

Aid law wars: lawyers v. scandal- mongers

by Robin Davies

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Who knew the dry-seeming topic of aid law would ignite a debate? Jo Spratt — an Australian National University colleague and self-described aid law enthusiast — has written a [spirited critique](#) of a recent Development Policy Centre [policy brief](#) [pdf] and related [blog post](#), co-authored by me and Camilla Burkot, on the uses of aid law.^[1] This post responds.

Jo describes the policy brief, fairly enough, as generally lukewarm about aid law.^[2] However, I am not persuaded that its specific recommendations for legislative action are, as she says, ‘unambitious and unrealistic’. On the contrary, I believe legislating for scrutiny is eminently realistic, yet no empty gesture. And, if ambition in this arena is wanting aid to be effectively applied to development ends, then I think legislating for scrutiny is a much better way of realising that ambition than trying to outlaw the use of aid for ‘non-development’ purposes.

Jo makes four main points, namely that (a) the infamous case of the Pergau Dam demonstrates the potential impact of aid legislation, (b) the policy brief failed to acknowledge the value of aid legislation as a normative and accountability framework, (c) restricting aid legislation to more or less apolitical matters ignores the political nature of aid, and (d) above all, legislation could and should limit the use of aid for ‘non-development’ purposes. These points are tackled in two bites below, with Pergau occupying the first bite.

The Pergau Dam affair — no advertisement for aid law

Jo pings the policy brief for having omitted to mention the [Pergau Dam affair](#), a unique and momentous episode in the history of British aid. It is in fact hard to discuss Pergau at all without going into some depth; the case and its consequences have consumed a great deal of other people’s ink. For one useful discussion, see

this Center for Global Development (CGD) [event summary and video](#) featuring Sir Tim Lankester, the upright British civil servant at the centre of the storm.^[3] The Pergau case is certainly instructive. However, it is often misunderstood and, considered carefully, speaks for the value of scandal rather than the value of purpose-related aid legislation.

I will cut a long story as short as I can. In 1994, UK government funding for the Pergau Hydroelectric Power Project in Malaysia — the largest UK aid project at that time — was challenged in the High Court by a small NGO, the World Development Movement (WDM). The funding of £234 million was a *quid pro quo* for Malaysia's purchase of £1.3 billion worth of military aircraft and frigates from the UK, pursuant to a shady bilateral agreement dating back to 1988.^[4] The project had been judged uneconomic by the UK's Overseas Development Administration, because power could be generated more cheaply by means of gas turbines. Lankester, the Administration's Permanent Secretary, had clearly advised his minister so.

The plaintiff's challenge was based on the purpose clause of the [1980 UK aid legislation](#) [pdf] in force at that time, which stated:

The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.

The possibility of a legal challenge of the kind mounted by WDM was not among the wildest imaginings of the British government. The understanding had always been that, under the above clause, it was up to the Secretary of State to form an opinion as to whether a project was of sufficient economic benefit.^[5] The legislation, after all, does not explicitly limit the minister's financing power to economically 'sound' assistance.

However, the two justices of the High Court who heard the case, Rose and Baker, accepted WDM's contention that the Secretary of State's power should be understood to be limited to the provision of assistance for economically sound projects, and upheld the challenge. Subsequently, the UK government returned about £10 million pounds to the aid budget, representing the amount spent on the project during the financial year of the judgement, and met the balance of its

obligations to Malaysia (some 90% of UK's total commitment) from non-aid sources.^[6]

The key thing to note about the court's decision is that it rested upon just two points. One was strong evidence that the project was uneconomic. The other was an interpretation of the legislation according to which the minister could only allocate aid funds to economically sound projects. In other words, the intrusion of non-development objectives — via the link to arms sales — was not a relevant consideration for the court. As Justice Baker **said** in his judgement,

When the decision was made in July 1991, there was nothing in aid terms to justify the use of public money for the Pergau project. The Secretary of State's power to provide financial assistance under section 1(1) of the 1980 Act was not triggered. Had it been, that would have brought into play the opportunity for the Secretary of State to take into account political and wider economic considerations, such as British commercial interests. But it was not.

