

SDC Justice Sector Capitalisation

Country Desk Review of selected countries¹

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¹ Desk review by Pilar Domingo, Aoife McCullough, Craig Valters and Freya Lyte

1. Introduction

This paper takes stock of trends and ways of working in Swiss Development Cooperation (SDC) support to justice sector reform. It is based on a desk review of 20 projects in six country offices (Bolivia, Tajikistan, Ukraine, Serbia, South Africa and Morocco) and the Global Programme on Migration.

This desk review is part of a wider capitalisation exercise reviewing SDC support to justice sector reform. The Capability Exercise (CAPEX) includes: a wider Mapping paper of SDC programming drawing on a database of projects and activities provided by SDC²; two country case studies; a thematic study on justice sector support on land issues; and a review of trends in international support to justice sector reform.

The objective of this desk review is to provide a qualitative mapping of a selection of countries where SDC supports various justice sector interventions. The review answers the following key questions:

1. What is the **strategic and thematic orientation** of SDC support to justice sector work?
 - How does SDC justice sector work feature in Swiss development policy?
 - What is the strategic and thematic orientation of SDC support at country level?
2. What **analytical tools inform** programming choices?
 - Conceptual underpinnings of rule of law and justice sector reform
 - Features and forms of context analysis
 - Identification of justice needs and problems and features of programmatic design
 - How theories of change are articulated
3. What are the **‘ways of working’** in practice on justice issues distinctive to SDC?
 - Models of assistance
 - Ways of working in practice
 - Knowledge management and learning
4. **Lessons learned** and recommendations

2. Methods and approach

For the desk review the research team looked at SDC justice sector programming looks in 6 countries and 1 global programme (overall 20 projects): Ukraine (4), Tajikistan (6), Bolivia (1), Global programme (3), Morocco (4), Southern Africa (1) and Serbia (1).³

The review is based on a question template which sought to draw out the strategic, thematic, conceptual, operational and process elements of SDC programmes. 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 1). The review drew on the information provided by this to develop insights on what features of SDC practice and structure help or hinder identifying context-relevant ‘justice problems’, defining entry-points for justice sector support entrypoints, and shape SDC ‘ways of working’ in this area.

² See Mapping Paper submitted to SDC in June 2016

³ Further engagement with the Bolivia office, facilitated by SDC HQ, allowed for access to additional information on other project and programming areas. This has informed the analysis in this desk review, but does not feature in the annexes presenting information on programming that draws on initial documentation provided by SDC. Additional documents were also provided in relation to the Serbia country office support to justice sector reform which have helped to inform the review paper.

Information was accessed from a selection of documents provided by SDC. This included primarily Credit Proposals, Cooperation Strategies, and varying, project reviews, evaluations and progress reports. The desk review complements a wider mapping of SDC support to justice sector reform which looked at 58 programmes active between 2010-2015, working in Africa, Asia, Europe, Latin America and the Caribbean and the Middle East.

The desk review has also benefitted from the Mapping paper, presentations on two field-based case studies to date (Pakistan and Bosnia-Herzegovina), and engagement with SDC staff from headquarter (HQ) and from country offices present at the Lausanne F2F meeting in June 2016. This allowed the team to obtain a wider understanding of where and how justice sector programming features within SDC development strategy more generally, and what it involves in practice.

There are some limitations to this review. First, there was variation in the range and quality of documents provided for each project and activity. For some projects, evaluations were available, but they did not always provide sufficient information for this study. They also varied in terms of scope, purpose and quality, whether they assessed underlying assumptions and theories of change, and the degree to which interventions have been relevant to political, institutional and socio-cultural realities of context. Where evaluations were not available the study has drawn on available internal reporting.

Second, a desk review is inevitably limited in relation to what it can elicit about the practical aspects of *process* and *implementation* of programming - more available from interviews and fieldwork than from programming documents. For some of the countries there has been opportunity to engage with SDC country staff (eg through the SDC F2F meeting in Lausanne). This has allowed greater insight into process aspects of programming, such as how political analysis and knowledge of context are used to identify the features of the justice needs and 'problem' at hand, and decisions on entry points and project design. This engagement has allowed the research team to get a better understanding of how country staff elaborate on their implicit and explicit theories of change, how they factor in political economy analysis to identify windows of opportunity for engagement and constraints and take account of country specific power structures and positioning of relevant stakeholders for different justice issues. Finally, resources allocated to this desk review in practice allowed for only a summary review of the many documents provided.

Thus, while the review has sought to go beyond a descriptive review of programming intent, analytical assessment of the practical features of implementation, outcomes and impact of SDC engagement, findings can only be modest and tentative given the scope of the review. Rather, the objective, is to map general features of SDC support to the justice sector.

3. The strategic and thematic orientation of SDC's justice sector programming

3.1 General overview of SDC justice sector work

SDC has extensive experience and long-term history of support to justice sector and rule of law reform. There are a number of features characterising SDC work in this area.

First, a summary review of the SDC website and HQ documents reveals **a long history of policy commitment to and programming experience** dating back at least to the 1990s on a range of rule of law objectives and justice sector reform issues. These bridge different thematic and strategic areas, and activities. There is a consistently strong normative policy on support to human rights. Second, since 2000 Swiss foreign policy has a **constitutional mandate and political commitment to support human rights, rule of law and democracy** (SDC 2006).

The scope and conceptual trajectory of SDC's engagement with rule of law and justice issues as a matter of HQ policy and practice are reflected in the following SDC documents:

- In 2004 SDC commissioned an evaluation of its rule of law and human rights guidance documents (SDC 2004). This underlined the history of Swiss commitment to human rights support. It recommended that SDC update its human rights and rule of law strategy to be made more directly relevant to development objectives, to be grounded in clearer access to justice guidance and to go beyond the focus on civil and political rights.
- A 2005 position paper on SDC's support to human rights reiterated that access to justice and rule of law programming were key features of SDCs governance work (SDC 2005).
- In 2008 SDC published a concept paper on rule of law and justice sector support (SDC 2008). This underlined SDC's Strategy of adopting "rule of law as an explicit operational focus of SDC's thematic priority of good governance following a portfolio analysis in 2006 by which SDC decided in 2006 to consider rule of law and democratisation, including questions of State reform, decentralization, economic governance, human rights and justice systems, in its ten thematic priorities for the future" (SDC 2008). The paper made explicit the instrumental argument of the relevance of rule of law and access to justice to support equitable and pro-poor development is explicitly made.
- Governance work in SDC has a long-standing normative tradition relating to democratisation, human rights and transition politics, in which rule of law and access to justice (including transitional justice) are recurrent features. As governance has become a 'transversal' theme, to be mainstreamed in SDC (SDC 2007 and SDC 2016a), rule of law is identified as central for advancing "accountability, transparency, non-discrimination, participation, and efficiency" in development. To this effect judicial independence, impartiality and an accessible justice system are seen as important for law-bound and rights-enhancing development (albeit, increasingly embracing the need to work with legal/normative pluralism) (SDC 2007).
- SDC undertake a range of justice sector and rule of law activities (ODI 2016):
 - In economic and development activities, justice sector interventions feature in relation to land rights, property regimes and land dispute issues– reflecting also SDC's long-standing focus on rural development.
 - There is a strong presence of support to women's access to justice, mostly in relation to gender-based violence, but also to broader women's rights including family law, as migrant workers and victims of trafficking, and as detainees.
 - Support to criminal justice and penitentiary reform processes, for instance relating to prosecution services, access to legal aid for detainees, and prison conditions features widely.
 - And finally, SDC has an established tradition in supporting access to justice and rights protection in its migration work.
- More recently, Swiss engagement with the Post-2015 agenda has involved highlighting that "a new transformative agenda for sustainable development must include and make strong reference to human rights, including economic, social, cultural, civil and political rights". The Swiss statement specifically identifies justice, the rule of law, peace, and the social inclusion, of women, youth, children and disadvantaged groups as 'core principles and components of the Swiss position' (SDC 2015). See also the SDC working paper on Swiss Position on Governance in the Post-2015 Agenda (SDC 2013).
- A recent SDC policy paper on democratisation, decentralisation and local governance (SDC 2016b) takes into account a number of approaches and issues relating to judicial reform,

ranging across access to justice/rule of law, questions of accountability, protection and enforcement of rights and reform of judiciaries.

Despite this seemingly established experience in justice sector engagement, it is not an area that appears in practice to have strong visibility within SDC development policy and programming. Conversations with SDC staff in HQ and country office suggest that there is no clear position, guidance or centrally administered knowledge management structure regarding justice sector reform and rule of law support approaches, beyond the normative commitment to advancing human rights and rule of law. Country offices, rather, rely on staff skills and thematic expertise at the country level to build up their own access to justice programming.

This has been acknowledged in some evaluations. A 2014 evaluation of SDC governance programming, for instance, noted that “SDC would equally benefit from investing resources to ensure that critical justice and rule of law issues, which currently receive only limited attention, can be adequately addressed by the DLGN and the Conflict and Human Rights Network” (SDC 2014a). On engagement in fragile and conflict affected contexts, a 2012 evaluation of SDC instruments signals the relevance of, and policy commitment to, justice sector and rule of law support in transition settings. It also notes that relative to service delivery, the harder areas of justice, security and jobs have less presence in SDC engagement (SDC 2012).

In sum

- There is an explicit normative and strategic orientation and policy commitment to human rights and rule of law, which is moreover constitutionally mandated in Switzerland, and reaffirmed in recent development policy, including for conflict and fragile affected contexts.
- There is an important presence *in practice* of justice, rule of law and rights-related programming across a range of development, governance, migration and humanitarian issues; and spread across divisions, departments and thematic areas and activities.
- At the same time, this seems not to be supported by a robust presence of operational orientation and practical guidance on rule of law and justice sector reform, nor it seems is this area perceived as core SDC work by SDC staff.

