Engaging with the Justice Sector - SDC Guidance Note

October 2017

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1. Introduction

In May 2017 SDC's directorate decided to mandate SDC's Thematic Unit *Conflict and Human Rights* to elaborate and publish a guidance note[1] on justice sector reform as part of the Justice Sector Capitalization Exercise (CAPEX).

This note is a SDC *C-Document*[2] that seeks to provide guidance to SDC staff on justice sector support. It aims to provide direction with regards to the strategic reflections that underpin an engagement in the justice sector. Furthermore, it aims to give operational level directions that equip staff with the evidence and knowledge needed to successfully pursue or initiate justice sector support programming.

Rule of Law and justice have become increasingly important in international development cooperation and for SDC. This is the result of the Agenda 2030 (SDG 16), and the New Deal for Engagement in Fragile States on the one hand, and of SDC's strategic shift towards fragile and conflict-affected countries – which is reflected in the Dispatch 2017-2020 – on the other hand.

Rule of law describes a system where elite actors, governing authorities and most of society agree to be bound by a set of rules that regulate social, political and economic interactions. In such a system, decision-makers and power holders can be held to account, members of society have access to justice to seek remedy and redress, and disputes can be resolved through non-violent means. When these accepted 'rules of the game' are meaningfully grounded in principles of human rights, rule of law can contribute to sustainable peace and equitable development.

However, in practice rule of law is never absolute. There is rarely a clear causal pathway between support to rule of law and the wider goals of sustainable peace and accountable government. Rule of law takes different forms. The texture of rule of law and justice systems in any country is the result of political and institutional change over time. It is therefore crucial for international actors to avoid assumptions about easily replicable trajectories of rights based rule of law, and what corresponding justice systems should look like.

Why is rule of law and justice sector support important in development cooperation? It is because they contribute in the following way to pro-poor, rights-based development, peace and governance objectives:

- Rule of law supports **inclusive political participation at different levels of government**, and peaceful alternation of power.
- More effective and rights-based law enforcement capabilities contribute to **improved safety, policing and security provision** for citizens in partner countries.
- Improved access to justice contributes to more effective legal voice among vulnerable and excluded groups to **seek remedy for rights violations, and fairer outcomes in dispute resolution.**
- Implementation of **accountable government** is made possible by working justice systems contributing to improved judicial accountability relating to rights violations, breaking habits of impunity and corruption.
- By enabling trust and certainty in the regulation of economic activities, rule of law and effective and predictable law enforcement can act as a **catalyst for economic development** and contribute to stabilizing social and economic rights. They facilitate more secure conditions for the **protection of livelihoods, asset accumulation and equitable distribution of resources.**

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[1] Protocol of the SDC Directorate, 29.05.2017, Point 6 "Justice Engagement of SDC", p.3.
[2] SDC C-Documents are work tools, approved by the thematic responsible at SDC. The directorate departs from the principle that only a limited number of copies of the document is distributed.

Engaging in the justice sector is a political undertaking. Justice is about the rules regarding how disputes are resolved, how power is distributed, and how states are held to account. Accordingly, there is an increased focus on *how* development actors engage in justice sector reform and what works best when pursuing changes. The 2017 World Development Report on *Governance and the Law[3]*, is example of the renewed focus on *how* to approach reform in highly political sectors.

Also for SDC it is essential to focus on *how* to best and most effectively engage in justice sector support. In consequence, SDC undertook a 18-month long learning process (Capitalization exercise or CAPEX) to compile its experiences, approaches, and lessons learnt on engaging in the justice sector.[4] The capitalization revealed that SDC is well positioned with its structure and way of working to support its engagement. These include 1) its long-term approach; 2) its decentralized structure and decision-making processes, which ensure context-relevance and allow for the design of approaches that reflect country needs and socio-political realities; 3) its strong normative commitment to human rights, the rule of law; 4) the important role given to national staff allows SDC to access local knowledge, local networks and acquire an in-depth understanding of the political dynamics within the justice sector; and 5) SDC's long history of supporting justice reform efforts and conducive policy framework.[5]

SDC is a comparatively small donor in justice sector reform. This is not necessarily a disadvantage. The comparative size of its programs may be less likely to elicit political resistance and its lower funding levels allow carefully testing. SDC generally defines its strategy and positioning according to context, donor landscape, and opportunities. Importantly, it is commonly viewed as a donor that does not pursue a political agenda[6].

The CAPEX documented strong examples of contextually appropriate SDC programs that are maneuvered in a politically smart way, take into account power dynamics, and use windows of opportunities in a strategic manner. Yet, it also revealed weaknesses in SDC approaches. Program documents often lack a deeper analysis of the political economy inherent in the sector and there is rarely a systematic assessment of the political space and how change can be supported. As a result, theories of change in program documents sometimes rest on "leaps of faith" that refer to recurring assumptions of international rule of law agendas. While the CAPEX has shown that SDC has in general moved beyond a narrow justice institution and state-focused approach in this sector, it is not immune to approaches that are solution-driven and draws on a standard set of interventions. Thus, while SDC does have important strengths that enhance its engagement, it needs to overcome the weaknesses identified.

The answer to effective justice programming is not about increasing budgetary spending, but about ensuring that programs ultimately benefit the poor and solve actual justice problems they are confronted with in a conflict-sensitive manner.

2. Overview of SDC's justice sector engagement

SDC's engagement in the justice sector is considerable. For the period of 2010-2015, SDC spent approximately CHF 200 Mio. on 58 justice programs by all four SDC domains combined. SDC has

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[3] World Bank Group *World Development Report 2017 : Governance and the Law. Washington, DC: World Bank.* https://openknowledge.worldbank.org/handle/10986/25880
[4] The Capitalization process resulted in several analytical documents, which can be accessed at: https://www.shareweb.ch/site/Conflict-and-Human-Rights/startpage-topics/human-rights-justice#menu04
[5] Dispatch on international cooperation 2017-2020; Swiss Federal Constitution, art. 54; Swiss Foreign Policy Strategy 2016-2019.
[6] Reference to 2011 Evaluation on SDC in fragile contexts

spent slightly more on justice sector support in fragile states, where it is engaged with fewer programs.

Expenses per domain are as follows:

- South Cooperation[7]:   CHF Mio. 117.19 = 23 programs
- Cooperation with Eastern Europe: CHF Mio. 49.59 = 18 programs
- Global Cooperation (without GI):   CHF Mio. 26.3 = 4 programs
- Humanitarian Aid and SHA: CHF Mio. 8.66 = 13 programs

SDC's justice sector engagement can be divided into **four main approaches** (see annex for more details):

- **Legal change** (development of new legislation or reform of existing legislation)
- **Judicial reform** (reform of the judiciary)
- **Access to justice** (bottom up approaches with a greater focus on end users of justice systems)
- **Organisational support** (support to non-judicial, but justice-related bodies)

SDC's thematic engagement is very broad, reflecting the wide variation of this sector. Most common recurring thematic focus areas are: **human rights, violence against women, criminal justice, and land/property rights.**

Also the choice of **organizations and actors that SDC programs are targeting** is broad and varies from one program to another. Civil society and national governments are the most common actors for programs to work with overall.[8] However, there are also significant numbers of SDC programs working with actors directly involved in the justice system, such as the judiciary, prosecution services & the police, legal aid providers and prisons. The general public is engaged with by fewer programs than major institutional actors, but more frequently than local government or rural communities. Actors at the periphery of the justice system generally receive less focus, such as land/property registry bodies, human rights commissions or the civil registry.

3. Strategic considerations for SDC support to justice sector development

Rule of law and justice sector have become more present in international support to development and governance, including in fragile and conflict-affected contexts. The SDGs put rule of law at the heart of development and recognize the need to build peaceful, just and inclusive societies that provide equal access to justice and are based on respect of human rights. Goal 16 is the main goal fostering peaceful, just and inclusive societies. However, the agenda goes beyond this and includes 24 targets from seven other SDGs that are linked to this aspiration. Together they are called the goal 16+[9]. In the framework of goal 16+ numerous targets of different SDGs aim to contribute to just societies[10].

Rule of law is also a core component of the 'sustaining peace' agenda agreed in United Nations Security Council Resolution (UNSCR) 2282 (2016).
In the last thirty years, international support to justice sector reform has become a more complex, multi-actor, multi-dimensional field of engagement. This reflects international efforts to accommodate

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[7] The figures are valid for SDC's institutional set-up in 2016, i.e. prior to the split of the MENA division and the creation of SONAP.

[9] http://cic.nyu.edu/sites/default/files/peaceful_just_inclusive_targets_analysis_aug2016.pdf
[10] For example target 16.3. Rule of Law and Access to Justice; 10.3. "equal opportunity laws, policies and practices"; 4.5. "all forms of discrimination in education", or 8.8. "labour rights"

the different functions that justice institutions (formal or informal) fulfil that are relevant for development, peace and governance objectives.

