comparing the law and “transitional justice” (transition from one system to another). They gladly yield to the temptation to teach about Swedish law and automatically recommend Swedish administrative and organisational solutions. Thus the resource base may restrict what can be achieved in the short term. Increased co-operation with experts from other countries would be healthy.

13.11 Conclusions for legal development co-operation

In the preceding, a number of circumstances peculiar to legal development co-operation are pointed out, though some of these may also play a role in other areas in a less accentuated way. Taken together, these circumstances involve a number of restrictions that require detailed planning of legal development co-operation projects. A good quality risk and an interest analysis are required as part of the preparations, as are a clear and long-term vision and a preparedness to allocate resources.

14 Principles for legal development co-operation

14.1 To learn from experience

Donors have hitherto acted pragmatically, as they did not have a theoretical and consistent model for legal development. The experiences mentioned above ought naturally to be taken into account. One ought to avoid an evolutionist, instrumental and ethnocentric approach to the law. However, the conditions for legal development co-operation are now more favourable than in the past. Not only is there more knowledge about legal development co-operation, but conditions have also improved. In addition, there is a better understanding of the importance of the judiciary, as a result of the process of change which was mentioned at the beginning, and in many countries, e.g. in Latin America, there is now a stability which makes them better equipped for judicial reform.

14.2 National resources

Many of the problems which are a feature of the legal systems in the south and in eastern Europe are caused by a scarcity of resources and the evil circle this creates. It relates to corruption, lack of competent personnel, inefficient ways of working, drawn-out procedures, citizens' lack of trust in the system, inadequate access for the poor, bad

premises, out-dated equipment, etc. In dialogue, a central task for donors ought to be to point out the necessity for the government to allocate resources to the judicial system. If it does not, its commitment can be called into question. The forms for judicial reform may influence the government in the correct direction. If it proceeds through a well-rooted process, this may improve the prospects for the government to allocate the means required for a reformation.

14.3 System approach (holistic view)

One of the few recognised principles for legal development co-operation is probably the need for a system approach. Firstly, conditions in sectors other than the judicial affect the latter and the reverse. A weak school system, for example, has an impact, since illiterate people have difficulty in asserting their rights with the assistance of the legal system. The legal system can protect the media from interference, at the same time as the media can combat corruption in the legal system. Secondly, a system approach encapsulates demands on agreement between economic policies and judicial reforms as well as between political developments and judicial reforms. Both of these system approaches (which can be said to have an external perspective) in general agree well with development co-operation trends to emphasise the general policy environment in partner countries and to adopt an integrated approach as a basis for co-operation.

Thirdly, in a system approach the various parts of the legal system hang together and must be taken into account, both regulations and institutions (internal perspective). Civil society should be accorded its rightful place and informal (traditional) law and informal institutions must be brought into the picture. Here the elements that are more difficult to grasp can be found, like attitudes to the law and other parts of the culture of justice.

Fourthly, reforms should be implemented on the basis of well-founded priorities, in a sequence and with a speed that suits the conditions in the concrete case, both the first mentioned (external) and the third (internal). A system approach entails that not everything needs to be done at one and the same time.

The demand for a holistic view is particularly apparent during structural reform of the legal system (see 14.9 below) and one ought to avoid introducing a very broad programme which lacks clear focus. If the judicial reformation is part of a sectoral reform, there is also a demand for a holistic view, though it may be less stressed, while many isolated inputs require a less ambitious framework.

14.4 Developing capacity

In agreement with the need for a system approach, capacity development should be as much of a catch-word in the field of legal development co-operation as in most other sectors. The legal system as a whole ought to be purposefully organised, including the relations between and tasks of its institutions. Judicial institutions ought to be given the competence, tools and other resources, organisation and methods of work, etc. which are required for them to be able to fulfil their role. In this context, capacity refers to all parts of the system, not only to the key organs, but also to institutions like those for education and further education. If such capacity is built up, not only the legal system as such is favoured; it also contributes to the general attempt to strengthen governance of society.

14.5 Long-term perspective and resources

System changes require firm establishment, a long-term vision with corresponding programming, sustainability and resources, so that judicial reforms can be implemented. Smaller, isolated projects may be justified, but if possible ought then to act as a stimulus to the system changes.

