

STRENGTHENING THE RULE OF LAW: MAKING THE CASE

This submission is prepared in response to the call for input as part of the reflection process launched on 3 April 2019 by the European Commission on the rule of law in the European Union. It focuses on formulating proposals for future action for the Commission's consideration, primarily oriented towards better promotion of the rule of law and early prevention of related issues. The submission also highlights ways in which the OECD could support the Commission in this endeavour, building on the OECD work on people-centred justice and legal empowerment, business-friendly justice, administrative justice, open government and broader governance reforms.

Better Promotion of the Rule of Law

To support the promotion of the rule of law across the Union, the Commission may consider reinforcing its actions in the following areas:

A. Strengthening the business case for the rule of law and responsive justice

To increase societal demand for the rule of law and to strengthen its promotion and awareness, there is a need to strengthen the business case for the rule of law and people-centred justice, also by showing the cost of the failure to act. Currently, there is limited evidence on the impact of an effective, accessible and efficient justice system, sound legal advice and services, and broader rule law. There has also been insufficient rigorous research and evaluation to understand the effectiveness of different rule of law and justice interventions (including on meeting the needs of citizens). To this end, the business case for the rule of law could be strengthened in, at least, three directions:

- **Rule of law as a basic value and a foundation of good governance:** The rule of law is a basic value of the European Union and a requirement for OECD membership. It is also a necessary underpinning for the achievement of many societal goals. There is evidence that investment in the rule of law, including access to justice and legal empowerment, can help tackle corruption and injustice, close the gap between formal and actual rights, and trigger legal and institutional change¹. Strengthening the understanding of the links between the rule of law, quality and people-centricity of justice systems, good governance and trust in institutions could help make the case and promote grassroots discussions on the rule of law across the countries.
- **Rule of law and access to justice as core pillars of people's well-being:** Rule of law, including access to justice, is at the centre of inclusive growth strategies that improve policy outcomes for people and lead to better access to economic and other opportunities and public services. Laws and regulations shape and foster access to education, health and other social benefits. In contrast, the absence of the rule of law undermines people's ability to claim their rights in accessing these services. In fact, there are significant costs associated with the inability of people to claim their rights and resolve legal problems. By only looking at the costs² related to the inability to access justice (and not at the broader implications related to the failure to exercise rights), a conservative estimate places the annual costs of health/employment impacts of legal problems for individuals in a range going from 0.5% to 3% of the GDP in most countries³.

¹ OECD White Paper on Building the Business Case for Access to Justice (2019).

² The estimates are based only on the direct expenditures related to legal problems (lawyer and court fees, transport, etc.) and the cost of adverse consequences on people's health, income and employment situation.

³ OECD White Paper on Building the Business Case for Access to Justice (2019)

Unequal access to justice may perpetuate existing inequalities, including in the areas of educational attainment, health conditions and employment opportunities, which are important determinants of growth and well-being. Growing evidence highlights a correlation between unequal access to justice and broader socio-economic inequalities, disproportionately affecting vulnerable groups (e.g. women, children/youth, elderly). The *OECD Framework for Policy Action on Inclusive Growth*⁴ highlights access to justice as part and parcel of the key dynamics to “invest in people and places that have been left behind”. Indeed, empirical analysis shows that legal and justice interventions directed towards vulnerable groups generate direct benefits for their recipients and contribute to more inclusive societies with long-lasting impacts of societal welfare.⁵ Yet there is a significant need to strengthen our understanding of the costs of lack of access to justice and rule of law (at the country level, within specific sectors), as well as to understand what works in closing the existing rule of law and justice gaps.

- **Rule of law and effective justice as enablers of sound business and investment climates:** A functioning rule of law and justice system contributes to a thriving business environment and longer-term investment decisions. It supports contract enforcement, reduces transaction costs and creates a level playing field for market stakeholders by instilling confidence in “the rules of the game,” ensuring fair competition and protecting property rights. The OECD work (2013)⁶, including its economic surveys, increasingly highlights the importance of the rule of law and effective justice institutions for economic growth.⁷ *The OECD Policy Framework for Investment*⁸ (PFI) suggests that when key elements of effective access to justice are missing or result in inefficient (e.g. complex, costly, and lengthy) procedures, companies, including SMEs, would limit their activities.⁹ Deepening the analysis of the links between the rule of law, effective justice and inclusive economic growth, could further strengthen the case for the rule of law as an enabler of business development and investment climate.

