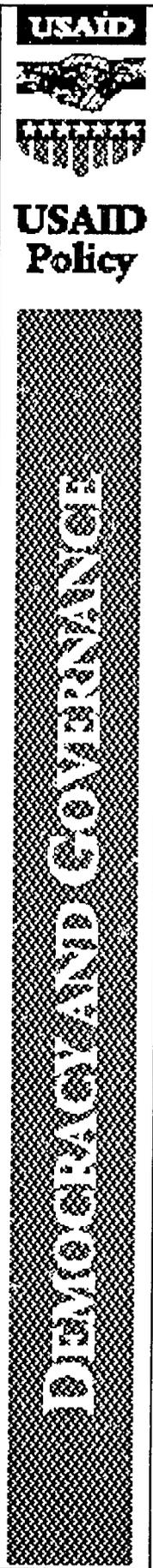


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DEMOCRACY AND GOVERNANCE POLICY PAPER #1*

February 27, 1995

Topic: Policy and Implementation Options for Rule of Law in USAID

Note From the Administrator --
Policy Working Papers

From time to time, I will be sharing with you some of the thinking of senior Agency leadership on key policy issues and major USAID program areas. These periodic policy working papers will outline the way we are approaching USAID activities. They will include some of the questions we will be asking about planning country and global programs, and issues that we expect you will address as you develop USAID strategic plans and specific programs.

This is the first in this series of working papers. The subject is USAID efforts to promote respect for the rule of law. This is a key element in our overall approach to sustainable development and is critical to our democratization strategy. As a result of experience gained during the past decade, USAID is the leading donor in the design and implementation of rule of law programs that stress democratic values and respect for fundamental human rights. This is a standard that I intend to maintain.

The attached memorandum summarizes our current thinking about USAID efforts in the rule of law area.

* The Democracy and Governance Policy Paper is one of a series of papers that will be disseminated several times annually by the Bureau for Policy and Program Coordination to inform USAID personnel of latest USAID policy in Democracy and Governance.

INFORMATION MEMORANDUM FOR THE USAID SENIOR STAFF

FROM: Rule of Law Working Group

SUBJECT: Policy and Implementation Options for Rule of Law Programs in USAID

OVERVIEW

In October 1993, a five-person Rule of Law Working Group (ROLWG) initiated a policy review of USAID activities in the rule of law sector.¹ Responding to concerns raised during a congressional hearing the previous month, the ROLWG considered issues relating to host government commitment, human rights and inter-agency coordination. The group also conducted an inventory of programs, examined recent program evaluations, considered program design and implementation criteria, and identified interagency and donor coordination issues.

This memorandum presents the ROLWG's conclusions regarding USAID programming in this sector. The memorandum also identifies a number of issues requiring further discussion and policy decisions by USAID senior staff and, in some instances, by an inter-agency process.

BACKGROUND

Since the mid-1980s, USAID has committed more than \$220 million in resources to rule of law programming. While many of these programs have been quite successful, some aspects of the programs have been criticized by congressional oversight committees and human rights organizations, among others.

The General Accounting Office (GAO) in a September 1993 report identified several specific criticisms. Regarding the Latin American program, the GAO offered the following comments: 1) implementing programs without a host country political commitment narrows the sustainability of the work; 2) taking a narrow technical and institutional approach has

¹ The working group included: Larry Garber, PPC/OSA; Gary Hansen, PPC/CDIE; Keith Henderson, ENI/Rule of Law Adviser; Debra McFarland, LAC/DI; and Johanna Mendelson, LAC/DI.

limited impact; 3) obtaining total US Embassy support is essential for effective program management; 4) program management is hampered by the lack of experienced staff; and 5) impact evaluations are important for sound management decisions. In Eastern Europe, the same GAO report concluded that USAID had not learned from its experience in Latin America, that the agency focussed on short-term technical requirements without fully assessing needs or formulating long-term goals and objectives, and that programming was initiated without identifying clearly defined lines of authority and responsibility among the participating agencies and embassies.

