SDC Justice Sector Capitalisation

Thematic study on land and justice

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1. Introduction

This paper takes stock of trends and ways of working in Swiss Development Cooperation (SDC) support to land governance with a focus on dispute resolution and justice sector reform. It is based on a desk review of four country offices (Burundi, Niger, Mali and Kyrgyzstan). It also draws on information from the Global Programme on Food Security.

This desk review is part of a wider capitalisation exercise reviewing SDC support to justice sector reform. The CAPEX includes: a wider Mapping paper of SDC programming drawing on a database of projects and activities provided by SDC[1]; two country case studies; a Desk Study of SDC programming in seven countries; and a Literature Review of developments in international support to rule of law justice sector reform.

This thematic study draws on four overarching questions, drawing on the shared outline for the desk review, the case studies, and guiding the overall capitalisation exercise.

- What is the strategic orientation of SDC's justice sector programming relating to land?
- What is the thematic content of SDC's justice sector programming regarding land and property?
- What operations and processes feature in different country contexts to design and implement justice sector programmes relating to land governance?
- What lessons have been learned across these areas, particularly in how they relate to 'ways of working' and impact?

The paper is structured as follows. **First,** it presents a summary review of the key issues in the literature on international support to legal change and land governance, justice sector reform, access to justice and dispute resolution systems in connection to property and land rights, ownership and use of land. **Second,** it considers the experience of SDC drawing on the four countries noted. The focus of the paper is on property and land issues as relevant to rural development; and on those governance features relevant to rights, access to justice and dispute resolution in relation to land. Mostly it will not focus on property and land in urban settings.

2. Methods and approach

For the thematic study the research team reviewed SDC justice sector programming in four countries and one Global Programme. The review is based on a template which sought to draw out the strategic, thematic, operational and process elements of SDC programmes in relation to land and dispute resolution. The question template allowed for a mapping of basic information about programming content and orientation as well as a more qualitative consideration of both the thematic scope of SDC work, and ways of working (see Annex 2). The review draws on this to summarise the key features of SDC practice and structure, and how these, and how enable identifying context-relevant 'justice problems', defining entry-points for justice sector support entrypoints in the area of land and justice.

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[1] See Mapping Paper submitted to SDC in June 2016

Information was accessed from a selection of documents provided by SDC. This included primarily Credit Proposals, Cooperation Strategies, and varyingly, project reviews, evaluations and progress reports.

The review has sought to go beyond a descriptive review of programming intent, analytical assessment of the practical features of implementation, however, findings can only be modest and tentative given that as a desk review it draws on existing reports and documents rather than on more nuanced narratives easier to elicit from qualitative field work and interviews. Instead, the objective, is to map out the general features of SDC support to legal reform and justice sector work in relation to land governance, land rights and property regimes in rural development.

3. Summary review of key issues on land and justice

The thematic study begins a brief overview of the key discussion in the literature on justice sector reform relating to land disputes, land use and land titling. The focus is on summarising the governance aspects of land use and land ownership, especially as this relates to law reform, justice and dispute resolution mechanisms, at national and sub-national levels.

3.1 The political economy of land governance and property rights

The multi-dimensional role of land in shaping development trajectories makes land governance an inevitably complex area for international support. The distribution of land and the types of property regimes that define rules about individual, collective or state access, use and ownership of land varies significantly across regions, within country territories and over time. Property regimes, land use and ownership patterns, and the normative development of property rights are closely enmeshed in the political economy of development. Histories of institutional change, land governance systems and the development of property ownership regimes intersect with legacies of colonialism and global trends in political and economic development – and the place of agriculture, rural development in this. The political economy of rural development thus reflects global, national and subnational power relations, and as well (progessive or revolutionary) processes of political contestation regarding the control, ownership and use of land. This in turn is reproduced in the development of regulatory, legal and normative frameworks and the dispute resolution mechanisms that societies develop to resolve conflict over control, ownership and use of land (chapters in Von Benda-Beckman 2006).

Our analytical understanding of the role of land, land governance systems and different types of property regimes in shaping social, political and economic development, is in many respects limited by the fact of what continues to be a quite disconnected body of literature in the social sciences on the study of land. In practice, the political economy of land governance crosses a range of disciplinary and analytical approaches in the social sciences, but these have tended to remain siloed with insufficient cross-referencing and interdisciplinary dialogue (Borras and Franco, 2010). Much of the legal literature on property rights is technical and legalistic; political economy, legal anthropology and law and society approaches engage more explicitly with issues relating to politics and power, culture and social norms, including in relation to gender issues and other cleavages (ethnicity, religion); and agricultural economics has focused on development trajectories of rural livelihoods and productive use of land. However, overall there is insufficient cross-fertilisation across disciplinary boundaries on agricultural economics, the political economy of land and property rights

regimes, of justice systems, and thus implications for international support to land justice issues. Moreover, regional histories about the politics of land and rural development remains quite separate (Assies, 2009; McAuslan 2013; Manji 2015).

Land is a valuable resource in economic history. Who owns it, who can regulate its use, how it is used and how disputes about its use, control and ownership are resolved are key issues in social, political and economic development. Institutions of land governance – that is, the system of rules and regulations (formal and informal; state centred and non-state) about the ownership, use and management of land and property –are the outcomes of processes of contestation over land, and in turn are constitutive of pathways of development. Property regimes refers to the legal framework that defines the nature of property rights in a given polity (establishing the rights, duties and associated with ownership and use of different types of property). Land titling refers to the administrative system which ownership is accredited and registered.

How these institutional histories feature in different country and regional contexts and at national and sub-national level varies. They mirror power conflicts about use, control and ownership of different forms of property, and wider geographies of space and territorial characteristics; and property regimes are deeply enmeshed in histories of social and political change, and specific development trajectories. They are both the product of processes of contestation (with varying degrees of violence); and at the same time, are constitutive and reaffirming of power relations, including the power asymmetries and patterns of exclusion that might be at the root of conflict and cycles of violence (Feder and Feeny 1991; Von Benda-Beckmann 2006; MacAuslan 20; Manji 20).