3.2 Strategic and thematic orientation of justice sector work at country/programming level

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 a number of country strategies as a feature of SDC practice.

Table 1 provides a summary of strategic orientation, themes and issues in the countries and regions under study on SDC's engagement with justice sector support and rule of law for the six countries and Global Programme on Migration and Development of the desk review.).

Table 1: summary of strategic orientation, themes and issues

Country	Strategic orientation (drawing on country strategies – see references)	Justice themes and issues (drawing on programme documents and database)
Tajikistan	<p>Justice sector and rule of law support has been an important feature of the strategic orientation of SDC in the Central Asian countries since the 1990s and remains so in the current CS. Rule of law is seen as central to the advancement of legitimate state-society relations based on right protection, law-bound and accountable government, and of development, through effective dispute resolution over resources. Concretely in relation to Tajikistan the strategic orientation includes support in its “transition to market economies and establishment of rule of law and democratic systems” in the Central Asia 2012 – 2015 CS (SDC-CS Central Asia 2012).</p> <p>In practice there is a multi-pronged approach to rule of law support, which includes working on support to judicial reform and the wider legal framework, as well as access to justice and rights awareness of citizens. This also includes support to legal voice and the protection of vulnerable groups, with a focus on women’s rights, and protection against domestic violence. It also includes working with government agencies and judicial bodies, with the aim of strengthening the judicial and law-enforcement capabilities of the state.</p>	<ul style="list-style-type: none"> • <u>Access to justice</u>, with a strong focus on legal aid provision, legal awareness and rights protection of vulnerable groups. • Access to justice includes a component on awareness raising and legal aid relating to <u>rural land issues and land rights</u>. • <u>Civil registry system</u> has been support to increase coverage of civil registry, as a measure to assure rights protection and legal security of citizenship, including in relation to access to public services • <u>Criminal justice</u> working with different component of the criminal justice chain (including in relation to prevention of reoffending and rehabilitation, detention conditions, and with a strong focus on juvenile justice) • <u>Violence against women</u> through support to legislative change, access to justice and legal aid for victims, as well as support to psychological services • <u>Judicial reform</u> with the aim of
Bolivia	<p>Human rights and decentralisation</p> <p>There are two main projects in this area involving: access to Justice; and life without violence.</p> <p>And a Basket fund for implementing the Strategic Institutional Plan of the Defensoria del Pueblo (Ombudsman)</p>	<ul style="list-style-type: none"> • <u>Criminal justice</u> and access to justice, through support to public defender service and legal aid, training and capacity development. Support also includes working with women and juvenile detainees in terms of access to justice, rehabilitation and protection • <u>Access to justice</u> through a new conciliation service conceived of as a formal mechanism of dispute resolution, and also as ADR system resolved by non-judicial mediators. Access to justice in the context of the 2010 constitution recognising legal pluralism. Finally, Access to justice is also supported in criminal justice (with a focus on women and children) • <u>Violence against women</u>, working with justice institutions along the justice chain,

		<p>access to justice and awareness-raising, supporting the implementation of a new law. This involves a holistic approach to the problem of violence against women, with multiple entry points and levels of engagement – engaging with the complexity of the justice chain and multiple actors involved..</p> <ul style="list-style-type: none"> • <u>Policy dialogue and monitoring</u> of justice developments through what is labelled ‘strategic actions’ – identified as a concrete component of justice sector programming [acciones estrategicas]
Morocco	<p>The North Africa strategy in the wake of the Arab spring has a strong focus on democracy, transitional and human rights. In the case of Morocco, access to justice, protection of rights (including political rights) and observance of due process by the courts.</p>	<ul style="list-style-type: none"> • <u>Access to justice</u> with support to legal aid (including para-legals), public awareness, across a range of justice issues including in protection of migrant workers and against trafficking; support to on women’s rights, and juveniles; legal aid for detainees. National partners include national human rights organisations, network of lawyers • <u>Migration and trafficking</u> with a focus on both improving rights awareness and capacity of judicial and enforcement agencies to be better equipped to protect rights, and on civil society organisations and beneficiary groups to seek protection. • <u>Judicial reform</u>
Ukraine	<p>Justice sector reform was defined as a priority area in the 2011 to 2014 CS (SDC-CS Ukraine 2011), but with a view to being phased out subsequently. In the CS of 2015-2018 (SDC-CS Ukraine, 2015), justice sector reform does not feature as a component of Swiss cooperation. However, there is an explicit targeting of human rights protection and promotion of humanitarian law – framed mostly in normative rather than institutional/political language.</p>	<ul style="list-style-type: none"> • <u>Criminal Justice</u> and human rights, including work on prisons/penitentiary reform (including legal change, prison conditions, pretrial detention); and a strong focus on support for juveniles, women detainees and mothers in prison; capacity development and training; provision of) • <u>Access to justice</u>, with a focus on criminal justice • <u>Judicial reform</u>, including work on improving judicial independence, and enabling restorative justice
South Africa⁴	<p>Support to justice sector reform, strengthening the judiciary and access to justice in the context of decentralized justice (SDC-CS East and Southern Africa 2000 and SDC-CS Southern Africa 2013), and in support of rights awareness.</p>	<ul style="list-style-type: none"> • <u>Access to justice</u> (through awareness raising) • <u>Judicial reform</u> to small claims courts (capacity development, training) • <u>Legal change</u> relating to small claims courts(capacity development and research)

⁴ Integrated within the Strategy for Development Cooperation 2000-2010 in East and Southern Africa2

Serbia	Democracy and rule of law support is an important component of Western Balkans accession discussion.	<ul style="list-style-type: none"> • Reform of the judiciary and criminal justice, (through capacity development, organizational support and training) • Access to justice (through support too legal aid providers)
Global Programme on Migration		<p>Migration and the rights of migrant workers as well as victims of trafficking are a key focus.</p> <ul style="list-style-type: none"> • Support has been targeted at legal reform, through engagement with governments to bring national legislation and policy in line with international norms on migrant labour rights • Access to justice is a recurrent focus including through support to legal aid, and to associated services (including psychological and medical services). • Support has also been aimed at research on migration and rights

Strategic orientation

The strategic orientation of SDC is normatively grounded, with strong reference to democracy enhancing rule of law in pursuit of better human rights protection, law-bound and accountable government, and more equitable access to justice. The *intrinsic value* of human rights is quite central to SDC national cooperation strategies (in contrast, for instance, to the ‘golden thread’ narrative of the UK where rights protection has been justified in terms of its value for economic development (ICAI 2015)).

The *instrumental* case for why support to justice matters also features from a developmental perspective in country strategies. For instance: the case is made that by improving the rights of migrant workers (legal change), and their access to protective measures (access to justice) ‘labour migrants have decent labour conditions and contribute to the development of their countries of origin’ (GPMD Strategic Framework 2012-2017) (SDC-GPMD, 2013); the protection of land and property rights contributes to the enabling conditions for enhances economic development (SDC-CS East and Southern Africa 2000).

Justice issues and thematic orientation

The thematic orientation, selection of justice issues and entry points of SDC work varies considerably at country and programme level. The programming documents indicate SDC engagement taking place across a broad range of thematic areas and addressing very different justice, rights protection and accountability issues (see Table 2).

Table 2: Summary of issues, themes, target groups and activities⁵

Issues	Themes	Sub-thematic areas/activities	Target group / partner
Human rights, democracy and rule of law	<ul style="list-style-type: none"> • Legal change • Judicial reform • Access to justice 	<ul style="list-style-type: none"> • Drafting of laws, policy • Infrastructural/ organisational support 	<ul style="list-style-type: none"> • National government • Local government • Judiciary

⁵ Drawing on documents reviewed for the desk study, the Mapping Study (ODI 2016) and conversations

<p>Criminal justice</p> <p>Land/ property rights</p> <p>Migration and trafficking</p> <p>Violence against women</p> <p>Transitional justice [not present in programming examples in the desk review, but yes in country strategy]</p>	<ul style="list-style-type: none"> • Organisational support and reform (to include non-judicial but relevant bodies, including state and non-state actors, at national and sub-national levels) 	<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • 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
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Justice sector reform covers potentially a very wide range of rights, justice, due process, dispute resolution, judicial accountability issues and thematic areas. In part that is what explains the elusive character of the international support agenda to rule of law and justice sector reform. There are different ways of ‘cutting the cake’. For organisational purposes, we have distinguished between justice domains or issues (areas of rights protection and justice provision), and themes (entry-points, activities and levels of engagement). In addition we considered in more detail the range of sub-themes or activity areas, and the types of partners and beneficiary groups.

The range of issues mirror SDC’s strategic and normative orientation, and its development tradition. While they reflect in many respect a standard menu of issue areas relating to international support to the justice sector, some distinctive and recurrent elements worth underlining in SDC work include the following:

1) Human rights and democracy remains a central theme of SDC work. The focus here is essentially on what political, institutional, normative and socio-cultural processes of change can contribute to both protecting (human) rights, and advancing a law-bound, accountable state and political system (rule of law). This normative orientation features in a number of country strategies, and in several cases provides the conceptual underpinnings of why improved justice provision is an important feature of an accountable, law-bound and rights-enhancing democracy. The governance components of strategic engagement underline this, through such issues as the need to improve judicial independence as a feature of democratic separation of powers. For instance, recent thinking on justice sector strategy in Serbia underlines the importance of judicial independence (SDC-Serbia 2008 and 2011; World Bank- Serbia 2010; 2012; 2014). In the case of Ukraine there has been considerable attention paid to engendering a culture of, and capacity for judicial independence (Jeannet and Sedyk 2013; Tiede 2009). Mostly, though, the *political* dimension of support to judicial independence in pursuit of the accountability function of courts remains relatively underdeveloped in these countries – and programming targets mostly capacity development, at least on paper. More generally, on democracy and human rights, justice sector support focuses on how to advance human rights protection, primarily through improved access to justice, rather than the political independence of courts. The emphasis is thus more on the

demand-led intent of access to justice and bottom up legal voice, but also potentially lends itself to a 'depoliticised' narrative of justice sector reform, (albeit, possibly strategically so in terms of 'politically smart' engagement in this sensitive area, as discussed further below).