Here we set out the strategic implications for SDC's support to the justice sector, looking at: **major strategic considerations** and on **key principles of engagement**.

3.1. What are the major strategic considerations for donors?

Major strategic considerations for SDC (and other donors) are: (1) to take into account the **political dimension of justice sector support**; (2) to adequately **deal with fragility**; (3) to take into account the **reality of legal pluralism** in its partner countries.

3.1.1. Political nature of justice sector engagement and implications for *donors*

Rule of law and justice systems are important for development. The content of law, and the way that justice and dispute resolution systems work affects political, social and economic decisions with consequences for development outcomes. How these systems (state and non-state) are accessed and experienced by different groups in a country tells us about how societies define fairness and social justice.

At the same time, **rule of law and justice systems are themselves political outcomes**. They are the product of processes of political contestation and negotiation over time by which societies develop rules and systems to regulate social, political and economic life, and to resolve disputes through non-violent means. Rule of law and justice systems take different forms in different countries, reflecting context-specific histories of institutional and political development.

In practice **access to justice is experienced in different ways by different people and groups, mirroring patterns of inequality and exclusion**. Uneven experiences of rule of law and justice are especially pronounced in divided and unequal societies, where cleavages relating to class, ethnicity, religion, gender and urban/rural divides might be especially unresolved, or where dispute resolution mechanisms are especially susceptible to political capture by powerful interests. We also know that in practice different rights vary in how they feature in contemporary political systems. For instance, some systems privilege individual property rights over collective or community regimes of use and ownership of land.

There is now a wide acceptance about the **need to engage with the political and social complexities of how justice is imagined, how rule of law is politically negotiated** - and to understand who the winners and losers are of these unfolding battles – to improve effectiveness in programming. This recognition marks an important shift in a field that has tended to privilege top-down, state-centric and technical approaches to supporting justice systems. This has implications for how international actors should develop strategies to support their reform and development. SDC, like other international actors, has already moved away from purely top-down, and legalist interventions. There is a greater emphasis on bottom-up approaches, working with different end-user groups to support legal empowerment and more equal access to justice.

3.1.2. Dealing with Fragility

Switzerland's commitment to work in fragile, conflict affected and hostile environments is not only based on its own experience and mandate but also on an international consensus. According to OECD DAC "State of Fragility Report 2016", fragility is understood as "an accumulation of risk factors in five dimensions (societal, political, economic, environmental and security)".[11][12] Countries affected

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[11] OECD (2016), Brief Number 11: States of Fragility 2016 Report (p.2)
[12] *"Development assistance for peaceful and just societies: A long way to go with need for orientation"* Article by Nils Rosemann, Senior Policy Advisor for Conflict and Human Rights, SDC., p.1-2.

by conflict and fragility were among those left furthest behind by the Millennium Development Agenda. By 2030 poverty will become increasingly concentrated in fragile states and the OECD predicts even under the best case scenario more than 60 percent of the global poor will be located in these contexts.[13]

Hence, donors are increasing the proportion of funding for fragile and conflict affected settings. The ambitions for addressing different justice problems are high; the challenges for rule of law and risks related to engage in these contexts are especially high – often because the underlying political settlement itself is in question.

To manage these risks, SDC works with a conflict sensitive approach that is based on a **comprehensive risk management** (contextual, programmatic and institutional)[14]. Through a careful and continuous **context analysis**[15] and with the help of **fragility assessments**[16] Swiss Cooperation Offices (SCOs) shall identify the fragility issues hindering the development, humanitarian and transition mandate in their partner countries.

Recurrent justice issues often include; addressing legacies (or ongoing risk) of violence and human rights abuses, for instance through transitional justice processes; and (re)building trust towards, and access to justice and dispute resolution systems (formal or informal), including to address grievances that might be drivers of conflict and fragility; post-conflict/post-transition constitutional and legal reform processes; engaging with non-state actors; restoring basic sense of safety and security.

Underlining the huge variations in what constitute fragile settings, **typical challenges in terms of building up rule of law and accessible justice systems in fragile and conflict-affected contexts** include the following**:**

- There are heightened conditions of insecurity and uncertainty for state and society in general related to weak state legitimacy and/or limited territorial reach of state governance. In some cases there are also parallel or alternative governance structures established by non-state actors (such as for example organized crime or criminal gangs in Honduras).
- High levels of volatility mean that institutions, relationships and networks are in flux. For instance, peace agreements, might bring a short-term sense of stabilization, but often conflict related violence transforms and intersects with other forms of violence (such as armed groups financing their military capacity through drug-trafficking or organized crime).
- Previously existing state capabilities may have been weakened as governments struggle to staff judicial and law-enforcement bodies (courts, prosecution services) when crisis or conflict takes hold.
- (State) fragility often goes hand in hand with high levels of capture of existing justice and dispute resolution mechanisms by powerful interests. This is true of both state and non-state forms of justice provision. Persuading powerful individuals or groups to accept rule of law constraints on their conduct and interests is a major challenge
- There are heightened security risks for vulnerable groups. For instance, women are more likely to be vulnerable to conflict related sexual and gender based violence – including in post-conflict settings and in contexts characterized by high and endemic violence. At the same time barriers to justice might be made worse by the experience of social fracture, social exclusion, institutional weaknesses and increased levels of distrust in existing security and justice mechanisms. This distrust often results from conflict and or the weakness, lack of efficiency and resulting lack of credibility of these institutions in the eyes of citizens.

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[13] OECD: States of Fragility Report 2016, p. 137
[14] https://www.shareweb.ch/site/Conflict-and-Human-Rights/startpage-tools/cspm-tool
[15] https://www.shareweb.ch/site/Conflict-and-Human-Rights/startpage-tools/cspm-tool/context-analysis
[16] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/_layouts/15/WopiFrame.aspx?sourcedoc=/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/Working%20Aid%20-%20Context%20Analysis_1_issues%20of%20fragility_RON.docx&action=default

- There appears to be an escalation of transnational threats to security and justice provision relating to organized crime, trafficking of drugs, arms, people, and illicit financial flows. These often overwhelm and contribute to the weakening of already fragile formal or informal institutions of justice and security provision.
- As societies struggle to move on from conflict to post-conflict stabilization or more long-term political calm, there are challenges relating to dealing with legacies of violence, and trauma as well as long-term grievances that might have been at the root of conflict/violence.

Insecurity, endemic violence, weak state institutions that lack credibility and are not efficient undermine social cohesion and contribute to a climate of distrust in societies.

In many contexts, this has gone hand in hand with a more recent securitization of international donor responses to transnational security risks. This trend can increase tensions between hard security objectives and ensuring basic safety and humanitarian support, and investing in justice and human rights protection.

Yet conditions of conflict and fragility **need for SDC** – and other international actors – **to strengthen their capacity for rapid response interventions to provide basic safety and protection to populations from violence or rights abuses and to combine it with a long-term out of fragility approach**. SDC's approach to the challenge of working in fragile contexts is to always take the context as the starting point for programming. Based on a detailed and continuous context analysis, as well as a comprehensive risk management, SDC identifies entry points for all its programming with a view at contributing to reducing fragility in a given context. For SDC comprehensive risk management means "being fit for purpose" and staying engaged even in times where other donors leave countries and shift from development to humanitarian or even military assistance.

In fragile contexts international programming needs to be able to redirect funding and react with agility to changing features of the justice problem and to unforeseen changes not only in the wider political context but also the justice challenges that are the object of support.

This should go hand-in-hand with medium and long term engagement on prevention and investing in capabilities for access to justice, remedy and redress. In many cases, this means working strategically across sectors with a comprehensive approach. For instance, on conflict related sexual and gender-based violence there is strong reason to invest in cross-sector strategies (see Box 1 below)

Box 1: Integrated responses to conflict-related sexual and gender-based violence
In order to more effectively tackle country SGBV vulnerabilities associated with conflict and fragility, there is a need for stronger cross-sectoral engagement. This can include the following issues in thinking about the multi-dimensional and multi-sector challenges associated with this risk: • Understand the benefits and risks of unintended consequences when supporting different transitional justice alternatives when addressing gendered legacies of conflict, including those relating to SGBV • Support legal change aimed at addressing discriminatory norms and practices in security and justice provision, noting the challenges of legal change implementation, and the risks of backlash. • Investing in countering social norms that exacerbate SGBV. This includes working with all social actors' voice and agency to develop individual and collective capabilities to counter risk and deal with consequences of SGBV. This includes both (potential) victims and gatekeepers of social norms and discriminatory practices at national and sub-national level • Integrate support to justice and security with work on education reform (relevant for prevention capabilities) sexual and reproductive health provision (relevant to address treatment of victims) • Support capabilities on sexual and reproductive health consequences specifically arising from conflict, and invest in fast-response capabilities to counter the immediate and long-term health consequences of violence and conflict.