14.6 Money or ideas?

The poorer the policy environment, the greater is the reason to focus on the ideas. To the extent that development co-operation is utilisable, the reasons to do so are reinforced. Conditions at central level have small chance of influencing the recipients to a similar degree as legal development co-operation concerns the interests of the central powers. At the local level, conditionality may often be more effective. One should add that co-operation with the east should in principle be based on utilising Swedish knowledge to build up capacity, so that funds for the legal area are not used to finance investments in, for example, infrastructure.

14.7 Reform process

Experience indicates that the approach to judicial reform has considerable significance, sometimes as great as the material content of the reforms. It requires a broad process that involves the interested parties and includes education about the judicial reforms and spreading information on them. Such a process can create the clarity, predictability and legitimacy required for the acceptance of the regulations and have the intended effects. It can also clarify which parties are most favoured by a certain input.

14.8 Comparative advantages

A donor's comparative advantages may affect the choice of countries for legal development co-operation, the choice of areas of input and the choice of methods. It may seem easier to specialise in certain types of inputs, for example, the development of organisations in the ministry of justice or accessibility of the law. However, the disadvantages of such a selection procedure (c.f. 18.2 below) are tangible as long as they do not rest on a firm foundation, e.g. the standards for legal development co-operation (see 13.6 above).

14.9 Choice of approach and ambitions

It is desirable for a donor to have a clear understanding of the ambitions – and thereby the resources and the time perspective – which should form the basis for legal development co-operation in any concrete case. One can differentiate between support to structural reform, “integrated inputs” and clearly limited inputs:

- (a) If the object is to give support to a structural reform of the judicial sector, the ambition is set high. Resources and time horizons must be adapted to this, since it concerns contributing to a change of basic conditions, including the legal culture and other supports.
- (b) If the object is to support judicial reform in a sector, the ambition is typically set lower. Judicial reform is here usually integrated in a more extensive reform, e.g. of the state administration, a social sector, the financial market or an industry. Judicial reform which is a part of structural adaptation can also be regarded as an integrated input.

This type of integration can become an effective way of giving substance to development co-operation based on human rights.

- (c) One can also conceive of limited projects of varying kinds, like seminars, field studies, individual legislative measures, buying literature, etc.

The choice of ambition and approach has consequences not only on the need for resources and the time perspective, but it also affects the risks and relevance of the inputs. Assessment of the relevance of the inputs and how they can be implemented becomes easier the lower down the ladder one goes and in a corresponding way, the vulnerability and risks of the inputs is reduced. Methodologically, the same thing can be achieved by departing from a clear and well-defined problem which the recipient is well-aware of (bottom-up), after which the programme can be extended. Alternatively, one can take a holistic view from the beginning (top-down). It is theoretically more satisfying but usually riskier.

14.10 Prerequisites and timing

Not only the needs of the recipient country and the donor's resources ought to determine which level of ambition and approach are suitable. At least as important are the conditions and the timing. If the prerequisites for large reforming projects are missing, e.g. because the political will is not there, the ambitions must be adapted to this reality, irrespective of which urgent needs are apparent. Similarly, one must be cautious in delicate situations, even if the political will to reform is strong; in the legal area it is the rule rather than the exception that recipient capacity is weak.

14.11 Target groups

Most legal development co-operation projects are probably of use to both the citizens in general and to certain individuals. A mortgage system, for instance, fosters general economic development, but is also of use to the agriculturist who can get credit. Freedom of the press can be of general use, e.g. if it counteracts corruption, at the same time as it can protect an individual whose rights are violated.

Sometimes it is said that inputs should start with the people or the individual. Yet it is not so easy to see in which way an individual perspective could lead to any assistance other than to the development of institutions. If, for example, one strengthens the office of the public prosecutor or legal aid and reforms the rest of the system, one may reduce awaiting trial times to the advantage of the detainees.

