

How to Note



Justice Sector Reform

1. PREFACE

The promotion of freedom, democracy and respect for human rights are key priorities in Danish development cooperation. Denmark's strategic priorities for support to democratisation and human rights identify the deepening of democracy and the realisation of human rights, as the two thematic focus areas for Danish engagement.

The purpose of this How to Note is to provide hands-on guidance and inspiration on how to put these strategic priorities into practice in Danish development cooperation.

This How to Note focuses on one particular aspect of the support to the realisation of human rights – building societies based on justice and the rule of law through support to justice sector

reform. Danish support to justice sector reform often includes support to formal and informal institutions, and to state as well as non-state actors. Further guidance on how to promote equal access to justice through informal justice systems is provided in a separate How to Note.

This Note introduces the purpose of Danish support to justice sector reform (section 2); identifies key questions to consider before initiating support to the justice sector (section 3); suggests various possible entry points for supporting justice sector reform (section 4); identifies elements common to support for justice sector reform (section 5); provides guidance on how to monitor and evaluate support for justice sector reform (section 6); and concludes with suggestions for further reading (section 7).

Danida's How to Notes provide brief technical guidance and inspiration for programming choices in Danish development cooperation. This and other How to Notes are available at www.danidadevforum.um.dk.

Contributions aimed at enhancing the content of this Note can be sent by email to the Technical Advisory Service of the Ministry of Foreign Affairs of Denmark at devforum@um.dk.

Key Messages

Danish bilateral support to justice sector reform should:

- Take the users of the justice system as its point of departure.
- Preferably be provided as an integrated part of sector-wide reform plans and processes that are based on international human rights norms and standards.
- Promote and respect the functional independence of the judiciary and of other independent institutions.
- Balance support to state, government and civil society by addressing both the demand and the supply side of justice in both the formal and informal justice systems.
- Empower individuals to claim their rights and enable their equal access to justice.

2. THE PURPOSE OF SUPPORT

The purpose of support to justice sector reform is to promote societies based on justice and the rule of law. A well-functioning justice system:

- **Promotes and protects human rights** and provides a fair and accessible system for redress where these have been violated.
- **Is based on and guarantees the rule of law.** ‘Rule of law’ refers to a principle of governance in which all people, institutions and entities (both public and private and including the state itself) are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards (Report of the Secretary General of the United Nations, S/2004/616).
- **Is central to sustained economic growth and poverty reduction.** It promotes and protects people’s livelihoods, personal and property rights, and enables everyone – including the poor and marginalised – to claim their rights and to seek compensation (both against the state and against others) where their rights have been infringed. It also provides an efficient, effective and accessible mechanism for contract enforcement, including for

the poor and disadvantaged, and contributes to creating an enabling environment for private sector development.

- **Promotes peace and security** by offering ordered methods to manage conflicts, grievances, and disputes.
- **Is vital to good governance** because it provides a framework of rules and principles that govern the relationships between the state and individuals, and between individual members of society.

3. KEY QUESTIONS TO CONSIDER

Support to justice sector reform must be based on prior context and stakeholder analysis. Key questions include:

What is the legal tradition and the current socio-political context?

Justice sector reform programmes are highly context specific. The scope and priorities of sector reform will be determined by, for example, whether the justice system is based on common law or civil law; whether the country is post conflict; whether it is transitioning from a one party system to multiparty democracy; or whether it is moving from central planning to a more open, market based economy. Other key issues to consider include:

- Specific governance constraints, for instance the extent to which constitutionally independent institutions in the sector (such as the judiciary and the prosecution service) are independent and impartial in practice, and are properly financed; and the extent to which they provide a balance against the power of the executive.
- The values and ethos of key justice sector institutions (such as the judiciary, police and the prison service). To what extent do they uphold the rule of law and human rights? To what extent is the sector influenced by corruption and controlled by entrenched interest groups? What laws and regulations exist in the field of ethical conduct and integrity and is there a system for independent enforcement of these laws and regulations?
- To what extent is there an appetite for reform in the sector?
- Who are the drivers of change in the justice sector – which individuals and institutions?