3.1.3. Dealing with legal pluralism

Dealing with legal pluralism involves recognizing that the state is not the only source of law and systems of adjudication. Plural normative systems can complement state laws by providing order by alleviating the burden on state institutions, or by enabling diversity of preferences[17]. Also, community-led and other forms of dispute resolution justice may be geographically, financially and socially more accessible than state-led systems.

SDC has experience of working with legal pluralism in very different settings. The majority of countries SDC works in have plural legal norms, processes and systems of justice. These are both 'formal' and 'informal', ranging from state law and court systems, to different forms and venues of alternative dispute resolution, and customary justice.

There is a tendency towards a shift in donor's appreciation of the need to understand legal pluralism better and to work with the complex reality of the multiple forms of dispute resolution and justice mechanisms that feature in different societies. However, in practice it remains challenging for donors to engage with non-state justice providers. In part this reflects the persistence of several assumptions which have underpinned how donors have engaged with non-state systems.

Assumption 1: Non-state justice systems are more discriminatory than state justice systems

Western donors have been wary of engaging with those justice systems which are non-state, because they are viewed as discriminatory. However in reality all justice systems (whether state or non-state) need to be judged on their own merits in terms of normative content, and actual practice, as to whether they reinforce existing social inequalities, discrimination or power asymmetries, or by contrast provide more locally relevant and speedy dispute resolution for the population.

Assumption 2: Non-state justice systems undermine state capacity to deliver legal services

A common concern is that non-state systems interfere with and undermine the legitimacy and capacity of state justice systems. However, many informal systems exist, first, because of the absence of, or continued abuse by, the state; second, complement state systems enhancing access to justice, including to reduce case backlog; third reflecting the fact of culturally diverse societies.

Assumption 3: Non-state justice systems are fixed and timeless

Terms such as 'traditional' and 'customary' encourage a perception that non-state justice systems are fixed, or at least that they rarely change. This is often not the case. Just as with state law, they are susceptible to contestation and renegotiation, in part due to wider political, social and economic forces, in part due to shifting capabilities and balance of power in the communities they serve.

These assumptions may hold true in some times and places but SDC does well to test them against context specific political economy conditions (as they do, for instance in Bolivia, Niger and Tajikistan). Moreover, modern justice systems all have an assortment of alternative dispute resolution and non-state conciliation mechanisms to make access to justice speedier and more effective.

It is also the case that community based forms of dispute resolution may work well where in dealing with grievances and conflicts in homogenous and small communities. They are likely to be less capable (as is also true of state mechanisms) of successfully delivering justice when communities are heterogeneous, made up of minority/majority groups and if faced with new forms of threats, such as organized crime (drugs trafficking, arms smuggling) or radicalized groups. It is important therefore to

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[17] World Development Report 2017, "the role of law", p.84-85.

bear in mind the challenges of how fragility and conflict affects plural legal and dispute resolution mechanisms- their efficiency as well as credibility.

There are a range of possible entry points for engaging with legal pluralism, some of which are informed by the assumptions above. Some are summarized here:

Table 2: Possible entry points for community justice and other alternative dispute resolution systems

Possible entry point	Pros	Cons
Recognising, formalizing and/or codifying non-state systems	Eliminates flexibility which can encourage elite capture	Fixes down previously fluid social justice systems, with the risk of affirming discriminatory power relations where these are a feature of non-state system
Encouraging integration between state and non-state systems	May challenge unhelpful dichotomy between systems	May expose non-state system to unfamiliar punitive or retributive measures
Directing users towards 'formal' systems, such as legal aid and district courts, (including for appeal purposes)	May provides more options for recompense for users	May put users into a complex and ultimately costly legal process
Politically smart engagement with and/or training local of leaders in dispute resolution, legal, or human rights principles	Encourages less discriminatory practices	May not shift long held discriminatory views
Setting up NGO-led community mediation forums	Provides locally legitimate version of existing informal systems	Sometimes lacks sustainability
Supporting voice and agency of vulnerable groups to contest/challenge discriminatory non-state systems	Contributes to changing discriminatory norms and systems	Risk of backlash against vulnerable groups

Overall, an engagement by SDC with justice systems should be informed through their potential to reform, rather than their formality, informality, or current non-compliance with human rights norms. Just as with formal justice mechanisms it is important to be mindful of being conflict-sensitive this is no less true of interventions engaging with different forms of non-state justice mechanisms and mediators.

Creative forms of engagement can include working with the gate-keepers of customary norms, such as local chiefs or religious leaders, as well as vulnerable groups to cultivate social norm change, for instance on women's access to land, or protection from such practices as early marriage. Each of these require careful analysis of the existing justice norms, processes and systems, and the power relations and interest structures that they serve. From that starting point, SDC staff can consider whether there are plausible, safe entry points for reforms that tackle discrimination and inequality.

3.2. How to engage in the justice sector?

Noting the political nature of justice and rule of law work, this section outlines some strategic principles of engagement that should inform SDC work. There are examples of some of these featuring in SDC support in practice. It also summarises possible entry points and risk issues.

3.2.1. Principles for engaging

We have seen that justice sector engagement is highly political and engaging in it involves risks. In consequence an important principle of engagement is comprehensive risk management (contextual, programmatic and institutional risks). This includes a detailed and continued context analysis (context must be the starting point of the engagement), a clear and tested theory of change and a solid, realistic monitoring and reporting system.

When engaging in the justice sector it is important to take a **flexible and adaptive** approach. Being flexible means having the space, intention and ability to change a programme when required. For example, the removal of a supportive minister for addressing due process in criminal justice, in a punitive society, might mean that a program needs to be adapted or change direction. Being adaptive means explicitly testing different approaches from the start, seeing what works, where and why, and then focusing on building on successes. Testing out different options – for example working with a range of community mediation providers with different approaches – and testing how they perform is a good way of ensuring positive results. Any interventions still need to be based upon the best available evidence and analysis, which should highlight where there might be opportunities for, or constraints to, progressive legal change.

An example of this in SDC work is reflected in the Global Programme on Migration and trafficking. Here, adapting the language of rights protection to fit realistically in with the political space available has included advancing rights through anti-trafficking laws that are politically more palatable for the governments in question than pushing for migrant worker laws.

Evidence confirms the importance of locally owned and locally driven change processes across different stakeholder groups, and the need to work with different **local partners**. This includes actors who are invested and have a degree of power as the best way to support change through development interventions. Priorities in any given country need to be set by those partners. The relatively decentralised structure of SDC already facilitates autonomous decision-making in terms of setting priorities and redirecting programmes at country level. This allows for a degree of scope for autonomous choices on programming design and strategy at the country level, as long as it aligns with HQ and country level strategic and normative orientation. The challenge is for country staff to make choices about which local reform coalitions or movements to support that can contribute to advancing change processes that are both locally owned and aligned with SDC normative orientation. SDC staff should engage strategically with legitimate local institutions or groups – such as domestic oversight mechanism or growing civil society groups – which they can support without overly skewing their ideas and incentives.

Policy literature on being **politically smart** suggests the need for strong political understanding of what is possible, and using this to inform considered action given existing constraints, opportunities and space for strategic coalitions. This means building good political relationships either with reform champions or with potential spoilers to cultivate their buy-in to intended change processes. For instance, on implementing new women's rights to land or in marriage, the support of community religious leaders will be important to change social norms on domestic gender relations.

For this it is important to have deep understanding of existing incentives and interest structures, an awareness of the political risks involved and an appreciation of the potential for an intervention or program creating additional conflict or 'doing harm'. The relatively lower SDC levels of funding in comparison to larger donors may mean that some of its work can elicit less political resistance, and for that reason be more politically effective. Most of SDC's work is being implemented through partners. Therefore, it is not enough for SDC and its cooperation offices in partner countries to be politically smart; those partners need to be politically savvy operators –and understand the politics and sensitivities of a specific justice issue.

Finally, focus more on function than form. Too many development programs start with solutions, not problems. This is true in many justice projects, which focus far too much on form over function. So a solution might be to build more court houses and train judges, as this might be easier than **addressing wider sources of injustice and justice provision**. A problem-driven analysis, such as that offered in the justice chain in Section 4 below, helps staff to get specific about what they want to address.

In embracing ways of working that encourage flexible, adaptive and politically smart engagement, **there is a fine balance to strike between ensuring working conflict sensitively and doing no harm, and working to maximise political opportunity structures to support key alliances, build networks among reform champions and support reform agendas** that advance SDC normative commitments. This is a fine line that depends on deep understanding of context, the specific nature of opportunity structures for (and obstacles to) change, and unfolding political and institutional change processes. We address how this might be done with more specifics in section four.

3.2.2. Summary of Entry points

An important development across the justice and rule of law support is the multiplication of entry points to address different types of justice problems and rule of law objectives. While there is still a tendency to draw on standard menus of interventions, the range of thematic areas has broadened; there are more multi-level engagements, accommodating both state-centric and increasingly more bottom-up approaches; there is greater aptitude to work with customary norms and non-state actors.