- 2) The strong focus on **migration** as a strategic priority theme for development cooperation since 2009 is a particular feature of SDC (SDC-GMDP 2013). From the justice perspective, this includes addressing the following questions: protection of migrant rights, especially in relation to labour; trafficking including as a labour issue but also in terms of protection of victims of trafficking; supporting legal change to align domestic legal frameworks with international norms; and support to access to justice capacity on the supply and demand side, as in Morocco (GADEM 2014); Sri Lanka (Rupasinghe 2015). Support here also focuses on generating research on rights of migrants (SDC-GPMD 2013), as in Morocco and Sri Lanka (GAATW 2014; Pattainak 2014).
- 3) On **criminal justice**, there is a tradition of work on the protection of the rights of detainees (including in pretrial detention). There is also a particular focus on working with women and juveniles in detention. SDC's support addresses different parts of the criminal justice chain. Work includes:
 - Legal change to update criminal codes and procedure with the aim of strengthening due process principles (as in the Ukraine).
 - Working with judges, both in terms of training and capacity development including on international legal commitments (Ukraine); supporting their role in legislative reform (Ukraine); training (Morocco); supporting the establishment of specialised law-enforcement and judicial officials on juvenile justice issues (Tajikistan); working with law-enforcement and penitentiary bodies at different levels and stages of the criminal justice process (Bolivia, Tajikistan, Ukraine).
 - Working on prevention and rehabilitation and prevention from (re)offending projects, and in some projects with a focus on women and juveniles (Tajikistan, Bolivia, Ukraine).
- 4) **Violence against women** features recurrently in the programming reviewed, and from different perspectives. This ranges from support to legal reform and policy development (as in the case of Tajikistan); support to victims in terms of access to justice and a range of other services including psychosocial services (Bolivia, Morocco, Tajikistan); developing guidance material and manuals for training across a range of actors (Morocco).
- 5) **Land rights** as a focus of justice sector reform matches SDC's traditional orientation to working on agricultural and rural development.⁶ One component of Tajikistan's justice sector work involves development access to justice, awareness of rights of land use and legal framework for rural population. There is a specific focus on women's access to use of land. The approach involves strengthening CSO capacity for legal voice through the Rural Development network (RDN) of legal aid centres, and training of lawyers and government officials at different levels of governance.

SDC works across a spectrum of thematic and entry point areas, as well as target groups and implementing organisations. This includes engagement at the national government level, and with state institutions relevant for justice provision as well as more bottom-up engagement with beneficiary groups, CSOs and NGOs. Importantly the boundaries across these forms of engagement are not necessarily clear-cut, and within programming there is often multi-level, multi-actor engagement. This has the merit of recognising and integrating in practice the complexity of the issues

⁶ The Mapping paper on SDC support to justice sector reform shows a relatively high proportion of justice work addressing land issues

as stake – noting the significant variation in this respect across country level engagement and programming.

- 1) Support to **legal reform** is a common theme in justice sector reform. There are a number of areas of legal reform that feature in SDC justice work.

Some relevant legal reform focuses on content relating to rights and discrimination. In relation to migration and trafficking, this includes support to aligning national legislation with international norms on trafficking and legislation on labour rights and labour conditions (South Asia; Morocco). It also includes legal reform and support to policy dialogue at regional and international level, and facilitating (peer) exchange between CSOs, INGOs and governments (GMPD). Three other common areas of support to legal change include criminal justice (such as strengthening due process; aligning conditions of pretrial detention with international norms) and violence against women; and eliminating discriminatory norms, for example in family law. (Ukraine; Tajikistan; Bolivia; Morocco).

Support to legal reform also includes changing process-related rules that improve access to justice, or judicial review. Examples include support to legal or constitutional change addressing judicial process, such as on rules regarding judicial independence (Ukraine); creating new organisational or bureaucratic capacities that can improve access to justice, (such as the establishment of civil registries Tajikistan); legislation relating to the provision of legal aid (Tajikistan).

Across SDC work, entry points to supporting legal change are multi-level. In the cases of Tajikistan and Bolivia this has involved supporting implementation of new law through strategic multi-tiered and multi-actor engagement. To this end, support to advancing legal change has included activities such as lobbying and advocacy in support of legal change; on implementation it includes such diverse strategies as awareness raising, capacity development, engaging with changing wider social norms at national and sub-national levels. Much of this is politically strategic work aimed at building trust, facilitating relationships, networks and alliances among reform champions, but also targeting unlikely allies whose buy-in is important for change. For instance, work to broker engagement between beneficiary groups and ‘gatekeepers’ of social norms. In Tajikistan, working with religious leaders at the community level has been important to incentivise social norm change in relation to family law with the aim of advancing women’s rights and their access to justice.

- 2) **Judicial reform** (with a focus on the judiciary) is a prominent feature of justice sector reform in international rule of law programming. Traditionally the focus of international support has been (and remains) on what systems should look like (that is, preset assumptions about the form that judiciaries should take). This has tended to take precedence over what the role of different features and components of justice systems should be (the actual function of judicial and dispute resolution systems). This distinction is discussed further below. In the SDC programming reviewed here much of judicial reform support has targeted addressing capability gaps. This includes a range of activities including infrastructural support, capacity development and training. Objectives of change vary, ranging from more technical issues to more normatively oriented ambitions. These cover improved case load administration including through improved IT systems (Serbia); training of justice providers, often judges (Serbia, Morocco), strengthening court capacity for delivery of justice services in small claims courts (South Africa) in criminal justice, (Bolivia, Ukraine, Tajikistan); mediation services (Bolivia). Some interventions are more explicitly political in orientation, including on issues of policy dialogue, and support to strengthening judicial independence (Ukraine). In reality, the boundaries between the technical and the political, of course, are blurred.

- 3) **Access to justice** across the different issue areas noted above constitutes an important proportion of SDC work in the programmes reviewed. In most countries reviewed, the focus is on improving both legal aid provision and the capabilities of beneficiaries to access to justice services (state provided or otherwise) in the protection of their rights or to resolve disputes. Support to access to justice in a number of cases also involves working with community level service providers. This is especially the case in contexts of legal pluralism or where the state has limited presence as a provider of dispute resolution mechanisms (Tajikistan and Bolivia – and in the latter case in the context of the new pluri-national constitution); and through different and sometimes newer forms of alternative dispute resolution. For instance, in Bolivia support to new modes of conciliation within the system of dispute resolution is intended to both speed up access to and the delivery of justice, and embed the logic of conciliation as a possible outcome of some kinds of disputes. Access to justice work spans engagement at different levels of the justice chain (see below for a discussion of justice chains). Principally SDC support to access to justice is premised on the goal of enhancing legal voice and agency of citizens and vulnerable groups. It involves advocacy and legal awareness, support to legal aid provision in criminal and civil justice, investing in different forms of dispute resolution and conciliation mechanisms.
- 4) Other **organisational support** outside of the formal justice system aimed at improving justice provision includes engagement with a range of state and non-state organisations and processes. On the one hand, there are activities aimed at building up state capabilities *outside the judiciary* in relation to law-enforcement, dispute resolution and rights protection. On the other hand, there is also support to build up the legal voice of civil society and beneficiary groups to be better equipped to use the law and justice mechanisms more effectively to protect their rights. On both the supply and demand side, support is targeted at a range of state and non-state actors, across different capacity development, institutional reform and infrastructural support entry points. Examples of non-judiciary organisational support in SDC across the supply and demand side of justice provision include the following:
- SDC support to the civil registry system in Tajikistan is aimed at affirming the legal identity of citizens. In doing so it is intended to provide added protection and recognition of their rights. For instance, having marriages registered in the civil registry provides for women to be better protected by family law. This is important in a context where customary or religious practice is important, and where often marriages have tended not to be formally registered with the effect that women were therefore not fully protected by family law.
 - Many of the countries reviewed have some support to a wide range of types of legal aid, paralegal, and advocacy CSOs that enhance the demand side of access to justice. This is intended to strengthen the legal voice and agency of rights bearers.
 - There are some examples of investment into research on justice (and other) needs, as in the case of trafficking in Morocco (GAATW 2014) and Sri Lanka (Pattainak 2014). It seems that in global programming in SDC there is more room for research and knowledge production aimed at building up the evidence base than in country level funding. This is likely to be true not just on justice sector issues.
 - Support to other non-judicial law-enforcement or government bodies include such agencies as prosecution services, local authorities, penitentiary bodies and work with bar associations. Mostly, the police is not a key actor in SDC justice interventions.

The documents signal considerable variation in entry levels, partner organisations (government bodies or CSOs, for instance). At the same time, it is the case that mostly justice sector programming focuses on formal justice mechanisms through organisational support and aimed at addressing capability

gaps⁷. Overall, in credit proposals and programming documents, working with customary justice tends not to be an entry point for engagement – at least explicitly on paper. There are some important exceptions (Bolivia, Tajikistan, Pakistan). It is also possibly the case that in some cases such engagement is not explicitly noted in programming documents, but implementation in practice necessitates engaging with non-state actors that shape dispute resolution processes or are custodians of customary norms and practices of justice provision.

In Tajikistan SDC programming takes account of the socio-cultural realities of customary forms of justice provision. This involves, for instance, working with religious elders to address justice and rights issues in ways that take into account social and religious norms at the local level. In Bolivia, formally programming has increasingly taken on board the importance of working with community forms of justice. As SDC increases its focus and presence in conflict and fragile affected contexts, where legal pluralism and limited legal presence of the state is a common feature, this may require more purposeful research and analysis on engagement with multiple forms of justice provision.