An individual perspective may, however, serve as a reminder that institutions are simply means to strengthen an individual's abilities. If a poor person cannot utilise her/his rights because s/he cannot read, one ought to admit that her/his rights are not realised, rather than assert that s/he has not made use of the law. An individual perspective may also be a good tool of analysis. One can analyse which effects an input has on a certain category of individual and can also analyse the legal system by following an individual through the system, for example, a woman who has been raped or a citizen who has a claim or wants to establish a business. In this way a poverty or an egalitarian perspective can hopefully make a greater impact in the planning of the project. An individual perspective can also be a starting point for co-operation based on human rights.

14.12 Conclusions for legal development co-operation

Principles and methods for legal development co-operation must be adapted to the particular prerequisites of legal development co-operation (see 13 above). This means that the lack of resources in the sector must be taken into account, that a holistic view is required and that the principles, which have been referred to in the preceding, must be upheld. Since legal development co-operation is relatively new and principles and methods less tested than is desirable, particular care has been devoted to the aspect of the principles.

15 Transfer of regulations?

15.1 Transfer of regulations or capacity

A large number legal development co-operation projects are made up of the transfer of legislation, judicial institutes and institutions from the donor's national system. It is not beyond the bounds of possibility that such transfers may have positive effects, but the angle of approach is ethnocentric, with the result that attention is diverted from the context in the recipient country, like its traditions and legal culture, and the need for accepting the legislation. Particularly in countries where the law only has a small role to play as a means for controlling society, such transfers may have difficulty in becoming established. Alternatives that have already been mentioned include capacity development with the aim of strengthening the recipient country's capacity to analyse its needs, design its legislation and judicial institutes, build institutions.

15.2 Regulations and institutions

Building up capacity is both costly and requires time. As we saw, in certain respects there is an answer to the question of when is "the law correct" (see 13.6). Then it is legitimate to participate in ensuring that such regulations and institutes are introduced, but only to the extent that the local context is taken into account. This includes the implementation of international agreements and certain generally accepted principles of the market economy, and the standards set by the EU.

15.3 Models

To the extent that regulations and institutes are transferred, there are reasons to prefer models that have shown themselves to work in different contexts. Examples are Unidroit's, UNCITRAL's and ICC's well-established work with models. Similarly successful national codification can be employed, e.g. the Netherlands and Quebec's codifications which have been successfully used recently in eastern European countries like Russia, and Latin America like the Argentine. The AsDB has created a system for disseminating comparative legal material to be used in the work of judicial reform. To the degree that Swedish legal development co-operation encompasses transfers, it thus need not necessarily be concerned with certain perhaps peculiarly Swedish regulations. A different matter is that Swedish legal institutes may provide impulses for judicial reform or that Swedish "experts" are perhaps not familiar with the relevant regulations.

15.4 Conclusions for legal development co-operation

The transfer of regulations and institutes are often linked to tremendous difficulties and are usually a less efficient form of development co-operation than building up capacity. To the extent that regulations and institutes are implanted, there are reasons to select models that have already shown themselves to work in different contexts.

16 Legal development co-operation to “difficult countries”

16.1 “Difficult countries”

One of the main problems for legal development co-operation may be that those in power do not have a genuine interest in judicial reforms. A repressive structure, attitudes to the law, the effects of the communist heritage, and corruption, organised crime and other factors, may each play a role.

16.2 Influence of attitudes

The dialogue may provide space for influencing attitudes. Even in the most difficult environments, it is usually possible to give support to forming public opinion and perhaps consensus, e.g. convincing the public of the value of judicial reforms or about humane criminal policies. This may occur in the form of support to non-governmental organisations and the private sector (bar council, commercial organisations, media that work for judicial reforms, etc.). Such support can in any case give visibility and safeguards in authoritarian environments. At best, networks are created which have a multiplicative effect.

16.3 Education, further education and research etc.

The education of teachers of jurisprudence can be a way of proceeding, even in difficult countries. The development of curricula, didactics and literature can be added to the list. Similarly, the further education of practising lawyers may be promising as well as participation in regional conferences and similar events. For both of these categories of lawyers, an exchange with colleagues in other countries may be of great value. New knowledge and feelings of collegiality create self-confidence and can sow the seeds of renewal. Depending on the choice of subject matter, judicial research may be more sensitive, but usually it is recognised that there is a dearth of knowledge.

