



Justice and security – when the state isn't the main provider

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Most people in the world do not take it for granted that the state can or will provide justice and security. Donors who seek to improve access to these services should abandon their concern with 'what ought to be' and focus on 'what works'. This means supporting the providers that exist, and accepting that while wholesale change is not possible, gradual improvement is.

Non-state actors are the primary providers of justice and security in the Global South where they deal with an estimated 80 to 90% of disputes. In the past decade, international development agencies have therefore begun to include non-state providers in their programmes to improve access to these services for the poor and marginalised. This focus covers programmes in conflict-affected countries such as Afghanistan, in fragile and peacebuilding contexts such as Sierra Leone, and in stable young democracies such as Ghana. At the same time most international resources are still invested in the establishment or reform of state institutions according to a Euro-American state-centric model of law and bureaucratic structures. This limits donors' ability to engage with a diversity of organisations.

If people's access to justice and security is to be improved it is necessary to rethink the state-centric agenda. Donors have much to gain from deepening their understanding of who the local providers are, what justice and security mechanisms are available, and what is legitimate at the local level. Context-sensitive and evidence-based programming is crucial.

State institutions work more efficiently when they are shaped according to local needs for justice and collaborate with local non-state providers. However, there is a great variety from locality to locality. Non-state providers of justice and security include traditional or customary authorities, community-based policing groups, restorative justice and

RECOMMENDATIONS

- Move beyond a state-centric agenda so that programming is based on 'what works' at the local level rather than on 'who ought to' provide services.
- 'What works' sometimes works because of lack of international engagement. International actors may therefore use their leverage with governments to create a space for local providers, rather than engage directly with them.
- Ensure context-sensitive and evidence-based approaches to programming, oriented as much as possible towards the needs and demands of end-users.
- Factor into programmes the idea that provision of justice and security are often deeply political matters, involving competition over power and resources. Consider the political implications when donors support certain providers over others, and communicate clearly the strengths and weaknesses that this support role entails.
- Be aware of the tension between local ownership and international actors' normative agenda (including human rights) and be clear about where to position activities on that spectrum.
- Promote human rights as a process. The first step in doing so is to open up a space where those without a voice may be heard and perceived perpetrators may be offered reasoned arguments, rather than immediately criminalizing all longstanding and widely supported abuses.



mediation organisations, work associations, and so forth. How they operate depends on historical, socio-cultural and political factors. Their relationship to the state differs widely. There may be full recognition and close collaboration, limited partnership, unofficial acceptance, competition and even open hostility. This variety makes the very concept of 'non-state' ambiguous for international programming. Furthermore, donors must scrutinise whether local people desire support at all, whether governments want support for local providers and whether donors are able or willing to provide support to the preferred solution. Unsurprisingly, there is no single response to these issues.

Whatever framework of support is chosen, it will involve political choices and have political implications touching on issues of power, resources and rights. Justice and security provision are not simply technical fields that require technical solutions.

BEYOND STATE-CENTRIC THINKING

'State-building' is often the preferred concept, guiding international donors for both domestic and international political reasons. It is necessary to scrutinize this concept. First, the question is why programmes seek to establish a Euro-American state model when it is not achievable for this generation or the next in most of the world. Secondly, the state/non-state dichotomy that informs the state-building framework rarely reflects reality. Linkages and overlaps exist between institutions that represent and draw authority from the central state and institutions that generate authority at the local level. Collaboration between providers and struggles over the authority to provide services are continuous. Thirdly, it cannot be assumed that 'the state' or 'the government' is able or even willing to do-

minate all other organizations within its internationally recognized territory. This is the case even if state officials insist that funding is channelled through the institutions that they represent. Significantly, the practices and principles of law and justice that state institutions follow may not meet the needs and demands of the local recipients of services – or indeed of the international community.

Thinking beyond the state/non-state dichotomy has real implications for how programmes are designed and implemented. It does not simply mean supporting new alternative dispute resolution (ADR) forums to ease the pressure on the state courts – as was the case with the *Musalihat Anjuman* in Pakistan. It has been suggested that the strengthening of *Musalihat Anjuman* to deal with disputes at the local level has not only further weakened the formal court system and undermined the state's responsibility. It has also to some extent side-lined already existing local initiatives that had come quite far in, for instance, improving women's access to justice. Thinking beyond the state/non-state dichotomy means taking one's point of departure in providers of locally acceptable services that already exist.