In September 1993, the House Foreign Affairs Committee (HFAC) held hearings on US government rule of law/administration of justice programs. Many members, including Chairman Hamilton, expressed concern about the lack of effective coordination among the participating US Government agencies: USAID, Departments of State and Justice and United States Information Agency. The agencies responded that a new Interagency Working Group on Democracy and Human Rights would soon be established and would provide the necessary policy coordination. At that time, Chairman Hamilton indicated that he would convene a follow-up hearing to review progress on the coordination issues. We have subsequently heard that HFAC has prepared draft legislation on Rule of Law programs for inclusion in new foreign assistance legislation and is planning follow-on hearings in the fall of 1994.

FINDINGS/CONCLUSIONS

The following summarizes the findings and conclusions of the Rule of Law Working Group (ROLWG).

1. Inventory

The inventory verified that Latin America is in the forefront with diverse and active programs in virtually all countries, followed by Africa, Asia, Eastern Europe and the Near East. Program funding in the NIS region, however, will quickly eclipse that in most other regions given the level of effort of recently let contracts. Most regions designate their programs as supportive of democracy building goals, but economic development goals are also identified as the objective of some rule of law programs; this is most clearly the case in the NIS region.

Latin American programs tend to focus on promoting judicial independence, with secondary objectives of efficiency and effectiveness; newer programs add elements of increased access and accountability. Eastern European programs support the objectives of fairness and equality through the development of new laws, constitutions and procedures. In Africa, efficiency and effectiveness, followed by increased access, equality and fairness, are generally identified as program objectives. The NIS concentrates on two objectives: judicial independence and equality/fairness.

2. Program Impact

USAID can attribute impact in a number of areas directly to agency funded interventions.

- Strengthened *judicial independence* with the introduction of judicial career mechanisms.
- Improved *efficiency and effectiveness* of justice sector institutions through case tracking, professional training and modern management practices.
- Increased *access to justice* through the expansion of public defender programs, legal aid and introduction of alternative dispute resolution mechanisms.
- Enhanced *equality and fairness* through law reform and drafting of new constitutions with greater guarantees for due process and protection of rights;
- Greater *accountability and transparency* resulting from court watch programs, media assistance and other NGO efforts; and
- Better *police and investigative services* as a result of the activities of the Department of Justice's ICITAP program, which operates with USAID funding in Latin America.

In addition, USAID rule of law programs have had collateral benefits for other USG objectives. For instance, improving prosecutorial systems through the introduction of oral, adversarial criminal procedures has positive spin off effects for USG counter-narcotics program objectives. In some circumstances however, attributing improvements to specific USAID interventions is quite difficult (*e.g.*, improving court efficiency as a consequence of providing computers and other equipment).

3. Criteria for Assessing Country and Program Priorities

Determining whether a host government possesses the requisite political will to justify USAID programs in the justice sector remains the most significant issue in rule of law programs. Without host government support, long term sustainability of USAID funded programs are jeopardized. Thus, the ROLWG sought to identify specific criteria to assist USAID in making these determinations and considered various sources of information upon which to base these decisions. It also reviewed the circumstances under which active rule of law programs should be suspended.

The working group determined that the issue of program sustainability and its relation to other development objectives was critically important. In this respect, an objective analysis of the level of political/legal development in the country and the constraints to

justice sector reform should be carried out before program implementation. Based on this analysis, a decision should be reached as to the perceived commitment to reform. This analysis, along with a technical assessment of the justice sector, should be used to determine the appropriate mix of program interventions.

The following criteria should be used to assess political commitment, the current state of political/legal development and constraints to reform:

- the degree of support (or lack thereof) for reform among elite groups such as the supreme court magistrates, legislators, and other executive branch officials;
- the existence of (or lack thereof) a reformist constituency among professional associations and interested NGOs;
- the level of judicial independence (or lack thereof) from other branches of government, political parties, and/or military and police;
- the level of perceived honesty (or lack thereof) of judicial personnel and accountability within the system; and
- the level of resources (or lack thereof) provided overall to the justice system as compared to other budgetary requirements such as military spending.

Other essential elements to consider in assessing host country commitment to reform are: the human rights environment; the ratification of international human rights covenants; and the willingness of a government to permit on-site investigation by intergovernmental organizations and human rights NGOs.