- What is the relationship between the justice sector and institutions like the security forces involved in state security?¹

Who are the users and potential users of the justice system? To what extent does the justice system provide a basic service to everyone, especially the poor and vulnerable, and what are the barriers to people accessing justice? Women, young people and other marginalised groups often find formal justice institutions inaccessible because of their geographical distance from service providers, cost, language, cultural barriers and lack of awareness. These potential users must also be considered in the analysis.

Who are the main justice providers? Formal justice institutions (such as the courts) are often perceived as largely irrelevant to the lives of most of the population. Instead, the vast majority of problems and disputes are resolved through community based, semi-formal, customary or religious mechanisms – for example by traditional leaders or vigilante groups. Sometimes these mechanisms are linked to the formal justice system through regulatory oversight or by funding from central or local government. It is therefore often not enough to focus only on formal justice institutions in justice sector reform processes.

Civil society is also involved in providing justice in various ways including as paralegal and legal aid providers, monitors and reporters of human rights violations, advocates for specific causes (such as women's rights, and as awareness raisers. They often also perform an important bridging role between the formal and informal systems of justice.

What do we understand by the justice sector? The 'justice sector' is made up of a number of actors and institutions with distinct functions that must be linked in a flow for justice to be properly delivered. The strength of the sector is equal to the strength of the weakest link, and so a co-ordinated approach is needed that includes all functions in the flow.

The justice sector is complex and cuts across all branches of government. It involves legislative, executive and judicial functions, and it involves state and non-state actors. It is therefore vital to understand the powers, roles, functional links and relationships of all of the different institutions and actors that deliver justice.

A sectoral approach to justice reform involves different levels of consultation, cooperation, communication and co-ordination between

the institutions and actors at both the operational level, and the strategic, policy, planning and resource allocation level. Key challenges for institutions seeking to work as a sector include: the need to maintain the functional independence of the judiciary and of national human rights institutions without exempting them from institutional accountability requirements; community-based dispute resolution mechanisms, paralegals and other informal justice mechanisms may not be recognized as part of the justice sector; and limited sectoral policy-making and planning capacity, including budget planning. There may be no single institution with this responsibility, or there may be several (possibly competing) bodies seeking to lead the sector – typically the Ministry of Justice, the Ministry of Internal Affairs and the Judiciary.

What is the scope of justice sector reform? The scope of the reform programme being undertaken varies from one context to another. Most justice sector reform programmes address both the criminal and civil justice systems – both of which are central to justice provision. Some reform programmes may be more limited and cover only certain institutions or functions of the system – for example, police or prison reform, or legal reform within specialised areas such as commercial law and labour law.

Administrative law may be dealt with by both public administration institutions and the judiciary and could also be the focus for reform. Examples include immigration law, land law, social welfare law, labour law, and taxation law. Sometimes justice institutions also provide administrative services such as civil registry (birth, marriage and death registration), land titling and business registration.

Public safety and security, road safety, and post conflict reconciliation processes may also be covered by justice sector reform.

What are the main justice needs of the users (the rights holders)? To develop a prioritised and well-sequenced reform agenda, the main needs and constraints facing the users of the justice system in their encounter with the formal and informal justice systems must be identified. This can be done, for example, by user and perception surveys; in conclusions and recommendations emanating from international treaty body reporting mechanisms (such as the universal periodic reviews)²; and in broader governance assessments that also address the perspective of the private sector.

¹ State security institutions include the defence forces, immigration services and internal security organisations. The police are also involved in state security and are core justice sector providers, with primary responsibility for maintaining law and order and criminal investigations. But in modern models of policing, state security should not be a core police function. Instead, these models see the police primarily as upholders of the law rather than as defenders of the state.