In international development, much of the focus on land, land governance and property regimes has been the work of economists and rural development practitioners. With the discovery that institutions are important in shaping economic development, there has been a growing interest in the impact of specific features of property regimes and land governance systems (Deininger and Feder 2009). One conclusion of institutional analysis of economic development has been the suggested correlation between low growth in developing countries and underdeveloped systems of property rights, in particular, in relation to (individual) land titling and secure land tenure (ibid). Accordingly, success or failure of land policies has often been measured more in economic terms and less so in relation to the interface between land use and ownership with wider processes of political and social transformation (Borras and Franco 2010).

In recent years, with growing attention to food security and livelihoods challenges, debates over property regimes, land use, tenure and more diverse political narratives about reform of systems of land governance and reforming land distribution are acquiring new visibility across a wider range of development and land governance issues (Assies 2009a; Cotula 2017; chapters in von Benda-Beckmann et al 2006, 2017). This includes a growing attention to the interface between global, national and sub-national contests over land use and ownership, and how this affects conflict, security (and food security) and pro-poor development. There is now a greater push to bring together different disciplinary and analytical perspectives to understand the role of different actors and institutional reform processes to support more effective and targeted international and policy responses that can contribute to integrated solutions to different, but interconnected development and governance problems.

By way of summary, trends over the last forty years in land reform that inform current approaches to justice and land governance reform processes include the following:

- By the 1970s earlier waves of redistributive land reforms began to give way to a new trend in land law reform increasingly centred on the affirming legal security (often through individual titling) of individual property rights. This was in keeping with the end of dominance of 'state-led development' models, which had placed more importance on land distribution policies in transitions from feudalism to capitalism, following assumptions of modernisation theory. (Assies 2009a; Bernstein 2002). In Latin America, especially, this trend resulted in patterns of privatisation of land in contrast to earlier policy cycles aimed at redistributive land reform (as in Mexico, post 1930s and Bolivia in 1953). Further, this coincided with the shift to policies of structural adjustment and market-led development models, and the new forms of economic globalise. In Sub-Saharan Africa, land reform took different forms, including through nationalisation policies (among the socialist administrations) and privatization (often with the aim of eliminating customary land tenure systems) (Wily 2011; MacAuslan 2003; Deere and Leon (2001).

- In the 1990s, policy shifted towards combining increased efforts with securing property rights and titling, and legally recognizing informal settlements and customary land tenure regimes – in diverse ways (Archambault and Zommers eds. 2015;). Importantly, the focus moved from an emphasis on redistribution to achieving security of tenure and ownership through land governance reform. A number of trends regarding land titling and recognition of legal pluralism can be identified since the 1990s.
    In urban dwellings this followed the logic of assumed economic benefits accrued from titling for occupants of urban informal settlements (Atuahene 200; Deiniger and Feder 2009). This was very much in keeping with de Soto's argument about value of titling to enabling security at several levels. The literature shows that interventions aimed at securing individual property rights do not always render positive results. Since the 1990s there has been a growing critique of those efforts which have underpinned undifferentiated calls for 'titling' or 'formalisation' when these have not taken account of complex histories of institutional evolution, the particular features of the political economy in question. This has meant that many of the assumed benefits of formalisation, titling and marketisation that featured in 1990s responses to land reform have often proved to be ineffective in terms of economic development; and misplaced in terms of these resulting in effective modes of land governance (Deininger and Feder 2009; Easterly 2008).

- At the same time – and related to recent political mobilisation by indigenous groups (as in Latin America) – there has been a growing recognition of the merits of engaging with legal pluralism. This has resulted in the formal recognition of customary norms relating to land use and land ownership, variably so, across regions (Wily 2011; Assies 2009a), and to community mechanisms to resolve disputes about this. Fundamentally this included a recognition of communal use and ownership of land, (including in recognition of property regimes predating colonialism). In the 2000s this 'going with the grain' of sorts came to be recognised by the World Bank as a more realistic mode of engaging with the complexities of the institutional layering of legacies of colonialism, post-colonial political economy of (re)distributive land policies, or policies that in effect translated into dynamics of reconcentration of ownership/use patterns (Deiniger 2003).

Mostly, though, hierarchies of normative systems mean that formal, state-centred forms of land titling tend to trump customary norms – despite legal and political processes oriented to reconciling normative pluralism (Alden-Wily 2011b and 2012)

- Mostly, there has been a trend towards land reform that seeks to regulated and harmonise land use and land tenure in ways that accommodate the realities of legal pluralism, the needs and rights of communities and vulnerable groups to secure their access to (use of or ownership) of land as a feature of their livelihoods and economic capabilities (for instance, to exit poverty, and engage in productive economic activities). Pro-poor land governance is a cornerstone of contemporary narratives of land reform.

- Additional recent trends in the politics of land governance include the following (Alden Wiley 2011b). Legal reform enhancing women's rights to land, through law that provides more opportunities for co-ownership of land in families; that protects women's rights to land at inheritance and in widowhood. Land reform processes are increasingly working to enhance duties and powers of land management and administration through decentralised governance structures. There are also increased efforts to 'democratise' land governance institutions at the community or other-sub-national levels, including with a view to reducing the local power of chiefs acting de facto as landlords.

- These trends have progressed concurrently with new forms of land grabs and patterns of reconcentration of land ownership in what is dubbed the 'global land rush'. As noted by Cotula et al. (2014), 'land grabbing' describes a range of processes and different kinds of actors, such as local governments, local land users, urban elites, and foreign investors, depending on the context. Importantly, large-scale acquisitions of land are growing, increasing the pressure on and competition for land – and in ways that discriminate against more vulnerable groups (IIED 2014). This large-scale increase in land acquisition by foreign companies and investors as well as local ones, who are sometimes aided by local governments and domestic elites (Crabtree-Condor and Casey 2012). For example, in Sierra Leone, it is estimated that 20 percent of farmland has been acquired through land grabs[2] for agribusiness investors (ibid). Finally, changes relating to climate change, demographic growth and urbanisation are further adding new pressures on access to, use of and ownership of land, which have implications for the development of land governance systems (IEED 2014; Toulmin, 2009) .

