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Understanding and engaging informal justice

Report



Understanding and engaging informal justice

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About the Platform

The Knowledge Platform Security & Rule of Law brings together a network of relevant communities of practice comprising experts, policymakers, practitioners, researchers and the business sector on the topic of security and rule of law in fragile and conflict-affected contexts. It provides for a meeting space - offline as well as online - and intellectual stimulus grounded in practice for its network to share experiences, exchange lessons learned and discuss novel insights. This way, it strives to contribute to the evidence base of current policies, and the effectiveness of collaboration and programming while simultaneously facilitating the generation of new knowledge. The Secretariat of the Platform is run jointly by the Hague Institute for Global Justice and the Conflict Research Unit of Clingendael Institute.

Overview

Engagement with informal justice systems in developing countries has emerged as a major policy priority for donor nations such as the Netherlands. This interest reflects practical realities. After all, in the developing world, an estimated eighty to ninety per cent of disputes are handled outside the state justice system (Albrecht and Kyed 2010: 1). In countries with weak institutions or that are prone to conflict, informal justice can be particularly prominent because state courts cannot or will not consistently uphold the law. Thus, engagement with informal justice constitutes a vital area of engagement for both domestic and international policymakers seeking to produce tangible changes in how justice is actually experienced. However, it is also an area fraught with risks.

This working paper seeks to examine potential engagement by domestic and international actors with local informal justice systems. It consists of three main sections. The first section examines the nature of informal justice. It highlights some common advantages and disadvantages of those systems. Part two examines four donor relevant case studies with high levels of legal pluralism where most disputes are settled through informal mechanisms. The cases span from conflict prone states where the governing authority is actively contested to more consolidated democracies. They are designed to cover a wide array of potential settings, drawing on places of ongoing conflict (Afghanistan) and a polity teetering on the brink of major conflict (South Sudan). The case studies also include an example that enjoys stable and legitimate governance, but a democratic deficit (Rwanda) as well as a democratic state that faces serious economic, political, and judicial challenges (Ghana). The final section offers some general insights based on the examined cases. Most notably, it outlines the major policy options available as well as some key issues to consider.

Defining informal justice

In this paper, informal justice means justice processes distant from the formal state courts. As highlighted by a United Kingdom Department for International Development (DFID) working paper, the term ‘non-state justice’ “includes a range of traditional, customary, religious and informal mechanisms that deal with disputes and/or security matters” whilst avoiding, potentially unwarranted, assumptions about the operations or content of those mechanisms (DFID 2004: 1). Additionally, where “two or more legal systems coexist in the same social field” one speaks of legal pluralism (Merry 1988: 870). Such co-existence often happens in situations where informal justice is present as the informal system will exist alongside the formal, state one. However, as will be highlighted by the case studies, it is not possible to speak accurately of the characteristics of ‘informal justice’ in the abstract. As Campbell and Swenson highlight:

Non-state justice is often referred to as informal, traditional or customary law. However, these terms might not capture the empirical reality. Informal systems can, in practice, be highly formalized. Ethnic Pashtuns in Afghanistan draw on a non-state system based on longstanding cultural beliefs, *Pashtunwali*, known for its complexity, formality, and comprehensiveness. On the other hand, the state legal system can be highly ad hoc and state officials may disregard or may not even know the relevant law (Campbell and Swenson 2016: 6).

Thus, context specificity is essential. While many scholars have emphasized that “the process is voluntary and the decision is based on agreement” (Wojkowska 2006: 16, see also Harper 2011), this idea is not borne out in most cases. The processes are generally binding and subject to enforcement without consent. In other cases, there is technical, formal consent but that consent is given under pressure. Thus, we cannot assume that non-state justice outputs are necessarily acceptable to participants, just as one cannot assume about their quality or voluntary nature. These determinations are firmly empirical questions.

Informal justice systems can vary dramatically not only from state to state but also within states. Nevertheless, there do tend to be major clusters of informal justice: 1.) Religious, 2.) Customary, and 3.) Alternative Dispute Resolution. Religious legal systems are explicitly predicated on, primarily, principles of human conduct rooted in an established system of faith and worship. Examples include Islam, Christianity, Judaism, and Hinduism as well as a host of smaller belief systems. While religion is subject to divergent interpretations, these mandates can be particularly compelling as it often makes the system’s mandates synonymous with

transcendent religious concerns. Therefore, it can be particularly resilient to change as it often requires participants to significantly modify religious beliefs. This can be difficult not only individually but also communally, triggering larger community disapproval.

‘Customary law’ is used to identify boundaries based on observed behavior within a community rather than statutory or codified law (Glenn 2011: 42). Customary systems are characterized “by customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory” (Harper 2011: 17). Yet, customary law is fundamentally paradoxical as it is also “dynamic, adaptable and flexible, and any written version of it tends to become outdated quickly” (Id.) Thus, customary law may often be less rigid than religious law but nevertheless remains quite enduring, and policymakers should not expect to be able to change it easily through programmatic initiatives. After all, the whole idea of custom is prolonged repetitive behavior with a significant historical pedigree, even if that historical understanding is not technically accurate. Customary justice systems involve power dynamics that may reflect a broad-based social agreement in a certain community but still conflict with international norms. Moreover, the idea of outside actors simply coming in and dictating behavioral change can easily spark a backlash.