The annual human rights report prepared by the Department of State provides an overall assessment of human rights conditions worldwide. The State Department report, as supplemented by reports of NGOs, provides the foundation for assessing the specific human rights performance of any given government. The report also includes an evaluation of judicial independence, access to legal assistance, status of due process rights and constitutional norms in each country considered. In relying on this report as a basis of determining political commitment, USAID should explore with the State Department, or develop on its own as is done in the Africa Bureau, the use of more quantitative reporting indicators so that changes can be tracked over time. Research on appropriate quantitative and qualitative indicators will be carried out by the Agency's Democracy and Governance Center.

The proposed list of criteria tracks with the approach outlined in a recent CDIE assessment on ROL programs (see below). The CDIE assessment identifies the potential for support and/or opposition from political elites and organized constituencies -- such as bar associations, law faculties, and NGOs -- as the most important factors to consider in making

investment decisions. Other critical factors include judicial independence, levels of corruption, media freedom, and donor leverage.

In the same vein, although more difficult, criteria also are required for determining when and how to close down a rule of law program. Usually, some political event (*e.g.*, the overthrow of a democratically elected government) serves as the basis for such actions. USAID should also reconsider expending scarce resources for approved programs where host country support is not forthcoming.

In summary, where there is no willingness to support judicial reform, or where the non-governmental community is denied access to government institutions, government-to-government assistance simply should not be provided without a change in conditions. Assistance to and through NGOs, however, may still be provided. On an exceptional basis, and, if appropriate to facilitate dialogue with the government and to foster greater awareness for reform, highly specific, short term pilot projects with the government may be undertaken.

4. Strategic Framework

In 1992-93, CDIE conducted an assessment of recent rule of law programs, reviewing activities in six Latin American and Asian countries. The report was the focus of a discussion with interested US government agencies, NGOs and academics in February 1994, and with field personnel during the first USAID Global Rule of Law Conference held in July 1994.

In the view of the ROLWG, the most practical aspect of the report is the development of a strategic framework for setting ROL priorities and designing country programs. The strategic framework identifies the most essential need as host country political leadership support. If this support is lacking or weak and fragmented, a program focussing on "*coalition and/or constituency building strategies*" is called for to build political will and public pressure for reform. Program elements would include support for the media in investigative journalism, anti-corruption campaigns, and/or other mechanisms to elicit public support and dialogue on the issues of judicial reform. Various education and training programs, along with observational visits, also are helpful in this context.

Where political support exists, program designers should analyze whether the legal system structures are adequate. If not, ROL programs may emphasize "*structural reform strategies*", which include budgetary autonomy, restructured processes and procedures such as judicial review, adversarial procedures, alternative dispute resolution and judicial career services. This is similar to the approach in several Latin American programs.

The next level of program review, given adequate political commitment and equitable legal structures, is to examine the performance of the legal system. In many circumstances, the appropriate focus for donors is on "*access creation strategies*" such as legal aid, court watch programs and alternative dispute resolution. Programs would be designed to empower

those groups and individuals that are disadvantaged and do not have guarantees of due process. While not specifically covered in the assessment, gender issues such as women's access to justice and the role of women in the legal system should be strongly considered in this approach.

The final level of assessment focusses on "*state building strategies*", which involves the institutional capacity of existing legal structures to perform their intended functions. Many traditional USAID program elements such as improved court administration and human resource development through training for judicial sector personnel are included in this approach. Other possible approaches to address this strategy include programs to enhance the functioning of law schools and bar associations.

While generally praised, the report generated some controversy among field practitioners during the July 1994 conference. Field officers questioned the selection of countries and projects and the evaluators' criteria for determining a successful effort. Mostly, field officers were leery of the report being used improperly as a prescriptive tool for determining project components, hampering creativity and country specific solutions and being used inappropriately by the IG and/or GAO as the basis for evaluating projects and programs.

In reviewing the comments prepared by the field officers, the ROLWG concur that the strategic framework should not be applied in a prescriptive manner. Rather, it should be used by the field to fully consider various options and approaches to building sustainable reform programs. In order to do this, field personnel require on-the-job training, easy access to expert advice to conduct the required analyses, information on successful approaches and a compendium of program indicators to track overtime. It is anticipated that these tools will be provided by the Democracy and Governance Center and by PPC/CDIE.