The above describes the main issues and thematic areas that feature in the programming documents reviewed. In practice the range of activities and entry-points vary significantly. There is, moreover, considerable variation in terms of SDC's level of ambition regarding intended change, the degree to which justice sector work is siloed and piecemeal or holistic, and how it is integrated into the wider development objectives of the SDC's country strategy. In some cases, SDC's ambition can be backed up, such as when they work as part of a multi-donor trust fund, like in Serbia. In other countries, such as South Africa, it appears to be more piecemeal. Levels of ambition in terms of explicitly delineated intended change objectives also vary within country (see example of Ukraine in Box 1). Some are presented as intended change processes that contribute to higher level outcomes; others are more concrete output based. This has implications for how consistency in the articulation of theories of change is represented across programming (but this is likely not limited to justice sector reform).

Box 1: Variation in scale of objectives within country: the case of Ukraine

In the case of Ukraine there is some divergence in the types of objectives which were identified. In some projects, SDC aimed for ambitious transformative change. For instance, in the Prevention of Juvenile Crime programme, the objective was to decrease the level of juvenile crime through involving the police in proactive prevention strategies. In other projects, the objectives are limited to output levels. For instance, in Phase 3 of the Ukraine Justice Sector Reform programme the project aimed for the judicial community to be involved in the development of legislative changes related to the independence of the judiciary rather than actual legislative reform. In an evaluation of the latter programme, it was rated highly as it had achieved all its objectives, in the evaluation of the former, it was noted that the programme did not achieve all of its (more ambitious) targets.

The complexity and multi-dimensional nature of justice sector work inevitably lends itself to potentially high levels of variation in terms of entrypoints, activities and thematic focus. This is often perceived as challenging for donor organisations which struggle to find an organisational home or single narrative of this work contributes to development. Instead, embracing this complexity allows for international support to justice sector and rule of law to be able to work in more adaptive and context relevant ways. In this vein, the fact that SDC works across very different justice themes and issues is not in itself problematic. Rather, the fact that SDC country offices can draw on country expertise and knowledge of the field reflects an organisational capacity to allow for relevant justice

⁷ This is noted in the Mapping Exercise (ODI, 2016) with over 50% of programmes focusing on capacity development and training.

‘problems’ to be identified according to context specific needs and political economy conditions (and thus be potentially ‘locally-driven’) and programmatic choices to be defined accordingly. Adapting to context specific justice needs seems more pertinent than specialising in a small selection of issues for SDC.

In sum

- SDC– as other donors - engages at different levels (national, sub-national) and through very diverse entry points (through government, formal state institutions, civil society and research organisations) to address different areas of support to justice provision and rule of law development.
- Justice is conceptualised in normative terms, in close alignment with SDC’s policy and strategic orientation and is premised on rights based development. Rule of law and access to justice are seen as contributing conditions for the advancement of pro-poor democracy, human rights and accountable government.
- As with other donors, the breadth of SDC engagement on justice sector work reflects its diffuse nature and elusive definition within development work. It is relevant to different sectors, governance and development objectives, which also means that it has no natural sectoral home in development cooperation. In that sense SDC justice sector engagement – as with other donors – seems somewhat ‘peppered’ across different development and governance priority areas.
- The seemingly primary focus on technical and capacity development features of justice sector reform – in many respects drawing on the similar menu of activities that characterises much of international rule of law support - suggest to some extent an ‘apolitical’ understanding of the task at hand (rights protection, access to justice, legal change).

4. Analysis informing SDC’s justice sector programming

This section summarises analytical approaches that inform SDC programming in justice sector reform. It provides a summary overview of the type of analysis that informs programming – as reflected in the documents reviewed. It then distinguishes between explicit and implicit theories of change that characterise how justice sector support practice is structured.

4.1 Conceptual and analytical underpinnings of justice sector and rule of law support in international donor engagement

It is useful to preface this section by noting four points that are informing recent thinking on international support to justice sector reform.⁸

First, it is now mostly accepted that changes in justice sector provision, rule of law and the definition of rights are deeply political processes. The rules about how disputes are resolved, states held to account through judicial review, or how criminal justice is administered are outcomes negotiated through political processes. Whether through legislative change, constitutional reform or more fundamental regime transition processes, these define such principles as the actual workings of separation of powers, the role of different law enforcement, dispute resolution and review mechanisms, and the place of rights, and how to integrate the realities of legal pluralism. Thus, what justice provision and rule of law looks like in practice reflects political bargains about how disputes and contestation regarding the distribution of power and resources are resolved in any given society. It follows that international support engagement in this field is inevitably a political endeavour likely

⁸ See literature review on international practice in justice sector support (ODI 2017) which summarises the critiques, and changing trends over time. See also Denney and Domingo (2016) and Domingo (2016) for summaries of wider literature and current debates on justice sector support.

to have a bearing on who benefits (and how loses) from such reform processes. Some reforms can result in win-win solutions (such as reforms that improve the speed of case load management). But mostly, changes in justice systems are likely to have redistributive impact. In addition to encountering capability gaps in the system that might undermine intended change processes, such reforms may also create quite active resistance among stakeholders or interest structures that might stand to lose from these changes. Despite this political component being now quite widely accepted, international support to justice sector and rule of law reform remains in many respect technical and legalistic, and still quite top-down.

Second, and relatedly, international sector support in this area has focused on the *form* of what justice sector provision should look like, rather than the *function* or purpose that it serves. This has several implications. First, there are pre-established assumptions about what dispute resolution mechanisms should look like (that is, assumptions about *form*). Thus, from the outset there are often pre-defined solutions to the challenges of justice provision, instead of starting with a detailed examination of the particular justice needs or ‘justice problem’ as relevant to the context. Second, this has tended to translate, therefore, in imported ‘cookie-cutter’ approaches where programme design and intervention activities draw on a standard list of reform recipes, often replicating the legal and judicial formats of donor countries. This practice of importing legal and institutional traditions remains vibrant despite the wealth of evidence on poor results and impact of this form of justice sector support.

More recently, there has been a growing shift to thinking about the *function* aspect of justice systems, that is, what purpose do they serve. In any given society, justice systems do several of the following: provide a system to resolve disputes; administer criminal justice and contribute to law-enforcement; protect rights; hold to account abuse of power through judicial review mechanisms. But moreover, the form that these functions take are the outcome of country-specific trajectories of institutional change, political contestation over rights and what constitutes just and legitimate forms of dispute resolution. Judicial traditions are also shaped by international norms and commonly shared (often regional) histories of state formation, social contracts, similar legal traditions, as well as histories of colonialism (for instance, Latin America tends to follow the code law countries’ traditions). National histories are further complicated by the fact that realities of legal pluralism and the existence of different forms of customary and alternative dispute resolution. It is now commonly accepted that previous assumptions of linear processes of modernisation and state development translating into an affirmation of formal justice systems modelled around western liberal democratic traditions trumping customary or community forms of dispute resolutions does not reflect the reality.

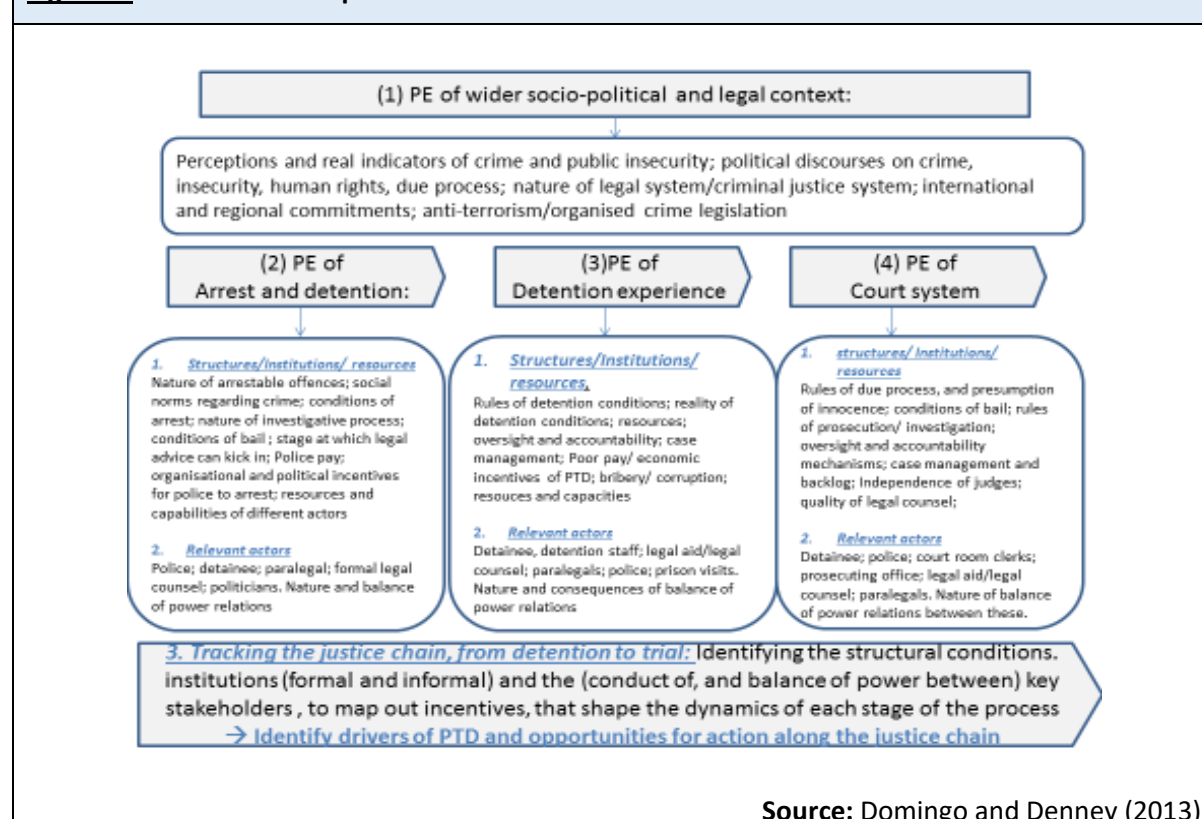
In response, to some extent, international donors working on justice sector reform have begun to take on board the complexity of these institutional histories, and the merits of using analytical approaches that take context conditions as the starting point to make choices about programming. Issues of relevance, ownership and sustainability will benefit from approaches that focus on the justice needs and problems, as they exist in practice in political, socio-normative and cultural context. **By shifting from a focus on form to a focus on function, international actors donors will benefit from starting with identifying the features of justice problem in question, and developing solutions in a way that is relevant to context, and thus more likely to be locally-driven and locally-owned.**

Third, 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 address the problem as relevant to the context.⁹ By way of illustration Figure

⁹ See some examples of these in Annex 2

1. shows what a closer look at the political economy of a criminal justice chain can unveil regarding the particular drivers of excessive and arbitrary pretrial detention. This analytical lens can help to identify where there may be more politically plausible opportunities for engagement and reform than an approach that focuses on the legal 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 contribute to sustaining high levels of pre-trial detention. For instance, it may be that laws are in keeping with international norms, but police are rewarded in practice for high numbers of arrests and there is little effective oversight regarding whether due process is observed in practice; and detainees are discouraged from resorting to legal aid. Investing in legal change or training judges, therefore, might not target either the key drivers of PTD nor the most effective opportunities to address the relevant blockages.