In practice, different experiences of land reform, the governance of titling and registration have resulted in complex forms of institutional and organisational layering, with diverse, and competing interest structures and power asymmetries shaping process and outcomes. This is manifested in different ways at the national and sub-national levels (Alden-Wiley 2011; Benda-Beckman et al 2006;

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[2] Generally, land grabs refer to the large-scale acquisition of large pieces of land through buying or leasing by local or foreign elites or investors as well as transnational companies. *See* Borras, Saturnino M, Ian Scoones, Ruth Hall, Ben White, and Wendy Wolford. "Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction." *Journal of Peasant Studies*. 38.2 (2011): 209-216.

the s the contentious issue of large-scale land acquisitions: the buying or leasing of large pieces of land by domestic and transnational companies, governments, and individuals.

Cotula et al 2004). Moreover, while different modes of land governance are proposed as a means to reduce (violent)conflict, the scholarship on the political economy of different property regimes is still quite young (Boone 2015). For instance, in relation to the enthusiasm with individual land titling and central registration systems, there is some recent research that suggests that in the short-run, this can incite and exacerbate disputes and prompt land grabbing measures (Cotula et al 2004). The most salient critique relates to the distributional implications of for instance de Soto's (2000) proposal, which entails titling on the basis of present land occupation. Since those presently using and occupying the land may not be the neediest, basing land titling solely on present occupation would not be empowering the poor or have-nots in society (ibid). Toulmin (2009) further identifies challenges associated with efforts to develop land registration systems. They are expensive; it is not clear who bears the cost of this, and the risk is that the poorest groups and individuals are less likely to benefit from new systems; it is not evident that conventional land registration systems have been able to address competing (but not necessarily conflicting) use of land, for instance between farmers and pastoralists; there are important capacity deficits to sustain national and sub-national systems of land governance.

In addition, well-intentioned efforts to formalise customary norms through formal recognition of communal ownership rights and regulated by land governance systems that accommodate legal pluralism are not unproblematic. Women, minority and vulnerable groups are often marginalized in customary systems of land ownership, particularly in systems organised around kinship, ethnicity or political and sectarian affiliations. Thus, while formalizing customary systems may provide security to marginalized and vulnerable groups, they may contribute to affirming inequalities and institutions that create such inequalities (Archambault and Zommers eds. 2015). Moreover, registration may penalise holders of secondary rights over the land, such as women and herders, who often do not appear in the land register and are thus especially vulnerable to expropriation (Cotula et al. 2004). In practice – as noted by Alden-Wily 2011), there is wide variation in how formalisation of property ownership and customary norms on land intersect, including taking into account the political economy realities of power structures, and interest groups at the global, national and sub-national level.

The role of the state has also varied, as owner, 'distributor', regulator or provider of dispute resolution mechanisms; but also susceptible to the perils of capture by elite interests. Where state capability or presence has been ineffective, or where other logics of authority over-ride, for instance in sub-national or customary modes of land regulation, local chiefs are also disruptive actors, and intersect with national and global trends of land use and value in ways that (McAuslan 2013).

Taking note of context specific histories of the political economy of land and property regimes, how institutional change has been politically contested, and with what consequences in terms of economic, social and political development needs to be the starting point for thinking about policy approaches to land governance and related justice reform.

Moreover, as Manji (2006; 2015) reminds us, current trends and cross-sectoral interest in the institutional forms of land management is not new – and was already present in the Law and Development movement of the 1960s (see also the ODI literature review on international support to justice as part of this CAPEX). Whereas in the 1960s the focus was on the state-led development, and the state's capacity to act as an agent of distribution, the current focus on law in development sees the state more as regulator, and less as economic actor. Thus, in the context of prevailing narratives

of good governance and rule of law, there is an assumed theory of change that formal titling, mostly through the establishment of ownership claims, will improve the economic value of land, through the provision of legal security regarding land use and property rights. Manji's critique of the current technical focus on formalisation of land titling lies less in whether this may contribute economic development, but in the fact that current narrative (that draws on de Soto's work, and was advanced at the height of structural adjustment and neo-liberal thinking of the 1990s) has been fundamentally technical in character. Advances in effective modes of land governance, (as is also true of much how rule of law has been promoted in the discourse of good governance), is conceived – in the narrative of good governance - uncritically as a technical process where the effort needs to be primarily directed at addressing capability gaps. This obscures the fact that in practice what is at stake is a political discussion about land and its distribution of (access to and control) land. Manji and others note that current policy debates about land management have been stripped of their political content, on the basis that there is a shared agreement about the merits of current directions of land law and land governance reform processes.

3.2 Land governance, justice and dispute resolution

While the scholarship on the political economy of land governance advances, the connections between this work and international support to rule of law and access to justice remains underdeveloped.

Land related grievances are a recurrent driver of conflict. Central to land governance is the matter of who decides which land belongs to whom, and what is the role of the state – or other structures of authority - in settling dispute over the use and ownership of land. At issue are also questions of what constitutes legitimate forms of land governance, that are widely accepted as fair by significant proportion of the population. From a normative perspective, the objectives of land governance mechanisms that contribute to equitable and pro-poor outcomes, in keeping with human rights-based approaches, are grounded in a range of international policy platforms and objectives. But institutional change processes associated with the development of land governance mechanisms at country level are deeply political, and inevitably the outcome of political contestation. They reflect the particularities of power structures and concrete histories of struggle over the control and ownership of land and property.

Land governance includes the following features. It involves those processes and mechanisms by which decisions are made regarding access to and use of land, and how disputes over this are fundamentally resolved. A summary of features that constitute land governance systems (Deiniger et al 2011; Palmer et al 2009) includes some of the following:

- Legal and institutional framework that defines the rules and systems regarding the recognition and enforcement of property rights
- Property regimes refers to the legal framework that defines how rights to property are constructed relating to ownership, control, use, and obligations, and whether they are collective/individual rights, or pertain to the state
- Mechanisms and processes regarding land-use planning, land management and taxation, (with a view to maximising economically efficient, socially equitable and ecologically sound management of land resources
- Public-land management,

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- Public provision and management of land information, including registries, cadastres that give recognition to use and control of land and property
- Dispute resolution and conflict management systems, including across the range of overlapping (formal and informal) normative systems that define (often in competing terms) what constitutes the right and just form of use, ownership and control of lad.