In other words, if the project had been a decent one from an economic perspective then the plaintiff's case would have been thrown out, regardless of the noisome link to arms sales. The plaintiff won because the court, in what can reasonably be described as an instance of judicial activism, took upon itself the power of determining what is an economically sound use of aid funds.^[7] That the UK government had not anticipated this outcome is quite understandable.

In short, Pergau should not be understood as a case of aid legislation working as intended to ensure aid funds were used only in the service of development objectives. Rather, it was a case of apparently toothless (or, as Jo says, 'lacklustre') legislation being interpreted in a surprising way to ensure aid funds were not used to finance an uneconomic project.

One might argue that the legislation should have been written as it was later interpreted by the court, to require the use of aid funds only for sound projects. But do we really want the judiciary to be arbitrating competing assessments of the cost-effectiveness of aid projects? In the case of Pergau, the facts were at least clear enough; Lankester had already advised the minister in writing that the project was a bad buy. In many other cases, determining the most cost-effective way of achieving

an given end is a matter of fine judgement.

It is noteworthy that the umbrella aid legislation now in force in the UK, enacted in 2002, jumps the other way, explicitly depriving the judiciary of the discretion exercised by the court in the Pergau case:

The Secretary of State may provide any person or body with development assistance if he [or she] is satisfied [emphasis and gender balance added] that the provision of the assistance is likely to contribute to a reduction in poverty.

The lesson of the Pergau affair is that scandal brings about change, not that purpose-related aid legislation does. The UK government was already in **all kinds of trouble** about the matter before WDM's legal challenge. The High Court loss was particularly newsworthy and humiliating but, even without this, it seems highly unlikely the government would or could have persisted in supporting the project with aid funds.

The key development in the whole Pergau Dam saga was really the revelation of Lankester's advice to his minister, which happened in the course of a 1993 National Audit Office inquiry and subsequent Public Accounts Committee hearings. This reinforces the point made in the policy brief: scrutiny is the high road to effectiveness. As Lankester said in the CGD panel discussion linked above, 'greater transparency when the deal was being made would have stopped it in its tracks'. We should not need or want lawyers to ward off uneconomic projects; scandal-mongers and other scrutineers exist to take care of that.

It's worth making a final point under this heading. Jo says that the UK government 'had to pay back' the full cost of the Pergau project to the aid program. In fact, the court had no power under the legislation to impose this or any other penalty and, as noted above, the government itself voluntarily reimbursed the aid program only for £10 million in expenses incurred during the financial year of the decision, which represented about half of the amount spent up to that time. This reflects the fact that a government cannot sensibly be fined or otherwise sanctioned for failing to act as aid law dictates.^[8] The only realistic penalties for breaches of aid law are the same as those for breaches of policy commitments: governments' reputations are dented, and ministers occasionally resign in ignominy.

The policy brief took the view that general aid legislation does too little work to justify its existence. Jo, by contrast, suggests that by providing a normative and accountability framework, general aid legislation is surely doing useful work even where it is not enabling Pergau-style legal challenges. To think otherwise, she says, is to miss the point of legislation.

The quickest response to this is to ask: what, then, is the point of policy? Governments are elected on policy platforms, and elaborate other policies while in office. They are accountable for the quality of these policies and their implementation in the parliament, in the court of public opinion and ultimately at the ballot box. Would this accountability somehow be strengthened by writing all policy into law? On the contrary, solidifying too much policy into law runs the risk that accountability to voters and their representatives for policy commitments will be conflated with accountability to judges for compliance with the law.

There is, as was argued in the policy brief, specific and feasible work for aid legislation to do in obliging governments to implement aid policy transparently and with appropriate attention to evaluation. Courts can, if necessary, order information to be released or evaluations undertaken. But there is no additional work for aid law to do in promoting democratic accountability for the array of policy commitments that governments typically make in relation to the allocation of aid or indeed, *pace* the relevant UK legislation, the volume of aid.

Jo sees a further role for aid law in embedding the pillars of good aid policy — as defined by the government in power — so as to discourage or hinder policy change by subsequent governments. Aid, she argues, is as political as various other areas of policy, so why not use legislation to lock in aid objectives, priorities and so on? This is consistent with the idea that aid law could provide a normative and accountability framework, but adds the notion that the framework might, at least to some extent, be politically partisan.