What is the capacity of the justice sector institutions (the duty bearers) to respond to the needs of the users? Based on the identification of the needs of the users, the capacity of the relevant institutions to meet these needs must be assessed.

Which other development partners support justice sector reform?

Development partners may have different understandings about how a justice system should work based on their own legal systems and traditions. It is, however, vital that development partners align their support to the needs and priorities of the partner country, as formulated in nationally owned sector strategies and policies. Development partners should also work to develop a joint approach to which issues to prioritise in the relevant forums for policy dialogue – based, for example, on the conclusions and recommendations of universal periodic reviews.

4. POSSIBLE ENTRY POINTS FOR SUPPORT

Context and stakeholder analyses should provide the basis for deciding whether and how to support justice sector reform. Possible entry points for support to justice sector reform include:

Supporting constitutional and legal reform. Because the constitution provides the framework within which subsequent justice sector reform can be pursued, constitutional reform processes provide a crucial entry point for addressing foundational issues related to justice and the rule of law.

Legal reform is another key entry point for support to justice sector reform. Legislation may be rather antiquated and sometimes dates back to the colonial era. The legal pluralism that characterises many developing countries (where various legal systems continue to operate) also presents specific challenges. Reform of substantive laws (such as the penal code, land law, domestic violence, family and inheritance laws), procedural laws (that determine the rules by which cases are heard by the courts) and organic laws (that define the structure, composition and functioning of the institutions that make up the sector) are therefore often warranted – also with a view to improving linkages between the formal and informal justice systems. There may also be a need for strengthening the legislative process and the technical law-making capacity in executive agencies or the parliament.

Supporting the development and implementation of national justice sector policies and plans. The development of a national vision and strategy for the justice sector – with overall reform goals, specific

targets and costed plans – provides an important entry point for addressing the challenges of the justice sector from the perspective of its users and for applying a functional rather than an institutional approach for justice sector reform.

Supporting a competitive environment for enterprise development.

Where a country has prioritised growth and competitiveness, the Ministry responsible for enterprise development (usually the Ministry of Finance or of Trade and Industry) may champion reform of the justice sector to improve the investment climate. Support in this area might include increasing the speed and efficiency of contract enforcement, developing best practice commercial laws, ensuring business registries function well and addressing particular challenges for women’s economic empowerment – such as women’s limited access to land and property rights.

As part of Vietnam’s legal commitments under the bilateral trade agreement with the United States in 2001 and its accession to the World Trade Organisation in 2006, the government was required to meet certain standards regarding legal transparency and the legislative process to establish a predictable and transparent legal environment for private businesses.

The government therefore committed to ensuring that policy consultation with key stakeholders would precede the drafting of legal documents. The entry into effect of new laws and decrees was also made conditional upon publication in the Official Gazette. These obligations had a discernible, positive effect on the population at large. For example, the percentage of draft laws and ordinances posted for citizens’ comments on the website of the National Assembly increased from 25 percent in 2004 to 92 percent in 2006.

Supporting anti-corruption strategies and plans. Anti-corruption strategies and plans often include an important element of strengthening the justice sector and thus provide potential entry points for support. For example the ratification and domestication of relevant international treaties, legal reform, capacity development of the prosecution and the judiciary to investigate, prosecute and sentence corruption cases and the development of ethical codes and supervision measures to reduce corruption within the justice sector itself.

Supporting local ‘joined up’ approaches to justice provision at the operational level. Demonstrating the benefits of moving away from a narrow institutional approach can be a good starting point for sector reform.

² The Universal Periodic Review (UPR) involves a review of the human rights records of all UN Member States once every four years. The UPR is a state-driven process under the auspices of the UN Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

Uganda's Chain Link project was a pilot scheme aimed at improving co-operation, co-ordination and communication between justice sector institutions at the local level. It began in one magisterial district and linked all key justice providers in the criminal justice system together in a Case Management Committee that held monthly meetings. After six months a 20% reduction in the remand population at the local prison had been achieved, barriers had been lowered between the agencies in the criminal justice system and 600 cases "clogging" the system were weeded out in a simplified procedure.

