The rule of law is a governance issue that involves two main aspects: law-making (Parliaments) and law application/enforcement (the Judicial System). This programming sheet covers the judicial system and the broader justice sector context which the judicial system is part of. For integrity, transparency and anti-corruption within the judiciary, please refer to the “programming sheet on anti-corruption”.

1. Definition of the concept

The *judicial system* (or *judiciary*) is the system of courts which administer justice in the name of the State. It is one of the three powers of the State (alongside the legislative and executive power) primarily responsible for the interpretation and application of the law as well as the supervision of its enforcement.

The *Justice sector* would encompass the formal justice system, informal justice delivery and mechanisms, mechanisms of human rights adjudication and other human rights monitoring and protection institutions such as ombudsman or national human rights commission, institutions such as the ministry of justice, prosecution services, the judicial police, the bar association, civil society organisations involved in the field of justice, possibly restorative and transitional justice, as well as the penitentiary.

The objective of supporting the judicial system and/or the broader justice sector is to guarantee the separation of powers, equal access to justice, the independence of the judicial system, the effective access to legal redress and the submission of the state authorities to the law. The rule of law and separation of powers not only constitute the

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1 The rule of law implies legality, regularity and consistency in the enforcement of the democratic order. It requires that the process of law-making be transparent and itself guided by law. All exercise of public authority must be regulated by and consistent with the constitution and the law. An independent judiciary to which all persons have free recourse must control the interpretation and application of laws. The rule of law is violated if arbitrary decisions are taken by public authorities. However, there is also a need for discretionary powers within the limits of law, for some flexibility to apply the legal prescriptions to individual cases. The rule of law is a necessary ingredient for the sustainability of development strategies and polices. The engagement of economic and social agents in development processes is facilitated when actions by institutions are predictable and reliable. A country operates under the “rule of law” when it has: a legislature that enacts laws which respect the constitution and human rights; an independent judiciary; effective and accessible legal services; a legal system guaranteeing equality before the law; a prison system respecting the human dignity; a police force at the service of the law; an effective executive which is capable of enforcing the law and establishing the social and economic conditions necessary for life in society, and which is itself subject to the law.
pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency.

A preliminary analysis will focus on the organisation of the judiciary and justice sector institutions in any given country. Questions arising in this respect could be linked to the adequacy of the geographic repartition of courts/tribunals/prisons in the country, certainly before any support to the judicial system, including possible infrastructure works, are carried out. Further questions arising relate to the court's jurisdiction and the existence of specialized courts: Are there administrative, constitutional, commercial courts? Juvenile courts? Do military courts function and coexist with civilian courts, and what is their power of jurisdiction? Is there a Council for the Judiciary and what are its powers? Is the prison administration, including pre-trial detention facilities, placed under the jurisdiction of the Ministry of Justice?

The legal systems’ duality (traditional and modern) in many developing countries must also be taken into consideration. Traditional laws' prescriptions may collide with internationally agreed standards, particularly when it comes to gender equality and indigenous peoples' rights. This situation will only change in the long term and should be approached in a balanced way.

In countries in transition and post-conflict settings, the most urgent challenges related to justice, are (1) the fight against impunity, meaning the establishment of the truth, the trial and punishment of perpetrators, and (2) reparation and compensation for victims (3) reform of the judiciary in order to restore its legitimacy, independence and impartiality, and hence its public credibility. Depending on the extent of the violations and the context, a balance will be found between the sometimes conflicting notions of mercy, truth, justice and peace. The State may for instance opt to establish a para-judicial truth and reconciliation mechanism alongside or instead of judicial procedures.

2. Taking the concepts into account in the analysis of the country situation

The following "entry points" identify some indicative questions for analysis while programming EC interventions in the judicial system and/or in the broader context of the justice sector. The list of questions is not exhaustive. Complete answers and analysis require in depth identification work.

In addition to corruption-related issues within the Judiciary (see programming sheet on anti-corruption), the following general aspects can be taken into consideration to analyse the Judiciary and/or the broader context of the justice sector. This is not a matter of analysing the judiciary and/or the justice sector strictly from the standpoint of legislation but of looking into how it actually functions, since social, economic or cultural factors may hinder the genuine exercise of rights by certain groups. At the same time, the quality of the administration of justice has a direct impact on democracy and the development of States.
Independence of the judiciary and separation of powers:

- Is there a clear constitutional, legal and administrative framework describing the competencies of institutions/actors in the administration of justice (courts, prosecutors, lawyers, prisons, judicial police, ministry of justice) and the respective jurisdictions between each one of these institutions/actors?

- Is the independence of the judiciary guaranteed by the State and enshrined in the Constitution or the law of the country?

- Does the judiciary decide matters brought before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any party or for any reason?

Accessibility of civil and criminal justice/access of citizens to justice:

- Is the justice system (both formal and informal) equally accessible to all citizens, especially disadvantaged groups, in regard to such matters as geographical proximity, cost, procedures, and professional assistance? In analyzing access to justice, the issue needs not be equated with access to courts but is to be viewed as a broader notion including the whole range of fora/institutions and remedies available in public and private law.