Figure 1. Justice chain for pre-trial detention



Source: Domingo and Denney (2013)

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. It is an example of getting close up to the problem at hand to identify solutions that are adapted to the context.

In **Annex 2** other possible justice chains are listed on addressing the blockages relating to legal mobilisation (the decision to resort to legal action) [Example 2] and in relation to the choices in practice that victims of violence against women face when confronting options of how, if and where to report their experience [Example 3].

Fourth, in contexts of conflict, post-conflict and fragility, justice problems (as is true of development problems general) are susceptible to the challenges of rapid political change, uncertainty and fluidity. This heightened risk of uncertainty underlines the merits of programming that is flexible and adaptive to fast changing challenges and opportunities.

These points are relevant in the context of current discussion on adaptive and flexible ‘ways of working’ that signal the need for programming to be sensitive to the political economy conditions of context, locally-driven and politically smart. This includes ensuring that programming is problem driven, rather than starting with the solution (Fritz et al 2009; Booth and Unsworth 2015; Andrews et al 2012), and that it contributes to brokering locally negotiated trajectories of change that are politically feasible. At the same time, programming, it is argued, needs to be agile and adaptive to keep pace of changing conditions, and to make the most of shifts in the balance of power between relevant stakeholders and the windows of opportunity that these give rise to; but also to enable learning feedback loops so that theories of change can be revisited, and there are embedded mechanisms to integrate learning from what is working and what is not. These questions are at the heart of current discussions on improving development practice so that it moves away from narratives of ‘best practice’ to ‘best fit’ approaches.

Taking this into account, in reviewing SDCs approach to justice support the following questions were considered. First, what forms of socio-political analysis inform programming design and implementation (formally and in practice)? Second, how is change expected to happen and what assumptions underpin theories of change; and to what extent are decisions about programming driven by assumptions about form, or is the starting point the justice problem in context? Here the question is how justice problems and needs are identified and defined, *as they exist in practice*; and from this, whether theories of change are accordingly articulated.

4.2 Use of analysis to inform programming in SDC justice sector support

Assessing what analytics inform SDC programming is limited in a desk review. The main document that outlines programming design and objectives is the Credit Proposal. The structure of the Credit proposal – as noted by SDC staff - does not lend itself to a detailed exposition of political economy analysis, given its brevity, and its function primarily being that of providing the “basis for the operative, administrative and financial approval of its interventions and their results based management” (SDC 2014b). It includes a theory of change to be justified, with a clear identification of objectives, stakeholder assessment, resourcing, risk analysis and monitoring and evaluation. But the room for context analysis is mostly by way of background information, and to position the intended intervention against the relevant development or strategic orientation of SDC work at the country or global level. Thus credit proposals only provide summary information of how analysis informs programming.

The desk review found that use of analytical tools is unevenly reflected in the documents reviewed. A detailed review of *all* relevant documents, (including internal notes, MERVs), was not in the remit of the task, so that it was not possible to elicit how systematically analysis or other forms of deliberation in SDC informs programming design, implementation and ongoing monitoring and evaluation. On the basis of the documents reviewed, there is a mixed picture *on paper* of the degree to which decisions about justice problem programming are systematically grounded in socio-political or political economy analysis. At the same time mid-term and end of project reviews and the internal documents reviewed appear to signal recurrent checking in on process aspects of programming process, and in some cases more explicitly on the political viability and case for substantive changes in justice provision.

For instance, SDC’s contribution to the Multi-Donor Trust Fund led by the World Bank provides an interesting example of how mid-term and final reviews of different phases of the programme, and internal SDC documents add up over time to a story of internal reflection eventually resulting in SDC pulling out of further investment in the sector. One mid-term review of the multi-donor trust-fund

support in Serbia to the justice sector found that the project did not sufficiently consider the “overall political economy aspects of the justice reform reforms, the institutional complexity of the Project, or the limited capacity of the Ministry of Justice” (World Bank -Serbia 2012). The same review also found by contrast, that there was a sound process of problem-identification and evidence-based working: ‘A set of relevant diagnostic studies was identified at the time of preparation to provide a preliminary assessment of key areas of intervention. Among others, these studies focused on the actual progress in the implementation, impact and gaps of the 2006-2013 NJRS, an expenditure and institutional review of the justice sector (JPEIR), capital budgeting, aid coordination and management, and an assessment of training needs.’ (World Bank -Serbia 2012). But eventually, later internal SDC documents indicate an internal process of reflection (among other things) on the degree to which the WB focus on judicial efficiency, and whether SDC support to justice reform should be more oriented to advancing judicial independence and access to justice.

Internal documents of this kind and other documents reviewed seem to suggest a clear understanding that justice problems are political issues is prevalent; and thus that justice sector interventions are inevitably political undertakings. Relatedly, SDC engagement requires strategic and politically informed calculations about what might be effective and politically plausible entry-points, and where political.

It is also important to distinguish between what formally features in the documents, and the undocumented or implicit analysis that appears in some cases to drive choices on entry-points (mostly elicited from conversations with SDC staff). SDC staff commented that such documents as credit proposals and log frames do not necessarily (or primarily) reflect the analytical work that informs programme design and implementation strategy; nor do they reflect more strategic, if often not formalised or documented assessments about how change can be supported through adaptive and under-the-radar activities. We return to this in the next section on ‘ways of working’.

In this vein, one evaluation of SDC work in FCAS found that analysis features strongly in programme design and implementation (SDC 2012), contributing to identifying country specific needs, relevant and appropriate national partners, and informs theories of change and testing of assumptions. The evaluation also found that strategic, tactical and day-to-day assessment of the issues informed decisions and actions, contributing to a capacity for flexible and adaptive engagement in practice (SDC 2012:31)

At the same time, there is not a clear sense of systematic knowledge management or documentation process of how analysis informs interventions, and underpins the logic of theories of change. It is also important to note that SDC programming replicates a focus on technical assistance and addressing assumed capability gaps – as found in the mapping paper.

An overview of how (formal) analytical tools feature in programming docs reviewed found the following:

- Context analysis are included in the credit proposals with varying degrees of detail. But they are often summaries of the wider political context there is not necessarily a clear link as to how this informs decisions relating to the theory of change.
- It is not clear how systematically there is recourse to political economy analysis about the concrete justice problem at hand, in ways that demonstrably inform the design of what are

politically sensitive programmes in the areas of justice and prison system reform¹⁰. In some cases, as is in Bolivia's programme on *Life without violence*, there is a more documented understanding of the complexities of a concrete justice problem, and the need for a multi-dimensional nature approach to programming. In others, as in Tajikistan, it is evident that such systemic analysis underpins strategic thinking about programming choices, although this is not explicitly documented.

- Problem specific stakeholder analysis features unevenly in credit proposals. These are often descriptive but do not always include an analysis of the interest and incentive structures, strategic alliances or relational issues which may influence project outcomes – positively or negatively. (Sri Lanka, however, is an example of a stakeholder analysis that informs programming)
- Gender analysis does not clearly feature systematically, and there is a risk that it becomes a 'box-ticking' exercise. This is despite substantive engagement on gendered experience of justice problems, as highlighted in the previous section. In some cases, such measures as gender disaggregated data is incorporated into outputs (as in the case of Ukraine).
- Conflict sensitivity is regularly mentioned but not often in ways that explicitly inform programming choices (Tajikistan).
- Conflict analysis features in some credit proposals for programmes (as in the case of Morocco – where these analyses tended to focus on how the programme was going to decrease tensions/conflict rather than examining the potential for the project to aggravate ongoing tensions). Conflict analyses were not explicitly included in credit proposals but conflict is in some cases highlighted in the risks section, (as in the cases of Ukraine, and Tajikistan).

Overall, on the positive side, there is a strong sense that programmes are contextually appropriate. But it is not evident that formally structured analytical tools explain this. Conversations with programming staff, and some available internal documents signal examples of 'politically smart' manoeuvring of power dynamics and windows of opportunity as these unfold. This seems to be the case in Tajikistan, Bolivia and Serbia (discussed further in the section on 'ways of working'). It is not clear though how 'thinking out of the box' is organisationally incentivised and rewarded in SDC. If formal analytical tools are not necessarily explaining effective engagement, it would be instructive to invest in trying to identify what factors explain politically smart programming in justice sector reform.

Project documentation does not reflect a clear process of integrating analysis into shaping decision making about programme design and intervention logic/strategy. While analysis may be informing practice elsewhere, its value-added to explaining how change is likely to happen, given political economy conditions and the particular challenges of a justice problem, is not captured in the credit proposals.