16.4 A new generation

In nearly all “difficult countries” there is a younger generation that is knowledgeable and inclined to seek change. There may be reasons to direct tailor-made inputs to this category, e.g. to contribute to making contacts in foreign countries which can function as a stimulus to their efforts.

16.5 Conclusions for legal development co-operation

Not unusually there is good reason to refrain from legal development co-operation to regimes which are repressive or at least “difficult”. If there are strong reasons nonetheless to make an input, great care must be devoted to designing it. Otherwise, there is a substantial risk that the input may legitimise undemocratic structures and produce meagre results.

17 Legal development co-operation to countries after conflicts

Increasing attention has been drawn to the fact that the law can not only play a role in preventing conflict. It is also an important instrument in “post-conflict situations”, e.g. Bosnia, Haiti, Cambodia, Kosovo, Serbia, eastern Europe, East Timor as well as South Africa and several other African countries.

17.1 Reconciliation, truth and legal proceedings

There are always reasons to attempt to bring clarity in what has happened. It is a psychosocial concern and may contribute to reconciliation. To bring war criminals to justice and demand other kinds of accountability is normally desirable, but in certain cases amnesty may be motivated, e.g. if a referendum has been held or “both sides” are agreed on ignoring the past. Truth commissions do not exclude trials, since the latter typically encompass fewer people and take more time.

17.2 Restitution and compensation

Normally a well-functioning judicial system is required for restitution and compensation to be possible. It includes restitution of housing, land, other property and of jobs and additional economic recompense in those cases where restitution is not possible. Compensation for non-payment of earnings and compensation for psychological suffering are also on the list.

17.3 Protection of minorities

Many conflicts have an ethnic background, which is why effective safeguards of minority rights are a precondition for a sustainable peace. It is concerned with judicial safeguards from discrimination at all levels – from the constitution to local bye-laws – and in many areas, like protection against discrimination in the work place, at school, by the police and the judicial system.

17.4 Support to returnees

It should be a central part of a post-conflict policy to facilitate the situation for returning exiles, which not only requires strong support from the legal system in several respects which have already been mentioned, but also the right to get credit for time spent abroad when the rate of pay is set, a law to validate foreign examinations, a law to get documents, etc.

17.5 Support to civil society

Different phases in a country require different sorts of support to civil society. After a conflict, organisations that deliver social services of various kinds are needed, e.g. legal aid, but also organisations which build public opinion regarding issues like those mentioned in 17.1 – 17.4. Support to civil society may, however, not take the place of inputs to state institutions, since a number of functions can only be undertaken by them.

17.6 Conclusions for legal development co-operation

After a conflict it is necessary to build up the legal system again, since a number of urgent needs can only be met if there is a well-functioning system of justice. Thus it is desirable for an identification of needs to be done as soon as possible. What has been said here

about “post-conflict countries” is largely also applicable in countries that have been hit by natural disasters, even if the views put forward in 17.1 and 17.3 usually are assumed to have less relevance.

Methods for legal development co-operation

18 Methods for legal development co-operation

18.1 General

It is apparent that there are a number of conditions that apply specially to legal development co-operation (see 13 above), but one can nevertheless assume that what is good methodology for development co-operation as a whole is good practice also for this form. For reasons touched on in the preceding, legal development co-operation may, however, be both more sensitive and more vulnerable than development co-operation in many other areas. Thus particular care ought to be devoted to accountability, sustainability, building capacity and similar factors.

18.2 Accountability of the recipient

The accountability of the recipient (ownership) is central, since in many cases the institutions in the legal area are weak and there may be pockets of resistance to the desire to reform. The more ambitious the reforms (see 14.9 above), the greater is also the demand for accountability of the recipient. A factor that may affect accountability – and thus is one of its indicators – is the political will which can advantageously be manifested in a strategy for the sector. Other positive factors are the division of costs, loan financing, the strength of the partners in co-operation, problem and need orientation (which counteracts the control of what is on offer) and interactive ways of working which start with the recipient’s problems. It is desirable for accountability to be based on a genuine partnership both between parties in development co-operation and between the government of the partner country and those with interests in the projects. There may be a need for an analysis of interests to reveal the attitudes of key actors to the projects. In the case where the recipient is not prepared to shoulder responsibility, the idea should be set in the foreground and the volume of co-operation be restrained. This suggests that partners in co-operation, for instance the ministry of justice, may need to be strengthened and perhaps also that non-governmental organisations become involved.

