RULE OF LAW, JUSTICE SECTOR REFORMS AND DEVELOPMENT COOPERATION

SDC CONCEPT PAPER

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Concept Paper

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Rule of Law, Justice Sector Reforms and Development Cooperation – an SDC Concept Paper

Abstract

Like other donors, SDC has dealt with rule of law issues for years. In several countries, SDC supports judicial reform and the improvement of the legal framework for economic and social development. This concept paper aims to provide information and guidance to SDC's staff and partners at headquarters and in partner countries. The concept paper begins by identifying the essential elements of the rule of law. Although there is no internationally accepted definition of the rule of law, key elements generally include: non-discrimination and equality before the law, the hierarchy of norms, and the substantive coherence of the legal framework, the government is bound by law, the separation of powers, the independence and impartiality of the judiciary, and respect for human rights.

The rule of law is interlinked with other concepts used in international cooperation: the rule of law is a means to realize human rights and gender equality, a key element for good governance, decentralization, poverty reduction, economic development, and peace building. Depending on these different perspectives, the concept is multicoloured, and it results in different and sometimes even conflicting approaches to and priorities for legal and judicial reforms. SDC will use the rule of law concept as a means to realize human rights, and implement its principles with flexibility, taking into account the relevant context, and potential entry points for cooperation.

Part two of this concept paper looks at the growing trend to include the rule of law dimension in legal and judicial reform projects. The performance of judicial institutions depends not just on operational efficiency, but also on their accessibility to vulnerable groups and effectiveness in realizing human rights. Justice sector reforms are increasingly seen from a systemic perspective, as a series of interconnected institutions and procedures to be analysed and improved. Moreover, legal and judicial systems are not restricted to formal, "modern" laws and institutions: they include informal and traditional law and procedures.

Part three provides illustrative examples of SDC's engagement and experience involving the rule of law dimension both in legal and judicial reform and in other areas of development cooperation. The examples show that the legal dimension of development can be addressed in a variety of contexts and manners with different partners and entry points.

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Introduction

Together with peace, human rights and democracy, the rule of law forms part of the main values and goals of Swiss foreign policy. Since the early 1990s - and confirmed in 2000 by the new Federal Constitution - the promotion of human rights, democracy and the rule of law is one of its five explicit objectives.

While the constitution treats the rule of law as a value per se, it is also an important means to realize human rights and democracy. It is one of the key elements of good governance, defining how public affairs should be managed in a country. Good governance and the rule of law enable the State to ensure peaceful coexistence among all social groups, a secure and decent quality of life, and to realise human rights for all. The law is one of the key instruments of the State in its exercise of power. The rule of law defines and legitimises the behaviour of State authorities and their relationship with citizens. It establishes rules for access to resources and for political, economic and social interaction. Like other donors, SDC has dealt with rule of law issues for years. In several countries, SDC supports judicial reform. In 1999, SDC published a rule of law paper, explaining the concept to SDC's staff and partners. SDC's Strategy 2010 refers to the rule of law as an explicit operational focus of SDC's thematic priority of good governance. After a thorough portfolio analysis, SDC decided in 2006 to consider rule of law and democratisation, including questions of State reform, decentralization, economic governance, human rights and justice systems, in its ten thematic priorities for the future. It identified gender equality and governance as crosscutting themes for all its activities. SDC's strategic choice is to foster good governance both as a sector and as a transversal theme. Based on the Roadmap for the Implementation of Transversal Themes, the implementation guide on Governance as a Transversal Theme, which was published in 2007, provides a list of guiding questions for SDC's operational personnel, and an orientation for promoting the rule of law.

In 2005, an evaluation of SDC's human rights guidelines and its rule of law paper revealed a need to clarify and update SDC's position. A revised human rights policy was issued in 2006. This updated rule of law concept paper takes into account the lessons learned in the field, reflecting recent trends and priorities in development cooperation.

The concept paper aims to provide information and guidance to SDC's staff and partners at headquarters and in partner countries. Part one of the paper identifies the essential elements of the rule of law. Part two illustrates the growing trend to include the rule of law dimension in legal and judicial reform projects and programmes. Part three illustrates the rule of law dimension in legal and judicial reform and in other areas of development cooperation through examples from SDC's experience.

Part I: The rule of law: definitions and linkages

1 The key elements

Historically rooted in liberal thinking in response to the king's ambition to absolute power, the term rule of law has since been used in a variety of ways, legal systems, economic and political contexts. As a consequence of different national histories and functions, the meaning of the term in different languages ("Etat de droit", "estado de derecho", "Rechtsstaat") may not be the same. For example, in authoritarian contexts the law was and is often seen by the elite as an instrument by which to impose their power and economic interests, legitimised by formal State laws and judicial institutions: for the people in power, rule of law may mean "ruling by law". In more pluralistic political contexts, the rule of law makes State institutions function independently and in the "general", long term interest of the State as defined by the constitution and the laws.

Although there is no internationally accepted definition of the rule of law, key elements generally include:

- **Non-discrimination and equality before the law**: laws at all levels treat citizens equally and refrain from discriminating against certain groups.
- **The primacy of the constitution, the hierarchy of norms, and the substantive coherence of the legal framework**: the constitution has priority over other laws, and there is a hierarchy of laws.
- **The government and administration is bound by the law**: policy and decisionmaking respect the limits and the guidance provided bythe law.
- **Separation of powers between legislative, executive and judicial authorities**: The three branches of government fulfil independent yet interdependent functions that should remain separated, with mechanisms of mutual checks and balances.
- **Independence and impartiality of the judiciary**: The judiciary is not controlled by the other branches of government, especially the executive branch, in order to prevent abuse of power.
- **Respect for human rights**: human rights standards form the basis for State legislation and policy, and are imperative for fair judicial processes.

The rule of law is interlinked with other concepts used in international cooperation. The following sections will explore in more detail the complex relationships between the rule of law and other concepts in development cooperation. This should help to explain the different priorities set by donors in different contexts, and the various approaches to legal and judicial reform (see Part II).

2 Rule of law and human rights

The rule of law is intrinsically linked to human rights. It is an important means by which to realize human rights, and many rule of law concepts explicitly include the element of human rights. For SDC, the respect for human rights is part of a functioning State that enables human development for all. Both human rights and the rule of law are important for organizing the justice sector, and are also relevant to all sectors of State activity. Human rights and the rule of law should guide the behaviour of State authorities in designing and implementing laws and policies and in providing services to citizens. The rule of law should be interpreted to include the respect, protection and realisation of human rights.

Indeed, international human rights instruments (including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms) set out important elements of the rule of law: the principles of non-discrimination and equality are at the core of human rights, as well as the right of everyone to be recognized as a person before the law. Human rights **instruments** contain detailed standards for judicial procedures and law enforcement, including minimum standards of treatment for detainees. International human rights instruments lay down fair trial rights including the right to be tried by an independent and impartial court. Such instruments are binding on many States, including Switzerland, who are therefore accountable for respecting, protecting and ensuring such standards in their national laws and policies. Human rights therefore add international legitimacy to claims for Rule of Law reform.

Box 1: International standards for judicial systems and law enforcement

A number of international and regional human rights instruments set out minimum standards for the judiciary. One of the most important instruments is the International Covenant on Civil and Political Rights, which has been ratified by 160 States. It includes the following rights and duties:

Art. 2: Prohibition of discrimination

Art. 6.1: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Art. 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Art. 9.1: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Art. 9.3: Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized

by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Art. 10.1: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Art. 14.1: Equality before the courts, right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Art. 14.2: Presumption of innocence.

Art. 14.3: Minimum guarantees in criminal procedures.

Art. 14.7: The right not to be tried or punished again for an offence for which the person has already received a conviction or acquittal in accordance with the law.

Art. 16. The right to be recognized as a person before the law.

Art. 26: All persons are equal before the law and entitled without any discrimination to the same protection by the law.

3 Rule of law and the governance principles

Although there are different ways of defining "governance" or "good governance", the various concepts always refer to the rules, processes and behaviours by which interests are articulated, resources are managed, and power is exercised in a State or in a society. The principles of the rule of law belong to the main features of good governance. The legal and judicial framework play a critical role in determining the nature of public governance, particularly the way in which the State's regulatory power is exercised, and how public functions are carried out.

Box 2: SDC's definition of governance

"Good governance and the respect for human rights are increasingly recognized as indispensable conditions for sustainable and balanced development. Governance, i.e. the way in which the institutions of the state operate and how the state relates to individual citizens, civil society and the private sector, is key to shaping the framework for development. Good governance means that political systems provide opportunities for *all* people to influence government policy and practice. Good governance requires an honest and accountable government capable of responsibly managing public resources and combating corruption, guaranteeing equitable access to basic services and access to justice for all. Experience shows that all of these features should be in place in order to eradicate poverty ."

From: SDC Governance division, Medium Term Orientation 2008-2011, Governance.

