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Nothing ventured, nothing gained: foreign policy towards non-state justice

By Geoffrey Swenson*

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Promoters of the rule of law stress the importance of non-state justice for security, stability, and access to justice in the Global South. But as **Geoffrey Swenson** highlights, actual foreign policy tells a different story. Risk aversion – rather than results – drives foreign policy. Successful rule of law promotion ultimately demands greater risk.

Differing legal orders

In the Global North, people assume law means government courts and legal institutions. People sometimes opt out of government regulations; for example, by signing an arbitration agreement. But courts can still step in to enforce decisions or void unfair agreements. Government-backed legal institutions underpin justice and security.

In much of the world, however, reality could hardly be more different. Here, non-state justice systems, rooted in custom or religion, handle the [vast majority](#) of disputes. Non-state justice has a [dramatic influence](#) on whether international efforts to promote the rule of law, access to justice, and human rights [succeed or fail](#).

Rhetoric and reality

For decades, international policymakers [ignored](#) non-state justice or saw it as a threat. Now, however, policymakers openly proclaim the importance of working alongside non-state systems to promote peace, security, and justice.

The UN Security General's [rule of law vision](#) has identified customary and informal justice mechanisms as vital in the global quest for justice. President Biden's [rule of law policy](#) cites engagement with informal justice as essential 'to ensure justice, rights, and security for all'.

Yet surprisingly little is known about *actual* policy towards non-state justice actors.

To find out more, [my article 'Promoting Law Beyond the State'](#) looked at how the nine largest donor states (Australia, Canada, Germany, Japan, Netherlands, Norway, New Zealand, United Kingdom, United States) have approached non-state justice in their foreign policy. Together, these states contributed over 95% of all rule-of-law assistance for over ten years, from 2008 to 2018.

Risk and rewards

Partnership with non-state justice authorities seems like an obvious solution. It promises to bolster security, stability, access to justice, and the rule of law. Non-state justice, however, presents some profound risks and severe challenges. Non-state justice thrives in remote or contested areas, so it is hard to tell whether programmes work. Programming may even undermine the systems non-state justice seeks to support, or prompt a backlash against them.

[Human rights](#) are an even greater concern. Almost without exception, non-state justice forums fail to fully uphold human rights norms. No donor wants to be seen as backing a system that may, for example, facilitate the return of women to abusive husbands, or allow cruel punishments. Unless efforts focus unambiguously on large-scale reform, they risk being cast as supporting injustice rather than justice.

The consequences can be profound. Funds may evaporate and activities may face severe security constraints. Real risk coexists alongside real rewards. For donors, however, there is little attempt to balance risk and reward.

A range of options

Risk aversion, not results, is the defining feature of foreign policy towards non-state justice. During the period I examined, Canada and Japan avoided non-state justice altogether. Others did engage, but in a rather unexpected way.

By far the most popular strategy was acknowledgement. Acknowledgment strategies understand that non-state justice is important, but do not meaningfully engage with it. The aims of this strategy were symbolic, and its proponents made no attempt to actually guide policy. Norway and New Zealand used the acknowledgment strategy exclusively.

When external actors *did* engage, they almost always wanted to transform non-state justice. Usually this meant trying to eliminate any rules, procedures, or punishments deemed contrary to human rights. Australia, Germany, the Netherlands, the United Kingdom, and the United States all tried this approach. Yet, it can be extremely difficult to do this without undermining the entire process. This is especially true when the legal order reflects longstanding customs or fundamental religious beliefs.

Sometimes, certain goals do trigger riskier responses. This usually means using non-state justice as a tool to stabilise rickety regimes or to defeat insurgencies. During President Obama's 2010–2014 [Afghan Surge](#), for example, defeating the Taliban and saving the Islamic Republic was so pressing that the US embraced existing tribal authorities. At the same time, the US sought to destroy the rival Taliban justice system. These riskier strategies of acceptance and rejection, however, [failed to deliver](#) and generated substantial criticism. By 2014, policy approaches had once again become more risk-averse.

Risk rules

Moreover, wherever governments did endorse riskier approaches, they abandoned them relatively quickly. By 2018, no external country either sought to work with existing authorities or explicitly sought to destroy them.

For all major donor states, official policy consisted mostly of platitudes and abstract formulations. Even states that promised to draft clear, comprehensive guidance ultimately did not do so. Australian policymakers ignored [evaluators' calls](#) for more robust, well-defined engagement with non-state justice. After 2010, USAID jettisoned efforts to craft actionable guidance. No other US agency even attempted to do so.

UK and Dutch policymakers understood the advantages and disadvantages of non-state justice initiatives, but never articulated a clear path forward. Germany required all activities to be consistent with international human rights norms and that change must occur through voluntary dialogue. While these preconditions may sound good, in practice, they precluded any constructive partnership.

No coherent foreign policy towards non-state justice

No state ever developed a coherent foreign policy towards non-state justice. Policy remained superficial. Assertions trumped evidence. Policy documents made few detailed or well-supported claims of how international efforts advanced their objectives. Policymakers simply assumed local stakeholders would support change. This is a crucial admission given these authorities were most likely to benefit from the status quo.

Profound disconnect

A profound disconnect exists between foreign policy rhetoric and reality. We urgently need a more open, nuanced debate about how external states should work with non-state justice. Donors seek to engage – but only on unrealistic terms. Human rights are crucially important. Still, the current emphasis on either refusing to engage or demanding rapid wholesale changes has not worked. Evidence suggests incremental changes tend to be most effective. More successful policy toward non-state justice requires greater risk tolerance.

This article presents the views of the author(s) and not necessarily those of the ECPR or the Editors of *The Loop*.

*Geoffrey Swenson

Reader in International Politics, City, University of London

Geoffrey's current research focuses on issues related to state-building, democracy and the rule of law, legal pluralism, international relations theory, and foreign aid. His work has been published in several leading journals, including [International Security](#), [International Studies Quarterly](#), [International Studies Review](#), and [World Development](#).



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