Table 3: Multiplication of entry points in justice and rule of law support

Multiplication of entry points in justice and rule of law support
Legal and constitutional reform: • Support to **constitutional reform** is common in post-conflict or transition settings. Processes of constitutional reform are windows of opportunity to incorporate new rights, build in accountability mechanisms, ensure greater inclusion and participation in settling. • **Legal reform**, including support to changes in commercial law, property regimes and land law; family law (and women's access to land and ownership rights); legislation on violence against women; criminal justice related legal reform (for instance, in relation to criminal justice, due process, access to legal aid, penitentiary reform); electoral legislation; migrants' rights; labour law, etc. Overall, the trend has been to move away from the crude legal transplants that characterised early law and development support processes.
Judicial reform: Much of justice sector reform has focused on judiciaries themselves with an emphasis on courts. • **Infrastructural support, s**uch as building court houses; building libraries; providing equipment (and associated capacity development) including furniture as well as IT, computers etc. • **Organisational features,** including training judges, support to salary, data systems of judicial decisions, work on ethics codes, legal education. • **Political and 'accountability' function of the courts,** addressing oversight role of courts, and politically sensitive issues such as judicial independence, and judicial review powers of courts.
Access to justice and legal empowerment: Bottom up approaches to access to justice and legal empowerment are an important part of international support to rule of law. This includes supporting capabilities for legal voice of vulnerable groups, and opportunities for rights protection and dispute resolution at different levels. • **Support to public interest litigation on social and economic rights** has become more salient as a form of 'politics by other means'. • **Legal aid** includes support to make access to legal counsel more readily available across a range of justice, rights and dispute resolution needs – including in relation to criminal justice; and to address barriers to access to justice. • **Community justice, alternative dispute resolution and engaging with customary justice and legal**

> **pluralism** have become more common. This includes working more with subnational realities of localised forms and understandings of justice.

> ***Organisational reform (beyond the formal justice sector):***
> A considerable amount of justice sector work has involved support to a range of institutional mechanisms that contribute to improving different judicial functions of justice. Examples include:
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> - **Ombudsman and different oversight agencies** such as electoral commissions, human rights commissions, special group rights commissions.
> - **Prosecution services** and their role in the administration of the criminal justice process are a core site of potential rights abuses.
> - **Penitentiaries** are key in terms of the experience of detainees the challenges associated with addressing issues of abuse, impunity, disregard for due process.
> - **Civil registries** have become increasingly salient as a space for securing legal recognition of individuals and groups and associated rights.

> ***Transitional justice:***
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> The third wave of democratisation, unleashed very different political experiences of dealing with legacies of violence and rights abuses committed during authoritarian regimes, or as a result of conflict. Donors have been involved in supporting different activities – with highly varying degrees of legitimacy and effectiveness. This includes one of more of the following: truth-telling (truth commissions or memorialisation processes of some form with the aim of documenting the experiences); justice (, criminal, retributive or restorative); reparations; security sector reforms; and guarantees of non-recurrence

SDC already has experience across most of these entry points, as identified in the CAPEX. These vary from country to country. Morocco programming engages with access to justice for women, detainees and migrant workers; Ukraine has a strong focus on criminal justice; in Mali, Niger and Kyrgyzstan there is a strong focus on dispute resolution relating to land; Tajikistan and Bolivia both work across a number of justice themes and entry points including access to justice, criminal justice, violence against women, judicial reform.

As international support and resources for justice and rule of law reform increases, additional features of this support include the following.

A broadening of the types of activities: As well as traditional forms of capacity development and training, there are more society-oriented activities including: awareness raising on rights and legal mobilization strategies; advocacy relating to legal change and implementation of new rights; advocacy and political mobilisation at national, sub-national and global levels to give voice to ; community-based activities relating to prevention of disputes or rights violations, rehabilitation and protection; psychosocial and medical support for victims of violence.

Broadening of actors involved in justice sector work. It is no longer focused only on national government or state actors, but now also includes an array of society based actors, including end-user beneficiary groups and CSOs. The range of international actors supporting change in relation to different justice problems has also significantly broadened since the 1960s. It not only includes bilateral and multilateral donor organisations. There is also a wide selection of international NGOs and private foundations focusing on different issues.

Engagement takes place now at multiple levels. In the past the focus was more on working with courts or governments at the national level. Engagement has extended increasingly to sub-national level activities on community level justice issues; and to global or regional levels, such as advocacy at regional or international rights organisations (such as taking cases to the Inter-American Court of Human Rights).

3.2.3. Risks of engaging with justice sector

The political nature of international support to justice provision means that there are risks associated with this task. Donors are often loathe to engaging in such overtly political processes as influencing rules about achieving judicial independence, or the judicial review powers of courts. But the fact is that even technical approaches to justice reform are likely to have political or distributive impact at some level.

There are several ways in which political risk features in justice sector support.

Risks associated with pushing explicit normative agendas relating to support to human rights can result in political clamp-down or backlash. For instance, legislation that criminalises female genital mutilation (FGM) and that is insensitive to prevailing social and religious norms at the local or community level, can drive the practice of FGM underground, exposing women and girls to greater risks of physical harm, and greater invisibility of the problem. In this example, support to legal change will need to be navigated at multiple levels (national and sub-national), including to ensure buy-in from the gatekeepers of social norms. Similarly, it is important to privilege 'do no harm' considerations in criminal justice work, to ensure that detainees are not punished for the well-meaning efforts of due-process activists.

Justice sector or legal reforms that upset powerful interests can result in diminishing the space for donor action. There may thus be good reason for strategic engagement to find 'under the radar' ways of working, in order to avoid direct confrontation with recipient governments. This is especially relevant in fragile or authoritarian settings where there is limited political space to contest power relations or vested interests. The calculation here for SDC (and other donors) is to consider whether the opportunities for progressive change are politically plausible and outweigh the more risk-averse option of pulling out.

Finally, in an international context where aid is susceptible to securitization, smaller donors like SDC need to be aware of the risks of engaging in a sector that is increasingly captured by the national security concerns of donor countries. This is especially important in relation to criminal justice and the rights of migrant groups.

4   Guidance on Project Cycle Management on justice sector work

This section discusses implications for operations and programming in justice sector work

There are four parts to good project cycle management for justice projects. These should not be considered chronologically, but as part of an integrated approach to project management.

- Overall approach
- Analysis, theory of change and problem-driven approach
- Management
- Monitoring, evaluation and learning

Distinctive to justice sector and rule of law work is that it involves the transformation of complex government systems. Linear change processes are unlikely as what is at issue is the transformation of power relations and interest structures as well as belief systems about social norms, gender relations cultural and value systems. Resistance and backlash is likely to be encountered, as well as the resilience of informal norms and invisible power structures that undermine human rights and rule of systems of accountability and constraints on the exercise of power.

Thus, impact-oriented work in this sector requires comprehensive risk management and working in a conflict sensitive way with a long-term engagement.

4.1 Overall approach

4.1.1 SDC's work on justice sector and rule of law

As underlined in Section 3 above, justice sector and rule of law reform covers a very wide range of thematic approaches. These cut across different areas of work, entry points and types of actors. The CAPEX developed the following summary table of activities and areas of work that feature in SDC programming and there is already considerable operational experience.

Table 4: Summary of SDC work across justice areas (adapted from CAPEX)

Approaches	Issues	Activities	Target group / partner
• Legal change • Judicial reform • Access to justice • Organisational support and reform (to include non-judicial but relevant bodies, including state and non-state actors, at national and sub-national levels)	Human rights, democracy and rule of law Criminal justice Land/ property rights Migration and trafficking Violence against women Transitional justice	• Drafting of laws, policy • Infrastructural/ organisational support • Other capacity development (including training, support to networks, policy dialogue, technical assistance) • Support to legal aid provision • Awareness-raising on rights and access to justice opportunities, including recourse to international law • Advocacy on legal reform, and monitoring implementation of new laws • Rights protection in criminal and non-criminal justice • Dispute resolution (eg family law, land disputes • Community based and other prevention, rehabilitation and protective programmes on different rights issues • Psychosocial and medical support for victims of violence, rights abuse and for detainees • Alternative dispute resolution, conciliation (formal and informal) and community justice • Research Redesigning and equipping detention centres	• National government • Local government • Judiciary • Other relevant law-enforcement/state bodies, including prosecution services, civil registries, police, prisons • Human rights commissions • Legal aid providers • Civil society • Direct beneficiary groups • General public (including concrete groups, like women migrants etc) • Lawyers/Bar Associations

Across these areas of work, SDC should continue to work on justice sector issues that have relevance for advancing pro-poor development objectives and contributing to human rights protection and inclusive and accountable governance. In practice SDC already engages in support on the following, working through entrypoints outlined above.