Justice sector support in relation to land in many respects is not dissimilar to international efforts on justice reform generally. Efforts are likely to address one of more of the following areas of change, either aimed at advancing institutional reform (formal and informal) across a range of relevant organisations (including judicial and other land governance agencies and bureaucracies), at building up the capabilities and awareness of a range of actors on the supply and demand-side, on, or at building up capabilities, investing in key relationships.

- ➢ Institutional reform, relating to the rules about the basis on which land use and ownership is decided. This may take the form of new **legal change**, or working to implement existing norm systems that are poorly implementing. Recurrent features of legal reform have included over time: agrarian reform policies with redistributive intent; legal reform aimed at facilitating land titling; legal reforms – including in family law – aimed at eliminating gender-based discrimination relating to access to land and property (for instance at inheritance or widowhood).
- ➢ Legal reform has also include **integrating or recognising different normative systems** that co-exist de facto, including customary norms (Isser 2011; Sieder and Sierra 2010). In Latin America during the 1990s and 2000's has been characterised by forms of constitutional reform that formalise legal pluralism generally, and in relation to dispute resolution systems, so that these are more grounded, or at least cognisant of the fact of community level forms of dispute resolution; and might include different forms of collective rather than individual ownership regimes. This includes taking account of the different normative understandings of property and ownership and the degree to which there are tensions and incompatibilities, and risks associated with not contributing to reproducing inequalities and discrimination based on gender, ethnic or community-based identity, or religion.
- ➢ Development of **justice and dispute resolution mechanisms** with a focus both on judicial systems, and more recently on community level modes of dispute resolution. This may include investing in different capabilities for both effective and legitimate dispute resolution or judicial mechanisms to be equipped to address disputes over land and property; and capabilities for legal voice, either through more equitable **access to justice.** Challenges include supporting access to justice in ways that protect the rights of access, use and ownership of land to the most vulnerable groups. This can mean focusing on community based approaches. At the same time there is a need to make sure that dispute resolution processes and mechanisms cross national, sub-national and global levels. If the focus is only on sub-national levels of justice provision, there is a risk of over 'localising' dispute resolution mechanisms in ways that disprotect more vulnerable groups from the legal mobilisation power of large agribusiness interests that can take states to court for violating international investment laws (Cotula et al 2014).
- ➢ **Organisational reform**, relating to strengthening capabilities by relevant authorities (both at national and sub-national levels). In relation to land this includes strengthening land registration mechanisms and bureaucratic capabilities to facilitate access; and to facilitate

community level forms of participation and 'ownership' in these processes. Experiences vary significantly (Toulmin, 2009; Cotula; IIED, 2014). Aims include: enabling titling and recognition of (diverse forms of) land use and ownership, channelling and management conflict, facilitating participative and deliberative modes of decision-making and dispute resolution. Increasingly support to organisational change includes working at community level, and in tandem with governance reform processes that advance decentralisation.

> **Legal aid/legal empowerment** and bottom up approaches aimed at supporting vulnerable (rural) population groups to navigate the opportunities offered by legal and administrative land governance frameworks, as well as the existing justice sector mechanisms (formal, state provided or customary/community forms)

Increasingly there is growing interest in gender and women's access to land.

4. Strategic, thematic and operational orientation of SDC's justice sector programming relating to land governance in rural development

4.1 SDC's strategic orientation to justice in land governance

SDC has a long standing tradition of working with rural development. This is echoed in its justice work, as noted in the CAPEX Justice Mapping exercise, which found that a significant proportion of this addresses land governance and in relation to conflict prevention, dispute resolution, land rights and rural development (ODI 2016). This is also in keeping with SDC's strategic orientation and programming in food security.

SDC is aligned with the following relevant policy frameworks: Voluntary Guidelines for the Sustainable Governance of Tenure of Land, Forests and Fisheries; African Union Declaration on Land Issues and Challenges with Framework and Guidelines on Land Policy in Africa

Strategic components of SDC work on land governance include the following. In relation to food security, there is a focus on supporting secure access to land; working on pastoral economies and pastoral livelihoods (as in the Sahel, the Horn of Africa and in Kyrgyzstan). In Niger, SDC strategy focuses on food security, peace and governance and support to education (CS-Niger 2016-2019). In Mali SDC's strategy is oriented to addressing a range of land/rural development related issues: prevention of conflict over natural resources (water, land, forest and pasture, including as exacerbated by climate change and natural disaster); with a special focus on vulnerable groups and their limited access to resources; migration; and land governance to address rural development. In Burundi, support to local level land management and governance, oriented to more equitable access and use of land and conflict prevention, is embedded within the wider Great Lakes three-fold strategy of development, humanitarian aid and peace promotion. In Kyrgysztan, SDC support to legal aid is inserted within a wider strategy to support access to justice for rural population in a context of rapid legal change and privatisation of land and property.

Much of the work on land governance (and implications for justice and dispute resolution) reviewed takes place in conflict affected and fragile contexts. As Switzerland is stepping up its work in fragile contexts, it is notable that the focus on conflict prevention is a recurrent strategic component of the work. In this vein, supporting land management, often at the local level, and in ways that contribute to creating space for dialogue and mediation among competing interests or groups over a scarce resource appear to be common features. Mostly, the work is not described as justice work, but as

support to land governance; in some cases it is part of peace building efforts, where decentralisation and resource management are institutional frameworks within which to develop capabilities to prevent/resolve conflict in relation to access, use of and control of land.

4.2 SDC's thematic content in land governance and justice programming (and country summaries)

SDC does not appear to have a single approach to land governance and justice. Rather, in keeping with its decentralisation structure, and as found in the CAPEX Desk Study, context specificity drives programming choices. Overall, there is a long-term perspective to SDC support to the range of activities associated with land governance, dispute resolution and justice.