The ROLWG concurs that the strategic framework developed by CDIE provides useful guideposts for USAID and US Embassy personnel in developing rule of law program components. While USAID/W will review future rule of law programs with reference to the framework, deviations from the framework are anticipated in accordance with the specific country situation. These deviations should be articulated and justified in the mission strategy or the program design document. Further, USAID/W will review the framework to incorporate lessons from on-going programs.

5. Performance Measurement

USAID's mandate of sustainable development can best be achieved by selecting a long-term approach. However, recognizing that the impetus for sustaining the reform effort must come directly from the host country and that there are pressures within the US to demonstrate results, USAID must set realistic short, medium and long-term goals to measure success based on a continuum of reform.

In the short term, USAID should consider forward movement in the reform process as an indicator of success. Similarly, the strengthening of the judicial system is only one factor in the broader goal of creating strong institutions of governance that can provide a base for democratic growth. A coherent set of performance standards related to specific objectives and accomplishments can and should be developed.

Within rule of law programs, performance measures can be developed and applied to the accepted principles of judicial independence, access to justice, equality and fairness, expedition and timeliness, accountability, public trust and confidence. Justice sector institutions must be encouraged to develop their own performance standards and, given the tools, held responsible for data collection. On the other hand, work with local NGOs will have to be assessed by broader measures of public opinion polling and political behavior indices.

6. Inter Agency Issues

The ROLWG identified several issues relating to how USAID interacts with other US Government agencies. The ROLWG strongly supports enhanced interagency coordination. Each agency involved in this sector has useful skills that can be brought to bear on the common agenda of strengthening democracies through ROL programming. USAID programming should generally utilize the sustainable development paradigm rather than focus on short term political and/or law enforcement interests (although there will be times when USAID can and should support these types of programs).

A major concern with USAID ROL programs is the convergence of interests with law enforcement programs. In transition countries, there is often a breakdown of public security and increase in common crime leading to a crisis of public confidence in a fragile government. Police and other law enforcement agencies in host countries are often ill-equipped to deal with these issues, given the low level of police prestige, lack of resources and other institutional constraints. At the same time, these institutions are often corrupt and abusive, and US government support to these institutions may be wasted or misused.

The ROLWG favors direct US government involvement in police assistance issues as it relates to improving the overall justice system and assuming human rights and accountability safeguards are in place. While State/INM and the Department of Justice clearly have the lead on law enforcement programs that relate to the US domestic agenda, they do not necessarily support sustainable development objectives. Thus, under appropriate circumstances, USAID should be willing to provide appropriate assistance to police and other law enforcement organizations. The ROLWG, together with others agency personnel, is preparing an options paper for senior staff review on the future role of USAID in police assistance programs. A follow-up memorandum will provide details on USAID policy in this area.

7. Donor Coordination

To date, USAID has been the lead donor in most ROL programs. The depth of the problems countries face in providing an equitable and fair system of justice, however, far outstrips USAID's resources and capacity to respond. The Agency must now share its experiences with the donor community and fashion effective donor coordination by identifying priority countries and developing mechanisms for co-financing of programs and projects. The May 1994 meeting of the DAC working group on Popular Participation and Good Governance, for example, provided an opportunity for USAID to share the CDIE rule of law assessment and to describe the strategic framework contained therein with interested donors

USAID's strength lies in its in-country presence, which should be used to establish and build coalitions and constituencies for reform, to identify key policy issues and to initiate demonstration and pilot programs. Some of the follow-on activities can be undertaken by donors with the resources to sponsor large scale efforts. Latin America, where the IDB and the World Bank have expressed an interest in funding judicial reform, is an ideal laboratory for enhanced donor coordination.

CONCLUSION

ROL should be a priority program within USAID's strengthening democracy strategic objectives. However, to achieve greater coherence within the program, the Agency will need to operationalize the strategic framework outlined above and continue to provide USAID personnel with the opportunities for training in the substantive areas of rule of law and more specifically on the application of the strategic framework. The First Global Rule of Law Conference held this past July provided a critical opportunity for developing a more coherent approach to Rule of Law programming.