The final category consists of private arbitration, mediation, and other forms of alternative dispute resolution (ADR). While often highly structured, arbitration agreements are explicitly designed to circumvent state law and legal process, but the extent to which these can be circumvented depends on the amount of leeway provided by the state (Sternlight 2005). In all instances, these processes are integrated into and fall under the ultimate regulatory purview of the state, exist at its pleasure, and even depend largely on state courts for enforcement. ADR processes are allowed and often encouraged because they are seen as more efficient, less expensive, and are often of higher quality. At the same time, it is important not to draw a hard and fast line between ADR and religious or customary systems as ADR may reflect those values and beliefs as will be highlighted by the Rwanda and Ghana case studies.

Engagement with informal justice

First, and foremost, engagement with informal justice has a compelling, practical rationale. After all, if most disputes are settled through informal mechanisms, then policymakers and donors seeking to improve access to justice, human rights and other justice related goals will see it as a logical area for programming. However, engaging non-state justice raises even more logistical issues than engaging the state system. A state system judge may be corrupt, incompetent, or unwilling to engage program implementers, but at least it is clear who is and is not a judge and the regulatory framework through which they operate.

Non-state justice in its various forms has been associated with a number of major policy advantages. Most notably, these systems are often viewed as more efficient, legitimate, intelligible and accessible to participants than state courts, whilst being less expensive, having more effective enforcement, and being conducive to more overall social harmony. In post-conflict settings, informal justice mechanisms are also viewed as potential tools to achieve transitional justice after the horrors of conflict.

At the same time, the engagement with non-state justice is fraught with risks. As it often reflects distinct cultural or religious norms not rooted in international human rights ideals, which might fail to uphold or even violate basic human rights. Women and other vulnerable groups are particularly at risk when informal legal systems are modeled on overtly patriarchal ideals (Campbell and Swenson 2016). These systems can also reflect significant bias towards powerful individuals and families and the legal processes often lack core procedural protections, such as procedural and substantive due process norms and the right to appeal. Furthermore, the relationship between state and non-state justice is often unclear and cases may be resolved in different ways, encouraging forum shopping by parties, particularly those with more economic or political clout. From a donor perspective, monitoring and evaluation can be a particularly acute challenge as much informal justice happens in remote areas where even local partners only visit infrequently.

There is a constant temptation to omit the negative aspects of informal justice systems or claim those systems with unsavory elements somehow fail to qualify as informal justice. For instance, a major UNDP-led report characterizes informal justice systems as demanding ‘a neutral third party not part of the judiciary’ to adjudicate disputes while also noting that “custom-based systems appear to have the advantages of sustainability and legitimacy” (UNDP, et al. 2012: 8). Yet, there is no guarantee of a neutral third party decision maker even if such a thing exists. Non-state justice is often idealized as a legitimate, advantageous, and cost effective alternative order, but likewise these traits cannot be assumed. Moreover, it is often cast as voluntary. Harper, for instance, contends, informal justice “is only law to

the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law” (Harper 2011: 17). This could be the case, but it more likely than not informal justice decisions are enforced through some threat of individual or group sanction that is considered to be legitimate by the community, even if not backed up by the enforcement power of the state. However, by seeking to avoid inevitable thorny issues, one obscures the policy tradeoffs that come from engaging non-state justice actors. All good things rarely go together and that is certainly the case with informal justice systems. Moreover, the type of situation within which the systems operate also has significant implications. In short, there can definitely be advantages to engaging informal justice but donors considering work in these areas need to be clear-eyed about what informal justice entails in a given place, how it relates to the larger judicial and political ecosystem, and what goals they are trying to achieve.

Illustrative case studies

These brief case studies highlight possible differences between states and reflect a range of informal justice environments in which donors often engage. Nevertheless, these cases share key similarities that warrant a comparison. Each case features high levels of legal pluralism and extensive use of informal justice mechanisms. The vibrancy of the informal justice sector coincides with low institutional capacity in the formal justice sector and the broader state. Furthermore, all of these countries have seen significant donor interest. The case studies are snapshots rather than exhaustive analyses. They are meant to highlight different types of environment and non-state justice systems in settings ranging from active conflict zones to places with a higher degree of stability.¹

Afghanistan

For nearly a hundred years, all legitimate state-sponsored legal orders in Afghanistan were grounded in a combination of regime performance, Islam, and tribal approval under the auspices of the monarchy. The system broke down, however, when Communists toppled the regime in 1978. The coup plunged the country into decades of civil strife until eventually the Taliban seized control. The Taliban imposed a harsh, but effective state legal order in the mid-1990s based on religious authority in tacit agreement with prominent forms of tribal justice. The Taliban regime was sympathetic to Al Qaeda's radical brand of Islam and harbored the perpetrators of the 11 September 2001 terrorist attacks. Shortly after the attacks, a major international effort was undertaken to dislodge the Taliban. The new, multi-ethnic state under President Hamid Karzai had the opportunity to prove itself as a valid governing entity and also enjoyed substantial international support, but this was squandered (Rashid 2008). Karzai, with international support, worked ceaselessly to centralize authority over the next decade and undermine constitutional checks and balances. The state built a judiciary that had the outside appearance of a modern state legal system, but which in actuality focused on rent extraction and quickly alienated the population. While a vast number of atrocities were committed both during the decades of conflict and during Taliban rule, there was never any serious effort by the Karzai regime or the international community to push for transitional justice whether state or non-state.