The rule of law is inherently related to governance principles:

- The rule of law is linked to the principle of **accountability**. Binding rules define the responsibilities of authorities at different levels. They are preconditions and benchmarks

for accountability. Judicial procedures and an independent judiciary are important instruments to hold those in power accountable for irresponsible behaviour.

- The rule of law and the principle of **non-discrimination** go hand in hand. Equal rights for all and the implementation of norms without discrimination are essential elements of the rule of law.
- The rule of law aims at **transparency** for all members of society and the eradication of corruption. Decisions are made following predetermined rules rather than because of money or privileges offered to the decision-maker.
- A functioning judiciary that protects the legal space provided for critical voices to express themselves, is essential for effective **participation** in decision-making processes.
- By increasing transparency and accountability, the rule of law contributes to the **effectiveness** of public management. The legal framework must be coherent and the judiciary should be independent and impartial holding accountable the other branches of government.

4 Rule of law and gender equality

In general, legal systems are not perceived to be gender sensitive. Although the rule of law promises equality and non-discrimination in the application of norms, the legal rules and judicial mechanisms have been designed primarily by men, often from a perspective that does not adequately take into account women's interests. Men still dominate law making, the administrative and judicial institutions and the legal profession. In addition to the various obstacles that the poor face when trying to use legal instruments, women must overcome specific barriers if they want to access the judicial system and claim their rights. For example, in family law cases, it is difficult for women to claim violence or abuse if they depend on their husbands financially. Moreover, the confrontational nature of civil judicial procedures means that the two parties must defend their individual interests. In many cases the women are less able to fight for their interests. Women face the particular challenge of implementation. Where judicial means are inaccessible to women, non-discrimination legislation is redundant and not applied in practice. Finally, many areas which are important for women's everyday lives are often seen as private or informal and therefore exempt from State regulation. For example, labour standards and social security often do not cover "informal" professional activities or domestic work, which is mostly executed by women.

If legal reforms are to have a positive impact on gender equality, it is not sufficient that the legal framework refrains from formal discrimination against women. The legal framework must respond in a coherent way to the needs and interests of both women and men, and accountability mechanisms, including the formal justice system, should be equally accessible to women and men. Only then can the legal and judicial framework contribute effectively to empower women and the realization of women's rights.

Box 3: Rule of Law for or against Gender Equality?

An analysis of the post-Cold War Rule of Law reforms in Sub-Saharan Africa shows that the gains for gender equality have been limited and hard won. A large part of the gender equality agenda remains unaddressed by the legal and institutional reforms undertaken so far. The main gaps identified include the following:

Constitutional guarantees of rights have only a limited reach, particularly where customary and religious laws are not only allowed to regulate family matters but to supersede anti-discrimination laws.

Reforms to property law have at worst deepened inequality and at best left existing biases intact.

The Rule of Law reform agenda lacks any serious engagement with informal or quasi-formal institutions, yet these play a key role in making decisions and resolving disputes (particularly intra-family ones), and have far more impact than formal justice institutions in shaping gender relations.

Judicial sector reforms privileged commercial dispute resolution and underinvested in judicial subsectors such as family courts and legal aid for family proceedings.

The study concluded that, even where governments professed commitment to gender equality, this commitment is not reflected in the articulation of priorities or the allocation of funds earmarked for legislative, judicial and law enforcement reforms. While advocates of gender equality have been adept at emphasizing the "democratic rule" prong of the Rule of Law agenda to force the opening up of space for women's constitutional rights, there has been less engagement with the specific "legal environment for the market" dimension of the reforms. There is therefore a need for gender equality advocates to mount a more coherent and direct challenge to market-based justifications for legal arrangements that generate or entrench gender inequalities.

See: Celestine Nyamu-Musembi, For or Against Gender Equality? Evaluating the Post-Cold War "Rule of Law" Reforms in Sub-Saharan Africa, UNRISD Occasional Paper No.7, 2005

5 Rule of law and democratisation

Development is inherently political. Politics refer to the processes through which people exercise power over the use, production and distribution of resources. It is important to remember that the legal framework is not politically neutral. It sets the rules for the distribution of power and resources, for the relations and interactions between the state and its citizens, among individuals, groups and economic actors, at central and local level. In the prevailing view of political systems, a democratically elected parliament, representing various groups of citizens and their competing interests, give the most legitimacy to the legislation process. By focusing on the hierarchy of norms (i.e. giving the constitution priority over normal laws, and laws over decrees from the executive), the rule of law can **strengthen the role of the parliament** in shaping the main orientations of public policy by the means of law-making.

Several rule of law principles are particularly relevant for **effective political participation**. The independence of the judiciary from manipulation by the executive is an important safeguard to ensure freedom of expression, personal integrity and security even for those who do not agree with the State power and seek to challenge it in a judicial process. Where the judiciary falls prisoner to the executive power, freedom of expression is not protected, making democratic institutions a farce.
The principle of the hierarchy of norms also sets important limits to political decision-making at central and local level. For example, governments and administrative authorities at all levels are bound by the constitution and the relevant laws. Decisions that violate constitutional norms or international human rights standards are unlawful, even if such decisions are taken by the president or by a legitimately elected parliament.

6 Rule of law and decentralisation

In many developing countries and countries in transition, decentralization has been an important aspect of public sector reform. In general, local authorities are expected to perform better, provide local services of better quality and accessibility, and all this in a more efficient way than centrally controlled entities. Moreover, local decision-making processes are seen as more participatory than national ones, because elected officials and voters are in closer contact. A functioning legal and judicial framework is paramount to the success of decentralization strategies and the performance of local governance. If the legal system does not clearly **assign the responsibilities of both the decentralized entities and the central authorities** in taking decisions and financing their implementation, accountability lines will be blurred, and the quality of public services will suffer. Moreover, the national legal framework (including the constitution) sets important **limits to the discretion of local power**, for example by prohibiting discrimination based on gender or ethnicity. An independent and impartial judiciary is also needed at the local level to sanction corruption and the abuse of power by local authorities and to ensure equal access to services to all citizens. In many countries, local authorities are directly confronted with informal or customary rules governing the behaviour of citizens and play an important role in shaping the relations between formal and informal judicial mechanisms.

Local authorities are seen to favour State accountability to citizens, because decentralized institutions are closer, more visible, and easier for them to reach than centralized authorities. The legal framework lays the basis for this accountability by providing rights to citizens and mechanisms for enforcement. If local authorities can be held accountable, this may build confidence and trust in accountability mechanisms in general - an important step to improved accountability and respect for the rule of law even at central level. In many cases, due to their proximity to local people and local issues, local institutions are more open to direct citizens' participation in decision-making, testing innovative approaches and mechanisms which could be addressed later on by the national legal framework.

7 Rule of law and poverty reduction

For many years, poverty alleviation and pro-poor goals have been at the centre of the aid agenda. In 2000, they were reflected in the Millennium Declaration and the Millennium Development Goals, and since then in national Poverty Reduction Strategies and in the development plans of most aid agencies. The overarching goals of pro-poor reform are to break the cycle of poverty that is multi-dimensional, and can become inter-generational, and to promote the empowerment of the poor. It also targets women and other groups that are excluded and discriminated against and who, as a result, are often amongst the most poor.

Rule of law principles can be relevant for breaking the cycle of multi-dimensional poverty:

- The principle of **equality** gives citizens the right to equal access to public services (e.g. education, health) and resources (land, water). In many countries where public resources are distributed according to the interest of powerful groups, the principle of equality lays the basis for poor people to get out of the cycle of poverty. Judicial mechanisms corresponding to the rule of law can provide them with legal instruments to enforce their rights.
- In a society based on the rule of law, norms and rules are set and applied to everyone, regardless their economic status or other conditions. State institutions implement these rules not only in cases involving the powerless, but also when powerful individuals and groups are concerned, thus protecting the less powerful actors against abuses (by State authorities or private actors), and providing them with basic security. If the legal framework in its substance does not privilege the rich and powerful, the rule of law contributes to the legal **empowerment of poor and marginalized individuals and groups**.
- By its impact on corrupt practices of State authorities, the rule of law makes **public services more accessible** to poor individuals and groups who do not have the money to bribe government officials, service providers, and judges.

8 Rule of law and economic development

In European history, the rule of law was linked to the development of a market economy, reducing the discretionary power of State authorities to interfere with private economic activities. Today, rule of law principles are seen as positive factors for economic and market oriented development. Formal legal rules for the market, systematically enforced by judicial institutions regard-

less of the parties involved, contribute to **making** framework conditions for economic activities more transparent and reliable. This makes judicial decisions about private disputes - and thus private behaviour - **predictable and puts competitors on an equal footing**, although their economic power might differ.

The concept of rule of law played an important role in political and economic transition processes in post-communist and in developing countries. While in the communist countries the State had played an important role in steering the economy, producing goods and delivering services, the role of the State changed in transition. It lost its role as, or its aspiration to be, the main producer of goods and services, and was expected to take over the role of ensuring an **enabling environment for a functioning market**, by providing a sound **legal and judicial framework ensuring the space for private economic action**. Under the heading of rule of law, new laws and institutional mechanisms were created with a view to the regulation of private property, production, contracting and financial services as well as the paying of taxes. In the process of privatization of State owned enterprises, a sound legal framework and its enforcement is particularly important, in order to avoid immense losses for the State Treasury and disproportionate gains for some private actors. In many countries, the legal and judicial framework is still far from being capable of ensuring a level playing field for all competitors.