In addition, key policy makers were sensitised through the project to the fact that low-cost reforms and enhanced co-ordination, co-operation and communication between them could achieve significant improvements.

Supporting reform at the institutional level. Where a sectoral approach to justice reform is weak or non-existent, support to a reform-minded institution may provide opportunities to develop the reform agenda by assisting with the piloting of new approaches.

Supporting transitional justice and peace and state building. Transitional justice measures in post-conflict societies can lead to reconciliation and thus support lasting peace. The establishment of new, credible and legitimate justice delivery institutions is also key to state building processes. Transitional justice may consist of specific national legislation; truth and reconciliation bodies and schemes for seeking and obtaining redress; and traditional justice mechanisms. In some cases, international tribunals like the International Criminal Court may also be involved in the provision of transitional justice – providing another entry point for support.

5. KEY SUPPORT ELEMENTS

Guiding principles for Danish support for justice sector reform include that it should:

- **Take the users of the justice system as its point of departure.** Support for justice sector reform should begin with the needs of the poor to access justice. Specific attention should be paid to those who are excluded from or discriminated against in both informal and formal systems.
- **Be provided as an integrated part of sector-wide reform plans and processes that are locally owned and based on international human rights norms and standards.** The support should preferably be aligned to a national justice sector strategy, target both formal and informal providers of justice and cover both civil and criminal law. Although Danish support should not and cannot target all of the relevant institutions and actors making up the justice sector, support to justice sector reform is likely to entail more than one institutional entry point and to be linked to separate institutional strategies, plans and budgets – even when the support is aligned to a national and sector-wide justice sector strategy. Whether the support should be provided as institutional, sector or general budget support will, thus, depend on the national set-up and the specific conditions in place.
- **Promote and respect the functional independence of the judiciary and of other independent institutions.** Danish support should promote the separation of powers and the independence of the judiciary and of oversight institutions such as national human rights commissions. If sector-wide plans and coordination mechanisms are supported, these should pay due attention to the core functions of each participating institution without exempting them from institutional accountability requirements.
- **Provide long-term support based on realistic objectives.** Improving access to justice for poor and marginalised groups is likely to be slow and incremental. It requires not only legal and institutional reform, but also efforts to influence the cultural beliefs, social barriers and structural inequalities that limit or deny justice to these groups. It is, therefore, important to be realistic about what can be achieved in certain periods of time.
- **Be harmonised with the support of other development partners.** Danish support to informal justice systems should be provided in collaboration with, in close coordination with, or through other relevant multilateral and bilateral development partners and actors.
- **Balance support to state, government and civil society by addressing both the demand and the supply side.** The 'demand side' refers to the users of the justice system, and to those demanding protection of human rights or reform, often represented by civil society. The 'supply side' refers to those institutions, organisations and individuals that provide justice services – in both the formal and informal justice systems.
- Where relevant, **support to justice sector reform should be integrated with peace and state building processes.** The establishment of new, credible and legitimate justice delivery institutions is key to state building processes. Furthermore, transitional jus-

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tice measures in post-conflict societies can lead to reconciliation and thus support lasting peace.

- **Be harmonised with the support of other development partners.** Danish support to justice sector reform should be provided in collaboration with, in close coordination with, or through other relevant multilateral and bilateral development partners and actors.
- **Link the support to justice sector reform to the overall policy dialogue.** The success of justice sector reform is closely associated with the political will of decision-makers to effectively pursue such reforms. High level commitments are often spelled out in poverty reduction strategy plans or national development plans. With a point of departure herein development partners should ensure that justice sector concerns remain high on the agenda in the policy dialogue.