In other contested areas of policy, however, legislation is usually only invoked by Australian governments where it is needed to create statutory bodies or constrain the actions of non-government entities.^[9] Legislating a government's own aid objectives and priorities, I still believe, can only have one of two outcomes: those objectives and priorities will be vacuous, or aid will become even more of a political football than it often is. Should a government legislate also the objectives and priorities of its foreign, trade or defence policies? It is hard to see what would be gained by doing so, and easier to see what might be lost. Policy is surely political enough.

Mindful still of the Pergau case, Jo concludes by suggesting that the main value of aid legislation consists in limiting governments' scope to use aid for non-development purposes.^[10] But, as should be plain from the above examination of Pergau, it is difficult in practice to see how legislation could ever do that. The legislation on which the Pergau judgement was based did not exclude the use of aid for 'political and wider economic' ends, even as interpreted by the High Court.

Looking closer to home, consider the aid sweeteners provided by Australia to countries such as Papua New Guinea and Cambodia in connection with refugee resettlement deals. In a very clear sense, these allocations were made for non-development reasons. They are undeniably dodgy. Yet the money, having been allocated, is being spend on quite ordinary aid activities in countries that can well use plenty of aid. So, in an equally clear sense, the funding is being used for development purposes.^[11] Should aid allocations with dodgy motivations or objectives be outlawed even where the projects financed are fine from a development perspective? If so, how on earth, in a judicial context, would 'dodgy' be defined and dodginess proven?

In sum, the Pergau Dam affair raises interesting points, but it does not support a case for purpose-related aid legislation. It shows rather that a good scandal can bring about beneficial change, and further that well-constructed mechanisms of democratic accountability will generate scandal, or at least effective criticism, where it deserves to be generated. There is a specific place for aid law in ensuring the existence and effective operation of certain such mechanisms. But in general there is no need for governments to be accountable to judges when they are already accountable to voters. The dodgy use of aid is a matter for scandal-mongers, not lawyers.

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[1] See also [this update](#) on US legislation.

[2] In fact, this author was once downright cold about aid law before developing warmer feelings about legislation of a specific (scrutineering) type.

[3] Jo provided a link to Owen Barder's summary of the case in the appendix of [this working paper](#). Tim Lankester gives a fuller account in a [book](#) published in 2012.

[4] The aid commitment was originally set at 20% of the value of the relevant defence contracts.

- [5] Lankester discusses this in his book on the affair.
- [6] The UK government also ceased aid funding for several other projects considered likely to be vulnerable to legal challenge on the same grounds.
- [7] The court's perceived blurring of 'the distinction between politics and law' in the Pergau case was criticised by the conservative British Supreme Court judge Lord Sumption in [his 2011 F.A. Mann Lecture](#).
- [8] The point is further illustrated by the UK's current [ODA target legislation](#), which says that if the Secretary of State fails to meet the legislated 0.7% ODA/GNI expenditure target in a given year, he or she must provide the parliament with an explanation and an account of steps to be taken to return to the target level in the subsequent reporting year — not exactly 25 years with hard labour.
- [9] In the extremely contested area of climate change mitigation, for example, legislation has been used to impose a price on carbon emissions (repealed in 2014) and to create the Clean Energy Finance Corporation (repeal so far blocked in the Senate).
- [10] Given that the OECD's Official Development Assistance reporting directives already establish basic limitations on the use of aid, for example ruling out assistance to military forces, the concern here is the use of aid for technically eligible but morally questionable purposes.
- [11] One can attempt to distinguish between the motivations for aid and the objectives of aid, [as the Hollway review did](#), but the distinction is tricky to maintain. Ultimately, it is more straightforward to say that Australia has both a specific development motivation/objective and an ulterior foreign policy motivation/objective for financing certain aid activities in Cambodia, namely those financed with the aid sweetener.

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Link: <https://devpolicy.org/aid-law-wars-lawyers-v-scandal-mongers-20160722/>