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¹ However, it is important to recognize the time and research constraints. This paper is the result of 35 days effort. As agreed, it is a desk study based on existing resources. Additional interviews were not conducted. The research also did not engage in-country fieldwork.

Ordinary justice

In Afghanistan the most effective form of legal order has never been state law. Rather, it was *Pashtunwali*; a non-state legal code based on tribal custom of Afghanistan's largest ethnic group, the Pashtuns. *Pashtunwali* is applied through local gatherings known as *jirgas*. Non-Pashtuns used the *shura* process, which mirrored the operation of the *jirgas* (Wardak 2003). While equity is stressed, the process is entirely male dominated. Barfield, Nojumi, and Their describe the *jirga* process:

Everyone sits in a circle so that no one takes priority. All members have a right to speak and binding decisions are made by common consensus rather than voting. This may take considerable time (days, weeks or even months) or fail to come to a conclusion entirely (Barfield, et al. 2006: 9).

Jirgas could not sanction physical punishment, but nevertheless fostered a very high degree of compliance (Kamali 1985: 4). Today, *jirgas* and *shuras* remain the default dominant forms of dispute resolution 'unless assistance is requested from another tribe or the government' (Carter and Connor 1989: 7, see also Wardak and Braithwaite 2013). Nevertheless, engaging longstanding non-state legal providers was not a state priority and no law on non-state justice was ever passed.

The Taliban also established its own informal justice system that claimed to adjudicate based on Sharia law, something which "[strengthened] their legitimacy in a deeply religious population" (Giustozzi and Baczeko 2014: 219). The Taliban justice system embraced Pashtun cultural values and tried to work constructively with tribal leaders. Taliban insurgents actively contend with the state system, especially outside the capital, by offering inexpensive, expedient, and relatively fair dispute resolution (Johnson 2013: 9). In short, the Taliban justice sought to provide exactly what the state justice system did not: predictable, effective, legitimate, and accessible dispute resolution.

Donor engagement

Considering that the legal system and human resource base had been devastated by decades of conflict, the needs were certainly daunting in 2002 (Swenson and Sugerman 2011). If anything, the challenges have only increased with the renewed Taliban insurgency and return to full blown conflict. During Karzai's time in office, Afghanistan's justice sector received over \$1 billion in aid from the US alone, yet the office of Special Inspector General for Afghanistan Reconstruction (SIGAR) determined that assistance generated no notable improvements (SIGAR 2015). The ability of international subsidization to advance the rule of law is quite limited absent a commitment by the state to the ideal. There has been no progress towards the rule of law and there have been few significant gains in the reach, effectiveness, and legitimacy of the state justice system (Singh 2015). International assistance has furthered state corruption and impunity rather than promoted the rule of law. The international community emphasized the promotion of human rights, particularly women's rights. These views clashed with *Pashtunwali* and Islamic law, as frequently

understood in Afghanistan, (De Lauri 2013) and gave the Taliban grounds to criticize the regime as unrepresentative and un-Islamic and promote their own justice system.

Given the failures of the state justice system since 2009, there was increasing donor interest, particularly by the US, in supporting and even creating new informal justice forums. Programs envisioned improving the quality of non-state justice and to strengthen linkages between the state and non-state justice systems. The most pressing goal of non-state justice support, however, was to supplement and consolidate US-led counterinsurgency efforts (Wimpelmann 2013). Yet, the program largely echoed work done for state actors and drew on the same highly suspect template (Coburn 2013). Training elders and other informal justice actors was a major focus. Trainings addressed state and Sharia law as well as administrative processes. In reality, tribal structure, warlords, or the Taliban underpinned order at the local level. Internationally backed local representatives were often not the most prominent community members. Whatever authority these individuals had largely reflected international assistance rather than local standing. Shuras set up by international actors could be quite destabilizing by distributing large amounts of external funding as well as by empowering individuals, through military force, that may not enjoy substantial popular support (Coburn 2013, Wimpelmann 2013).

South Sudan

After decades of violent conflict and five years as an autonomous region of Sudan, South Sudan achieved independence in 2011 after an overwhelming majority of the population voted for independence in a national referendum, which was greeted with massive celebrations. South Sudan was soon recognized as a full member of the international community. Independence has proved no panacea, however. The state has faced severe political, social, economic and legal challenges.² Despite the presence of an international peacekeeping force, violence has become endemic. State capacity is minimal, impunity commonplace, and corruption rampant. The state judiciary faces a staggering array of human resource, administrative, and capacity problems. These practical concerns are compounded by the fact the government of President Salva Kiir Mayardit has demonstrated no commitment to building a democratic state bound by the rule of law. The judiciary is not independent and its effective authority is decidedly limited. Order at the local level is largely maintained by informal justice mechanisms. Unsurprisingly then, the non-state justice sector has emerged as a focal point of efforts to maintain legal order at the local level. Additionally, the support of local justice actors has been an important priority for the national government as it tries to bolster the regime's authority. It is also an area of significant donor interest (Massoud 2015).