18.3 Sustainability

A clear shouldering of responsibility makes for a good prognosis for sustainability. In addition, sustainability is furthered by a long-term perspective, mutual trust, capacity building, integration of the work in the national budget, etc. It should be observed that sustainability does not always need to be institutional, but can be supported by individuals who circulate in the “judicial sector”. Many organisations may never become self-sustaining and often it is healthy for civil society to be restructured.

18.4 Building capacity

It has been pointed out that building capacity may have many different aspects, but analytically, capacity is a key factor. It should be noted that one cannot casually build on existing judicial institutions, irrespective of how tempting this may be in a short-term

perspective. Some parts of the legal system will be so compromised and in other ways run-down that one is paving the way for problems if one does not build up something new. Perhaps the ministry of justice is an exception; there is no alternative if one wants to deal with this central institution, for instance, because its analytical capacity must inevitably be strengthened. The legal area is well-suited to co-operation between partners (“twinning”) or other forms of fraternal collaboration as a method of building up capacity, and not only in eastern Europe, where the EU is working for such co-operation on a large scale in candidate countries.

18.5 Planning, follow-up and evaluation

Legal support often needs more careful planning and follow-up than other areas. A system approach (see 14.3 above) requires planning on the part of the donor so that it does not remain a reaction to isolated wishes on the part of the donor. Such planning requires good knowledge of the system in its entirety. If such knowledge cannot be gained, there may be reasons to limit the ambitions and perhaps to prefer a “bottom-up” approach. In eastern Europe, the situation may permit a freer view as a result of the Copenhagen criteria largely prescribing what should be done.

The goal for legal support can be based on functions, standards and other aspects that have been touched on in the preceding, particularly those that permit operationalisation and can be translated into indicators for measurement. A logical framework approach (so-called LFA) may be an excellent tool for the design of these projects. It is, however, not always so easy to define the precise goal and the target groups, or to assess the effects of the interventions at different levels. But the framework approach ought to be a useful method if one wants to find out what the result is at the end, since it requires a holistic view that also takes into account the circumstances beyond the legal system (see 14.3 above).

One ought to be open to the need for a complementary approach. It reveals itself in that inputs in this area – similarly to inputs in other difficult areas – are often changed during the course of the programme, with the result that the original goal becomes less relevant. Follow-up and evaluation may thus need to take place using a somewhat different yardstick than the original objectives. A process-oriented approach may then be required. One can also pay attention to the way the system functions rather than its results. This indicates that evaluations of inputs of this type ought to include the rationality of the inputs (relevance) and not remain with efficiency and goal achievement.

18.6 Coordination

As might be expected, coordination of legal support is far from perfect, among other things, it is notoriously weak between ministries of justice in recipient countries. In eastern Europe, coordination has broken down and the EU as the dominant actor has neglected other donors. Increased coordination and exchange of experiences is desirable. Experiences from other areas of development co-operation indicate that efficient coordination is simplified if a common programme for reform exists; the above-mentioned standards may fulfil such a function to some extent. Preferably there ought to be an institutional structure for coordination.

Does it cause damage if a recipient is given conflicting advice? This usually happens, but it is not inevitable, if the recipient has the capacity to evaluate all the advice and combine

it in an insightful way as, for example, Vietnam appears to be trying to do. It remains to be seen if the hybrids of common and civil law that are now evolving have a future. Coordination ought preferably to include inputs made through non-governmental organisations, since they often go together with the inputs made between states.

18.7 Dialogue

A donor may have legitimate grounds for expressing critical views, especially if they are based on standards for human rights. Since a well-functioning legal system is a prerequisite for citizens to be able to assert their rights, it is legitimate for a donor not only to take up violations of human rights, but also anomalies in the system of justice. On the other hand, there may be faults in the central functions which is why criticism may touch on national sovereignty. This is a cogent argument for being tactful in the dialogue.