However, particularly in the field of economic cooperation, international policies do not always take into account the key rule of law principles. For example, multilateral economic cooperation today is mainly based on the idea of a free market of goods and services – and human rights, equality and discrimination issues, such as the limited or even lacking access of poor or marginalized groups to basic resources and public services of health and education, are often not seen as a priority in practice.

9 Rule of law and security

Like the rule of law, the concept of security is multifaceted and has been evolving over time, with the changing perceptions of security risks and threats. The rule of law ensures the **enforcement of legal rules and standards for social and economic interaction**, which is an important aspect of security. Together with human rights standards, the rule of law contributes to the integrity and security of the person, providing individuals with legal instruments and judicial mechanisms to protect themselves against the abuse of power.

While state authorities are important in the protection of vulnerable individuals and groups from abuses by other civil actors, state authorities can also be an important source of insecurity. Where a strong state aspires to "law and order" through repression and social control, some individuals or groups may live without fear. However, for many other citizens, the omnipotent state itself is an important security risk. The rule of law provides a framework for balancing the need for public interventions to enforce the law in cases of violation on the one hand, and the need for **limiting the risk of abuse of public power** on the other. The law legitimises the existence and interventions of internal security forces, while at the same time it ensures that such interventions respect minimum standards of human dignity. The rule of law and the separation of powers are important means by which to hold the security forces accountable to the public.
The rule of law ensures that State **power is used in the public interest and that individual security is defined by law**, thus preventing individuals and groups from seeking justice and security by their own means, which can often lead to abuse of power, violence and security risks.

10 Rule of law and peace building

The **breakdown of law and order** is one of the defining aspects of any conflict or post-conflict situation. In many conflict situations extreme armed violence dominates the political environment for years, and criminal violence frequently becomes the norm, as legal rules are not enforced. Key features of transitions from civil conflict include a devastated infrastructure, destroyed or dysfunctional institutions, a lack of professional and bureaucratic capacity, an inflammatory and violent political culture, and a traumatized and highly divided society. In many cases, public trust in the government and its institutions is very low, there is no independent judiciary, and accountability mechanisms do not function properly.

In other cases, judicial mechanisms continue to function during conflict, at least in some areas (for example in Sri Lanka, or Colombia). If there is respect for the rule of law, the **judiciary can still be used to maintain a certain level of State accountability**, challenge the generalized use of violence, protect victims' rights and protect the country from a complete institutional breakdown.

Box 4: The Rule of Law is fundamental to peace building

"Our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. At the same time, the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law."

Source: UN Secretary General Report, The rule of law and transitional justice in conflict and post-conflict societies, 3 August 2004, S/2004/616, p.3

The rule of law is an important feature for **rebuilding peace** after violent conflict. Societies and governments have different options when dealing with their violent past - ranging from impunity and general amnesty to national truth commissions or courts and international courts of justice. Short-term peacekeeping often shies away from naming and shaming perpetrators who still might play important roles during post conflict situation.
However, if the transition to peace is to be sustainable, impunity is to be avoided. The need for justice has to be addressed, with careful timing and sequencing, and responding to the local needs and habits. Transitional justice is important, both to **address the culture of violence**, impunity and massive human rights violations that often took place during the conflict, and to begin a healing process within the community through truth and reconciliation, accountability and reparations. People have to **regain confidence and trust** in their neighbours and in State institutions. The State must be (re)built and its capacities strengthened, in order to maintain law and order and deal with old and new conflicts in a peaceful manner. It has been increasingly recognized that elections, public sector reforms, and other formal approaches are insufficient. A clear focus on establishing and reinforcing the rule of law, the effective functioning of judicial institutions, and law enforcement is needed.

11 Conclusions: Rule of law for a functioning State and a peaceful society

According to differing contexts and needs for reform, the rule of law has been used in development cooperation with different rationales:

- Rule of law is a means by which to realize **human rights** and a key element for **good governance and democracy** since it protects the human rights and fundamental freedoms that are needed for meaningful political participation and ensures accountability of those in power.
- Rule of law is relevant for realizing **gender equality**. If legal and judicial systems are not gender-sensitive, they often privilege men over women and reinforce discrimination.
- Rule of law is needed for the success of **decentralization** strategies and the performance of local governance, particularly by distributing tasks and responsibilities and ensuring legal accountability.
- Rule of law is essential for **fighting poverty**, since it empowers poor people to claim their rights and access justice on the basis of equality, and it reduces their risk to be exploited and abused by the more powerful and rich.
- Rule of law is important for **economic development** because it makes State decisions predictable and private contracts enforceable for all competitors.
- Rule of law is required for **peace building** because it provides the basis for a non-violent means of dealing with conflicts based on rules that are applicable to all, and can build trust by making decisions predictable.

Depending on these different perspectives, the concept is multi-coloured, and it results in different and sometimes even conflicting approaches to and priorities for legal and judicial reforms.

SDC considers the rule of law as a means to hold State authorities accountable for the use of State power, to further peaceful relations, security and trust among all social groups, to ensure human rights to all, including women, and to promote human and economic development for everybody, including the poor. SDC's support for reforms involving the rule of law will be **guided by its vision of a functioning State** and a **society solving its conflicts with legal means** instead of violence. SDC will use the rule of law **concept as a means to realize human rights, and implement its principles with flexibility**, taking into account the relevant contexts and potential entry points for cooperation.

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Part II: Implementing the Rule of law in justice system reforms: Trends and challenges *

1 Evolving approaches

Justice sector reforms are not a new issue for development cooperation, but priorities and approaches have changed over time. In the 1960s and 1970s, aid to the justice sector was concerned with the administration of justice, especially criminal justice, and with legal education and law reform. This 'law in development' approach was based on the assumption that legal reform and improvements in judicial institutions would spur economic development. The need to strengthen the ability of citizens, especially disadvantaged people, to access legal institutions was included in these early programmes. However, access to justice was narrowly identified with legal aid, representative (class) action and alternative dispute resolution.

The advent of structural adjustment in the 1980s, and its expansion (and failures) in the 1990s, meant a different emphasis by the international community on the rule of law, which was now seen to underpin structural and fiscal reforms that would create domestic economic environments conducive to foreign investment and trade and, therefore, national economic growth and integration into the global economy. Of particular concern in this context were the enforceability of property laws and contracts, the regulation of the banking sector and private enterprises, and prosecutions for corruption.

At the same time, human rights and social justice activists pursued a parallel strand of rule of law interventions focused on civil society organisations. In the same vein, transitional justice (efforts to seek justice for the victims of human rights violations during conflicts or authoritarian regimes, such as the Truth and Reconciliation Commission in South Africa) was pursued by a separate set of indigenous movements and institutions.

The end of the Cold War offered new challenges as legal systems had to be re-structured, laws rewritten, new courts created and judicial independence guaranteed in post-Soviet and 'third wave' democratic states. In the 1990s, with the collapse of Somalia, civil war and genocide in Rwanda and the Balkans, and the continuing violence and abuse of rights in newly democratic states, civil and political rights protection was given more prominence in the international agenda.

A wide range of rule of law programs sprung up everywhere in the early 1990s, funded by the World Bank, bilateral donors such as SDC, UNDP and regional development banks, and operationalised by specialized local and international NGOs or technical experts. Later in the 1990s, a range of good governance measures, including some related to the rule of law, were promoted as central 'pillars' of development in some of the national Poverty Reduction Strategy Papers (PRSPs). Topics included in rule of law programmes focused on the law, law-related institutions and on ensuring government compliance with the law. Examples include:

- the training of legal professionals, especially lawyers and judges;
- improvements to the physical infrastructure of legal institutions (e.g., court buildings, police structures, prisons);
- reform of the functioning of institutions, for instance, the judiciary or police service, including legislative and constitutional reforms;
- measures to strengthen judicial independence and other accountability and oversight agencies, including anti-corruption measures;
- civil society strengthening and the promotion of human rights; and
- support to transitional justice activities.
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Rule of law activities have also sought to achieve a number of, not necessarily complementary, goals, for example the promotion of democracy, the promotion of human rights and social justice, integration into the global market, the support for international law enforcement, e.g. the war on drugs, and international security. The latter has emerged especially since the terrorist attacks in the USA on 11 September 2001, as rule of law language has become part of the global 'fight against terrorism'.

By the year 2000, the international community had acknowledged that its development agenda, especially structural adjustment, had not improved the lives of the poor in many parts of the world. Therefore, it refocused its attention and formally accepted poverty reduction as its global objective. The Millennium Development Goals were adopted, as was the Millennium Declaration's nominal commitment to human rights, democracy and the rule of law.

2 Implementing rule of law programmes: lessons learned

The success of the rule of law approaches in development cooperation was limited and rule of law assistance has often failed to produce expected outcomes.