Ordinary justice

The practice of informal justice in South Sudan is messy and the line between state and non-state justice is frequently traversed. Informal justice in South Sudan belies an easy nationwide description. Nevertheless, there are certain core facets applicable in most settings. Deng notes the prevalence of an ancestral "lineage system [with] an overriding goal

² For instance, according to Foreign Policy (2016) magazine's Fragile State Index in 2016 South Sudan ranked number two in the world, in 2015 and 2014 it ranked number one.

of combining individual and group identity”, which prioritizes the values of “unity, solidarity, and harmony from members of the group” (Deng 2011: 294). Informal judicial proceedings tend to draw on local norms and cultural values as well as state-backed understandings of customary law (Leonardi, et al, 2010: 28). Even though each side tries to present its case in the best possible light, the ultimate aim of dispute resolution is invariably reconciliation. As a patriarchal system, operationally, chiefs and elders tend to play a very important role.

Most disputes are addressed locally or within extended family units. If that process fails “the next step for the disputants is likely to be a court headed by an officially recognized member of the traditional leadership” (Leonardi, et al, 2010: 31). The customary courts are divided into A, B, and C courts with varying levels of formality. The proceedings in lower courts have no set location and frequently occur outside. The chief and other judges play an investigative role in a conciliation oriented approach that presents both sides with a chance to speak and call witnesses. The process emphasizes simple clear rules because “customary law courts require that individuals present their arguments without the specialized assistance of trained advocates” (Jok, Leitch, and Vanderwint 2004: 42). The proceedings rarely follow codified laws or procedures. There is also no time limit on when claims can be brought. Thus, customary proceedings are invariably highly context specific. Above these courts are the so called town courts which are still firmly rooted in custom but tend to be a bit more formalized with greater prevalence of written sources and have more direct interaction with state courts. The state courts themselves ostensibly function on the basis of modern legal codes, however, their everyday operation is heavily influenced by customary ideas and out of court settlement remains a possibility even once court proceedings have commenced (Deng 2011: 302). Legally, all customary courts have limited jurisdiction and are subject to review by state courts. Furthermore, state courts have a repugnancy clause (Deng 2011: 306). Most customary cases tend to involve what would generally be classified as civil disputes though public crimes are also handled. Thus, customary courts are formally regulated by the state, but in practice they retain a high degree of autonomy.

Transitional justice

Transitional justice has been of significant interest in South Sudan. Scholars have argued that there could be a constructive role for the informal justice system therein (Williams and Deng 2016). However, as the situation in the country remains highly fluid and racked by conflict, transitional justice remains a primarily future concern. Nevertheless, there are still some small-scale initiatives. For example, UNDP has been supporting a number of transitional justice dialogues, but there is little prospect of UNDP or other donors dramatically scaling up work in this area while conflict is so active.

Donor engagement

South Sudan has seen an immense amount of Donor engagement. While the state justice sector has received most of the funds, the informal justice sector has also been of significant donor interest. However, as with transitional justice, the scope for serious engagement with non-state justice is limited. Granted, there could easily be legislative reform that changes the relationship between state courts and informal justice entities or further codifies what

constitutes ‘legitimate’ customary law. However, this process is inherently fraught with problems because state capacity is low and conflict ongoing. The challenges of codification have been well documented as it tends to be an exclusionary enterprise that favors powerful interests over the disadvantaged and can freeze a living tradition. Moreover, simply passing a law does not mean that realities on the ground will actually change as customary justice institutions retain extensive autonomy. Many of the existing laws are already not followed when they relate to the state justice system. As “the real drive to ascertain customary law was coming from the new government’s desire to exercise greater control over the provision of local justice”, the codification of customary law was neither neutral or technocratic (Leonardi et al, 2011: 115). Donors seeking to support the state need to be aware of its highly problematic record of human rights violations and corruption. Moreover, attempts to regulate the customary justice sector can risk undermining its authority as it risks being seen merely as a tool of the state and/or international actors.

Rwanda

On 6 April 1994, the assassination of the then president of Rwanda was the culmination of a series of events that led to one of the most horrific atrocities in human history, the Rwandan genocide. The tensions between the two ethnicities in the country, Hutus and Tutsis, became unbearable, resulting in the massacre of more than 800,000 people, leaving the country in shambles. Given the devastation caused by the genocide, Rwanda has since been a remarkable success. As Phil Clark notes, President Paul Kagame’s government “has recorded enormous gains since the genocide in terms of rebuilding infrastructure, socioeconomic development, gender equality, accountability for genocide perpetrators, and the integration of former combatants” (Clark 2014: 308). This is a truly impressive accomplishment in the wake of the genocide. This stability is not without negative externalities, however. Kagame’s regime does not tolerate effective dissent or opposing political mobilization. Freedom House (2016) classifies the country as “not-free”. For instance, the executive director of Human Rights Watch contends that “[d]espite the facade of occasional elections, the government essentially runs a one-party state. [...] Under the guise of preventing another genocide, the government displays a marked intolerance of the most basic forms of dissent” (Roth 2009). Additionally, the judiciary is not independent. And, as the sections below will highlight, the informal justice system also operates under a significant degree of state control. In short, Rwanda since 1994 has consolidated a legitimate, effective, but also authoritarian form of governance. The regime has also demonstrated that it sets the terms for Donor engagement and that donors must be willing to play by those rules.