Finally, the emphasis on the technical in the design of programmes in some cases seems to suggest that political, power and stakeholder analyses do not systematically inform programme design and implementation strategy. These seems so in the case of Ukraine.

4.3 Theories of Change in SDC justice sector support (explicit and in practice)

Theories of change vary considerably in how they are articulated, the degree of detail that features in the documents reviewed, and in terms of the extent to which they are outcome or problem driven. Here we distinguish between explicit theories of theories of change – the official narrative of change

¹⁰ Political and social analysis is not absent – rather what is often missing is how it informs understanding the concrete political economy dynamics that shape both blockages and opportunities for change specific to concrete justice problems.

that features in credit proposals, and *implicit* theories of change – the actual expectations of change strategic engagement by actors involved in programming and implementation actors.

Explicit theories of change are those outlined in credit proposals (as required by SDC guidelines) and in the form of logframes. These should mirror SDC normative or policy commitments as echoed in country strategies and reflecting country development features. They may be more or less politically informed and grounded in an analysis of the justice problem in question; but in some cases they mirror recurrent assumptions in international rule of law agendas about pathways to achieving rule of law, access to justice and rights protection (ODI 2017).

In the programmes reviewed, explicit theories of change vary considerably in terms of detail, transformative intent and assumptions about how intended normative (and political) change is achieved. Often articulated in credit proposals, these frequently read as linear ‘best-practice’ justifications of why effective access to justice (for instance), or independent judges are important for the advancement of rule of law, democracy or human/citizen rights and then falling back on technical assistance solutions. Such narratives of change sometimes seem rather formulaic, often normatively grounded and do not reflect the world as it is, but the world as it should be. This is especially so in those cases where technical assistance is expected to support transformative socio-political or normative change.

SDC documents show - like other donors – a tendency to replicate theories of change in justice sector reform premised on the assumption that normative change – such as significantly improved rights conditions – can be the outcome of technical assistance, sometimes based on pre-established assumptions about what the solution should look like.

For instance, one South Asian credit proposal¹¹ aimed at supporting the rights of migrant workers posits that by facilitating exchange and acquisition of new technical skills among South Asian governments to strengthen their labour migration frameworks, best practice in the treatment of migrant workers will be achieved. “To reach outcome 2 [*South Asian governments exchange, acquire and implement new technical skills to strengthen their labour migration frameworks*], workshops, seminars and peer exchange among sending countries and between sending and destination countries on technical issues will take place. This will allow concerned governments to exchange on and adopt best practices on issues such as standardized contracts for migrant domestic workers, fair and ethical recruitment, qualification recognition, pre-departure orientation and migrant resource centres. As a result, standard agreements in line with international standards will be concluded and implemented, leading to strengthened labour migration frameworks the region”. The theory of change here involves something of a ‘leap of faith’ that such activities will result in altering the incentive and interest structures that sustain the current flow of labour migrants in the region. The risk assessment in the same credit proposal does indeed signal the risk of “...the competition between sending countries in the labour markets in the destination countries and the consequent possible lack of political will to translate commitments into action”. The lack of political will is at the heart of the justice problem. Support to the suggested technical assistance and migration agreements might contribute to creating an enabling environment for change, but may not amount to much in terms of the actual realisation of rights of migrant workers if the core interest and incentive structures underlying this risk issue remain unaddressed.

¹¹ Project 7F-08841.01 on Decent Work for Migrants from South Asia (SDC-Global Programme 2014)

In the case of South Africa the theory of change is that “An effective access to justice will reinforce the civil society and its democratic values by giving equal treatment opportunities to everybody.... The Small Claims Court project aims at empowering communities to exercise certain civil rights – previously denied to them. It is also at the very heart of providing affordable justice to the most indigent and disadvantaged people in South Africa.’ (SDC-South Africa 2005). At face value, the explicit theory of change in itself assumes that increased resourcing in a number of spaces to small claims courts will result in a better and more equitable access to justice for poor and vulnerable groups. This includes both investment in the courts themselves and engagement with a range of stakeholders including the media, awareness and dissemination actors. Overall the emphasis is an addressing capability gaps. One risk issue that is identified is whether the small claims courts will result in a higher number of appointments of black justices, and women in ways that are more representative of society, and the vulnerable groups that they are intended to serve. The SDC documents are less explicit about how more transformative change happens, but some media reporting suggests that investment in small claims courts as supported by SDC have fundamentally altered access to justice and the court experience for vulnerable groups. This has involved not only greater proximity to these dispute resolution forums that are less costly and more speedy, but also cites the example of a white person facing a black mediator (SDC-South Africa 2010b).

These examples illustrate what is a common narrative in justice sector reform – often premised on linear assumptions about how technical assistance will result in better quality justice provision. The documents often provide limited information however about how change happens, and what can realistically be attributed to interventions in practice. Moreover, they do not necessarily tell us about the *implicit* theories of change that actually inform programming in practice.

Three features of SDC are noted. First, theories of change premised on normative readings of how change will occur are a common feature of SDC justice sector programming (in credit proposals) – echoing international practice in this sector. The emphasis is on formal institutions and technical approaches. Results might even suggest positive change, such as increased coverage, more cases being handled. But often these explicit theories of change tell us little about the quality of access to justice, how cases are resolved, or how interventions will alter gender, ethnic or other forms of bias and power asymmetries, or issues of political capture that are at the core of weak justice provision and rights protection. Relatedly, there was not strong evidence of problem-driven (as opposed to solution driven) approaches to justice issues.

Second, explicit theories of change that are technically grounded may have the merit of purposefully ‘depoliticising’ a justice problem that is politically sensitive, or the scope for transformative change is limited. This seems to characterise the efforts in Ukraine to advance judicial independence in a context of limited political space for this.

Third, it is also the case that some explicit theories of change are premised on complex readings of the justice problems, and the interests and incentives that drive key relevant actors to either block or support change. An especially interesting example is the recent intervention strategy developed in Bolivia to address violence against women as a justice problem, as described in Box 2.

Box 2: Factoring complexity and multi-dimensional change processes: *Life without violence*

The *Life without violence* programme in Bolivia is an example of a theory of change that takes into account the complexities and multi-level nature of justice 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 (violence against women). This includes 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 and discrimination.
- 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.

The theory of change tells a compelling story of the need to break out of sectoral silos and build an integrated approach to engaging with the complexities of violence against women in Bolivia as the justice problem it sets out to address. How it unfolds should be the object of close observation by SDC by way of building up knowledge on justice sector support.

Source: SDC-Bolivia (2016) – Credit Proposal 7F-08636.01

Implicit theories of change – often not documented, and sometimes purposefully hidden – are those that in practice inform programming choices and ways of working. Conversations with SDC country staff highlighted the fact that in practice, *implicit* theories of change are often what informs choices regarding entry points and strategy.

There are a number of reasons (typically) that may explain poor documentation of implicit theories of change. First, there may be considerations relating to political risk and do no harm, where the aim is 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. Third, implicit theories of change may also reflect poor organisational incentives structures within SDC relating to knowledge management and learning. This might inhibit, or insufficiently reward documenting more problem-focused theories of change about how to approach a justice problem, or explaining how change has happened in practice in ways that might enable learning and feedback loops.

Finally, it cannot be assumed that in the absence of strong explicit theories of change, programming is guided by implicit assumptions that are premised on politically strategic or creative approaches to

problem identification or programme strategy. The next section focuses on ways of working in practice, and what/how implicit theories of change inform the practice of programming and implementation strategies.

In sum

- Knowledge management structures that incentivise theories of change which derive from problem-driven political economy or context analysis are not evident.
- This seems to result in explicit theories of change in justice sector work that naturally replicate solution-driven rather than problem-driven approaches, and potentially reward technical approaches that draw on the standard menu of rule of law and access to justice interventions.
- Implicit theories of change (variably so) seem also present in SDC justice sector activities, if not publically documented, which more closely reflect engaging with the particular features of the justice problems addressed at the country/programme level.

5. 'Ways of working': the practice of SDC justice sector programming

This section aims to untangle some of the 'ways of working' in the practice of SDC justice sector support. First the section summarises key features of models of assistance in practice as is possible to elicit from the documents reviewed. Second it reflects on those features of SDC's ways of working that suggest in a number of cases a capacity for more politically agile, adaptive and flexible engagement than is evident from the more normative narrative of change processes that it supports, and the seemingly over-technical nature of large part of its justice work in the programmes reviewed. The last section considers the challenges of knowledge management that characterise justice sector programming.

A desk review poses challenges in terms of ascertaining the *practical* features of how programme design, choices of entrypoints and thematic areas, and the process components of how implementation (including adaptation, flexibility, strategic choices and learning) take place. It is the latter that reveals (and enables) SDC to be more problem driven than log-frames and theories of change seem to suggest in many of the credit proposals reviewed.

5.1 Models of assistance

Reflecting the thematic spread in justice sector support, models of assistance are wide-ranging. As noted in previous sections, these include the following:

- It is common to work closely with state bodies. In justice sector reform this includes working with and through ministries of justice, judiciaries at different levels, prosecutors and penitentiaries.
- There is also a commitment to, and focus, on the demand side of access to justice. This typically translates into working with –and building the capacity of – civil society organisations and beneficiary groups.
- There is a clear comfort with technical responses and a focus on formal institutional reform but less so with the follow up of implementation processes. For instance, support to legislative change, entails focus on supporting analysis of current legislation by experts, drafting of recommendations but no onward activity to support legislative change and implementation – this raises the perennial problem of what to do about insufficient political will. This reinforces the habit, on paper at least, of not engaging with the political economy of incentive and interest structures that block reform processes

- There is a frequent default to training, to developing ‘model’ institutions such as prisons, awareness raising through production of literature and organisation of seminars, workshops and conferences, contact with the media. As is true of most international support to justice sector reform, it is also the case that there is little detailed knowledge or documentation about what training involves, and what it achieves in practice. (Despite the fact that generally capacity development takes up a significant proportion of justice sector support among international actors, but we know remarkably little about what it delivers, and what effective capacity development looks like).