The criticisms of the earliest rule of law programmes, such as the 1960s 'Law and Development Movement' in the US, now resonate with modern development theory. These reforms had little impact because they were not 'owned' by the legal establishment in recipient countries and were not rooted in local socio-economic and political systems; the duration of the Law and Development Movement's Programme (only a decade) was too short to make substantial change; and it attempted to simply transpose a foreign legal system directly into a different society. Furthermore,

* This part is based on the Issues Paper SDC Rule of Law and Access to Justice written by Diana Cammack and Tammie O'Neil, Rights in Action, Overseas Development Institute, July 2006 (not published)

initiatives to increase citizen's access to justice narrowly conflated access to justice with access to formal courts, even in countries where the law in force entrenched social and economic discrimination, and where remedies outside the legal system sometimes provided better justice.

More recent critiques of rule of law interventions have revolved around other issues. Firstly, the absence of consensus about the meaning of the rule of law in practice, and the detrimental impact of this on programming and outcomes, has been noted. Secondly, and related to this, the causal assumptions underlying rule of law assistance have been questioned. In particular, it is argued that although the rule of law, economic development and democracy are related, the aid community has been wrong in assuming a 'mechanistic, causal imperative' between them. Combined with the lack of consensus, the 'shaky context' of these assumptions has led to 'an *ad hoc* laundry list of institutions to reform, mixed with high-flying rhetoric about the ends that the rule of law is expected to accomplish.' (Carothers, 2006).

It has been suggested that the focus of interventions is problematic. Focusing on judicial institutional reform rather than on other institutions, such as the legislative or the executive, has been criticized because the decision about which institutions to work with has too often been made without really understanding the mechanisms favouring and hindering the rule of law in a country. Moreover, questions about whether agencies ought to focus on building institutions at all have been raised. Defining rule of law by its institutions lead many practitioner toward a technocratic model of reform, while ignoring informal institutions, culture and opinion as equally powerful restraining powers. Institutional approaches have developed in part because rule of law programmes have been planned and undertaken by specialists, such as jurists, policemen, civil society campaigners. Coordination is rare while borrowing institutional models from the practitioner's native country is still common. Less emphasis on 'supply side' initiatives and more on civic participation – creating 'demand' – is advocated.

Typically, critiques of top-down programmes have focused on the lack of linkage of rule of law reform agendas to poverty alleviation and benefits for the ordinary person.

More recently, rule of law programmes have been accused of being unfocused. Some are thought to be confused, poorly designed, inconsistent and incoherent. Progress in meeting rule of law goals has also been slow, as many efforts have failed to do little more than scratch the surface, in part because they have not responded comprehensively enough to the needs for reform.

3 Harmonising and aligning: the influence of the new aid modalities

In recent years, the desire to create more effective and resource-efficient aid programmes led the donor community to review the manner in which it provides assistance. Where possible, donors have moved away from project assistance to new programmatic ways of providing aid. New approaches have included general budget support (GBS) and sector-wide approaches (SWAp). While SWAps have been used since the mid-1990s as an alternative to project aid, the Paris Declaration on Aid Effectiveness in early 2005 reaffirmed the need to improve aid delivery by harmonising donor assistance and aligning it with recipient governments' own comprehensive, national and sector development strategies. Necessary for the successful operation of a SWAp is the existence of a robust national framework for the sector, and a clearly articulated national development policy and operational framework, ideally provided by a Poverty Reduction Strategy. Closely designed and managed fiscal arrangements are also required.

SWAps have been used to provide assistance to the justice sector. However, whilst desirable in many cases, managing a justice sector SWAp is a more difficult exercise than single-institution reforms because the goals of the programme are more complex. 'Joined-up' and coordinated policy-making and implementation and a systemic approach across a number of institutions by various stakeholders is required. Adopting a SWAp may not therefore always be an option for some donors and in some country contexts, though where a justice sector SWAp already exist, some effort should be made to fit projects within that framework.

4 Adopting a more systemic perspective

The justice sector is not composed of isolated or formal institutions. Rather it contains a number of interconnected formal and non-formal, state and non-state institutions and procedures. The interdependence of these institutions means that improvements in one institution may be undermined by inadequacies elsewhere. Rather than working on institutions in isolation, the adoption of a systemic perspective involves understanding the linkages between institutions, and the procedures they are working in.

Importantly, a systemic perspective does *not* mean that it is necessary to catalogue or address all the problems within a justice sector or to work across all institutions. It does mean, however, that all interventions should be based on a systemic analysis and assessment that identifies the gaps and linkages between different parts of the system and appropriate entry points. Such assessments should include consideration of issues such as the political context, the level of demand for safety, security and access to justice (by various groups), the presence of non-formal and non-state justice systems and their linkage to formal institutions, and the influence and role of other external actors within the sector.

Adopting a systemic perspective must also be differentiated from the use of specific aid modalities, in particular a sector-wide approach (SWAp). A systemic perspective can, but does not necessarily, lead to the formulation of a sector-wide aid modality.

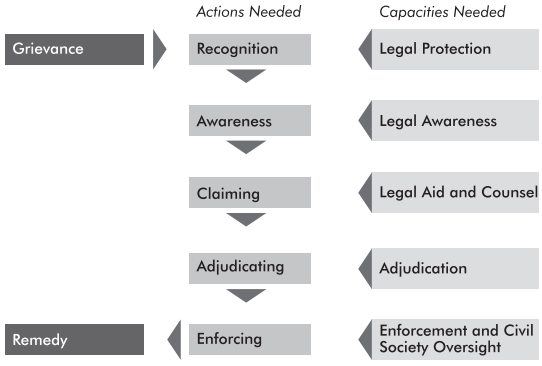
5 A growing focus on access to justice for the disadvantaged

In many cases, the legal system is an instrument of power in the hands of those in power, who have the political leverage to shape the legal framework in their favour as well as the knowledge and the resources to use judicial mechanisms if they need it. The perspective of the most poor and disadvantaged users, should be the starting point for analysis and programme design. This 'bottom-up' approach originates from the broader pro-poor consensus and entails seeking to understand how poor people perceive and experience the justice sector, including those factors that they feel prevent them from achieving justice and the strategies they use to overcome such obstacles. A participatory approach is needed in order to understand the priorities and experiences of citizens, particularly of poor and marginalized people who often do not trust the formal judicial system.

Revising laws and building judicial institutions keeps its importance, but it is not enough. The legal framework may respond to the needs of the rich and powerful, empowering them instead of the poor and marginalised. The judiciary is often dominated by legal professionals stemming from the country's elite, and the use of judicial instruments is a privilege for a very limited number of people. An access to justice approach aims at changing this logic, and make justice available to all. It comprises the following core components:

Box 10: Access to Justice: Capacities and actions needed

This analytical framework below shows the different elements constituting access to justice, and corresponding actions and capacities needed to obtain remedy for a specific grievance.



Sources: Michael R. Anderson, 'Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs' in IDS Working Paper No. 178. (Brighton, Institute of Development Studies at the University of Sussex, 2003); UNDP, Access to Justice. Practice Note (UNDP, New York, 2004)

Box 10 shows that access to justice does not mean access to courts only, and it is not ensured with legal support to individuals before the court. For an individual claim to be successful, several factors are decisive, starting from the recognition of the issue in the laws and regulation in force (legal protection) – and ending with the enforcement of the judicial decision even against the resistance of other people involved. For example, in cases of polygamy which is not recognized in formal legislation, legal aid and access to court cannot solve the problem of alimony for children, if their status is not recognized in law and there is no legal basis for claims.

6 Bringing human rights to the justice sector: the human rights-based approach

A human rights-based approach highlights the obligation of the States to provide equal access to justice for *all*. It places at the centre of justice programming the capacity of rights holders to demand remedies *and* the duty and capacity of both formal and non-formal institutions to provide them. In other words, it proposes that both the 'supply' and 'demand' sides of the justice system should be pursued together, highlighting that support to State institutions will continue to be an important component of justice programming, but that it must be complemented by interventions that enhance the ability of poor and disadvantaged people to access these institutions.

Whilst human rights *principles* can guide the *process* of programming, human rights *standards* give international legitimacy to the engagement of donors in the justice sector, provide guidance for the setting of higher-level programme objectives and for establishing benchmarks for the *outcomes* of programmes. For example, a number of civil rights enshrined in the International Covenant on Civil and Political Rights (ICCPR, see box 3) might set the outcomes and benchmarks of justice sector programmes. Other international conventions (ex. the Convention on the elimination of discrimination against women CEDAW, the Convention on the elimination of racial discrimination CERD, and the Convention on the rights of the child CRC) may also provide relevant elements for programming.

7 Realizing the complexity of legal frameworks

All legal frameworks are complex systems of substantial norms and procedural rules. In most cases, a legal system will have grown from a number of traditions and will therefore draw its legitimacy from different sources. This also means that, according to a country's history, a legal system can actually be rather inconsistent and incoherent.