Transitional justice

Approximately 800,000 people perished in the 1994 genocide. Transitional justice was a major concern for both the new regime and the international community. The International Criminal Tribunal for Rwanda (ICTR) was setup, but it charged a mere 93 people and convicted only 61 (Mechanism for International Criminal Tribunals). The Tribunal cost roughly \$2 billion (BBC 2015). Thus, transitional justice in practical terms was a primarily domestic matter. In this process, the idea of incorporating norms and practices from informal justice featured

prominently through the gacaca courts.³ Traditionally, the gacaca processes' emphasis was firmly on reconciliation and the restoration of communal harmony for local issues. While the process has a long historical pedigree, the use of gacaca for genocide related crimes was decidedly novel. Historically, the processes had been highly localized. It had rarely been used for major crimes and could not sentence people to prison. The new approach was distinct "from the traditional system by relying on written law, involving women as both judges and members of the General Assembly, displaying a more systematic organization among the administrative divisions of local government, and imposing prison sentences" (Clark 2007: 788). Moreover, the scale of the trials and the widespread international support for the process is without precedent (Waldorf 2006).

The gacaca courts operated to varying degrees from 1997 until 2012. There were roughly 11,000 community based courts with jurisdiction over crimes related to the 1994 genocide. Locally elected judges oversaw the proceedings. Gacaca courts operated on three distinct levels: cell, sector, and appeals. Cases were sorted into distinct categories depending on their seriousness. Retting described the gacaca process:

Suspects generally are tried in groups. On the day of trial the Inyangamugayo [judges] call the accused before the community. The president's ability to direct the trial is particularly important at the trial phase because there is neither a lawyer for the prosecution nor for the defense; gacaca is meant to arrive at the truth through community dialogue. If any confessions have been entered the Inyangamugayo reads them aloud. Then the Inyangamugayo question the accused one by one to verify the accuracy and completeness of the confession or, if one has not been entered, to discern facts about the alleged crime. After this round of questioning, the judges ask each accused if he or she would like to add anything. The Inyangamugayo then invite the community to give testimony or question the accused. The Gacaca Laws require the accused and witnesses to take an oath before giving testimony and to stamp their fingerprint next to the secretary's record of their comments. Depending on the number of accused and the level of community participation, trials can last as little as one hour and as long as several days (Retting 2008: 32).

However, this process was always tightly regulated by the state. The gacaca process had the clearly defined goal of supporting the state endorsed version of reconciliation. Gacaca courts were undoubtedly imperfect and the process has plenty of critics. The results however, are compelling. Roughly 400,000 people were tried through gacaca. The system's particulars and purposes may be new but it drew on longstanding cultural norms and beliefs. The process was generally seen as intelligible, legitimate, well organized, and effective.

³ The use of gacaca was and remains controversial. While this paper focused on the consequences of the decision to use gacaca processes, the question about whether to use them at all is discussed in detail by Kirkby (2006), Waldorf (2006), and Clark (2007).

Ordinary justice

While the genocide related gacaca courts are now closed, the Abunzi mediation in place draws on similar practices for ordinary crimes though it is envisioned as an ongoing process. The system is structured and regulated by state legislation. It is explicitly envisioned as a solution to the challenges facing state courts, relieving pressures off the state system by allowing a state-sanctioned, low cost alternative to formal litigation. Unlike courts, however, the focus is firmly on reconciliation. Individuals cannot be sent to prison and punitive measures are generally limited.

The system is extensive and highly regulated by state legislation, but many mediators lack detailed knowledge of the overarching legal framework of the system (Mutisi 2010: 63). Abunzi mediation draws on an extensive network of 30,000 mediators selected for their integrity. At least 30% of mediators must be women. The system is frequently described as mediation but, as decisions are binding, is more akin to arbitration. It is also highly localized, as participants must be from the same geographic area. The system offers similar opportunities and challenges to those mentioned above, with regards to the gacaca though, it benefits from dealing with smaller scale, more manageable issues.

Donor engagement

Rwanda has received extensive donor support for justice related initiatives (Uvin 2001). Transitional justice drawing on informal ideas has also been a major priority. The end results have been decidedly mixed as both state and informal justice remain highly political (Oomen 2005). The regime has established firm control over the political and judicial process, both formal and informal, for over a decade. The regime has undoubtedly achieved significant gains in a very challenging environment, but donors should recognize that any initiatives undertaken will be decidedly on the regime's terms. For potential donors, the decision of whether to support this system ultimately hinges on whether they want to bolster state efforts towards decentralization and whether they want to support the regime itself despite its authoritarian slant.

Ghana

Ghana has had a difficult road since independence in 1960, including frequent coups and periods of military rule. However, since 1992 Ghana has experienced five competitive, multiparty elections. It is the only country examined here which clearly qualifies as a democracy. Freedom House classifies it as "free" with significant political freedom and respect for human rights. Ghana has largely consolidated a democratic state with a modern, state judicial system predicated on rule of law principles. Unlike in the other examples, transitional justice is not a major domestic or international concern. While the democratic gains are impressive, the rule of law is not consolidated and corruption of the state judiciary is a serious problem. These issues have become particularly acute as evidence has emerged that implicated "34 judges and scores of officials in accepting bribes over the past two years" (Freedom House 2016).

Ordinary justice

At the same time, Ghana also has a robust ‘traditional’ legal system that operates alongside and often parallel to, the state legal system (Schmid 2001:8). As with the other states examined, it is consensus focused and highly localized, based on geography and tribal affiliation. In some cases, it is largely unregulated in practice. Chiefs tend to play an important role. As Ubink notes, “the position of traditional authorities in Ghana is, if not unique, at least exceptional in terms of strength in comparison to other African countries” (Ubink 2008: 20). The role of chiefs has evolved over time but they still retain significant autonomy and are still major pillars of the local legal order. They most frequently address issues that would be considered matters of private law, such as “land disputes, conflicts affecting chieftaincy, and family law matters, such as marriage and its dissolution, succession issues and custody matters” (Fenrich and McEvoy 2014: 5). While not free from state influence, decisions are not primarily guided by state law.