Support to legal change is a recurrent feature of SDC work. This includes mainly programming developing new legislation or reforming pre-existing legislation at the national level. It also includes constitutional reform (typically in post-conflict or post-authoritarian settings).
- *Opportunities*
  Legal or constitutional change processes are political opportunities to contribute to formal norm change, to establish new rights, justice or accountability mechanisms aimed at deepening state commitment to human rights and rule of law. They are also opportunities to give voice to excluded groups in shaping new formal rules (such as supporting women's movements to have influence on advancing women's rights and gender equality).
- *Challenges*

However, legal change is only one step, and the gap between gains on paper and implementation typically remain formidable, as affected interests will work to resist new rules. Importing legal transplants should be avoided, where laws from donor countries are copied directly into the recipient countries legal framework – regardless of local political conditions or relevance.

- *Ways of working*
  SDC support to legal reform should not be limited to technical assistance related to the development of legal text. Instead, it should be connected to the range of processes and activities such as lobbying and advocacy, awareness raising, capacity development, giving voice to vulnerable or excluded groups, engaging with changing social norms at national and sub-national levels. A focus on the ***process* of change** and not principally on the final legal product is important. In order for legal change to have 'game-changing effect' it needs to go hand in hand with political strategies to secure 'buy in' from key power holders and potential spoilers. This might include cultivating strategic alliances with reform champions, or seeking political support from influential international actors Enduring change also relies on wide consultation and participation mechanisms, best supported through sustained and long-term engagement strategies that secures ownership across a wide range of stakeholders over time. In all cases, understanding the political economy opportunities and constraints should inform what is politically plausible for legal change and its implementation, and where reform efforts will be wasted. Examples include Kyrgyzstan, Tajikistan and Bolivia, where legal change work focuses on the process of change, and on the politics of its implementation at national and sub-national level (CAPEX).

Judicial reform: This relates to programming that focuses on reform of the judiciary. It includes training judges and judicial staff, strengthening judicial independence, reducing corruption and improving court infrastructure. For example, in Bosnia and Herzegovina, SDC have supported capacity building of the prosecutors' offices and strengthening the capacity of oversight institutions (CAPEX). This was in part legitimated through working on court case backlogs

- *Opportunities*
  Judicial reform can contribute to building up institutional capabilities, which, if effectively harnessed to wider political, institutional and social norm change, can contribute to the capacity to address different justice functions: rights protection, dispute resolution; criminal justice administration; regulation; and judicial review of other branches of government
- *Challenges*
  There is a risk – as demonstrated by long-standing practice of international support to justice sector reform – to focus on technical approaches, and assumed capability gaps that might not sufficiently address the root causes of poor quality justice systems. Reforming institutions will not automatically or necessarily lead to better access or services for citizens and programs should not assume this is the case These efforts will likely not make much different if they do not consider the political economy features of the justice problems that they aim to address.
- *Ways of working*
  Support to justice sector development will be more valuable if it starts with addressing the particular features of the justice problem it aims to address.

Access to justice: This refers to bottom up approaches with a greater focus on end users of justice systems. It may involve working on legal aid, access to services, awareness-raising (such as on violence against women), and work with human rights commissions. This includes working with non-state systems at the community level and through different forms of engagement with alternative dispute resolution mechanisms. In South Africa, for instance, SDC has sought to enhance access to justice through support for small claims courts (CAPEX).

- *Opportunities*

By giving legal voice to excluded or vulnerable groups, such efforts can contribute to social accountable practices that involve recourse to the law and law-enforcement agencies. This can range from such processes as public interest litigation, to more protective forms of available legal counsel for detainees or victims of violence. At community level it can speed up and make more effective experiences of dispute resolution – including through alternative or customary dispute resolution processes

- *Challenges*
  It is important to keep in mind the risks of entrenched power asymmetries undermining equal access to justice or subverting these processes. Sustainability of access to justice efforts is a recurrent issue, especially regarding bottom-up approaches. In some cases, judicial budgets can include funding alternative dispute or conciliation mechanisms, as in the case of Bolivia where the effectiveness of a new conciliation mechanism has resulted in to buy-in from the judicial system

- *Ways of working*
  Whether SDC works to support access to formal justice mechanisms or to customary or community forms of dispute resolution, it be important to focus on the political economy and social norms context that is likely to shape whether access to justice will be pro-poor, rights-based or equity enhancing. For instance, in working at the community level, or through customary norms may be very effective in improving access to justice capabilities; but it is important to be mindful of avoiding localized solutions that might contribute to disempowering local communities vis-à-vis other actors, such as extractive industries or land grabs by powerful interest groups; or reaffirming practices of gender-based discrimination. In all cases, working through locally driven approaches that are mindful of existing power relations is important, including to note how plural systems either compete or complement each other, and with what consequences for vulnerable or excluded grups.

Organisational support: This encompasses support to non-judicial but justice-related bodies in this context, such as prosecution services and police, prison reform and land and property regulatory, civil registries bodies. It also includes work with local and national governments, and civil society. For example, SDC support to the civil registry system in Tajikistan is aimed at affirming the legal identity of citizens. (CAPEX).

- *Opportunities*
  Working across different relevant law-enforcement or regulatory bodies is important to helping to avoid siloed approaches. Moreover, integrated reform efforts that take into account the range of relevant bodies to addressing a particular justice problem is important

- *Challenges*
  As with judicial reform, there is a risk of overly technical approaches, and assumed capability gaps; and insufficient attention to how these might make a practical different to citizens

- *Ways of working*
  Support to the range of organisations that are relevant to improve the quality of justice provision and the prospects for need to be embedded in a holistic view of the broader political economy of rule of law, and the particular justice problem that reform efforts aim to fix. For instance, in the case of Tajikistan, nurturing the buy-in of religious leaders to encourage marriages to be registered is an important measure to advance the protection of women's rights in marriage (CAPEX).

There are three guiding principles to inform SDC programmes supporting justice and rule of law. These are relevant across all thematic areas.

- **'Problem-driven' approaches**: as outlined above, there is a risk that justice interventions rely on assumptions of easily replicable trajectories underpinned by SDC's own normative goals. This means, for example, that 'judicial reform' should not be construed as a goal in

itself. Nor should training for judges, other than in reference to an achievable purpose that contributes to addressing a justice problem. The important thing is to assess the plausibility of these reforms leading to realizable changes for people who engage with the justice sector, or for the advancement of a justice objective, such as improved accountability of public office holders, or better access to justice for women in divorce proceedings, or improving due process for pretrial detainees The multi-level change process for different justice problems takes time to achieve and is normally iterative and susceptible to reversals. Change thus should be articulated in the form of plausible theories of change relating to the problem in question, and the rules, relationships, capabilities and interest structures it affects (also see below).

- **Consider multiple and complementary areas of support**: While SDC may decide to work on a specific justice blockage, such as court backlog, this should be connected to the higher function that this serves to address, such as slow justice (with implications for access to justice), or prolonged pretrial detention. Addressing this may benefit from working across the justice system, for instance, investing in court procedure as well as in alternative dispute resolution forums. Working with these two areas – or indeed ensuring that other government departments and/or donors are – is a good way to help achieve overall outcomes.

- **Work beyond the justice sector**: Often cross-sector approaches are relevant to the problem. This should include non-justice sector interventions. For example, working to tackle violence against women needs more than awareness raising and legal aid. In order to address both prevention and then redress and remedy, and working across sectors is strategic. This might include connecting to women's economic empowerment interventions, or health sector support to strength response in terms of physical and psychosocial support. In Mali and Niger, justice issues relating to land use are closely associated with access to water (CAPEX, Thematic Study). Breaking through sectoral siloes is thus likely to be strategic.

The following example of programming on violence against women illustrates how complexity and multi-dimensional analysis can be factored in to operations, drawing on the *Life Without Violence* programme in Bolivia.

Box 2: Factoring in complexity and multi-dimensional change processes: *Life without violence*
The *Life without violence* programme in Bolivia takes into account the complexities and multi-level nature of the problem of violence against women.   Key features to highlight include the following: - The programme takes a '**problem focused approach**' as its starting point, and identifies the particular features of the justice problem (violence against women) as it exists in Bolivia. This involves working through the specific political economy features of the problem, unpacking the scale and incidence of the problem; the formal and informal norm structures that inhibit prevention, support, protection and rehabilitation (of victims and attackers) as well as the state response along the justice chain. This includes looking at the relevant formal institutional and legal frameworks as well as factoring in social norms, cultural practices, and embedded gender-based inequalities.   - Analytically it weaves a narrative of change that considers **the features of the justice chain**, and power/incentives structures that define how stakeholders are positioned in relation to the problem and the intended reform process. Stakeholders range from judicial, police and prosecution bodies, to the range of municipal and national government agencies that are relevant for law enforcement and policy implementation to the societal range of actors which reflect different normative, generational and cultural voices. The programme document underlines the need for building up strategic relations and engagement across these different actors and organisations.   - Importantly, the programme also underlines the need to integrate the problem of violence against

women against a **broader set of relevant socio-normative issues and multi-actor/multi-level responses** beyond the justice sector. Using opportunity structures provided by new legislation, the programme makes a case of connecting up the justice related agencies with the health system (on response and protection), the Ministries of Education and Communication (on education, awareness raising and information provision), national and sub-national levels of government and service providers.