Thematic content

SDC work on land governance in the programmes reviewed include the following:

- **Legal reform and institutional and its implementation relating to land governance**

This has tended to involve support to land reform, and to its implementation, in several cases aimed at improving land tenure and security of access and ownership – noting that the context varies. To varying degrees, this includes adapting to the normative complexities of legal pluralism and customary justice (Burundi, Niger); and to new formulations of land ownership, as in the experience of post-Soviet privatisation of land (Kyrgysztan). There is a strong focus on supporting access to/use of/ownership of land for vulnerable groups (Mali and others).

- **Land governance and land management**
A feature of land reform (and much of related SDC work) is that improved security of tenure – across different types of property regimes – can contribute to conflict prevention. Following from this, considerable effort is focused, in quite different ways, to supporting mechanisms, capabilities, processes, the development of relationships between different interest groups to put in place land governance and management systems at national and sub-national levels that either facilitate proof of (individual or collective) rights of access or ownership or create the space for dialogue to enable access to different users of land (Mali, Niger, Burundi)

A recurrent component of SDC support to land governance is through leveraging and navigating opportunities created by decentralisation, and governance at local level; and in many cases through engagement with customary forms land management, and dispute resolution.

- **Support to legal aid and legal services for the rural population; and access to justice**

In Kyrgyzstan SDC's focus has been on supporting legal assistant for rural citizens to be more aware of their rights relating to access to land and titling, and to facilitate mechanisms of dispute resolution (including through mediation and dialogue) relating to the use of land.

- **Organisational support**

This includes support to land/property registry bodies, including at sub-national level (such as the local land desks in Burundi); capacity development and training to build up human resources and strengthen processes around land certification at the local level (Burundi, Mali, Niger) and at the national level (Burundi). Organisational support, as noted in the CAPEX Desk Review and CAPEX Literature Review covers a wide range of state, non-state agencies and organisations, and

quite diverse capabilities, skills and resources (legal, technical, political), including building up databases of land maps and title inventories; as well as basic infrastructural support.

Country/programme summaries

This section briefly reviews the country experiences. It is important to note that this is based on written documents, which means that the more adaptive and flexible components of practice are not likely to be reflected.

BURUNDI: The focus of SDC's work in Burundi has been on conflict prevention through land management mechanisms at sub-national level that contribute to improving security of tenure, and certification of land rights, in ways that are cognizant of customary norms and community practices. The land situation in Burundi is characterised by increasing levels of conflict in relation to different land uses, excessive fragmentation of land due to demographic pressures, multiplying land conflicts, insufficient of land for returning refugees and internally displaced persons and complex bureaucracy involved in land management.

In this context, SDC's work has been based on a three-phase approach that starts with addressing immediate problems in relation to land management on a smaller scale in the Ngozi province to providing land management support on a wider scale. It aimed to contribute to the prevention and reduction of conflict over land as well as reinforcing a justice system to land management and land ownership.

Activities have included throughout the phases the following. There has been a focus on capacity development to improve land management capabilities at sub-national level (including organisational support to human and financial resources to facilitate certification processes; land inventory and database support; support to local land desks, modernisation of the cadaster in Ngozi). As land management has evolved, the 2011 revision of the land law created institutional opportunities to advance on municipal level land management that takes account of customary practices and institutions. More recent activities include outreach efforts aimed at facilitating participative mechanisms and consultation on local land management processes, and to raise awareness about land use and ownership rights. Two areas of support have included: localised land management processes around land certification; and (in later phases) support to women's access to land. It is not clear that the impact on women's has been important.

The theory of change over time is that support to certification processes that are adapted to local norms and practices will contribute to a more socially accepted pathway to preventing and resolving land related conflict. Effectiveness at the sub-national level will create opportunities to scale the experience up to national level debates for replication in other areas. As in the other cases, there is less explicit consideration of the concrete political processes that advance or hinder land governance process

Achievements include developing a legal system for land management based on the experience of the pilot project in Ngozi; establishing a platform for coordinating between civil society and the media that is functional; the development and implementation of new policies and legislative reforms aimed at promoting land rights, including for women while taking into account local practices and incorporating the question of gender in relation to land management. Throughout the

life of the programmes, three new communities have taken the initiative to establish operational municipal land management services; it is noted that the population within these communities, including women, were secured access to land through the certification process and the titling and the digitalization of the land titling process.

Among the **challenges and constraints**, SDC noted the difficulties of women's access to land certification, and the challenges of striking a delicate balance between integrating gender, while at the same time avoiding introducing artificial practices that would be rejected by the community and hence would not achieve sustainability. In addition, the rate at which digitalisation in the registration process is occurring remains low. And most public financial institutions do not yet fully recognise land certificates and need to coordinate better with existing work on the ground. More broadly, as noted by Kohlhagen (2012) reflecting on earlier work, the wider context of conflict and fragility, and the high degree of corruption and capture of public institutions relating to land management and justice provision undermine the prospects for progress.

NIGER: conflict prevention is a priority policy. Public resources are increasingly focused on security. And conflict over the use of land (and other natural resources) is identified in the Country Strategy as one of four conflict risk issues that need to addressed.

PASEL, SDC's land programme in Niger has focused on pastoral rights. The objective of PASEL is to ensure that mobility for pastoralists is recognised and protected by law and that institutions are in place to implement the relevant legislation. SDC's approach to land tenure is non-normative and based on existing modes of land use. There is a recognition that security of tenure for pastoralists is not fixed to a specific space, but rather is fluid and temporal. The PASEL programme explicitly acknowledges that the policy for pastoralists needs to consider how the pastoral system works in practice. Movement is recognised as a key feature of the sustainability of the pastoral system, and thus there is an understanding that land policy needs to reflect not only rights to space but also rights to movement and to access specific spaces temporarily.

Objectives include, securing access to grazing land for pastoralists, investing in land use planning, including through the recognition of customary institutions, and land governance that integrates collective land use and investing in participatory land use planning (Fleury 2014).