18.8 Focus on eastern Europe

Swedish self-interest not only creates a good basis for co-operation with our neighbours, but also a “pressure to offer supplies”. It is thus relevant whether the principle of division of costs can be maintained, so that the co-operation can become firmly established and safeguarded in the partner country. If a division of costs cannot be achieved – it may, for instance, be difficult in Russia, Latvia or Lithuania – the establishment should be safeguarded in another way. One example is a clearly articulated account by the partner country of its needs and priorities in the legal area. Not uncommonly, the Swedish side has sought this in vain. Causes are lack of competence on the part of the recipient and linguistic problems. It is also possible that one can reduce the demands moderately in those cases where projects relate directly to an EU requirement or alternately to very strong Swedish self-interests. In the latter case it is then desirable that the “Swedish interests” make their own contributions. In other cases one should design the co-operation to be more in line with the methodology that is traditionally applied in the south. It should also be noted that there may be a great need in a certain sector, e.g. the judicial, but that there is a lack of projects, which is why the partner country may have good reason not to allocate means.

18.9 Focus on development co-operation after conflicts

After a civil war or disaster it is often the public institutions that are incapable of taking responsibility. This may be an argument for rapid measures from the donor community and perhaps also for generous financing of running costs and other local expenses. At the same time, there may be a need to set up conditions for development co-operation, for example to protect minorities or to adopt anti-corruption measures. The result may be strongly donor-controlled assistance with little opportunity for accountability by local politicians and authorities. This is a disadvantage for efficient development co-operation and undermines the democratic process. This dilemma requires the donor to go forward in stages, to involve local actors and to be flexible.

18.10 Conclusions for legal development co-operation

The role of the development co-operation authorities in the field of legal development co-operation is demanding. Strategic planning, design of inputs, follow-up that are among the factors involved here are difficult to assess and in other ways the inputs are risky. Probably the basis for decisions is in many cases poorer in this area than in many

others. In addition, a holistic view is desirable at the same time as the level of knowledge remains rudimentary. Caution and methodical care are required. Legal support may be required in many “factual areas” – e.g. environment, capital markets, infrastructure – which is why a donor must combine such professional knowledge with legal expertise.

19 Need for the development of competence

19.1 Lack of knowledge

Development co-operation in the legal area takes place in a theoretical vacuum compared to many other areas. There is no established theoretical framework to form the basis for inputs. Not least, there is hardly any research on the legal system of societies in transition. It presumably needs an inter-disciplinary approach that combines traditional legal studies with judicial philosophy, legal anthropology and general theoretical development thinking. Similarly, studies are required of the conditions necessary to develop and support traditional law and its institutions and the opportunity to combine traditional and official law as well as their respective institutions. The methodology of development co-operation also needs to grow so that it can be adapted to the conditions in the legal area. This requires inter alia the systematic documentation and application of experiences.

19.2 Conclusions for legal development co-operation

The vacuum that exists argues for things like a careful approach and flexibility in the area of development co-operation, projects that are not too large, careful planning, and sometimes, a bottom-up approach.

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Appendix 2

Legal development co-operation between Umeå university in Sweden and Vietnam

What we are doing? How are we doing it?

An agreement on development co-operation was signed with the Ministry of Justice in Hanoi. Since the start in 1992, it was extended several times. Over this period the budget was about 25 million Swedish kronor.

The objective is to strengthen the rule of law in Vietnam, through building up institutions and improving capacity and thereby to contribute to structural reforms in the legal sector. In particular we are attempting to reinforce the role of the Ministry of Justice in the process of legislation, to increase the competence of its personnel and foster the creation of specialised courts, like economic and administrative courts.

The underlying concept is of being a Speaking Partner. This involves serving as a partner in long-term discussions with the Ministry of Justice, for instance in cases where the MoJ plays an active role in legislation. Through the MoJ we also co-operate with other central actors in the legal sector. For example, we worked together with the office of the public prosecutor in connection with criminal justice reforms and with the State Inspectorate concerning administrative processes and issues of administrative supervision. At an earlier stage we assisted with producing study materials for the training of lawyers.