This is an example of an integrated approach to engaging with the complexities of violence against women.

Source: adapted from Desk Study in the CAPEX

4.2 Analysis[18]

Strong analytical foundations to justice projects are essential. In line with the flexible and adaptive approach outlined above, analysis needs to be integrated into decision making processes. The purpose of outlining the following tools/approaches is not to overburden staff, but to suggest ways that current analytical approaches might be improved to unpack and test assumptions about how intended change might happen and the possible role of SDC support, considering the features of the justice problem in question (and its relation to the wider political economy of context).

Context analysis should be the starting point of all SDC programming, also in the justice sector.

In fact, to take the context as the starting point is at the heart of working in a conflict-sensitive way and for applying conflict-sensitive programme management (CSPM) at strategic and programmatic level. Context analysis allows to identify risks at contextual, programmatic and institutional level. A comprehensive context/ risk analysis has to happen in a holistic way that goes beyond technical context-related problems. Tools to undertake such a holistic context analysis can be found on the CHR Shareweb[19]. These tools include among others an **actors analysis** as well as a **fragility assessment**[20]. The latter uses the criteria of the Peace and State building goals as basic fields of observation and adds to it gender, environmental and psychosocial dimension. This tool helps to identify issues that hinder development and humanitarian mandates such as for instance fragility, violent conflict, human rights issues, social and political exclusion, missing security and other state functions.

It is important to note that SDC staff do not have to undertake a specific additional kind of analysis or use new tools. What matters is that the kind of analysis undertaken highlights the wider context, the opportunities and constraints for the justice problem it seeks to address, **to unpack in what concrete ways it will contribute to addressing governance blockages, and power dynamics that might be contributing to these.**

These approaches can be used in cross-cutting ways, depending on the justice problem. Currently, SDC primarily relies on context and stakeholder analysis. These are included in credit proposals with varying degrees of detail. But they are often summaries of the wider political context and there is not necessarily a clear link as to how this informs decisions relating to the identified theories of change or impact hypothesis. Here we outline the **value of having implicit and explicit theories of change**, and a problem-driven political economy analysis (fragility assessment) of justice sector interventions. This echoes recent SDC reflections on how to build up the Impact Hypothesis thinking underpinning

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[18] This section draws on the body of work currently captured under the labels of 'problem driven, iterative and adaptive' approaches, 'doing development differently, 'thinking and working politically', and on applying this to the particularities of different justice problems, and across different justice chains. See suggested resources in the Key Documents list below

[19] https://www.shareweb.ch/site/Conflict-and-Human-Rights/startpage-tools

[20] See also working aid on SDC Conflict and Human Rights Shareweb: https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/_layouts/15/WopiFrame.aspx?sourcedoc=/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/Working%20Aid%20-%20Context%20Analysis_1_issues%20of%20fragility_RON.docx&action=default

programme operations in practice (SDC How-to-note on Impact Hypothesis, 2015, SDC How-to-note "contributing to positive change in fragile and conflict-affected contexts[21]).

4.2.1 Theories of Change/Impact Hypothesis

Theories of Change[22] are way of integrating the forms of analysis above into a programme strategy and ongoing intervention process. A Theory of Change is an ongoing process of reflection, which seeks to unpack the black box of assumptions between inputs, outputs and outcomes.

Quality criteria for good impact hypothesis include (1) description of plausible cause effects of the main results chaing; (2) the main outcomes on both levels: population and organisations / systems and show how these are linked. (3) relate to other stakeholders and actors and their roles, (4) link with a clear definition of the final beneficiaries / primary stakeholders / target groups (5) in fragile contexts make explicit how they contribute to "out of fragility".[23]

While it often results in a *product* (a narrative document and/or diagram), it is important that it is an iterative *process*. There are both explicit and implicit theories of change for the work SDC does in the justice sector. The former refers to the official and publicly stated justification for a programme, while the latter is the often informal and private understanding of staff on what needs to be done to achieve change. Sometimes theories of change may need to stay private, particularly in relation to politically-sensitive countries or issues.

The purpose of undertaking a theory of change process is make ***explicit assumptions*** on how intended change processes will happen – and the role of a programme in supporting this - to subject them to critical scrutiny. For example, a common assumption is that technical assistance – such as training judges – will lead to behavior change of those judges, to be more trustworthy 'guardians' of the rule of law. The underlying assumption here is that this political role of judges is down to their technical capacity, rather than the incentives and constraints they might face, for instance, to exercise judicial oversight functions. But a theory of change process will help unpack the different conditions on which that depends and why – and whether there are alternative hypotheses for how change happens, and the actual incentives that affect the behavior of judges.

This happens to a degree in SDC credit proposals. There is also an iterative exchange between HQ and country office which can help to push programmes to justify the reasoning behind intervention choices; and theories of change are variable adjusted to adapt to changing conditions. However greater effort is required to articulate assumptions critically and test them over time, *during the life of programmes*. The tool used to unpack assumptions does not matter; the quality of the analysis and whether it informs decision-making does.

Implicit theories of change – often not documented, and sometimes purposefully hidden – are those that often in practice inform programming choices and ways of working, as on a day to day basis adaptation often does take place in response to changing conditions or identifying unexpected obstacles to activities not anticipated in earlier analyses (political economy, conflict, gender or other)

There are a number of reasons (typically) that can explain non- documentation of implicit theories of change. First, there may be considerations relating to political risk and do no harm, where the aim is

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[21] https://group.eda.admin.ch/group/Conflict-and-Human-Rights-Working-Groups/cooperationstrategies1/Documents/H2N%20-%202017-03-16%20-%20ARIs%20and%20CHRRis_RON.pdf

[22] In line with the SDC How-To-Note on Impact Hypothesis, the terms Theory of Change and Impact Hypothesis are used interchangeably.

[23] SDC How To Note on Impact Hypothesis; 2014:
https://www.shareweb.ch/site/Conflict-and-HumanRights/tools/Dokumente%20Shareweb%20von%20Excelliste/Impact%20Hypothesis.pdf

to avoid explicitly advocating politically sensitive directions of travel. Second there may be good reasons, given the inherently political nature of justice sector reform, to engage 'under the radar' activities in order to more effectively navigate complex opportunity structures, power relations and blockages. Avoiding the explicit can be politically expedient in order to support reform processes that are politically difficult.

This is especially relevant for fragile and conflict settings. At that same time, recourse to theories of change that are not made explicit to all local stakeholders raises issues of who chooses which are the biases to be privileged by SDC interventions., keeping true to conflict sensitive programme managementprinciples and alignment with SDC normative commitments working with an out of fragility logic helps resolve this dilemma.

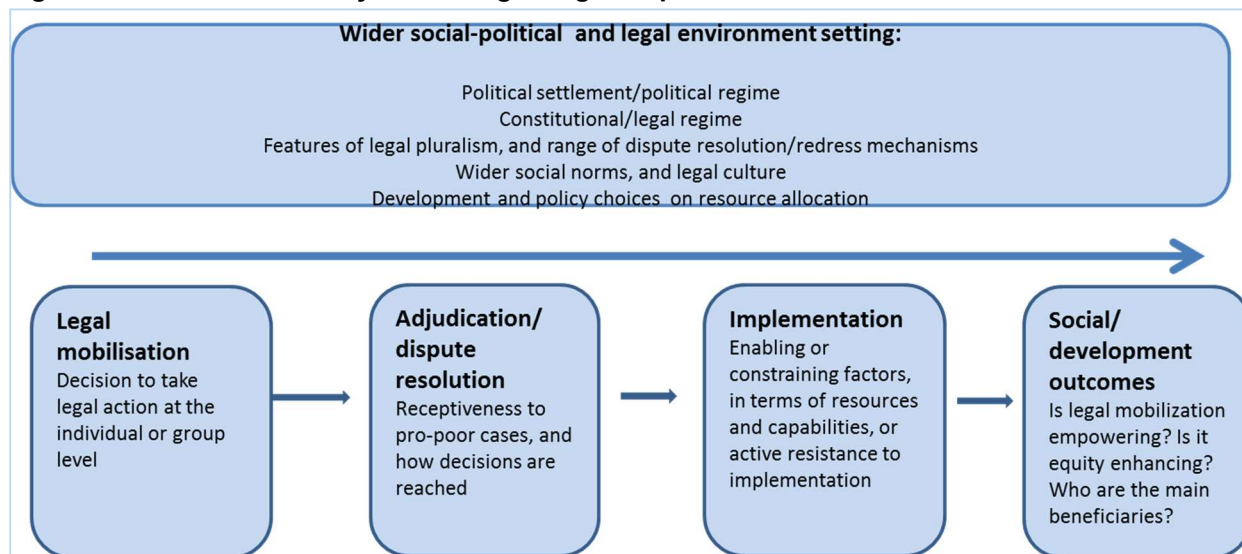### 4.2.2   Problem-driven political economy analysis and justice chains

Political economy analysis involves examining the distribution of power and resources in each situation and identifying the formal and informal interests, incentives and norms that maintain or threaten to challenge the status quo This can be done at a country, sector or problem-level analysis.