Proposed actions

- To further build the case for investment in the rule of law in order to raise awareness and to facilitate discussions among key actors on the related issues, the Commission could consider
 - undertaking a series of joint EU-OECD studies to analyse the cost of gaps in the rule of law, ineffective justice systems and unmet legal needs for people and companies. This work could build on the *OECD White Paper on Building the Business Case for Access to Justice* and allow to deepen the analysis of the cost of inaction in making the rule of law and justice a reality for all. The studies can also include the analysis of the rule of law variables and their impacts on other governance outcomes, growth and people’s well-being.
 - developing a comprehensive research and evaluation agenda to identify practices which “work” to close existing justice and rule of law gaps. This work would help enhance the quality of evidence on the impacts of different interventions, aiming to promote the rule of law, accessibility and people-centricity of justice systems. The OECD report on *Access to Justice for Inclusive Growth: Putting People at the Centre* and the *OECD White Paper on*

⁴ <https://www.oecd.org/economy/opportunities-for-all-9789264301665-en.htm>

⁵ OECD White Paper on Building the Business Case for Access to Justice (2019)

⁶ Palumbo, G., et al. (2013), "Judicial Performance and its Determinants: A Cross-Country Perspective", *OECD Economic Policy Papers*, No. 5, OECD Publishing, Paris, <https://doi.org/10.1787/5k44x00md5g8-en>.

⁷ OECD Economic Surveys (Portugal 2019, Slovak Republic 2018, etc). <http://www.oecd.org/economy/surveys/>

⁸ <https://www.oecd.org/investment/pfi.htm>

⁹ OECD (2018), *Access to Justice for Business and Inclusive Growth in Latvia*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264303416-en>.

Building the Business Case for Access to Justice set out a range of elements which could help frame such an agenda.

B. Enhancing legal literacy, empowerment and awareness

Legal empowerment and literacy are important tools to promote the culture and effectiveness of the rule of law, social accountability, public sector integrity and inclusive growth. Legal empowerment advances more meaningful civic engagement in the promotion of the rule of law, by ensuring that people understand how the law allows them not only to confront the injustices in their lives, but also to participate in the law-making and implementation. Legal empowerment can also raise awareness and provide people with tools to protect their rights, push for legal and regulatory protection, shed light on breaches of the rule of law and allow for a more effective participation in open government and consultation initiatives.

Proposed actions

The Commission could consider:

- Supporting a *comparative measurement agenda* on the state of legal literacy and empowerment across EU member states (e.g., through comparative surveys and case studies, e.g., similar to the OECD PISA approach). This work should be based on a robust analytical framework and a set of indicators (including outcomes and impacts of legal empowerment on the rule of law and social accountability, as well as enabling policies and institutions that promote and sustain legal literacy and empowerment).
- *Documenting evidence-based good practices, and promoting regional and national policy dialogue* in delivering legal literacy and empowerment programmes, which could support the overall promotion of the rule of law and enhance legal empowerment initiatives across the countries.
- Undertaking a *comparative analysis of capability of public agencies* to engage citizens and respond to their feedback and to engage in dialogue with civil society on legal empowerment and social accountability. Enhancing the role of public administration can thus promote open government and transparency, clarity of laws and regulations, and public consultation on the rule of law. OECD instruments, such as the *OECD Recommendation of the Council on Open Government*¹⁰ and the *OECD Recommendation of the Council on Regulatory Performance and Governance*¹¹ could provide useful support.
- *Strengthening the capacity of civil society* to engage in a dialogue with the authorities on rule of law issues, as well as delivering and assessing legal literacy and empowerment initiatives through capacity building and dialogue platforms (such as the forthcoming OECD Observatory on Civic Space).

¹⁰ <https://www.oecd.org/gov/Recommendation-Open-Government-Approved-Council-141217.pdf>

¹¹ <https://www.oecd.org/governance/regulatory-policy/49990817.pdf>

Early prevention

C. Promoting people-centred and responsive legal and justice systems

Justice and constitutional processes are important for the consolidation and maintenance of democratic governance and the rule of law by ensuring the protection of individual rights and liberties, and by delineating powers between government branches and bodies. In addition, they serve as a dialogue platform between people and their government (e.g. constitutional questions), considered a key aspect of open government in terms of consultations and two-way relationships. Administrative justice is also one of the main interfaces between public administration and people and a core enabler of holding the government to account.