In countries with a colonial history, the colonial power imposed its own legal texts and tradition but, in most cases, also left intact local traditional rules and institutions that did not harm its interests. Even after independence, many countries did not change the legal system they had inherited from the colonial power. For example, in Africa the legal systems and institutions of the former French colonies still differ considerably from the former British colonies, reproducing the European difference between British Common Law approach and the continental legal thinking based on the Civil Law tradition (see table 1).

Table 1: Key differences between Common and Civil Law

Common Law	Civil Law
Practised in the United Kingdom, the United States and some countries that were British colonies.	Practised in most of Europe, Central and South America and countries that were non-British colonies.
Based on non-statutory/case law resulting from tradition, custom and precedent. This body of judicial decision may then be translated into codes.	Codified system of law originating from Roman Law. Often developed in one draft.
Judicial decision has a prominent role in law making. Judges are involved in creating law.	Judicial decision has negligible impact on law making. Judges apply the law.
Lawyers use inductive reasoning based on case books.	Lawyers use deductive reasoning based on the law.
Courts usually have an integrated structure (with the ability to adjudicate on both criminal and civil law).	The court system contains speciality courts based on separate codes for different areas of the law (e.g. constitution, criminal, commercial, private, etc.)
Single-event trials are the norm.	Extended trials with a series of hearings are the norm.
Judges are usually selected as part of a political process.	Judges are usually part of the civil service

In recent years, international law has gained more importance, including for domestic legal systems. Most countries have ratified the main human rights conventions, accepting freely to respect, protect and promote human rights in their territories. They include most important international standards for the functioning of the judiciary and for law enforcement. Although these international norms are not always directly applicable in the ratifying countries, they are legally binding and the state has to shape its national legal system and its politics accordingly.

8 From a focus on formal justice to a more flexible approach

Although there is a trend in modern States to rely on written legal texts, adopted in a formalised legislative procedure, every country will also have unwritten rules and norms, particularly those which have strong oral traditions. As customary law, these rules are often legitimised by 'tradition' and culture but may change, rapidly responding to evolving needs for regulation. Moreover, in many countries there are parallel informal mechanisms of dispute resolution which mainly implement customary law. Where the formal judicial institutions do not function properly or where they are not accessible, these informal mechanisms often play an important role in guaranteeing law and order in the country.

A flexible approach identifies and builds on the comparative advantage of both formal and non-formal justice institutions. Informal justice institutions can include traditional, customary, and religious mechanisms and systems set up by the State outside the formal justice system. Non-State mechanisms can include community-based practices relatively isolated from the State as well as systems created or promoted by NGOs. Traditional and informal justice systems are often seen as best suited for conflict resolution and reconciliation at community level. Formal State courts are best suited to provide the legal and procedural certainty required where serious penalties are applicable, or where parties are unwilling or unable to reach a compromise.

Poor people are more likely to use non-formal institutions for the resolution of disputes, because they are often more accessible and able to deliver quicker and, in some cases, more appropriate forms of justice. However, it is as important to recognise that, like formal institutions, non-formal justice mechanisms may not provide just and equitable outcomes for all. For instance, non-formal systems can lack transparency and accountability, and can discriminate against particular groups, such as women. Fur-

thermore, use of non-formal systems may reflect lack of access to formal systems rather than an active choice on the part of users. So it must be carefully analysed when and how it is appropriate to engage with non-formal institutions, including establishing the relationship between formal and non-formal institutions. Justice systems operate optimally when formal and non-formal institutions are complementary. This entails that informal and formal jurisdictions are clearly defined and delimited, and both formal and non-formal institutions operate in a transparent way, consistent with the rule of law and the human rights framework.

9 Understanding the wider challenges

The effective operationalisation of legal and judicial reform programme requires the awareness of a broader set of challenges. For example, it is important to have a deep understanding of the political context. Legal reform and judicial reform are depending on decisions on laws and policies which are taken by parlamentarians and ministers, and there may be many politicians, officials or even judges not yet convinced by the usefulness of such reforms. Justice sector reform often challenges power relations as well as on-going illegal practices, such as political patronage and corruption, which may need to be addressed before justice sector reform can be effective and sustainable.

Moreover, the success of justice sector reform, like any development programme, depends on its being 'owned' by government and society. Ownership is strongest when local people initiate programmes. But this often requires specific measures to stimulate public debate, build the main stakeholders' commitment and form consensus on policy reforms. International policy dialogue may be required to ensure that there is adequate political will among the relevant authorities to improve justice for the poor and other disadvantaged groups.

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Part III: Selected lessons learned from SDC's engagement

SDC's engagement

As with many other donor agencies, good governance appeared on SDC's agenda in the 1990s. This was understood to involve a range of measures including the promotion of the rule of law, democratization, decentralization, media engagement, combating corruption, promoting human rights and improving public administration. A 2004 evaluation found that SDC's projects generally lacked civil society involvement, and failed to connect rule of law activities to the wider poverty reduction agenda[1]. Although SDC produced human rights guidelines in 1998 and a rule of law concept note in 1997, SDC's own good policy advice was not properly operationalised in its interventions. The evaluation also found that SDC had a 'piecemeal' approach to rule of law programming.

With the aim of learning more from its own experience, SDC organized a **capitalization conference** in 2006 regarding the integration of the human rights perspective into development cooperation. The conference drew upon lessons learned from SDC's experience with supported programmes and projects dealing with the rule of law. It confirmed that the effectiveness of supporting judicial reforms and access to justice is difficult to measure. However, several examples illustrate that advocacy efforts to review the legal framework are most successful when linked with field experiences. The existence of dual systems (formal judiciary and customary law mechanisms) was a challenge and created tensions in some countries. Support for rule of law programmes should be based on the realities of poor and marginalized groups and also challenge legal frameworks that do not respond to the needs of the poor. Access to justice should be seen both as a sector and as a means of achieving other rights. Therefore, access to justice should be promoted in other sectors. Access to justice is also seen as a key entry point to addressing abuse of power and corruption. The conference highlighted the role of human rights by challenging repressive legal systems, for the benefit of vulnerable groups, as well as by setting minimum standards for reconciling traditional perceptions of justice with the formal justice system.

The following project examples from SDC's programmes illustrate that the legal dimension of development can be addressed in a range of ways with different partners and entry points in a variety of contexts. The examples have been selected from a much longer list of projects which address rule of law issues in practice. This short presentation of examples does not do justice to all of the project dimensions. However, it is hoped that such illustrations will give some idea as to how SDC and its local partners have dealt with the challenges and trends identified in the previous chapter, and highlight the rule of law dimension in more concrete contexts.

1 Laure-Hélène Piron and Julius Court, Independent Evaluation of the Influence of SDC's Human Rights and Rule of Law Guidance Documents (SDC, 2004)

The rule of law in ensuring access to land: the *code pastoral* in Niger

Even though Niger has great potential with its agricultural land resources, the pressure on land has increased considerably during the last decade due to climate change and population growth and has led to many conflicts between the different users, particularly in the most densely inhabited and ecologically fragile areas of the country. While cattle-breeding remains the most important sector of agricultural production, the traditional semi-nomadic and nomadic cattle-breeders are increasingly confronted with sedentary population investing in more intensive agriculture. The traditional routes of migration are blocked by cultivated fields, and access to water sources is barred. The government of Niger realised in the 1990s that there is a need for legal rules to solve the increasing number of land conflicts resulting every year in the death of many peasants and shepherds. Principles for the orientation of a new *code rural* were elaborated in 1993, and a decree on the status of the territories to be used by the shepherds was elaborated in 1997. But the texts failed to take into account the dimension of property and land registers, the way of life and the routes of the herders' communities, and did not succeed in solving the conflict between the needs of sedentary agriculture and migrating cattle breeders.

SDC has been active in the debate concerning the needs of the cattle breeders and the legislation around the *"code rural"* for years. In 2005, SDC supported the *Ministère des Ressources Animales* in elaborating new legal texts which should complement the existing legislation of the *code rural*, taking into account the particular needs of the nomadic herder population. A national debate with the participation of all the concerned stakeholders was planned to prepare this new legislation. Moreover, the programme engaged in developing implementation mechanisms, such as the circumscription of pastoral migration routes (*couloirs de passage*) and zones for rest, to be registered in maps and marked in the landscape by highly visible plugs (*balisage*).

This example illustrates several elements:

- The legal framework is an important means by which to regulate access to scarce natural resources and to solve conflicts. The **absence of adequate rules confirms the power of the powerful** and leaves the less powerful without protection.
- Even where there are adequate legal rules, **implementation is often lacking, excluding again the less powerful from protection** and hindering their development. In many cases, implementation is not just an issue of a functioning judiciary; it also involves practical measures by the administrative authorities. If State authorities are committed and ready to invest the resources needed, many **practical and effective**

measures can be taken to make the rules known to the population and demonstrate readiness to enforce such rules in case of violation.

- Donors' cooperation in legal reform is welcomed by the recipient countries and thus **effective in sectors where donors have been engaged on a long term** basis, making the donor a competent and trustworthy partner not only for funding legal reform and implementation measures, but also for policy debate on legal and policy reform. **Alignment** with legal policies of the recipient country becomes much easier.