The justice chain tool discussed below is a concrete example of how to do problem-level analysis in the justice sector. This is closely related to power analysis. The justice chain tool, in figure xx below, is one way in which to unpack that for specific justice problems. It applies the reasoning of political economy analysis to different components of a justice chain, taking into account that different interest structures and power relations are likely to feature at these different stages *in relation to a concrete justice problem*.   This enables programming to move away from the focus on form to a focus on function - that is to respond to concrete justice needs, rather than to import preconceived ideas of what justice systems should look like.

Breaking down a 'justice problem' to the parts of the relevant justice chain can enable a closer analysis of the specific blockages and resistances to change, and the different opportunity structures that can be leveraged to identify entrypoints for programming as relevant to the context. This analytical lens can help to identify where there may be more politically plausible opportunities for engagement than an approach that focuses only on the legal or technical aspects. By looking more closely at what each stage of the chain looks like in any given country it is possible to identify context relevant capability or legal gaps, as well as the incentive and interest structures and social norms that enable or block reform. With this more granular information it is possible to construct theories of change that can more plausibly build on actual windows of opportunity, and in response to context specific challenges.

For instance, it may be that laws are in keeping with international norms on domestic violence, but judges are not receptive to domestic violence cases due to resilient social norms and practices that discriminate against women and girls. This analysis will help SDC assess factors that enable or limit victims' choice to action, whether to invest in awareness raising on the scale of the problem, in strengthening the voice and agency of victims (privileging safety and do-no-harm), in building capabilities and rewards within the justice system to be more law-compliant, or in building alliances with gate-keepers of social norms at the national and sub-national level. Assessing the wider socio-political and legal setting, staff can see if there are opportunities for support – and to which relevant actors at different points of the chain (victims' or women's organisations, legal aid organisations, community leaders, lawyers, law-enforcement bodies, or political actors). Digging into the details of such issues allows for more relevant activities that target those parts of the chain most susceptible to realistic and plausible change.

Figure 1: Justice chain analysis relating to legal empowerment

Wider social-political and legal environment setting:

Political settlement/political regime
Constitutional/legal regime
Features of legal pluralism, and range of dispute resolution/redress mechanisms
Wider social norms, and legal culture
Development and policy choices on resource allocation

Legal mobilisation
Decision to take legal action at the individual or group level

Adjudication/dispute resolution
Receptiveness to pro-poor cases, and how decisions are reached

Implementation
Enabling or constraining factors, in terms of resources and capabilities, or active resistance to implementation

Social/development outcomes
Is legal mobilization empowering? Is it equity enhancing? Who are the main beneficiaries?

Source: Domingo and O'Neil (2015)

Using justice chain analysis is one possible way of unpacking the political economy of different justice problem, and identifying politically plausible entry points or windows of opportunity for effective and relevant engagement.

These tools do not take the place of other forms of analysis. For example, gender analysis should be a key part of any theory of change and justice chain analysis. Comprehensive political economy analysis will contain elements of gender analysis, and vice versa. For example, a problem-driven political economy analysis of the Bosnia and Herzegovina judiciary interventions would look at the distribution of power and resources in certain areas – for example among judges – and see where there might be opportunities for change. This involves understanding how gendered power dynamics relate to those structures, and what that means for change strategies.

An assessment tool for gender mainstreaming is now used in SDC credit proposals. The aim of this is to ensure that projects collect gender specific information about projects, mainstream gender systematically from the very beginning of project cycles, and report the gender performance to headquarter for knowledge management and statistical requirements. There is a risk of this being a tick-box exercise. Most important is that an analysis looking at gendered power dynamics informs in concrete ways intervention strategy.

The example of Tajikistan in Box 3 illustrates an example of problem-driven, politically smart, flexible and adaptive programming where the objective of improving women's experience of justice to is envisioned through the lens of the features of women's access to justice as set against a wider political economy context where there are evolving processes of reform in different judicial, legal and governance areas.

Box 3: Problem-focused, politically smart, flexible and adaptive programming

SDC justice sector support in Tajikistan over time and across different justice and related interventions is an example of politically agile and adaptive engagement.It includes the following components:

- Drawing on a **deep understanding national and sub-national political economy factors to define**

relevant and locally defined justice problems appears to be the starting point of programme design. In the context of a political transition process shaped by the particular history of the state; and the geo-politics of the region has contributed to shaping concrete justice needs.This has informed a problem-driven approach based on an appreciation of these conditions, and how they shape barriers and windows of opportunity for advancing rights and access to justice – at the national and sub-national levels
  - Focus on women and their justice needs,
  - Making the most of available political space and enabling environment to support women's rights (which does not apply to support to human rights issues); over time to advance legal aid legislation and domestic violence policy
  - Investing in legal aid work small scale level, and with a focus on women seeking redress over family issues (in cases of separation, or on domestic violence issues)
  - Building up on early success to establish a network of NGOs, creating a platform for legal aid and support to other components of access to justice. This includes investing in legal awareness raising, (including through a social communications strategy).
  - Government buy-in to support women's rights and legal aid services

- **Politically smart and adaptive engagement with different stakeholders** at national and sub-national level has been a features of SDC country office engagement. This includes
  - Careful and creative weaving of relationships, strategic alliances and networks, such as engaging gatekeepers of social norms (like religious leaders at sub-national and national levels). It also includes investing time and resources in building trust among unlikely allies
  - Nurturing and then leveraging buy-in to different often parallel reform processes by key government and state bodies such as the Ministry of Justice or the prosecutor's office, and adapting to changing windows of opportunity as these arise.
  - Investing in capabilities of lawyers, and CSOs including to make them more politically agile and sensitive to social norms. This has been important in capacity development of lawyers and personnel of legal aid centers
  - Awareness raising and investment in legal voice of women has increased their capacity for legal mobilization.

- **Connecting the dots across different components of the justice chain** has been an important feature of SDC support in Tajikistan. For instance, investing in the civil registry included, among other objectives, enhancing women's rights and legal agency. In the degree to which more marriages are being registered in the civil registry, this maximizes women's legal protection.

Key factors include: a capacity for adaptive calculations, based on a close reading of national and sub-national political and socio-normative barriers and of changes in political space and opportunities; long-term engagement informed by nationally grounded knowledge of the justice problems (rather than imported solutions), combined with technical expertise in justice and legal change processes.

Source: Adapted from CAPEX

4.3 Project Management

Country strategies, agreed between country offices and SDC headquarters, set out the direction of programming at the country level. They reflect the agreed intersection between the strategic orientation and foreign policy underpinnings of Swiss Cooperation, defined at HQ level, with country specific needs, realities and accumulated SDC experience at the country level. Country programmes and projects on justice sector support thus need to be coherently integrated into country cooperation strategies. Distinctive to SDC is the relative scope for country-driven decision-making on thematic orientation at the country office level, and in ways that reflect country needs and socio-political realities. Moreover, flexibility in programming is recurrently noted in several country strategies as a feature of SDC practice.

For a specific program, different approaches to management may be required depending upon the complexity of the change processes SDC is intervening in. In situations of complexity such as these, adaptive management will be more appropriate. The latter often requires reconsidering the status quo in terms of project structure, staffing and culture.

- How projects are **structured** can have a big impact on whether they are able to learn as they go and adapt to changing conditions of local context. Giving implementer's flexibility, and building trust with them, is often the best way of ensuring that can happen efficiently. SDC are better equipped than many international donors to deal with this given its organizational structure and strong country presence. The capitalization study suggests that where there are knowledgeable SDC staff in place, they are able select implementers who are comfortable working in direct, honest and flexible ways. For example, in Bosnia, SDC have an ongoing partnership with both an independent judicial body and UNICEF in separate projects, both of which are premised on mutual understanding and ambitions.

- When reviewing the **staff** of a proposal, it is important to note that technical knowledge is not always the most important thing. Rather a proven track record of implementing in difficult circumstances (and adapting), and ability to build on and use existing relationships strategically to get the work done. To do effective justice projects, it helps to have long-term national staff equipped with technical knowledge and deep understanding of the country context. SDC is well placed to work this way, given its organisational structure. Having a long-term commitment and approach does not clash with the need to be flexible and adaptive – it allows for decision-making that is more rooted in evidence and experience.

- Creating a learning **culture** for projects is difficult. Improved knowledge management that contributes to learning culture can be supported through clear leadership and space for dialogue and critique, and for documenting processes of change that SDC work has contributed to. SDC's decentralized structure means local knowledge is more embedded in country staff, and they are therefore less reliant on implementers to make strategic choices than some other donors.