In practical terms this means that instead of trying to identify what is state and what is not, the point of departure should be how services are provided and by whom, how they are experienced by different users, and how the providers are linked to each other. It is also worth distinguishing between narrow and broad conceptions of state-building that are increasingly being applied by donors. State-building in the narrow sense focuses on building the capacity of state institutions, but increasingly the concept is applied to include the reinforcement of relations between the state and its citizens, including local justice and security providers.

Lessons can be drawn from South Africa where a somewhat minimalist state model *de facto* prevails in some areas:

PITFALLS OF A STRICT RULE OF LAW AND STATE-CENTRIC APPROACH

Rule of law approaches to justice and security programming are often too concerned with establishing a single state-legal system. They discredit other available options that are deemed incompatible with a modern state, irrespective of whether they correspond to the values and practical concerns of citizens. In Liberia, for instance, this has led to a 'justice vacuum'. The majority of the population prefers customary courts, but recent policies and laws restrict their jurisdiction and methods. In turn, state institutions lack capacity and popular legitimacy. An alternative is to approach the variety of providers that exist, not as rivals, but as an opportunity to improve services despite the limitations of state institutions. A network of state and local providers may even increase the legitimacy of the state as the facilitator of enhanced justice and security provision. At the same time, transparency and equal application of the rule of law is a potentially contentious issue.

When rule of law frameworks include locally anchored options there is still a tendency to tie them into a state-building oriented process. This is also the case with respect to the multi-layered approach, where a regulating and overseeing state is considered to be pivotal. For some, state oversight and regulatory control necessitates 'codifying and standardising' the domain of law and justice, even though it is the flexible, context specific and negotiated elements that are attractive to local users. So, who is the local in 'local ownership', and can donors accept and support justice and security provision that is not rule-driven, homogeneous and universal?

A way out of this impasse is to support less top-down, and more inclusionary dialogue between users and providers, to ensure the development of shared principles for justice and security provision.

a division of labour has developed where the state police deal only with serious crimes. Community-based, business and citizen driven groups deal with local matters such as petty crimes and the patrolling of public spaces. Local governments are the focal point around which the activities of different actors are coordinated. And in Bolivia and Ecuador, the legal system is *de jure* defined as plural in the constitution, which corresponds with the wide range of different ethnic groups and their particular legal frameworks. In Bolivia this means that different ethnic groups are represented in the Constitutional Court.

EVIDENCE-BASED PROGRAMMING AND END-USER ORIENTATION

The donor discourse on 'context sensitivity' supports the need for evidence-based programming. But many programmes continue to build on apparent commonsense assumptions about local justice and security arrangements and preferences. A focus on the actual practices and experiences of justice and security provision will shift the focus from 'who ought' to be the providing institutions to 'what works' for the end-users. This is part of a broader shift away from the institutional approach that has dominated the state-building agenda. This agenda has focused on the providers rather than the needs and demands of the primary target groups of donors: the poor, the vulnerable and the marginalized.

Methodologically, evidence-based programming implies that designs are based on in-depth assessments of what justice means to different users and what their preferred choice of providers are (captured through user-surveys, qualitative interviews, mappings of providers and participant observation). Support to local research capacity and investments in joint donor analyses are important.

Evidence-based programming excludes a preconceived understanding of which providers to support. For instance, in Ghana citizens prefer magistrate courts in many places for certain disputes, partly because they operate on the basis of informality and negotiation. State courts are popular because they reflect a long history of adaptation to Ghanaian society and are not, as in Afghanistan and Liberia, viewed as externally imposed institutions. Programmes need to take historical and contextual factors into account, including legislative legacies and levels of fragility and stability.

LOCAL OWNERSHIP: PROCESS RATHER THAN 'END-STATE'

Within the concept of local ownership lies the tension of what precisely is being owned and by whom. Donors often design and implement programmes with a particular end-state in mind and emphasise the creation of specific standards and certain types of institution. Commonly, this has led to donors supporting the establishment of new hybrid solutions, such as NGO-operated community mediation schemes and paralegals like the district level



justice sub-committees in Afghanistan and TIMAP's highly praised paralegal programme in Sierra Leone. They might fit international standards, but they also have the potential to exclude already available local providers.