Activities: since 2000, the SDC has spent CHF 15 million through its pastoralist programme (PASEL). There were two broad strands of intervention in PASEL. One strand featured the rehabilitation of 2000 hectares of pastoral zone including the drilling of 100 wells and marking of 4000km of pastoral routes. The second focused on supporting legal reform (the reformed Rural Code) on pastoralism and support to local, regional and national structures to strengthen their capacity to implement the reformed legislation, including conflict resolution.

The principal entry points that PASEL use to achieve traction and legitimacy are the decentralisation process, conflict resolution mechanisms that have been shown to work. Decentralisation process is used to allocate increasing responsibility to officials at the communal level. Existing conflict resolution mechanisms that have been shown to work are consolidated and expanded on by PASEL. Finally, much of PASEL's activities involve delivering on tangible benefits such as drilling of wells and marking of routes. Although not explicitly mentioned in the programme documentation, are likely to increase the legitimacy of the programme among pastoral communities.

In the final phase of this programme (2016 -2019), SDC will focus its efforts on strengthening the capacity of institutions to implement the Rural Code. Activities include capacity building of actors involved in the decentralisation process, capacity building for the Permanent Secretary who is responsible for the implementation of the code, supporting the set of observation structures to monitor adherence to the Rural Code and supporting rural and pastoralist organisation in policy dialogue. Significantly, activities include facilitating dialogue and working

Achievements identified during the auto evaluation include:

- Improved capacity in key actors responsible for land management to conceive of, plan and execute development activities at their level of operation.
- Better governance in relation to planning development
- Protection of third party rights
- Reduction in rural conflict between farmers and pastoralists due to the social agreements developed
- Reduction in intercommunity tensions over the use of watering points, routes and grazing areas
- The pastural areas have been extended except for the border areas

Theory of change: Land disputes are key justice issues that SDC aims to address through its PASEL programme. The programme understands the resolution of conflict as a technical and legal issue that can be resolved through the reform of legislation, capacity building of local authorities and marking of transhumance routes. The programme does not fully address how land titling works, i.e. who wins, who loses within the current system.

The principle objectives include the progressive handing over of responsibility to local actors, the functionality of the Rural Code at all levels (local, regional and national) and the protection of cross border mobility. The programme also aims to consolidate the progress made in relation to gender in previous phases.

The programme documents are explicit about the overarching theory of change; the local control of governance and development results in a more efficient and peaceful management of natural resources and agropastoral areas in Tillaberi, Dosso and Maradi. The assumption is that strengthening local management of natural resources will lead to the peaceful resolution of disputes over access to those resources. At the same time, a major feature of the programme is to disseminate the Rural Code, a nation-wide policy on land management. The reform of the Rural Code involved consultation (a process supported by SDC. The code also represents a centrally directed legal framework that is sometimes in tension with customary law – at the same time support at the local level involves navigating customary norms and practice. There is no clear reflection of how discriminatory norms and practices will be addressed through support to local land governance. Implicit theories of change seem to include:

- If the law related to land management is reformed to recognise pastoralists rights to access certain routes, then local authorities will be willing and able to protect transhumance routes
- If local authorities have the technical capacity to implement the Rural Code, then they will be willing and able to implement the Rural Code
- If conflicts occur between pastoralists, agro-pastoralists and farmers, local authorities will be able to use the Rural Code to resolve the dispute

Taking a step back, and in contrast to the nuanced and non-normative analysis of land tenure, these change assumptions suggest an understanding of justice and conflict resolution that is relatively apolitical; that is, there is insufficient explicit consideration about how to deal with conflict, for instance, between breeders and farmers, other than through updating and raising awareness of the Rural Code. In other words, there appears to be an underlying assumption that conflict between groups can be resolved through having appropriate land governance systems in place. There is no explicit analysis of the power dynamics that influence how and why conflicts emerge and the impact of this on how land governance mechanisms are likely to play out (and thus implications for the programme's space to contribute to conflict management or prevention). For instance, it is not clear in the documents how the evolving hierarchy between both Tuareg clans produce and reproduce conflict dynamics in Tillaberi region – and how this might affect programming activities and decision.

At the same time, risk analysis included in the Credit Proposal for the final phase of PASEL highlights how political instability can block the functioning of institutions. The programme plans to respond only if there is a crisis, but there is no description of how conflict might be navigated in politically informed ways. The reality of political actors blocking legal reform or implementation is not considered in a significant way.

MALI Project documentation on AVAL's, SDC's major lowlands development and pastoral programme, is less explicit about underlying conceptualisation of justice in relation to land, and more about land governance to improve security of tenure and property rights. While the programme's title 'Aménagement et valorisation pacifique des espaces et du foncier agricole dans la région de Sikasso' (Peaceful development and enhancement of agricultural land in Sikasso) implies that the prevention of conflict and resolution of land disputes will be a key feature of the programme, it is one part in a very large menu of activities. The thematic areas involved include conflict prevention through support to local land governance that better mediates relations between different groups of the rural population; organisational support to the local land commissions, including resources and capabilities to prevent/resolve conflict; and improve the representation of women and migrants in regional consultations of land governance. The sections of the documentation describing the land dispute resolution components of the programme do not clarify what justice issue is being addressed, so it is not clear what the explicit or implicit understandings of justice are.

Activities There are three components to the AVAL programme in Mali. The first component focuses on pastoralist use of land and is concerned with ensuring mobility of pastoralists. The programme works towards protecting pastoralist mobility through the provision of tangible features on the routes such as markers showing the extent of the space where pastoralists can graze, water points, sleeping points (for herders), and improved grazing areas. Similar to the programme in Niger, AVAL also works to support the institutional framework for land management by building the capacity of the Permanent Secretary's office and local authorities and establishing local committees. The programme also supported dialogue between local partners on land management.

The second component of the programme relates to the management of lowlands and includes quite traditional development approaches such as the distribution of improved seeds, fish larva, experimental research on sheep breeds, and training. A feature of the programme that might have included innovation was the initiative to facilitate agreements and local conventions in relation to

dispute resolution and land access. Unfortunately, the current documentation doesn't capture whether this is happening or not.