There is no single template for justice sector reform but support programmes should include a properly sequenced combination of at least some of the following *possible elements*:

Building strategic planning capacity and financial management systems across the sector. The capacity to develop a common vision for the provision of justice, and an ensuing sector strategy, tends to be weak at both the sectoral and institutional levels. A sector-wide co-coordinating mechanism may therefore need to be developed to enable the sector to work together to develop its strategic priorities and expenditure framework by prioritising across the sector. A national justice sector strategy developed by all the institutions in the sector is typically the focus of this process. On-going issues may include: ensuring an appropriate allocation of expenditure across the sector – for example balancing expenditure on the formal justice system with funding to community level justice providers; and looking for efficiency savings in investments and recurrent expenditure – including through synergies gained by operating as a sector. For example, joint training and capacity building or enhancing cooperation (resulting in the more efficient processing of cases).

Legal reform. Support for legal reform may entail support for a specific law reform commission or for the development of technical capacity within the relevant executive agencies and parliament. Law reform needs must be prioritised and sequenced paying due attention to international human rights norms and standards and to the

capacity and budget implications of reform – both in terms of human resources and infrastructure.

Expanding the provision of public defence and legal aid services. Access to public defenders and to legal aid for the poor and marginalised is often deficient and is not guaranteed by law in some countries. Support to expand the presence and accessibility of defenders and legal aid is an important means of improving access to justice. It may involve several actors including the Ministry of Justice, Legal Aid Boards, Bar Associations and civil society.

Strengthening accountability. Accountability institutions and mechanisms in the sector tend to be weak. These include codes of conduct, judicial integrity systems, internal but independent supervision and disciplinary mechanisms, national human rights institutions, agencies responsible for combating corruption, and other oversight bodies and mechanisms. Strengthening such institutions and mechanisms and ensuring a regulatory framework for effective and independent oversight should be a key element of support for justice sector reform.

Piloting new approaches to justice delivery. New models and norms for the delivery of justice are being developed internationally. Where appropriate, the exploration and piloting of such models and norms may be supported.

Examples include:

- Increased use of non-custodial sentences (such as suspended sentences and community service).
- Increased use of alternative dispute resolution (such as mediation for civil cases and court-mandated alternative dispute resolution).
- The establishment of integrated ‘justice houses’ at district level (with due attention to the separation of powers). These ‘houses’ gather several justice provision services (including legal aid, legal defence, registrars, prosecutors and judges) into one place to make it easier for people to access them,
- Liberalisation of the legal profession to abolish lawyers’ monopoly on the supply of legal services. This includes enabling paralegals and other service suppliers to provide legal services within boundaries established by law or regulation.

- De-formalising legal procedures. For example, hearing cases in prisons and establishing travelling task forces to identify and finalise expired cases and reduce the case-backlog.
- Victim focused approaches. These include the development of family protection units within the police to combat domestic violence, child abuse and sexual assault.
- Community policing where the police work in partnership with local communities to address crime.
- Improved regulation of non-state justice or security providers and of the legal profession.

Supporting change management. Justice Sector reform may involve substantial change to institutions, to the way they relate to other institutions in the Sector and to users. Such fundamental institutional reform requires careful change management.

Supporting human resource policies and development. The development of policies that attract and retain qualified staff, and that provide safeguards for the integrity and independence of the judiciary and oversight institutions, is crucial for the sustainability and impact of justice sector reform. This applies, for example, to policies related to recruitment, promotions, deployment and salary structure. Such policies should be part of, or complementary to, wider public sector or civil service reform.

The technical capacity in the core functions in the justice sector is often rather low. With a view to improving the quality of justice service delivery, the improvement of professional standards might include support to police academies and judicial training institutes for the different staff categories involved (judges, prosecutors, public defenders, registrars and so on).

Enhancing the efficiency of the sector. Legal reform and the training of justice providers may by themselves contribute to increasing the efficiency of the sector – for example, by reducing the time taken to process cases and, thus, the case backlog. However, other measures are often required too, including the development and introduction of modernised and computerised procedures, processes and tools at the intra- and inter-institutional level.