The legal dimension of managing scarce resources: Green Gold Pasture Ecosystem Management Program (PEM), Mongolia

The adoption of democracy and a market economy has brought about far reaching changes in Mongolian society, its economy and natural environment. The Constitution of Mongolia 1992 guarantees the citizens of Mongolia the right to freedom of residence - the legal basis for new patterns of spatial mobility in rural areas and a strong internal rural-urban migration process. As a consequence of the breakdown of most state-owned farms and companies and the privatization of the livestock production cooperatives (*negdel*) in the early 1990s, most of the rural population lost their jobs. Many rural families received relatively small numbers of animals, resulting in a high increase of mobile livestock-keeping households. The majority of these "new nomads" began to live a semi-nomadic life, often concentrating their animals in the close vicinity of settlements. Due to high transportation costs and their close proximity to the settled population, they move less frequently to seasonal pastures, and cause considerable ecological damage to vegetation and soils, while remote areas are underused.

SDC's Green Gold Pasture Ecosystem Management Programme (PEM) started in 2004. It aims to increase the self-reliance of poor and vulnerable herders, and to sustain their livelihoods through more productive and sustainable use of pasture-land. Project objectives include the testing of appropriate technologies, the introduction of co-management of pastures involving herders, local authorities and other stakeholders, and – what is interesting in this context - the testing of an enabling legal environment: the feasibility of the new Land Law will be tested, constraints on implementation identified, and recommendations for reform of the legal framework will be made to the competent authorities.

According to the Mid Term Review of 2006, this short project experience illustrates the following:

- The legal framework for land use and its implementation are of crucial relevance for successful and sustainable management of land resources and hence for the success of development projects in this field. The **legal framework is no longer considered an invariable "external" factor** of projects, but rather as an **objective to be directly addressed** by the intervention.
- Even in countries with a fairly passable legal and regulatory framework for the allocation of land and pasture use, taking into account the needs and varying interests of different population groups, there are **ongoing important challenges with regard to legislation** (in this example, the introduction of new user rights for nomadic and semi-nomadic herder population, their registration and their relationship to customary user rights).
- The **lack of implementation of existing legal rules is considered as one of the root causes of negative developments** such as the acceleration of pasture degradation. Conflicting and overlapping competencies of various State institutions, resulting in **bad governance**, contribute to the lack of implementation.
- While it is relatively easy and normal for a project team to start working on technological aspects and management, the **capacity to deal with the legal dimension of the project**, particularly the analysis of constraints hindering the implementation of legal standards, is often difficult to develop.

"Legal Assistance for Rural Citizens", Kyrgyzstan

Land reform is a major issue in many transition countries. In 1991, Kyrgyzstan embarked on a land reform programme. In 1998, citizens were accorded the right to own land, which was based upon the assumption that private ownership will lead to higher agricultural productivity and thus reduce rural poverty. Many new laws, by-laws and regulations have been passed since, with a view to establishing and encouraging a land market based on private property. However, coming from a nomadic culture and a communist legal tradition based on State property and collective use of land, central and local level government agencies and rural citizens have been and continue to be confronted with many problems in implementing the new legal framework and handling individual property rights. At times, existing regulations contradict each other or do not resolve important issues.

Founded in 2003 as a non-governmental organisation, Legal Assistance for Rural Citizens (LARC) has 21 operational branches throughout the country. It aims to strengthen property rights in rural areas with a view to facilitating agricultural development. LARC provides legal assistance to rural citizens (focusing on those active in agriculture) and administrative staff in the form of legal consultation, awareness raising, representation in litigation and other matters, and through support to legislative reform. LARC legal advisors deal primarily with issues of distribution and registration of land, land use (especially leases), inheritance, sale and purchase, mortgages, access to water, debts and credits, land taxes, and the establishment and registration of agricultural production enterprises.

The project experience illustrates several points:

- Legal reform can only be successful if and when **rights and responsibilities are clearly articulated**: Responsibilities of State institutions for implementation measures and monitoring must be clearly designed and institutions must be capable of fulfilling their duties. Citizens must know their rights and responsibilities regarding the land use. In particular, local administrative and judicial authorities (**as duty bearers) require institutional capacities** in order to enforce the legal framework, and awareness and capacities have to be built at the level of **rights holders** (land owners and land users, small and medium enterprises).
- The increased awareness among various actors regarding the legal rules pertaining to land issues and disputes contributes to **reduced corruption** and ensuring access to land resources, even for the less privileged. Legal aid activities can empower and motivate a number of citizens to take **action to hold local authorities accountable** for their handling of land cases.
- With a particular focus on servicing the poor, legal aid can at best reach a **modest level of self-financing**. It is likely that public resources from the State or from donors will continue to be required. However, legal services are not often considered an essential element of poverty reduction and development, nor do they receive much attention or resources from public budgets.
- A non-governmental organisation focusing on legal services has relatively **limited impact on government decisions** on land issues at the macro level (legislation reform, policy making).

Shirkat Gah's Women Law and Status Programme, Pakistan

Pakistan faces a difficult socio-political situation in many respects. Political violence and intimidation, religious extremism and the regional turmoil that surrounds the Taliban, a very weak and unstable political system, and a weak judiciary make life difficult and development almost impossible, particularly for vulnerable groups. Women are particularly vulnerable to suffering in such a situation, and are widely discriminated against.

Shirkat Gah is an NGO working for the cause of women's empowerment and social justice since 1975. One of its projects is the Women Law and Status Programme, which uses the national and international legal framework to promote the status of women in the society and improve their living conditions. The programme aims at safeguarding women's rights, creating awareness about the legal standards relating to women's issues (like violence against women) among communities, advocacy against discriminatory laws and in favour of new laws, taking better into account women's rights and interests. The programme integrates grass-roots activities, policy-level advocacy and support for building women's capacities to access rights and address their own interests. It operates at local, national and international levels in a mutually beneficial process. Shirkat Gah works as a resource centre and has adopted a cascade model, partnering with selected local Community Based Organisations which reach out to the communities. Together with other donors, SDC has been supporting the Women Law and Status Programme for several years.

Shirkat Gah's programme is illustrative of various aspects:

- While legal frameworks are far from perfect and some are even openly discriminatory, in most countries there are still many rules addressing women's issues and aiming at the protection of women's rights. But often **implementation is either lacking or discriminatory**. Taking law seriously in this context means holding State authorities **accountable** for discriminatory behaviour and activities, in order to respect and actively implement the legal framework to protect women.
- Creating **positive examples of women using legal tools** in practice and fighting publicly for their rights at a political level can have a strong **empowering effect** on women and womens' organisations throughout the countries.
- Linking **micro-level experience with macro-level advocacy** can be an important instrument for building political legitimacy and influencing political decision-making. Working through partners at the grassroots level helps the NGOs gain important insights into the shifting realities of women in a variety of rural and urban areas. This knowledge and practical experience adds legitimacy and weight to the organisations' advocacy role and their interventions with the authorities.
- The **international legal framework**, particularly the Convention on the Elimination of Discrimination Against Women, and linkages with international NGOs are **important points of reference for many NGOs working in challenging political contexts**, enabling them to hold national decision-makers accountable. The international dimension can also provide motivation, practical input, and sometimes protection to national drivers for change.

The complementary roles of formal and informal justice: Fostering equal access to justice in Peru

The need for judicial reform in Peru has been recognized for years. Politicians and civil society actors agree that inadequacies in the judicial system hinder the socio-economic development of the country and contribute considerably to the exclusion of the poor and vulnerable groups in society. Despite the existence of several reform projects, many challenges remain. The Constitution of Peru formally recognises the role of traditional rural communities in the justice system: traditional authorities are permitted to assume judicial functions within their territory in conformity with customary law, as long as they do not violate human rights.

However, there are no implementing regulations to guide the coordination of traditional and formal jurisdictions, particularly with respect to the local "*Juzgados de Paz*" (justices of the peace) assuming a general role of mediating and solving conflicts.

Capitalising on its participation in the local development and decentralization processes, SDC has supported a group of NGOs which aim to realize a basic local justice model, promoting access to justice for rural people, strengthening the traditional justice system and linking it to the formal justice system of Peru and the ongoing endeavours to reform it. Working directly with the judicial authorities, the NGOs analyse the strengths and weaknesses of local judicial services, and foster dialogue and cooperation between various stakeholders, with a view to improving access, and promoting the respect of human rights in formal and community based judicial procedures.