The third component of the programme is focused on the 'peaceful management of farm land' through the development of internal rules for the Land Commission, supporting verbal dispute resolution, recording of land tenure customs for each area, supporting debate on land policy at the national level and making the different policies that are relevant to land coherent.

The objectives identified for AVAL were to 1) support all stakeholders from national to local level manage natural resources peacefully and in a lawful and environmentally friendly way, and 2) households, rural collective enterprises and the communal and regional authorities use the lowlands in a sustainable way. The entry point for the first objective was the development of pastoral plans and local conventions through the *schemas pastoraux*. The entry point for the second objective was the focus on the potential for lowlands to produce diversified crops and support households in surviving the hungry season.

Achievements include among others: greater awareness of land governance laws, and implementation processes that are sensitive to customary norms and practices; in 7 of the pastoral schemes there appear to be more consensus based decision-making processes and practices related to land and natural resource governance, including through better relationships and dialogue between different relevant actors in relation to land governance; tangible improvements in terms of women's access to land, and their access to decision-making roles at the local level in relation to land management.

Theory of change: An explicit ToC is not outlined in the credit proposal for Phase 4 of AVAL; and the multiple components to this programme make it challenging to identify an overarching ToC in relation to land governance. Broadly, if institutions governing land management are in place that are relevant to local disputes and practices, this will increase the potential for local authorities (beneficiaries, moreover, of relevant capacity development) to collaborate with the relevant territorial organisations and interest groups to ensure the sustainable and peaceful management of the lowlands. This in turn will contribute to improved livelihoods and productivity for different rural populations

Several implicit theories of change can be identified:

- If households have better access to improved seeds and breeds of sheep, then their income will increase and fewer households will experience a hungry season
- If pastoral routes are marked, then farmers will allow pastoralists to pass through and the number of conflicts will decrease
- If the capacity of the local authorities and Land Commissions is invested in, they will implement the land management policy more effectively and the number of land disputes will decrease
- If women's voice and representation is supported, this will enable gender equity in decision-making spaces gender relating to land and natural resource management.
- Improved land governance which reduces levels of conflict will increase productivity and income

Challenges are mostly identified as operational challenges. As with Niger, there is a sense that land disputes are treated as a general feature of the coexistence between pastoralists and farmers, and there is limited reference to the specific politics of the area. This suggests that disputes are understood as solvable through local agreements and conventions and with an appropriate legal framework that helps to navigate customary norms and de facto practices. There is little sense of the power dynamics that may be connected to these land disputes, whether there is a pattern to the land disputes that is linked to local, regional or national politics.

KYRGYZSTAN: Legal Assistance for Rural Citizens (LARC) With the fall of the Soviet Union, an important shift has been the transformation of property regime from one of exclusive state ownership to private ownership. This has involved setting up a legal framework and instruments to facilitate exchanging state ownership of land with private ownership. This change resulted in an increase in land related disputes, exacerbated by limited knowledge of legal rights, and the new property regime among the rural population.

In this context the LARC programme, started in 2000 has focused supporting legal awareness of rural citizens about their rights in relation to land and agriculture. An early objective was to contribute to preventing inter-ethnic conflicts. As these did not surface, LARC strategically reoriented its work to focus on on-going land reforms and new policies and legislations in relation to land claims. Mostly, the programme has evolved around the main objective of legal empowerment for rural citizens in relation to land issues, providing them with legal knowledge and practical mechanisms to advance their interests and to engage more effectively with the legal system and public bureaucracy. The project has gone through six phases of development and has been financed by SDC (2000 - 2014) and co-financed by USAID (2001-2005) with the last phase, which is still ongoing, being focused on the overreaching goal of sustainability by developing a new five-year strategy around decentralisation, diversification of services and donors/contractors as well as a yearly step-by-step withdrawal of SDC.

Activities have been numerous over 13 years and have evolved to adapt to the changing context emerging opportunity structures. They include: establishment of a network to provide legal services across a range of land related legal issues, and awareness raising; support to different target groups to resolve disputes through different mechanisms in and out of court; support to the evolution and implementation of the legal framework on land reform; research activities.

Achievements include:

- Significant reach to rural population, with increased awareness of legal rights (calculated at 60,000 beneficiaries; and almost 10,000 citizens, with improved capacity and confidence to engage with legal system
- Active engagement with LARC activities by local authorities
- Active endorsement by beneficiary groups
- Effective lobbying for legal reform, through strategic networking across different interest groups and actors
- The gender component is important
- Sustainable legal services system

Theory of change: through improved awareness of legal rights, the rural population will be better equipped to ensure the realisation of those rights, to take part in community action relating to land

governance, hold authorities to account, and to protect their interests. This contributes to conflict prevention, and enhancing improved livelihoods.

The LARC experience seems to have been an especially effective programme in kick-starting a practice and network of legal services in a context which has seen transformative legal change, and in ways that has made these changes more legible to the rural population. At the same time it is not clear from the documentation how power or political economy analysis has informed choices made in relation to what legal reforms were to be supported, and the political aspects of those choices

4.3 What operational processes and features are in place to implement justice sector programmes?

Mostly there is a sense that SDC has engage with innovative programming that has enabled adaptive approaches to addressing a range of land governance issues.

The analyses of context, and the work in practice, it is documented (Fleury 2014 and documents reviewed in this CAPEX), suggests that SDC's efforts in supporting access to land and land rights is informed by:

- awareness of the political economy of competing interests in agricultural production;
- the politics of exclusion and discrimination which reflects power structures (affecting different vulnerable groups in diverse ways);
- the need not to idealise any governance system per se, but to work with what is institutionally in place, navigating what is possible (including at the interface between new legal frameworks on land governance and the realities of customary norms and practices, and social norms around different practices of collective/individual/gendered use/control of land
- a commitment to enabling participatory and locally grounded lend governance systems and procedures.

Noting the limitations of a desk review in capturing ways of working in practice, some summary findings in terms of the operational practice and features include the following. It is important to note that this does not differ from the CAPEX Desk Study on justice sector programming in 7 countries.