What does this tell us about programming in practice? One evaluation suggested that key is whether SDC programmes can add up to more than the sum of their parts. On Tajikistan Jeannet et al. (2011: 24) concluded that the access to justice ‘...programme is in fact a portfolio of four more or less independently working projects, due to the fact that coherence and coordination among the players is weak.’ While on paper there is an impression of disconnected project siloes, conversations with country staff signalled that strategic (if implicit rather than explicit) ‘joined up’ programming in practice was much more the case than reflected in the programming documents, as is discussed in the next section.

5.2 Politically smart, adaptive and flexible programming

Looking more closely at some ways of working in practice highlights some of the more innovative and interesting features of SDC programming in justice sector reform. At the same time, it is important to underline that these ‘stories of change’ were made evident through interviews and conversations with staff members, but it is not clear to what extent they reflect widespread practice beyond the cases reviewed here.

Mostly operational strategy and processes of implementation are formally outlined in credit proposals as fairly linear processes – with some exceptions. It is in the nature of the documentation of logframes and credit proposals that more politically agile and flexible practice is not likely to be represented in proposals, nor systematically documented in practice.

In practice in a number of cases, SDC programming at the country level displays a number of elements of what currently falls under the vogue of ‘politically-smart, flexible and adaptive’ programming that donors are encouraged to integrate into programme design, implementation and learning processes. To this is added the question of the degree to which programming in practice takes the justice problem as the starting point, and works with the concrete features of context realities to identify actual blockages and opportunity structures that characterise the justice issue, and design interventions accordingly.

By way of example Box 3 summarises the case of politically smart and tactical engagement in justice sector reform in Tajikistan.

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

Tracking the story of SDC justice sector support in Tajikistan over time and across different justice and related interventions provides a narrative of politically agile and adaptive engagement.

- 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 (border with Afghanistan and history with Russia) has contributed to shaping concrete justice needs at different levels and among different beneficiary groups. This has informed a problem driven approach based on an appreciation of the 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, taking account of labour migration flows to Russia, and remittance based logic sub-national economies
 - 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 recourse to social communications strategy).
 - Government buy-in to women's rights and to supporting 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. This includes 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 critical 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 changing political 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 especially important in training 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 puzzle** has been an important if poorly documented 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.

This reflects some of the features of SDC support to justice sector reform in Tajikistan. Importantly, these politically smart and adaptive features- and the implicit theories of change that they reflect – are not really documented, yet they are at the heart of explaining relevant and locally owned engagement.

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; the possibly of long-term engagement informed by nationally grounded knowledge of the justice problems (rather than imported solutions) and combine with technical expertise in justice and legal change processes.

The underlying narrative of change, however, seems to be poorly documented, undermining SDC's capacity for knowledge sharing and learning.

Sources: Documents provided and conversations/presentation by SDC staff

Other examples of politically smart, flexible and adaptive programming in practice include the following, it seems. In the Global Programme on Migration and trafficking, 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. In the case of Serbia, politically strategic

It is important to underline that this study cannot conclude that politically smart, context relevant and problem-driven approaches to justice sector work are widespread and systematically replicated across

SDC programmes. This is not least so given the proportion of activities focusing on much more traditional technical assistance. There does appear to be, however, an aptitude for agile and adaptive engagement that is attuned to the politics of context which seems quite distinctive to SDC. Some possible factors contributing to this include the following:

- The relatively decentralised structure of SDC appears to facilitate 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 long-term presence of national staff equipped with technical knowledge, and deep understanding of the country context institutional, socio-political and development trajectory. This contributes to the potential for more effectively identifying the specific features of the 'problem' as well as the opportunity structures available, the incentive and interest structures that either champion or block change, the range of relevant stakeholders (at the government, implementation and end-user levels) and the nature of the (shifting) power structures that shape these.
- Deep knowledge of national and sub-national processes and actors can also contribute to identifying and harnessing locally driven and locally owned solutions, and in ways that are cognisant of the nuances of social norms and customary norms and practices and how these can be negotiated and navigated.
- Country staff with long experience working with SDC are able navigate both changing political economy conditions at the national level *and* changing directions in strategic and foreign policy orientation at HQ level, (with the latter also being shaped by changes in global politics and normative directions, such as SDG's)
- 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. In some cases, it was suggested that SDC is limited in its capacity for impact by being a small donor. Others noted that this allowed for more strategic and under the radar political engagement that could be relatively ambitious.

5.3 Knowledge management, learning and research

In this potential for more politically-agile and context relevant programming it is notable that the scope for documenting and learning from success and failures is limited and tends to fall back on more output driven reporting. Some internal documents suggest a much more nuanced story of how theories of change evolve and are adapted in practice than is clear from the more formal paperwork. But overall, there is not a strong sense of a cumulative body of knowledge in justice sector work that contributes to strategic learning, knowledge management and communication on this area of work.

Thus, knowledge management stands out as an area of weakness in SDC justice sector programming at a number of levels:

- First, there are few examples of innovative M&E that result in feedback loops which serve to adjust and reorient programming in practice. While evaluations, MERVS as well as internal discussions and reflections documents do appear to influence and redirect programme in some cases, it is not clear from the documents that this amounts to a systematic process of documenting successes and failures; or that this in turn constitutes a system of embedded feedback loops to inform as necessary a reorientation of interventions. It is not clear that these reviews involve critically and systematically revisiting formally articulated theories of change.

- There are few documented examples of ‘what works and why’ in justice sector reform. There is a gap in documenting problem-driven and best fit examples that capture and work with the complexity of the issues involved. Rather there continues to be a focus on output based results frameworks which risk being descriptive around indicators that may not say much about the more substantive change processes relating to better, more equitable justice provision.
- The focus on best-practice approaches populating most log-frames limits the scope of moving justice sector initiatives out of their technical silos.

Many of the problems of knowledge management signposted here are in not likely to be limited to justice sector support efforts by SDC. Like justice sector work in other donor agencies, SDC also struggles to thematically place this work within broader strategic thinking on governance and development. Justice sector work remains at the periphery of strategic documents of development support. To this is added that SDC has not to date invested in building up a body of knowledge on what its support to justice sector work looks like, and how this sits against wider debates on international support to rule of law and justice agendas.

There is a case for creating incentives to document stories of change that capture socio-political complexity. Of course, this brings with it challenges of justifying contribution and attribution.

It is important to signal that the Global cooperation department seems better set up to integrate in a more consistent manner research and analysis. This includes the fact that it seems to have more scope to invest in research that can inform its strategic and programming choices.

6. Final reflections

It is not possible to identify a common thread of lesson learning relating to justice sector reform from the programming across the six countries and Global Programme. Within countries there are different and different approaches to justice sector support, and quite diverse experiences of learning and documenting impact. This diversity, as noted above, is not problematic. Moreover, approaches to justice sector work across four SDC departments (humanitarian aid regional cooperation, cooperation with eastern countries and global cooperation) are not inconsistent.

On risk management, the review exercise encountered different levels of engagement with risk issues, but not necessarily a clear SDC-wide strategy on risk in relation to justice work. Given the diverse nature of engagement in justice, this is not surprising as there are different potential risk issues. In relation to risk more generally in SDC engagement in fragile contexts, one evaluation found that there is a tendency towards ‘risk aversion’ (SDC 2012), suggesting a concern with the uncertainties of flexibility, and political risks of reporting on results. This is a recurrent concern for donors in fragile and conflict affected situations. The review process found in relation to how risk is considered in justice sector programming a broader expression of concerns. These ranged across a range of issues: examples of recognition of the limits to what are deeply political reform processes which can elicit strong resistance by affected interests (such as in relation to violence against women); considerations of do-no-harm (such as in relation to detainee populations); risks of insufficiently ensuring buy-in and ownership of either justice and law-enforcement actors or beneficiary groups; and risk relating to operations and procurement; risks associated with sustainability. There is a strong case for more systematic consideration of different categories of risk. In relation to encouraging flexible, adaptive and politically smart engagement there is a fine balance to strike between ensuring do 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 and unfolding political and institutional change processes.

Taking account of these challenges, the review found the following positive features of SDC engagement in justice sector work.

- **Problem-driven approaches *in practice*, that focus on function rather than form** seem to contribute to change processes that are more locally grounded. This requires an understanding of the development of rule of law and justice provision as deeply political and contested processes where there are winners and losers. What is at stake are distributive contests about how power, rights and resources are allocated, and disputes over these resolved. The question is then what enables this shift from form to function.
- **Deep knowledge of the political economy of context and of the justice problem**, even if not always explicitly documented, is key to informing programming in a way that ensures context relevant reform. It contributes to the potential for flexible, adaptive and politically agile engagement. It can help structure strategic engagement with different relevant stakeholders at national, sub-national and international levels, and broker key relationships and networks across different political, ideational and other identity or interest based divides.
- **Long-term engagement** consistently features as a strength of SDC's engagement with justice sector reform. This has several positive effects. First, partner organisations can more confidently plan for the long-term challenges of sustainability can be addressed with long-term strategic engagement [example of Tajikistan].
- **Organisational incentives** play an important role. It seems that the decentralised structure of SDC allows for locally driven and adaptive programming. At the same time, however, it is not clear that this translates into a system that rewards politically agile (and potentially risky) engagement, as opposed to risk averse and more traditional technical assistance in a politically sensitive area.
- **Clear normative compass.** A feature of SDC is its explicit normative commitment to rights based development underpinning strategic thinking and development policy.

Some areas where SDC might seek to review its strategic approach and operational practice include the following:

- There continues to be a **propensity to fall back on standard menu of technical assistance** and solution based interventions.
- **Ineffectual knowledge management structures.** This has the effect that knowledge sharing not only on thematic issues, but on ways of working is insufficiently documents shared between countries. It would be important to explore further whether within departments or regions knowledge sharing is more effective.