At the same time, state backed alternative dispute resolution has emerged as a major policy priority for state officials (Krigis 2014). While various pieces of legislation touch on the operation of customary justice, the 2010 Alternative Dispute Resolution Act is the most significant. ADR is seen both as a desirable policy goal in its own right as well as a corrective to the perceived “inefficiency, high costs, case backlog, inadequate resources, and corruption” of the formal court system (Nolan-Haley 2015: 85-86). The Act seeks to access the best of both worlds by seeking “to integrate customary and modern dispute resolution with the intentional inclusion of customary arbitration and mediation in the formal legal system” (Id.: 86). Yet, it has been a fraught process. While traditional customary processes promote reconciliation, the new system has seen a relatively low settlement rate. The ADR process demonstrates that it is by no means obvious that it is possible to use customary principles out of a customary context and expect the same results. New systems, whether claiming lineage from traditional practices or not, must prove worthwhile on their own merits rather than merely assuming compliance and effectiveness.

Donor engagement

Ghana has been viewed favorably by donors since it began its democratic transition in 1992 (Gyimah-Boadi and Yakah 2012). Because so much progress has already been achieved in Ghana, the scale of investment in the country has not been on par with the other countries noted both in terms of aid overall as well as in the justice sector broadly defined. Nevertheless, its informal justice system has been of significant interests to donors. For instance, USAID is seeking to eliminate “harmful traditional practices,” that are frequently manifested in the informal legal system (USAID 2016). It sponsors research and seeks to partner with relevant state institutions to try and eliminate harmful practices. However, changing customary practices is far from simple, particularly from the outside, and it is unclear how current initiatives will change the practices that have survived to this point.

Implications

The case studies above highlight that each setting is quite different, even though they all share extensive levels of legal pluralism. There are certain key points that are highly important for donors to consider when determining whether to engage non-state justice for any policy goal. Therefore, *understanding regime type and the local context, having clear policy goals and recognizing the overall impact on the justice sector's structures and operations is essential.*

There are a number of factors to consider including state legitimacy, capacity, setting, regime type (democracy v. authoritarian), and type of informal justice that donors seek to engage. It is also important to determine what the goals of programming are. These can include transitional justice, improving Ordinary justice, counter insurgency, increasing human rights, and bolstering support for state.

Donors can engage in a variety of ways. This includes backing informal justice as a substitute for state justice (which usually increases use); undertaking initiatives to decrease use of informal mechanisms, attempting to change the operations of informal systems (eg make it better for women), and/or formalizing it by making informal justice part of the state system, for example, by making informal processes courts of first instance subject to an appeal processes.

Examples from case studies

These dynamics are evident in the case studies. First, as highlighted by the case studies, the regime and governance situations more broadly can be viewed on a spectrum of state capacity and legitimacy. South Sudan and Afghanistan are very challenging environments for programming because state capacity is so low and corruption and rent seeking so high, while the non-state justice sector retains significant autonomy. Without sufficient stability and a state partner with similar goals, the scope for programming is limited.

Further along the spectrum, Rwanda has established a high capacity, legitimate regime that also monopolizes political power. Moreover, it does not protect many core basic human rights. Ghana, despite the fact that it has consolidated democratic governance, continues to face significant political, judicial and economic challenges. Informal justice remains important in these countries. The scope for engagement with the non-state justice sector is clearly delineated by regime performance and preferences.

While the state may be open to collaboration, non-state justice actors and the population at large might rightly be skeptical of the state and the actors supporting it. Donors risk replicating the situation in Afghanistan where the non-state actors that were funded were those that were most willing to engage with international or state actors rather than those considered to be the most legitimate and authoritative by the local population. Even in Ghana where the state enjoys democratic legitimacy and is open to collaboration with international donors, discriminatory customary practices towards women have remained stubbornly resistant to change in many localities.

There is a temptation to believe that non-state justice can be effectively engaged regardless of the **regime type** of the overarching political situation, but this is rarely, if ever, the case. Donor support is invariably mediated through state goals. Donor initiatives rely on state support or at least tolerance. For example, in Afghanistan, support for non-state justice was seen as a corrective for corrupt, underperforming state institutions. However, the state and donors were actually viewing non-state justice as a means to help prop up and legitimize the state systems. This is unsurprising as, after all, supporting non-state justice against the state's wishes risks overt opposition from the state and, at the very least, subtle attempts to undermine international efforts. Even in places where the international community has the most leverage, such as post-conflict states with a large international troop presence, domestic actors invariably have more control over events on the ground and can influence program outcomes. This dynamic exists even in places where states have been under international trusteeship, arguably the situation in which the international community has the most leverage (Tansey 2014). In most cases international support may make a difference at

the margins or incrementally over time, but effectively supporting informal justice in practical terms means supporting the regime's vision for the non-state justice sector. Non-state justice support is never purely technocratic. As Waldorf highlights, "[l]ocal justice is political justice: the 'judicial' elites are neither independent nor impartial, and their discretionary rulings serve community harmony not individualized justice" (Waldorf 2006: 10). Donors need to recognize that providing monetary and even technical support involves picking winners and losers. Consequently, aid may promote stability, but, at the same time, it can easily provoke additional tensions by unsettling the established order or distributing new resources into a local community and upsetting previous power dynamics.