Forms of analysis informing programming (including context, conflict, power or political economy analysis)

- Context analysis features in all cases in some form or another. Within that other forms of analysis (conflict, gender) feature to varying degree of detail. In all cases close understanding of context is important. However, there is less documented evidence that power, conflict or political economy analyses are used systematically to inform programme design and activities.
- Conflict analysis/political economy analysis: some form of conflict analysis features in all contexts in some form, not least given high levels of fragility, recent histories of conflict, and risk of renewed conflict. But it is not evident that findings from this analysis systematically inform porgamme choices in ways that take account of the political economy dynamics that such an analysis reveals.
  - o In Niger it was noted that how conflict and fragility intersect with the activities of land governance are not developed, especially in the border areas may impact on this

programme or vice versa. There is also little consideration of the institutional risk of facilitating the movement of pastoralists in a context where some pastoralists could be collaborating with extremist groups, particularly those based in Mali and moving across the border into the Tillaberi region.

o   While there is some recognition that the conflict in the north of Mali has resulted in pastoralists moving further south, there are no further considerations of the impact of conflict on the programme design. There is no analysis of the institutional risk of facilitating access for pastoralists, who may be linked with jihadist movements in northern Mali, to the Sikasso region.

- <u>Risk analysis</u> features in most (not all) cases. The risk of political instability, insufficient political will are frequently cited; but these are considered more in the light of operational risks, rather than how SDC programme might need to adapt to changing political circumstances.

- <u>Sustainability</u> is factored. For instance under the Great Lakes Programmes, the elements of 'do no harm' and sustainability have been particularly factored into the work, especially in relation to special considerations made in a context characterised by fragile peace. SDC's work in this sense focused on conflict prevention through strengthening the justice sector in relation to land access and use. The emphasis here is on preventing land-related conflicts as opposed to setting up or reforming dispute resolution mechanisms. In doing so, it very explicitly avoided disrupting or disregarding existing norms and customary systems, but rather opted for gradual change in order to guarantee sustainability and achieve long-term results.

Reflections on potential analytical blindspots

<u>Insufficient connection to multi-level political economy dynamics.</u> Land governance fundamentally affects who wins and who loses in relation to access, use and ownership of an increasingly scarce resource. The rules about dispute resolution (whether settled at the national level, or through complex realties of legal pluralism) are political outcomes, and also reflect the effective distribution of power in the community.

Despite the deeply political nature of the features of land governance and management systems (in terms of both normative content and process in practice), and implications for the workings of dispute resolution mechanisms – whether at national or sub-national level, mostly programming documents skated over the politics of this. This is not out of keeping with justice sector support generally.

Thus, while context specificity clearly informs land governance support, mostly it is not evident from the documents how the political nature of the intended change processes inform decisions about programming and activities. There appears to be a strong normative component underlying the theories of change, about the need for 'better' land governance and management that ensures more equitable and participatory processes for vulnerable groups in the procedures that define access, use and control of land.

While political risk is noted, and the adaptive elements are evident (in relation to being sensitive especially to sub-national conditions, or gender-based issues of backlash), it is less clear how

activities navigate resistance or backlash, and what process or analysis underpins decisions on how to respond to risks playing out. This is especially relevant for the contexts considered given conditions of fragility and conflict.

The risks of working with customary practices that might reaffirm power asymmetries to the detriment of vulnerable groups are highlighted, and there is an awareness of the complexities of legal pluralism. However, as seems to be the case with much justice work, there is a sense that efforts risk being too localised, and thus insufficiently connected to wider political economy dynamics, especially at the intersection between quite uneven forms of competition over scarce resources; or particular features of conflict. Considerations about conflict are very local but risk being insufficiently connected to histories of power dynamics that shape how and why conflicts emerge, and how these in turn will affect the workings of new land management structures. For instance, as noted above, it is not evident how SDC's work in Niger is informed by an analysis of the power hierarchy between clans and the impact of his on conflict in the Tillaberi region.

How do the programmes deal with accountability and learning? (M&E, knowledge management)

There is overall a lack of external reviews/ evaluations. Those labelled "external" (e.g. in the case of Niger) are often carried out by another section of SDC.

4.4 'Ways of working' in SDC rural activities on land governance and justice

Some features of about SDC activities should be noted in the context of the wider CAPEX exercise. It is important to note that some of these reflections can only be impressionistic within the constraints of a desk-based study. Moreover, there is significant variation

- Adaptive, politically informed approach. While there is not an explicit effort to engage in - problem-driven and politically-informed approaches, in practice , adaptive practices seems to feature on the ground. For instance, in the case of Niger programme documentation acknowledges a need for flexibility, including in recognition of the fact that pastoralism is evolving to adapt to ecological, social and political changes, and therefore, programme support neds to adapt alongside this.
- Supporting and leveraging opportunities created by legal reform on land governance to advance rights appears to be a recurrent component of SDC justice work in rural areas, even if how in practice different programmes navigate the political economy features is not evident.
- Many of the activities use the decentralised structures of authority to work with vulnerable rural populations in supporting land governance, and conflict prevention within that.
- There is a strong focus on facilitating dialogue/locally negotiated resource management agreements
    - at the local level in Niger on pastoral land use among different local actors has been an effective way of working to contribute to building trust
    - In Mali
- Working through local NGO's that are rooted in the community can make a different
    - In the case of LARC, identifying and working through a local NGO to facilitate change, and making strategic use of
- Focus on sustainability appears a recurrent feature of SDC work
- Sharing of results and models of working is a key dimension of these programmes.
- SDC's approaches appear to be vigorously tested through a process of piloting, e.g. Burundi.

- In many of the programmes reviewed, the <u>emphasis has been on the *prevention* of land-related conflicts</u> (for instance through land demarcation in the case of Niger or improved land inventory systems in Burundi), as opposed to setting up or reforming existing dispute resolution mechanisms.
- In many of the activities, programme objectives are not necessarily or primarily framed in the language of "access to justice" or indeed justice reform more generally. This is in contrast to more 'traditional' justice sector reform supported by international donors. Rather, they seem more likely to be framed in terms of institutional support and capacity building, and often of very practical skills (e.g. in agriculture).

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