These 'new' solutions raise questions about sustainability. Legal orders are the result of ongoing socio-political contestations over norms and institutions. It is unproductive to ignore these processes by imposing standards from the 'top'. Donors should have an honest debate internally about how to strike a balance between what they often consider non-negotiable standards, such as human rights, and the space for local ownership. And local ownership is dependent on broad-based and participatory dialogue about what standards for justice and security provision might look like and how they can be monitored. In Somaliland, for instance, inclusive dialogue meetings were organized. Funded by the Danish Refugee Council they involved clan elders, community and ministerial representatives as well as international and local NGOs. A number of solutions were discussed on how to promote human rights, build linkages between providers and create a plural system. Solutions included referral mechanisms between customary and formal courts and measures to ensure that customary authorities protect vulnerable groups.

THE POLITICS OF PROGRAMMING

Even when donors appreciate the centrality of politics in the programmes they design and implement, it remains a challenge to think outside the logic of a state bureaucratic framework. The kind of competition between different providers over power and resources that often characterise contexts with a variety of legal orders and actors should directly impact on how programmes are designed. This means ensuring a thorough analysis of local and national power relations, as well as allowing sufficient time to negotiate the inclusion of a variety of actors with state insti-



tutions – which has been a challenge in Sierra Leone, for instance.

Donors must consider the political role that they inevitably play when supporting certain providers and agendas over others. A key challenge is the opposition they meet from state leaders and officials who may fear losing access to political and economic resources when funding to state institutions is reduced to the benefit of other providers. What donors are well placed to do is to facilitate a process of change through political negotiation where a plurality of actors is considered in efforts to improve how ordinary people access justice and security. It is both the weakness and strength of donors that they are political actors, and their level of influence with national actors inevitably varies. One solution is to tone down the focus on state and non-state actors as belonging to discrete categories, and to start looking at the systems of providers that link together numerous nationally and locally embedded justice and security providers.

DONOR (IN)FLEXIBILITY

Donors are under various pressures. The international system in which they operate is governed by state-to-state interaction. In itself, this limits how much they can push for alternatives to centrally governed police and court systems. They are also driven by the domestic political agendas and bureaucratic practices in their home countries, and therefore often try to build states along similar lines (operating with frameworks, organigrams, etc). Since their funding is derived from taxpayers, donors are relatively risk averse and have to consider the implications of failure through programme experimentation for their constituencies at home. Money is also a challenge to spend due to bureaucratic checks and balances and complex grant-making procedures. At the same time, donors are under pressure to spend their budgets, which means that activity and expenditure are conflated.

Training, conferences and the building of infrastructure are expensive activities, but spending money on ‘the non-state’ usually is not. This is another reason why ‘state-building’ in the narrow sense of focusing on state institutions is often preferred. Impact needs to be articulated and if success cannot be clearly defined, donors are not able to provide financial support. It is worth being explicit

about these limitations so that demands on what can be achieved through external support are set within a more realistic framework. Improved communication of alternative development options in the home countries of donors is worth considering, both within their own organisations and to the public.

HUMAN RIGHTS AND INEQUALITY

Grounding programmes in ‘what works’ emphasises the dilemma that justice and security provision in the Global South is associated with a number of human rights violations, including discrimination and corporal punishments. This is often as much the case for the state police and courts as it is for local providers. This means that what leads to human rights challenges lies more in attitudes and power relations than within the type of institution itself. Cultural notions of gender roles, social status, and belief systems drive some of the violations of human rights occurring in justice and security provision. However, they cannot be divorced from the socio-economic conditions and power relations that sustain inequality.

The promotion of human rights and gender equality begins by understanding the context-specific processes of contestation. A simple focus on institutions and on prohibiting those practices that violate human rights within them is unlikely to be successful. Rather, the relations of power that underpin inequalities, including those between providers and users, should be the aim of programming. The challenge is to identify key agents of change and human rights objectives that can be realistically obtained. Empowerment strategies may facilitate spaces for dialogue where the voiceless are heard and support existing social movements that advocate the socio-economic opportunities of women and vulnerable groups. This is a long-term process as is generally the case for processes of social change in the fields of justice and security provision.

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Further information

This policy brief is based on insights from the conference ‘Access to Justice and Security. Non-State Actors and the Local Dynamics of Ordering’, 1-2 November 2010, Copenhagen. For further information about the conference, including programme, list of abstracts and participants, please visit [www.diis.dk/justice and security](http://www.diis.dk/justice%20and%20security).