- Do women, children, persons with disabilities and ethnic, religious and linguistic minorities, as well as persons in a situation of extreme poverty, persons infected with HIV or suffering from AIDS and indigenous and tribal peoples have access to justice on equal footing with other sections of society? Which pro poor access strategies do exist?

- Is the effective access to legal defence ensured as well?

Efficiency of the system of justice:

- Can the system deliver a judgement in a reasonable amount of time – both in criminal and civil proceeding? Are the general conditions conducive to an accountable judicial system in place and adequate resources to enable the judiciary to properly perform its functions (appropriate salary, adapted system of recruitment and promotion, transparent disciplinary regulations, reasonable number of trained judges and other personnel, equipped courts, balanced geographical repartition)? Do the various judicial procedures provide for investigation, prosecution, judgement and relevant punishment of those responsible for any crimes/misdemeanours/offences (whether these constitute human rights violations or not)?

Fair trial:

- Are domestic standards and executive acts consistent with international human rights law? Does the body of case law incorporate international standards for the administration of justice and human rights and does it clarify the scope and content of human rights and fundamental freedoms and the obligations of the authorities?
• Do criminal judicial procedures guarantee the proper administration of justice in conformity with international standards for a fair and equitable trial and also the rights of those brought to trial, defendants and victims?

**Alternative mediation and dispute resolution (informal legal process, traditional justice):**

• Are mediation and alternative/traditional/informal dispute resolution mechanisms in place? Are they taken into consideration by the formal justice system? Do they provide an efficient and well accepted alternative to the formal judicial system? Indeed, often, statistically, most disputes do not come to court, and the justice system is part of a larger mechanism of dispute resolution.

**Enforcement of Court decisions and penitentiary**

• Are court judgements enforced fairly and effectively? Is the level of enforcement for judgements independent from external pressures? What is the role of auxiliary agents/organizations in complementing the actions of key state institutions devoted to the enforcement of judgments?

• Is there a penal policy in place? Is there a probation system in place? Do alternative sentences to detention exist and function properly? Is imprisonment used for discriminatory purposes?

• Do conditions in detention comply with international standards? Is there a mechanism for independent and effective supervision of punishment—prison and non-custodial sentences—by a magistrate? Are there prison inspection services? Do complaint mechanisms exist for detainees?

More detailed elements of analysis can be found in the Basic principles on the independence of the Judiciary, the role of Lawyers and the Role of Prosecutors adopted by the UN (links in section 4).

**3. Taking the concepts into account in the Community response strategy**

The response strategy should approach the reforms in the judicial system in a holistic way. Narrow approaches purely input- (increasing salaries) or output-oriented (training of judges) disconnected of any other intervention or strategy should be avoided: they are in general not sustainable and do not necessarily lead to the strategic objectives mentioned above. The elements of analysis identified in section 2 could be the basis to decide engaging together with the government and other donors in a detailed assessment or audit of the whole system, in order to identify the most appropriate interventions and their sequence. If a Public Expenditure Review is carried out or a general Public Service Reform Programme is envisaged, the justice sector should be taken into consideration.

In a security system reform context, the links between justice and security/police should be explored. The fight against crime and violence are key in the fight against poverty, the realization of the Millennium Development Goals, and sustainable economic, political and social development. An integrated reform of the security systems, of which the
justice system is part, can contribute to the stabilisation of situations of fragility in countries affected by a high level of crime. The existence of a crime prevention strategy and policy at country level is a key element of such reforms. Criminal justice reform will obviously be the focus of support in a security system reform context; however, such reforms will need to be implemented in parallel with wider justice reforms in order to be fully effective. Support to legal and judicial mechanisms that provide an oversight and accountability structure for security institutions will also need to be considered. Within security systems, the judiciary is both a mechanism to hold security services accountable and a security provider itself. The careful consideration of its links with the other sectors of a security system is therefore paramount.

The following components of the Judicial system can be taken into consideration to engage in a Strategy of Reform: justice within the national budget (programming of expenditure, implementation rate, Public Finance Management (PFM) issues, need for a Medium-Term Expenditure Framework (MTEF)), wage structures, systems for recruitment and promotion, initial and ongoing training, administration of justice, geographic distribution of courts and tribunals, provision of legal service, strategy for rehabilitation or for reform of the prison system, strategy for setting-up or enforcing non-custodial systems, ‘roadmap’ for legislative reform.

4. Useful links for further information

- For possible indicators see “Handbook on good governance in EC cooperation”, Section 2
- Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers
- Basic Principles on the Independence of the Judiciary
- Basic Principles on the Role of Lawyers
- Guidelines on the Role of Prosecutors
- 2002 Opinion of the Council of Europe's Consultative Council of European Judges (Conseil Consultatif de Juges Europeens, or CCJE) on the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality.
- UN Office on Drugs and Crime