The base is made up of questions and searches on the part of the Vietnamese, who have the right to take all the initiatives. This means that demand governs all the work. Every year the MoJ meets us and presents a number of issues of varied character. The Vietnamese first want an introduction, then further education, to make contacts and get comments on new bills, go on field trips and gain practice, etc. During the discussions we usually meet the people who need knowledge, irrespective of whether they are from the MoJ or from somewhere else.

Based on the specific needs and requests on the agenda, we discuss how we can contribute, what form of competence is suitable, practical or theoretical, from which region the people come, and so on. This often takes some time and the final question that is dealt with is usually considerably more focused than it initially was. On occasion we refuse to participate in certain areas, so for example we have refused to participate in compiling a register of criminals and purely criminal justice issues.

To move the discussions forward we use – as purveyors of competence – people at the university in Umeå who pay shorter visits to Vietnam. We return home and hold further discussions on what ought to be done and who should do it. When the parties are agreed, the work is concretised in written communications and sometimes in follow-up meetings.

The breadth of the work is combined with continuity

To implement the actions we use the personnel of the institute in Umeå, to the extent that we have appropriate expertise. About 15 staff members have worked within the project. We have also employed academics from all the law faculties in Sweden, from several European countries and from Canada, Australia and south-east Asia.

We have engaged advocates, judges, administrative officials from Sweden and from several other countries in various parts of the world, both as on-site experts and to arrange studies and undertake similar tasks. There is often great interest in contributing and establishing contact. Thus we have established good contacts with several public bodies, courts and ministries of justice and a number of legal practices in the region, as well as with universities in several of these countries.

We have tried to mix academics with practitioners, senior lawyers with younger ones, etc. Sometimes we have tried to mix expertise from various judicial cultures to illustrate different ways of solving issues. This fits in with the culture of curiosity and an ability to critically review all the foreign solutions that are present today in Vietnam.

We have worked in many different legal spheres and with the questions linked to them, like bankruptcy law, family law, citizenship, civil and criminal justice, implementation within the sphere of civil law, gender issues, legal aid, arbitration procedures, complaints against public authorities, economic courts, and organisational issues in the Ministry of Justice.

Initially we also worked with linguistic competence, inter alia through the establishment of a language laboratory at the law school in Hanoi and through the coordination of elementary legal courses combined with language lessons in Australia.

The most recent inputs include:

- Personnel from the Hungarian Ministry of Justice are sharing experiences from their transitional period – inter alia concerning the new philosophy of power-sharing and the changed status of the courts;
- Design of a Case-based course for Vietnamese bailiffs/debt collectors;
- A field trip to Singapore to shed light on the administrative routines at the Ministry of Justice in Singapore.

The knowledge base and continuity are ensured since several people at the institute in Umeå are currently involved and have done or are doing research on issues related to the project. Three Vietnamese and three Swedish lawyers have together produced an overview of the Vietnamese legal system which has been published in both English and Vietnamese. It is being used to disseminate information both internally and externally. In addition, with means from Sarec, Per Bergling has written a doctoral thesis on questions closely related to the project.

We have also chosen only to work with short-term consultants who return repeatedly. This has functioned well on the whole in Vietnam, even if things sometimes go more slowly than we would like, or even stand still on occasion. The advantage is that one can go there at short notice. The coordinator of the project pays three or even four visits per year, when issues have moved forward or changed direction. The rest of the time, contact is maintained through the written word.

Having an ingrained suspicion against long-term experts, Vietnam regards this as expensive compared to other inputs. The informality on which the long-term concept is based, is not yet to be found in the Ministry of Justice since it is so close to the political life, which is demonstrated in connection with those in the long-term employ of the MoJ. It is doubtful whether any useful purpose would be served if one person were present

there all the time. In addition, there is a clear risk that when Vietnam sees the costs involved, one would start from a negative position if such a relationship were to be established.

The broadly-based exposure that we are engaged in is probably quite rewarding in the Vietnamese context, where nothing is uncritically accepted. On the contrary, independent choices are made with increasing national pride. In recent years what is on offer has become considerably broader, both when it comes to multilateral and to bilateral support to the legal sector, and today there is a substantial array of choices.