This experience illustrates:

- If the judiciary is to succeed in its role of resolving conflicts and ensuring personal security to all citizens, judicial institutions must be **accessible to poor and vulnerable groups**. While it is important to ensure that judicial institutions are operational and function in conformity with the legal and procedural framework, the focus must be on **adequacy and accessibility** of their services.
- **Informal justice systems**, which play an important role particularly in those regions where the formal justice system is dysfunctional, are especially relevant: they are more accessible to the poor and vulnerable groups, and provide quicker and less expensive means by which interpersonal conflicts can be solved.
- There is a growing awareness that the "modern" and "traditional" systems, **working in parallel, sometimes contribute to legal insecurity, abuse of power and confusion** – and to the exclusion and marginalization of the powerless rural poor for whom the formal system is practically inaccessible. The relationship between these systems must be clarified in order to avoid such outcomes, and they must be interlinked.
- Respect for nationally and internationally **recognized human rights standards** is a challenging yet valuable entry point to encourage minimum standards **in both the formal and informal justice** systems.

Facing the challenges after a civil war: the example of Rwanda

The civil war and the genocide of 1994 deeply traumatised the Rwandan population, destroying the country's social fabric and making reconciliation and development extremely difficult. When it came to power in 1994, the government created a special judicial procedure known as *Gacaca* to deal with an initial 100,000 of individual cases of prisoners accused of crimes in the context of the genocide, an incredible challenge for the authorities and the war-torn society. The *Gacaca* courts are extraordinary judicial instances drawing from traditional justice elements, but not respecting international judicial standards. They were implemented with difficulty, but managed to process the high number of accusations and cases which had even dramatically increased during the process. By 2007, almost half a million cases were dealt with in the first instance (out of more than 800,000), and some important cases had been transferred to the ordinary court system.

However, the civil war and the genocide also had an impact on the ordinary justice system. Almost all legal professionals were slain or had migrated in 1994. Comprehensive reform of the justice system has been implemented since, but the judiciary still has many challenges, in particular the lack of judicial independence, financial resources, widespread corruption of law enforcement personnel, and the limited number and capacity of judges, prosecutors and lawyers. The judiciary does not yet fulfil its role of resolving conflicts peacefully and according to an adequate legal framework and the rule of law. Conflicts are frequently resolved by violence or in the interests of the powerful, and access to justice is not certain. Massive internal displacement, inheritance issues after the killings, and increasing pressure on scarce land resources contribute to a high frequency of land conflicts, often leaving the most vulnerable (poor widows, orphans) without any protection. This results in their exclusion from effective participation in the local development process.

In order to contribute to the reconciliation process and fight impunity, SDC has been supporting and monitoring the *Gacaca* process as well as the rehabilitation and reform of the formal justice system for several years. Together with other donors, it provided financial support to the *Gacaca* authorities, and mandated an international NGO to monitor the process and its impact on the rights of the accused and victims. The support for the ordinary justice system focused on making it more operational and accessible to poor rural people, especially women. SDC has supported several local and international NGOs with the provision of legal aid and awareness raising. Through its partner, *Avocats sans frontières ASF*, SDC contributed to the development of a more sustainable legal aid system provided by the Bar Association of Rwanda.

This example illustrates the following:

- A **joint donor strategy** of financial support, combined with **permanent critical analysis** helped the judicial institutions to develop. However, there are clear limits to influence political decisions from outside, since the judiciary is often seen as very **close to the touchy core of State sovereignty**.
- A **functioning judiciary is crucial for the building of trust and confidence** following a violent civil war. If perpetrators are not held accountable for most serious violations of human rights committed before and during the war, regardless the ethnic characteristics of perpetrators and victims, citizens will hardly be able to develop trust in the impartiality of State laws and institutions. Violence and the abuse of power will remain the norm, rather than the rule of law.

- **Political commitment and considerable financial resources** are required for making judicial institutions work effectively and independently and ensuring access to justice for those in need of protection. Since the investment in judicial mechanisms is not seen as economically productive in the short run, State budgets as well as donors' commitments often do not take the financial needs for judicial reform seriously enough.

Legal protection for internally displaced persons and refugees: The Network of Humanitarian Legal Offices (NHLO) in Serbia and Montenegro

After the painful and violent dissolution of the Yugoslavian federation and war in Kosovo in 1999, Serbia and Montenegro were confronted with a high number of refugees and internally displaced persons (IDPs). Altough the numbers of refugees and IDPs were decreasing over the years, in 2005 there were still more than half a million people neither able nor willing to return to their previous homes, and their situation remained uncertain. While they were initially preoccupied with basic needs such as food and lodging, they quickly found themselves facing intricate legal problems involving the loss of personal documents, access to State services (social pension, education, etc.), their legal status in the host region, as well as property and tenancy rights.

Since 1997, as part of its humanitarian aid programmes, SDC has invested in the set up of the "Network of Humanitarian Legal Offices", providing legal assistance to refugees and IDPs in Serbia and Montenegro. This support was continued with a more long term perspective, taking into account the continuing need for legal support for refugees and IDPs, including returning asylum seekers from Western Europe. The NHLO was also supported by SDC with institutional change and in adopting a human rights based approach. This approach requires the NHLO focus on the empowerment of vulnerable groups, aiming either for their integration at their place of settlement or return to their region of origin. For this aim, the NHLO's 21 legal offices and 34 satellite offices provided legal assistance to more than 100,000 clients over the years, raised awareness for the needs of refugees, IDPs and victims of violence, and played an important advocacy role for the relevant legal reforms.

This example shows various aspects:

- **Even in times of conflict and war, legal protection and a functioning judiciary is important**, particularly for the most vulnerable groups. Where the judicial and administrative institutions are working, they must be used and strengthened.
- The phenomenon of internal displacement and the return of refugees has **important legal dimensions** which can only be dealt with from within the national legal, judicial and administrative framework: property and tenancy rights, heritage, access to registers and the issue of personal status documents are important aspects **determining the possibilities of refugees and IDPs both to integrate and return**.
- Providing legal aid to refugees and IDPs has proven to be an important **factor for their empowerment or, at least, for hindering further exclusion**.
- Refugees and IDPs are not a homogenous group, and their needs for support differ. Applying the human rights based approach helps to **target free legal aid services to vulnerable groups** that are most in need of support, as well as local minorities and victims of violence.

Addressing the gaps at diverse levels: The Centre for Social Justice in Gujarat, India

Compared to other countries in the region, India's legal and judicial framework is relatively well established and adequate from a rule of law perspective. The separation of powers and independence of the judiciary are important formal features of India's legal framework. However, the judicial system is viewed as more or less dysfunctional when it comes to protecting and implementing the rights of vulnerable groups and individuals against the interests of the powerful elite. In Gujarat, judges at all levels have a reputation for less than adequate professional capacities. Corruption is widespread, and courts, prosecutors and police forces are seen as favouring the powerful elite in many ways. Lawyers are not properly trained to effectively execute their role, and vulnerable citizens are not aware of their rights or the procedures to follow in order to claim such rights. Judicial decisions are rarely enforced, and there is a great deal of mistrust amongst ordinary people who do not view the formal justice system as a successful means to solve conflict.

Since its creation in 1994 as part of a NGO network in Gujarat, the Centre for Social Justice has focused on "social transformation through law", by using legal tools to uphold legal and human rights and access to justice for the vulnerable, and by creating legal awareness. The Centre has also aimed at strengthening the human rights perspective in the day-to-day functioning of the judiciary, as well as improving legal education in Gujarat. Several district centres provide legal services to vulnerable groups, and contribute to model cases and high-level public interest litigation, with a view to ending widespread impunity for massive human rights violations which are frequently occurring. The Centre also builds awareness about the legal dimension of social problems, engages in capacity building of legal professionals and "paralegals", and supports judicial institutions. It monitors and analyses the general human rights situation, including the investigation of grave violations of human rights, and systematically requests information on all kinds of public issues, with a view to establishing State transparency and accountability. The Centre actively advocates and lobbies for legal and judicial reform. Together with other donors, SDC has supported it's activities for several years.

The experience of the Centre for Social Justice is illustrative in several respects:

- Although the legal and judicial system can be formally based on the rule of law and non-discrimination, in reality it has often contributed to the reinforcement of patterns of discrimination and to the social and economic exclusion of poor and vulnerable groups. A **dysfunctional judiciary impedes the development** of such groups, and **fails to protect them from abuse and prevents them from benefiting from the rapidly growing economy**.
- A comprehensive and systemic approach must be based on a thorough **analysis of the various practical gaps and obstacles** which hinder vulnerable groups from effectively using the judicial system to realize their rights.
- The use of **legal tools is not a prerogative of lawyers** and judges: Ordinary citizens can use such tools, if they have access to information on basic rights and procedures and are empowered to do so. **"Paralegals"** with such basic knowledge, stemming from the same socio-economic background and knowing the local problems and potentials from practice, can provide better basic legal support to vulnerable groups than professional lawyers.
- Although taking into account the limited role of NGOs in addressing such gaps and bottlenecks, various stakeholders are to be supported in order to **build capacities on both the supply side (the judiciary as duty bearers) and the demand side (the vulnerable groups as rights holders),** and foster dialogue between the two sides.
- Legal aid provided by an NGO has operational limits and more impact can be reached by **focusing on model cases** and provinces rather than aiming to service all people in need.
- In a conflicting and/or authoritarian context, insisting on the independence of the judiciary and addressing concrete cases of power abuse can put **legal aid providers at severe risk**. These personal risks have to be managed carefully. By their explicit support, international donors often play an **important role in exposing such cases to international attention and protecting outspoken NGOs and individuals** involved from a repressive reaction.