The decision to engage non-state justice, therefore, needs **clear policy goals**. Equally important, judicial state-builders must recognize the inevitability of policy trade-offs. The illusion that promoting the rule of law and fostering a more constructive relationship with non-state justice can be done successfully while, simultaneously, accommodating a predatory regime or downplaying widespread electoral fraud needs to be abandoned. The rule of law cannot simply be tacked on to other international priorities. In Afghanistan, the international community consistently touted its commitment to strengthen the rule of law, consolidating democracy, and improving the quality of governance. In reality, the international community was focused on stability and security, which translated into largely uncritical support for Karzai's regime and what criticism did occur was verbal scolding, not reduction in support.

To maximize the prospects of success, initiatives in highly legally pluralist settings must make a good faith effort to work constructively with existing pillars of legitimacy. Even in the judicial sector, success is **context specific** and a sustainable successful outcome would likely bear little resemblance to the justice sectors of donor states. In Afghanistan, a state justice system that is able to project authority and possess legitimacy over wide swaths of the country would require tapping into religious and tribal sources of legitimacy, improving the quality of justice, and creating partnerships with tribal and religious non-state justice actors. Most likely, a workable state justice system, at least in the short to medium term, would share more with the Taliban's justice system's ideological foundations than with those embodied in the liberal democracies. This tension is inherent. This is true even in Ghana, where the state enjoys genuine legitimacy and popular support for building a modern democratic state. The rule of law remains elusive, non-state justice actors retain the autonomy to ignore international human rights norms and it is by no means clear that international action has the ability to meaningfully change behavior.

Policymakers need a realistic vision that recognizes the role of non-state actors as interested political actors in their own right and in certain cases potentially also as spoilers. They must accurately determine the overarching legal pluralism paradigm and its programmatic implications, while recognizing that donor initiatives are rarely, if ever, able to spark fundamental transformations in a short time frame. Ideally, if donors seek to change the operation of the non-state justice systems, they should also have a credible strategy for transforming the current environment towards a more constructive environment that has a strategy for engaging both non-state justice actors and state officials. That strategy must be rooted in a deep understanding of a country's culture, politics, and history along with a keen understanding of the potential foundations for a legitimate legal order. The idea that South

Sudan or Afghanistan would soon resemble a secular legal order that wholeheartedly endorses gender equality and international human rights norms was optimistic to the point of negligence.

Equally important, policymakers must be aware that even programs with ostensibly good intentions can be unhelpful or even counterproductive. For example, in Afghanistan, the international community has remained almost willfully blind as it spent immense sums without any plan for how more funding would not simply replicate previous failures (SIGAR 2015). International actors worked with institutions known to be highly corrupt without hesitation and in many ways enabled their corruption, which has facilitated the creation of a rent seeking, predatory state, with the judiciary as one of its most corrupt appendages. The damage can be even worse where non-states actors are merely pawns to international intervention in local matters. This can easily make local tensions worse and the resolution of longstanding disputes even more intractable.

Bibliography

Albrecht, P. A. and Kyed, H. M. (2010). *Justice and security: When the state isn't the main provider*. Copenhagen, Danish Institute for International Studies.

Barfield, T., et al. (2006). *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*. Washington, DC, United States Institute of Peace.

BBC (2015). Rwanda genocide: International Criminal Tribunal closes.
<http://www.bbc.com/news/world-africa-35070220> (last accessed August 26, 2016).

Campbell, M. and Swenson, G. (2016). *Legal Pluralism and Women's Rights After Conflict: The Role of CEDAW*. forthcoming *Columbia Human Rights Law Journal*.

Carter, L. and Connor, K. (1989). *A Preliminary Investigation of Contemporary Afghan Councils*. Peshawar, Agency Coordinating Body for Afghan Relief.

Coburn, N. (2013). *Informal justice and the international community in Afghanistan*. Washington, DC, United States Institute of Peace.

Clark, P. (2007). Hybridity, Holism, and Traditional Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda. *George Washington International Law Review* 39: 765-838.

Clark, P. (2014). After Genocide: Democracy in Rwanda. *Juncture*, 20(4): 308-311.

De Lauri, A. (2013). "Access to Justice and Human Rights in Afghanistan." *Crime, Law and Social Change* 60(3): 261-285.

Deng, F. M. (2011). Customary Law in the Cross-Fire of Sudan's War of Identities. *Customary Justice and the Rule of Law in War-Torn Societies*: 285-323.

Deng, D. and Willems, R. (2016). *Expanding the Research of Justice and Accountability in South Sudan: Intersections of Truth, Justice, and Reconciliation in South Sudan*. (Utrecht: Pax).

DFID (2004). *Non-State Justice and Security Systems*. London, Department for International Development.

Fenrich, J. and McEvoy, M. (November 2014). Promoting Rule Of Law In Customary Tribunals In Ghana. *Harvard Human Rights Journal*. <http://harvardhrj.com/2014/11/promoting-rule-of-law-in-customary-tribunals-in-ghana/> (last accessed August 22, 2016).

Foreign Policy (2016). Fragile State Index. <http://fsi.fundforpeace.org/> (last accessed August 22, 2016).