Our way of working also opens possibilities of introducing controversial issues like human rights through the back door, by dealing with them in various factual areas where they occur as current issues.

Obviously one sometimes experiences the situation as a step forward and at other times as a step backwards. At the same time questions occasionally arise that make one almost fall off one's chair because they are so frank and open. One question that arose a few years ago was what would happen if there was a change of regime – where would the present leaders go? Would they be removed through the back door or could they find other work? Other examples of interesting issues raised in discussion concern the independence of both the judiciary and the public sector.

It is important to emphasise that on the Vietnamese side there is an unbelievable breadth. Among those present when we organise seminars or courses in Vietnam are usually representatives from several ministries, educational organs, courts at different levels and the office of the public prosecutor.

Language and publications

A particular problem is clearly the language. Today we usually work directly in English at our working meetings. Interpretation is usually required at larger gatherings and lectures. This sometimes creates difficulties, though the number is falling as the level has been raised considerably. A problem that looms at least as large is the bad habit of presenting and documenting information that is widely known.

A conversation can sometimes be very open-hearted and informative, but one must bear in mind that if one asks the same person to write all this down, one often gets a very vague document. There are probably several explanations. One is that the culture is not geared to reading and writing – information is largely orally transmitted. Another and equally important reason is the insight that if access to information is power and thus status, has one any incentive to share it unnecessarily?

To write documents together with Vietnamese lawyers is an unusual experience. We write and they delete. One can often learn from this and thus come to understand what is acceptable. The printed word sometimes enjoys a respect and expectations of what is true and correct – clearly it is also simpler to hold someone accountable for what they have written compared to what they have said. A little later one notices that no one is paying any attention to the printed word but is acting from a purely pragmatic perspective. Undoubtedly, many of the old traditions are preserved here.

When we began, there was virtually no literature on the Vietnamese legal system. Thus we have supported such production, mainly of textbooks, but also sector analyses.

Sometimes we have also been impressed by the actions of the Vietnamese. For instance, a brochure on legal aid was adapted to Vietnamese conditions and subsequently reproduced on their own initiative.

Competition

A feature of the Vietnamese public sector is competition rather than collaboration. The competition is to increase one's own competence and resources, both internally and externally. The various ministries and central government authorities sometimes fight for who should take responsibility for a new task and thus receive new resources. Too often the perspective is one's own welfare rather than that of the state apparatus. In the wake of new tasks comes more power and thereby a better position and greater opportunities to gain legal and illegal advantages, often in the form of corruption.

This perspective is clearly understandable in this context, where no public servant can live on his pay. In some areas in which we have worked, we have demanded that people from particular government departments and public authorities should participate – in order to ensure that they would at least know what is happening and thus seek to establish a culture of transparency, at least within the state itself.

In recent years this work has become more difficult as more donors have become involved in areas where differentials can create problems. Thus support in the area of legal information has periodically become more difficult and been delayed, sometimes because the donors are all waiting for each other. The internal Vietnamese power struggle also creates coordination problems.

Conclusions

- The work that aims at changes in the legislation, institutions and capacity building should be broad-based.
- By using a broad competence base very large contact surfaces are created, particularly as our activities involve Vietnamese participants from many different parts of the legal system.
- Interactivity and ownership – the Vietnamese formulate the problems and seek common solutions through discussion.
- The patient and confidential dialogue has facilitated inputs in sensitive areas like the rule of law and human rights.
- Cost-effective, but not long-term, and a regional approach with a great deal of expertise and field trips to the region.
- The restrictions are that our programme is directed towards the government and probably needs to be combined with or supported by assistance to civil society.
- With regard to the work, we have in the past and perhaps ought in the future to continue to increasingly focus on the administration of justice rather than the development of legislation. The need for supporting the implementation of the framework is becoming increasingly obvious.
- Because of competitiveness between the donors who are present, there may be reason to contribute to less glamorous areas that nonetheless are central, like the implementation of the judgements passed by the civil courts.

- It is important to work with the view that there is a very long time-perspective, even in those cases where the political goals are clear, which they definitely are not in the case of Vietnam. It is a question of changing a culture, and those who are not lawyers may have difficulty in understanding the implications of that.

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Appendix 3

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