Expanding the presence of formal justice sector institutions. Access to justice requires the relevant institutions to be available and close to the users. An increase in the presence of justice sector institutions throughout the country may therefore also be warranted. The rate of expansion and the geographical prioritisation is context specific. But innovative models for low cost and integrated infrastructure solutions may prove beneficial, with all of the necessary services of the core institutions present, interlinked and able to respond to the users' needs.

Supporting civil society to empower individuals to claim their rights and enable their equal access to justice. Civil society plays an important role in justice sector reform. Support can be provided to enable civil society organisations to fulfil one or more of the following functions: contributing to accountability – for example, by monitoring and reporting on human rights abuses and on the progress of justice sector reform; representing the interests of particular groups like women, children and people with disabilities; directly providing justice services – like legal aid or paralegal services; supporting the capacity development of state institutions – for example, by providing human rights training and capacity building for the police; acting as advocates and lobbyists for, amongst other things, laws on domestic violence or land reform; and raising awareness of people's rights through media and other campaigns.

Mainstreaming gender. Women face particular challenges in accessing justice. Worldwide, as many as one in three women are beaten, coerced into sex or otherwise abused in their lifetime.³ Women are also more likely than men to be denied property rights. Yet women are less likely than men to have access to justice, and may be subject to unhelpful attitudes on the part of justice providers – including the police, community leaders and judges. The challenges facing women's access to justice can be addressed, for instance: through legislation – such as laws that criminalize domestic violence and that enhance women's property rights; in the institutions in the sector – for example, by establishing specific services (such as police protection units) to address serious problems facing women; by training and awareness raising programmes for justice providers to sensitise them to particular challenges facing women; and in staff policies aimed at increasing female representation within justice sector institutions (such as police officers, magistrates and judges).

Mainstreaming human rights. International human rights obligations and recommendations from treaty bodies are instrumental for determining priorities and sequencing in justice sector reform.

3 UNIFEM, (2009), *Violence against Women Worldwide*, Fact sheet.

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Support can be provided to promote the ratification of international human rights treaties and their translation into domestic law, to human rights training for justice sector operators and informal justice service providers, to awareness raising and to periodic treaty reporting – both state reporting and shadow reporting by civil society.

Building public awareness and engagement. Supporting state and non-state actors to engage with the public (the users) in the reform process, and to develop and implement communication strategies, can help build consensus for reform and strengthen public confidence in the sector and in the rule of law.

6. MONITORING AND EVALUATION

Because the justice sector involves a large number of institutions and potentially has a wide variety of possible priorities and reform agendas, being clear from the beginning about what the reforms are intended to achieve is critical. If possible all institutions at the sectoral level should agree to specific, quantifiable targets. And ideally, the number of outcomes and targets should be limited.

It is likely that the delivery of most targets (such as speeding up the processing of criminal cases) will involve sector-wide cooperation and co-ordination. Developing targets at the sectoral (rather than

institutional) level may necessitate putting in place new systems for collecting information and data, and developing new means of measuring and verification (such as perception surveys). The sectoral monitoring and evaluation framework should ideally be developed within the context of the country's over-arching justice sector strategy or the Poverty Reduction Strategy Paper or National Development Plan.

When developing a monitoring and evaluation framework and identifying targets and performance indicators, careful consideration should be given to what information is collected and what data is actually available in the sector. Particularly in post conflict and fragile states, even basic information such as the number of cases pending may not be available. Care must also be taken to ensure that performance indicators measure the right thing – for example, a better performing justice sector may result in reported crime levels going up as people become more confident in using the system.

A wide range of instruments have been developed that can assist in setting indicators including by the Vera Institute, the World Bank, the American Bar Association and the Danish Institute for Human Rights.

7. FURTHER READING

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World Bank Justice for the Poor - www.worldbank.org/justiceforthe poor