4.4 Monitoring, Steering, Evaluation, Knowledge Management

Monitoring can perform a number of functions: accountability (upward and downward), learning, communication, strategic reflection and more. A typical challenge is that implementers worry too much about accountability to donors, rather than learning and adapting. This does not need to be the case. There are a range of tools which can support programmes that seek to learn and adapt as they go, including outcome mapping and harvesting.

4.4.1   Monitoring and evaluation

A key part of monitoring and evaluation is measurement.

An important reference document (especially for work in fragile and conflict-affected contexts (FCAS) with regard to M&E is the CHRnet How to Note *"contribution and measurement for positive change in fragile and conflict-affected contexts"*[24].
Special attention should be paid to *Effectiveness Goal EG6 Human Rights* and the related indicators *6.4. "Contribution to the improvement of rule of law and access to justice"*

Joint Reference Indicators (RI):
Access to justice: *Measures taken by public and civil society actors which have improved public access to judicial procedures or alternative legal conciliation procedures and the share of the population, including women and disadvantaged groups making use of these opportunities.*

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[24] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/H2N%20-%20Contribution%20and%20measurement%20in%20FCAS.pdf

Effective and independent judicial authorities: *Institutional capacities of assisted judicial authorities and quality of their procedures measured against international minimum standards. Satisfaction of the population with their efficiency, independence and quality; percentage of women, disadvantaged population groups.*

Aggregated Reference Indicator (ARI)

Rule of law / access to justice: *Number of persons whose human rights have been better respected directly or indirectly by projects and programs supported by Switzerland.*

CHRnet Reference Indicator (RI):

Rule of Law / Inclusion: *percentage of population reporting having personally felt discriminated or harassed within the last 12 month on the basis of a ground of discrimination prohibited under international human rights law.*

With justice sector reform projects, there are a range of levels at which measurement might take place, including programme, sector or system level, country or context level; policy level. Concretely, SDC's draft Practice Note on portfolio outcomes in Democratisation, Decentralisation and Local governance suggests several 'fields of observation' which can be populated with a mix of targets/indicators that capture different dimensions of rule of law and justice change processes.

The key point here is to acknowledge that interventions have different expected and unexpected consequences at multiple levels, and as a consequence of different intersecting factors. Attribution is mostly not straightforward and SDC already has guidelines on monitoring that acknowledge flexibility in this respect. Only a **plausibility test** of SDC contribution rather than empirical evidence of attribution is required.[25]

Table 5: Possible fields of observation

This suggested mix of targets/indicators for justice and rule of law *(in italics)* take into account the various dimensions of change processes, drawing on SDC Fields of Observations for democratisation and decentralization.
1. Processes and interactions of key stakeholders. *Not only the duration of pretrial detainees in arbitrary detention, but how often they have had access to legal counsel and with what concrete follow-up actions taken; strategies of social or issue movements in giving visibility and legal to human rights violations (women's rights, disability rights, labour rights violations); how key networks and relationships have developed between law-enforcement bodies*
2. Behavior and attitudes: the use of a specific service by the target group, or: the use of communication mechanisms of local authorities with citizens. *Actual use of courts by women; patterns of judicial conduct observed through direction of rulings;*
3. Quality of the change process: (including mixed methods to ascertain process and outcomes) *Not only quantity of cases, but quality of rulings; nature of legal mobilization strategies; surveys of users and providers of dispute resolution mechanisms*
4. Intermediate results: Targets/Indicators should be broken down on the different steps and building blocks needed in the short and medium term for achieving the hoped for outcome. The impact hypothesis helps to identify the different steps. *For example, women's access to justice as a long-term goal consists of different building blocks such as awareness of women about their rights, and plausible mechanisms of remedy or justice; access to relevant information; experiences of collective engagement in problem solving;*
5. Disaggregated or specific targets/indicators for vulnerable groups. *The disaggregation of data in terms of sex is already a requirement from the point of view of gender mainstreaming; others can also be included relating to ethnicity, religion etc*

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[25] SDC Guidelines for elaborating cooperation strategies (2013) references in Draft SDC Practice Note on portfolio outcomes in Democratisation, Decentralisation and Local Governance

6.	Subjective aspects (such as perceptions) and objective elements (such as administrative statistical data on services, expert judgments).

Subjective aspects are particularly important to qualify relations and interactions.

7.	Multiple perspectives from different groups and types of stakeholders. This may be done by providing for disaggregated data collection or by qualitative methodology (such as stakeholders' perception's survey).

Different users and providers of justice mechanisms, and stakeholders working in other relevant sectors or governance process relevant to rule of law and justice sector processes. Legislators; justice sector and law-enforcement operators; lawyers and legal aid providers; CSOs, NGOs, social movements on concrete rights or justice issues (rights to water, disability, LGBT, migrant workers; displaced populations, women,)

There are some significant challenges to overcome in monitoring justice projects.

- Monitoring typically encourages sticking to plans, when often they will need to change as part of justice programming. For example, it may be that a legal aid support project, which supports paralegals across the country, is not functioning due to a lack of buy-in from local power-brokers. However, since monitoring incentives keeping promises of 'number of paralegals trained', the project continues as is.
- What counts as 'justice' is contested. There are no standard or universal validated measures on what justice is. This often leads justice projects to measure what is easily countable. As with above, this may be people trained, when indicators for what progress looks like on justice issues need to be much more nuanced – perhaps drawing on qualitative data.

Below are a range of tools and approaches that can be used to support good M&E. The key with each of them is to use them as part of a wider learning strategy.

Table 6: Key tools and approaches for M&E

Tool	Main usage	Do's	Do not's
Logframe (include ARIs/TRIs)[26]	Monitoring Planning and tracking change	Use realistic output process indicators which map likely pathways to outcome	Have fixed output indicators over the life of a project when engaging in complex change process
Political economy analysis	Revealing structures and incentives through life of programmes	Engage in ongoing analysis, by local staff	Get an external organization to write a big PEA that doesn't get used
Fragility Assessment[27]	Context Analysis Tool Part of comprehensive risk management	Engage in ongoing analysis, involve local staff and partners	Get an external organization to write it
Actors Mapping[28]	Context Analysis Tool	Engage in ongoing analysis, involve local staff and partners	Get an external organization to write it

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[26] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/H2N%20-%20Contribution%20and%20measurement%20in%20FCAS.pdf

[27] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/_layouts/15/WopiFrame.aspx?sourcedoc=/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/Working%20Aid%20-%20Context%20Analysis_1_issues%20of%20fragility_RON.docx&action=default

[28] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/_layouts/15/WopiFrame.aspx?sourcedoc=/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/Working%20Aid%20-%20Context%20Analysis_3b_four%20As_RON.docx&action=default

Justice chain	Problem-focused political economy analysis for justice problems	Use this to drill down to specific justice problems SDC can plausibly influence, keeping in mind wider political economy challenges	Assume SDC can only influence one part of the justice chain
Theories of Change[29]	Planning, steering and evaluation	Write an honest theory of change that is regularly updated	Write a theory just for accountability purposes that is not updated
Outcome Mapping	Planning, monitoring and evaluation Behavior change	Embed outcome mapping at the start of a project	Do a logframe, theory of change and outcome mapping as separate processes
Outcome Harvesting	Evaluation Behavior change	Use this to evaluate complex change initiatives	Use just for accountability

4.4.2 Knowledge Management

Effective knowledge management is key in ensuring accountability while not overburdening project staff. This can be a difficult area for SDC due to their decentralized model. The key to good knowledge management is often collaboration, which can be tough to do across offices and between HQ and country representations.

Investing strategically in knowledge management regarding its justice sector work can contribute to building a library on problem-driven, agile, flexible and adaptive ways of working in a politically challenging field. The following may be steps in that direction:

- First, there is a case for creating an accessible online repository connecting guidance to documenting innovative programming case studies and top tips for justice reforms. This should include a focus on innovative approaches and best fit examples (moving beyond best practice). **SDC's *Conflict and Human Rights Network* (CHRnet) provides such space for exchange and learning about good practices and failures and promotes horizontal and vertical learning.**
- Second, there is a case for creating incentives to document stories of change that capture socio-political complexity of justice process *from the start of programme design*. Of course, this brings with it challenges of justifying contribution and attribution. This includes investing in wider research to inform knowledge of the justice problems, and analytical approaches to guide in concrete ways plausible theories of change, and from this, strategy and programming choices. This is at the heart of political economy analysis approaches that focus on concrete (justice) problems to flesh out what is politically plausible, smart and where adaptation over the life of a programme is important.
- Third, consider how to join up justice work with innovative methods of learning in other areas..

SDC's revised focus on justice should not be seen as something isolated but also inform different economic, political, governance and rights issues.

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[29] https://www.shareweb.ch/site/Conflict-and-Human-Rights/tools/Dokumente%20Shareweb%20von%20Excelliste/Impact%20Hypothesis.pdf

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