Making human rights a reality: *Defensoría del Pueblo* in Bolivia

The Constitution of Bolivia established the role of the *Defensor del Pueblo* (similar to an ombudsman) as an independent institution relatively closely related to Parliament and its role of oversight on the executive and administration. It monitors public sector activities to ensure respect for constitutional rights and the promotion of human rights. The *Defensor* has the right and duty to receive, process and investigate individual complaints regarding abuse of public power and human rights violations. The *Defensor* may inspect places of detention and make recommendations to the authorities. The *Defensor* is also responsible for assessing whether the public administration fulfils its duties to citizens.

Since 1998, the *Defensoría* has played a growing role in monitoring human rights and the rule of law in Bolivia, and raising awareness of such issues for citizens and authorities. It has established a national network of 16 regional offices accessible to citizens and has a mandate to consider individual complaints. It has also published information and educational material on various human rights issues, which have been widely distributed. It contributed to capacity building of the administration (particularly the police) in the respect of human rights. It is supported by a Basket Fund consisting of several donors.

The international support for the *Defensoría del Pueblo* demonstrates the following:

- Separation of powers does not mean isolation: The executive, legislative and judicative branches of the state must be seen as a **transparent system of checks and balances**, with various mechanisms of mutual accountability.
- Since the entire public sector is required to follow the rule of law, its elements are important features of public service delivery: the *Defensoría* is based on the assumption that, **where there is no monitoring and accountability, discrimination, corruption and power abuse are widespread**.
- Judicial procedures alone are not sufficient to implement the rule of law and human rights: although the judiciary has an important role in dealing with individual complaints in a formal and legally binding manner, additional mechanisms are needed to make the rule of law a reality in citizens' daily lives. The *Defensoría* is an accountability mechanism both for treating individual complaint cases in a more informal and accessible way and for investigating and **analysing structural problems of human rights and abuse of state power beyond individual cases**.
- The *Defensoría* can make recommendations to the State authorities for the respect and promotion of human rights. Respect for the rule of law and human rights is not black and white, but is rather an **ongoing and never-ending process**.
- The use of **basket funding** contributes to **harmonizing donors and aligning with internal policies.** Moreover, donors support the State in its role as duty bearer and its **obligation to proactively promote international human rights standards** in all spheres of public intervention. It also corresponds to the obligation of donors to promote the respect for internationally recognised human rights in other countries, wherever possible.

Reforming the justice system and prisons in Ukraine

As a member of the Council of Europe, Ukraine is committed to the rule of law and an independent judiciary. It seeks to fulfill its international obligations, stemming from the European Convention on Human Rights and the international Covenant and to realise European legal and judicial standards in the country.

Although Ukraine has already reformed its legal and judicial system in many ways, there is still a long way to go to combat the lack of transparency, poor accountability and corruption, and to improve upon the respect for human rights.

SDC has supported Ukraine for several years with various approaches. Noting that Ukraine's prisons were overcrowded and in poor condition, the SDC intervention began by rehabilitating prison buildings and training prison staff. The next phase involved analysing the most relevant causes for overcrowded prisons and identifying the most vulnerable groups of detainees. Subsequently, the focus was on the quality and speed of judicial decisions related to juvenile offenders, and finally on crime prevention for juveniles. Today SDC's programme comprises several projects, namely support for justice reform based on judicial independence and international standards, support for a model centre of competence on reform issues in the penitentiary system, support for developing police strategies to decrease juvenile crime, contribution to the reform of pre-trial detention, and support for improving the conditions of imprisoned women, particularly mothers with children.

This example illustrates various issues:

- From an isolated intervention on prisons, the approach was widened to a more **systemic view** of the issues at stake. This must not result in a huge expansion of project activities, but it **guides the project in selecting more strategic and sustainable interventions** at various levels, while remaining pragmatic and modest.
- Applying a **human rights-based approach (HRBA) means a more systemic perspective**: Interventions such as rehabilitation and training initiatives for penitentiary staff are to be seen from the angle of their impact on vulnerable groups and their rights and interests (juveniles, persons living with HIV/AIDS, mothers with children).
- Following the human rights-based approach, **duty bearers and rights holders in the judicial and penitentiary system are to be addressed**, building the capacity of duty bearers (penitentiary staff, judges, police) and empowering rights holders (female and juvenile prisoners) to claim their rights.

Legal aid for the poor in Vietnam

For over 20 years, Vietnam has been in a far-reaching economic transition, resulting in a rapidly growing market economy. While the political system is still based on a strictly authoritarian one party system, the legal system is seen as an important tool for the management of the State and a changing society. Comprehensive legal and judicial reform has begun, including the development of a legal aid system for the poor. On the one hand, legal aid should raise citizens' awareness about new laws so that they can respect the new norms. On the other hand, the legal aid system should guarantee the "rights and legitimate interests" of individual citizens, based upon the International Covenant on Civil and Political Rights which has been ratified by Vietnam.

Under the auspices of the Ministry of Justice, a national legal aid agency has been created. Provincial legal aid centres have been established in all 63 provinces to provide legal aid services to target vulnerable groups, especially the poor, ethnic minorities in remote areas, and homeless children. SDC has been supporting the development of legal aid and the National Legal Aid Agency NLAA for many years. For the last years, SDC is cooperating closely with other donors, funding a joint project on the legal aid system.

The project experience illustrates:

- Since all State authorities are bound by the rule of law, **legal aid goes far beyond promoting access to the formal judiciary**. It includes support for citizens to learn about, claim and enforce their rights before any authority (including the land claims authority, the police and their powers of arrest…). It also means that conflicts between citizens (for example, divorce or inheritance cases, land conflicts, labour conflicts) should be solved in accordance with the laws and rights enshrined in the international and national legal framework.
- The impact of legal aid depends very much upon the general role of the legal and judicial system in a particular country. Where the law is seen as a **management tool for an authoritarian government**, it is not easy to use the legal system effectively to realize human rights for citizens. The **independence and impartiality of the judiciary** is key, as well as the **political space for lawyers** to challenge authoritarian decisions.
- The challenge for State legal aid is to **effectively uphold citizens' rights, which can oppose the interests of State authorities.** If the legal aid providers are an integral part of the State administration and hierarchy, they do not necessarily have the space and power to support citizens in challenging the decisions of other State authorities.
- The quality of legal aid should be measured by its accessibility to vulnerable groups. However, it is **not so easy to determine who is the most vulnerable**. Even among vulnerable groups there are big differences on how people can use the legal system to effectively defend their rights and interests.
- Judicial standards enshrined in international and national law are a **stable and legitimate basis for a joint project of several donors in a politically delicate field**. The fact that a national agency manages the project is contributing to **harmonization among donors and alignment** with the policies of the recipient country.

Law enforcement and community policing in Bosnia and Herzegovina

Security sector reform remains an important component of the transition process in the former socialist countries in Eastern Europe and the Balkans. Following the war in Bosnia and Herzegovina, the reform of the security sector was a particularly delicate issue. While the armed forces were integrated into a national army structure according to the Dayton agreement, the competence of the police forces remained with the federal entities, the *Republika Srbska* (mainly inhabited by Serbs) and the *Federation of Bosnia and Herzegovina* (mainly inhabited by Croats and Bosniaks). The latter even delegated the responsibility for police forces further to its ten cantons. The establishment of national police structures was put forth as a condition by the European Union (EU) to sign a pre-accession agreement, but the political decision-makers were unable to agree on such a reform for a long time. The main features of this reform and its implementation continue to be hotly disputed. However, reform is not only needed at organizational level, but also regarding the approaches and methods used by the police and its relationship to citizens. In the framework of its regional programme on police reform, SDC has supported the elaboration of a national strategy on *Community Policing* and its implementation in two pilot projects in both entities, with a view to expanding to the whole territory.

This experience shows that the methods and approaches applied by the police are most relevant for realizing the rule of law for all citizens, regardless of their nationality or ethnic origin:

- In the ongoing discussion regarding the sharing of political power, the police forces - and their political control - remain decisive factors for realizing the rule of law. By enforcing the decisions of political decision-makers and the judiciary, the **police forces effectively determine in the last instance which rules are enforced and implemented** – and which groups of the population can count on protection of their rights and interests.
- Community policing is a bottom-up approach focusing on the **security needs of citizens, including those belonging to ethnic minorities or vulnerable groups**. It emphasises prevention of abuses instead of repressing illegal behaviour only, and thus contributes to the enforcement of legal rules in a more constructive manner.
- In a war-torn society where mutual trust and confidence must be rebuilt, it is particularly important to demonstrate that the security forces are not only enforcing State power, but they are also **duty bearers providing services to citizens**, responding equally to the security needs of everybody, and respecting human rights.
- Most importantly, the community policing methodology can **build the confidence** of citizens belonging to different groups in a common institution which is highly visible.

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