Freedom House (2016). Freedom in the World 2016. <https://freedomhouse.org/report/freedom-world/freedom-world-2016> (last accessed August 22, 2016).

Giustozzi, A. and Baczko, A. (2014). The Politics of the Taliban's Shadow Judiciary, 2003-2013. *Central Asian Affairs* 1(2): 199-224.

Glenn, H. P. (2011). Sustainable Diversity in Law. *Hague Journal on the Rule of Law* 3(01): 39-56.

Gyimah-Boadi, E., and Yakah, T. (2012). *Ghana: The limits of external democracy assistance* (Working Paper 2012/40). United Nations University, World Institute for Development Economics Research.

Harper, E. (2011). *Engaging with Customary Justice Systems*. Rome, International Law Development Organization.

Johnson, T. H. (2013). Taliban Adaptations and Innovations. *Small Wars & Insurgencies* 24(1): 3-27.

Jok, A., Leitch, R. and Vandewint, C. (2004). A study of customary law in contemporary Southern Sudan. Juba, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs.

Kamali, M. H. (1985). *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*. Leiden, Brill.

Kirkby, C. (2006). Rwanda's gacaca courts: A preliminary critique. *Journal of African Law* 50(2): 94-117.

Kirgis, P. F. (2014). Status and Contract in an Emerging Democracy: The Evolution of Dispute Resolution in Ghana. *Cardozo Journal of Conflict Resolution* 16: 101.

Leonardi, C., et al. (2010). *Local Justice in Southern Sudan*. Washington, DC: United States Institute for Peace.

Leonardi, C., et al. (2011). The politics of customary law ascertainment in South Sudan. *The Journal of Legal Pluralism and Unofficial Law* 43(63): 111-142.

Mechanism for International Criminal Tribunals. The ICTR in Brief.

<http://unictr.unmict.org/en/tribunal> (last accessed August 26, 2016).

Merry S. E. (1988). Legal pluralism. *Law & Society Review* 22(5): 869-896.

Massoud, M. F. (2015). Work Rules: How International NGOs Build Law in War-Torn Societies. *Law & Society Review*, 49(2), 333-364.

Mutisi, M. (2012). Local conflict resolution in Rwanda: The case of abunzi mediators. *Africa Dialogue Monograph Series 2*: 41-74.

Nolan-Haley, J. (2015). Mediation and Access to Justice in Africa: Perspectives from Ghana. *Harvard Negotiation Law Review* 21: 59.

Oomen, B (2005). Donor-driven justice and its discontents: The case of Rwanda. *Development and Change* 36(5): 887-910.

Rashid, A. (2008). Descent into Chaos: The US and the Disaster in Pakistan, Afghanistan, and Central Asia. New York, Penguin.

Rettig, M (2008). Gacaca: truth, justice, and reconciliation in postconflict Rwanda?. *African Studies Review* 51(3): 25-50.

Reyntjens, Filip. "Rwanda, ten years on: From genocide to dictatorship." *African affairs* 103.411 (2004): 177-210.

Roth, K. (April 11, 2009). The Power of Horror. <https://www.hrw.org/news/2009/04/11/power-horror-rwanda> (last accessed August 22, 2016).

Schmid, U. (2001). Legal pluralism as a source of conflict in multi-ethnic societies: The case of Ghana. *The Journal of Legal Pluralism and Unofficial Law*, 33(46), 1-47.

SIGAR (2015). SIGAR 15-68 Audit Report: Rule of Law in Afghanistan: U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than \$1 Billion. Washington, DC, SIGAR.

Singh, D. (2015). Explaining Varieties of Corruption in the Afghan Justice Sector. *Journal of Intervention and Statebuilding* 9(2): 231-255.

Sternlight, J. R. (2005). Creeping Mandatory Arbitration: Is It Just? *Stanford Law Review* 57(5): 1631-1675.

Swenson, G. and Sugerman, E. (2011). Building the Rule of Law in Afghanistan: The Importance of Legal Education. *Hague Journal on the Rule of Law* 3(01): 130-146.

Tansey, O. (2014). Evaluating the Legacies of State-Building: Success, Failure, and the Role of Responsibility. *International Studies Quarterly* 58(1): 174-186.

Ubink, J. M. (2008). In the land of the chiefs: customary law, land conflicts, and the role of the state in peri-urban Ghana. Leiden, Leiden University Press.

UNDP, et al. (2012). Informal Justice Systems: Charting a Course for Human Rights-Based Engagement. New York, UNDP, UN Women, UNICEF.

USAID (2016). Democracy, Human Rights and Governance, <https://www.usaid.gov/ghana/democracy-human-rights-and-governance> (last accessed August 22, 2016).

Uvin, P. (2001). Difficult choices in the new post-conflict agenda: the international community in Rwanda after the genocide. *Third world quarterly* 22(2): 177-189.

Waldorf, L. (2006). Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice. *Temple Law Review* 79: 1-87.

Wardak, A. (2003). Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan. Institute of Afghan Study Center.

Wardak, A. and Braithwaite, J. (2013). Crime and War in Afghanistan: Part II: A Jeffersonian Alternative? *British Journal of Criminology* 53(2): 197-214.

Wimpelmann, T. (2013). "Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage," *Central Asian Survey* 32, no. 3.

Wojkowska, E. (2006). Doing Justice: How Informal Systems Can Contribute. New York, UNDP.



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