Taking the findings of the review process some areas for development include the following.

First, there is investing in **organisational incentives structures** within SDC to reward adaptive, flexible and politically smart engagement that encourages problem-driven approaches can facilitate more locally-driven and context relevant support in justice sector work. This includes integrating in more

meaningful ways the findings of problem-focused political economy analysis in informing programming choices and activities.

Second, and relatedly, this would be helped by more explicit **effective mechanisms of knowledge management and embedded learning** which learning approaches that can inform adaptation of activities. This includes investing in documenting success and failures – noting the political issues in justice sector work that make this challenging. This should involve testing and contesting assumptions about change and theories of change underpinning programming choices at the design and implementation stages.

Third, beyond these more general issues that are relevant to governance work broadly, SDC staff could benefit from **thematically oriented knowledge outputs on different issues and themes of rule of law and justice sector reform**. Currently SDC lacks thematic guidance on what constitutes a key component of governance features of development.

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Annexes

Annex 1: Questionnaire guiding the desk review of programmes

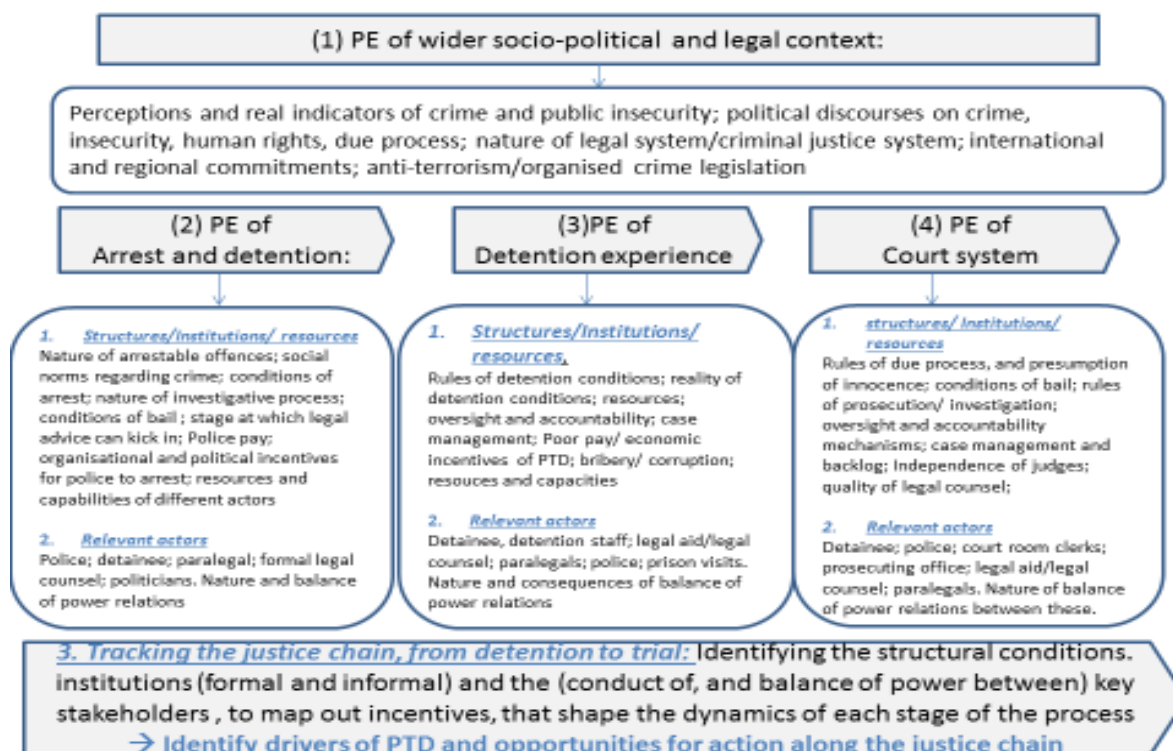
Desk analysis of SDC justice programs

Ukraine (4), Tajikistan (6), Bolivia (1), Global programme (3), Morocco (4), Southern Africa (1) and Serbia (1), this output will address the following questions

1. Overview of programme
2. What are the implicit and explicit understandings of the following issues:
 - How do understandings of justice feature in programming?
 - How do understanding of conflict and fragility feature in programming?
 - How do human rights/human-rights based approaches feature in justice support?
 - How is gender integrated and how does it feature in justice programmes/projects?
3. What forms of analysis/analytical tools are used and how do these inform programming, choices on thematic areas, intervention entry-points and activities?
 - Types of context analysis, conflict analysis*, stakeholder, power, or political economy analysis used
 - How does this inform decision on programming, activity choices or where to focus resources?
 - How does this inform theories of change and intended change processes/achievement of objectives and outcomes?
4. Outcomes, impact, assessment of what works? [primarily draw on evaluations, if possible]
 - What was found to work (approaches, activities, ways of working)
 - What was found to be problematic?
 - What types of recommendations emerge?
 - Structures for lessons, knowledge management/ knowledge sharing, M&E
5. Ways of working
 - Information on 'ways of working' and approaches to engagement, including role of civil society
 - Is compliance with Aid Effectiveness agenda made explicit (this includes ownership, alignment, harmonisation, results, mutual accountability)
 - In terms of engagement across departments: are they siloed; are lessons learned?
 - In terms of thematic areas: Are they siloed? What does lesson learning and sharing of information look like? Utility of M&E, or knowledge management, to inform activities during the life?
6. How do risk calculations feature in existing documents? [short answers]
 - To what extent are principles of do no harm articulated and adhered to? (risk)
 - Are issues of political risk made explicit (including issues of sovereignty, country ownership,
 - Is sustainability factored in?
 - Are institutional risks (for the donor) considered?
 - Special considerations on fragility and conflict
7. Other questions

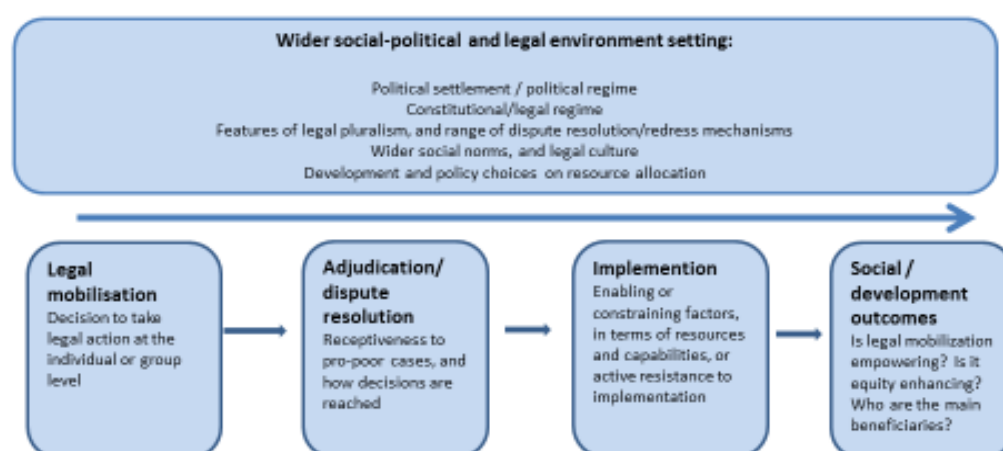
Annex 2: Political Economy of Justice Chains

Example 1. Justice chain for pre-trial detention:



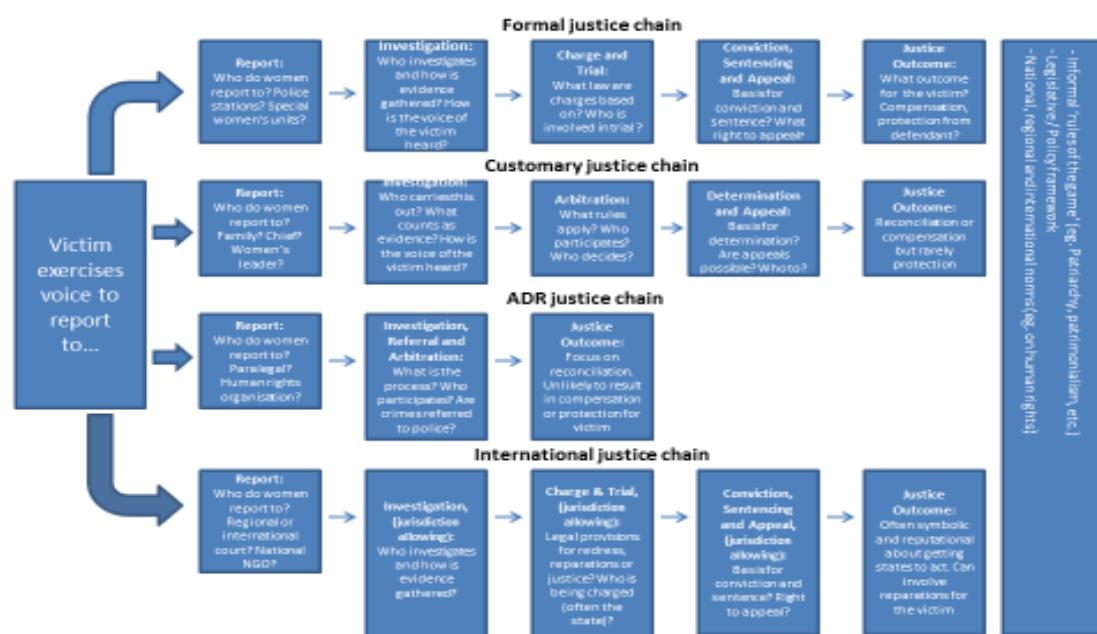
Source: Domingo and Denney (2013)

Example 2. Summary of a justice chain on legal mobilization/legal empowerment



Source: Domingo and O'Neil (2015)

Example 3. Justice chain for report on violence against women in a context of legal pluralism



Source: drawing on Denney and Domingo (2013)