Accessibility, responsiveness and user-centricity of justice, transparency and clarity of legal information, as well as availability of legal support and advice are critical in preventing the backsliding of the rule of law. In the absence of effective and accessible justice or in the case of failed justice institutions, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.¹² As such, there is a growing need to promote a *shift towards people-centred and holistic approaches* in strengthening the rule of law (including justice institutions). The *OECD Serving Citizens* framework highlights governments' responsibility to serve its people and provide public services, including justice services that should be designed to meet the expectation and needs of their citizens. The *OECD criteria for people-centred services* and the *forthcoming policy framework on inclusive justice* could be useful in guiding the design of a holistic people-centred justice ecosystem.¹³

Proposed actions

The Commission could consider:

- Undertaking a *comparative study of EU member states of people-centricity* of their justice systems, which could help orient further reforms.
 - Such a comparative study could support the identification of the core elements of the justice systems necessary to effectively protect the rule of law (e.g., proper mandates and powers from procedural rules as well as effective use of these powers). In addition, the study could include the analysis of responsiveness and people-centricity of the legal and justice systems to the *needs of people and businesses and the state of legal empowerment across the EU*. It could also focus on the characteristics of the administrative judiciary necessary to enable effective scrutiny of the administration and help protect rule of law. The comparative study could be complemented by country-level *strategic and periodic assessments*, with the focus on outcomes and EU-wide benchmarking.
 - In order to map legal needs, the Commission could consider undertaking legal needs surveys, which could shed light on the user-centred experience of legal problems from the perspective of citizens or businesses. The surveys could provide insight into the everyday nature of legal and justice problems, and the potentially serious consequences of failing to meet these needs. The *OECD-OSJI Guide on Legal Needs Surveys*¹⁴ as well as the *OECD Survey Module on Legal Needs of Business*, including SMEs, could provide support in

¹² <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

¹³ See the list of criteria in the OECD 2019 report "Access to Justice for Inclusive Growth: Putting People at the centre", available at www.oecd.org/governance/equal-access-to-justice-for-inclusive-growth-597f5b7f-en.htm. Such service criteria include evidence-based planning, equality and inclusion; availability, accessibility, prevention, proactivity and timeliness; appropriateness and responsiveness; outcome focus and fairness collaboration; and integration and effectiveness

¹⁴ www.oecd.org/governance/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.htm

undertaking these surveys (either as stand-alone or as modules in other surveys). These surveys can also support the implementation of target 16.3 of the 2030 Agenda (“*to promote the rule of law at the national and international levels and to ensure equal access to justice for all*”), as highlighted in the UN Governance Praia Statistical Handbook Chapter aiming to support countries in implementing SDG 16 (forthcoming, led by UNODC, OECD and OSJI).

- The data could also support the development of EU-wide and national strategies and roadmaps to ensure implementation of the rule of law and providing justice for all and serve as the basis for preventive activities.

- Promoting *justice sector innovation to facilitate the development of people-centred justice services and ways to advance the rule of law (e.g., innovative legal empowerment initiatives)*. Building on its extensive experience, the OECD Observatory of Public Sector Innovation¹⁵ could support the promotion, collection and showcasing of justice and rule of law related innovations.

- Promoting *multi-stakeholder and cross-sectoral policy dialogue* to deepen the understanding of the rule of law, and people-centred justice, facilitating peer- to-peer exchange of good practices and lessons learned. The OECD offers platforms such as the OECD Global Roundtables on Access to Justice¹⁶, as well as multisectoral networks, which could be used to 1) articulate the links between the rule of law, responsive justice and other societal goals; 2) strengthen the case for investment in the rule of law and people-centred justice systems; 3) identify lessons learned and good practices in promoting the rule of law, people-centricity of justice, legal empowerment and social accountability.

The OECD stands ready to support the EU on the actions proposed in this submission and other areas to advance the implementation of the rule of law across the Union.

¹⁵ <https://oecd-opsi.org/>

¹⁶ The information on the latest roundtables can be found here: 2019, Lisbon: www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-portugal-2019.htm; 2018, Riga: www.oecd.org/gov/equal-access-to-justice-oecd-expert-roundtable-latvia-2018.htm.