Promoting the Other Rule of Law

Geoffrey Swenson
Associate Professor
City, University of London

Abstract- Promoting the rule of law is a key foreign policy goal for Western donor states. The rule of law assumes the state legal system can project law uniformly over its territory and monopolize legitimate violence. In most countries that receive foreign aid, however, non-state justice systems rooted in custom, tradition or religion handle the vast majority of legal disputes. This dramatically influences the prospects of international efforts to promote the rule of law and related goals, yet scholars have paid relatively little attention to foreign policy towards non-state justice. This paper proposes a new theory that explains donors’ policies based on risk tolerance and strategic objectives. It posits five policy strategies (acceptance, transformation, acknowledgement, denial, rejection) and four common goals (judicial reform, symbolic recognition, state-building, counterinsurgency). It then explores how the nine largest rule-of-law-assistance donor states approached non-state justice in practice from 2008 to 2018 through a structured comparison of policy documents. It also examines case studies of the five donors with the most comprehensive approaches. Donors strongly favored risk-averse approaches towards non-state justice, even when this was unlikely to produce the desired results or undermined policy coherence. Certain policy goals – such as counterinsurgency or state-building – sometimes prompted riskier choices, but only when there was a compelling justification and reasonable prospect of success. Overall, major rule of law donors displayed risk-averse, superficial policy towards non-state justice, minimal stakeholder engagement, a failure to grapple with the nuances of legal pluralism, and a lack of evidence to support existing policies.
Introduction

The rule of law is foundational for a just legal order, democracy, and good governance (Fukuyama, 2014). It is seen as fundamental to successful post-conflict state-building initiatives (Paris, 2004) as well as counterterrorism and counterinsurgency efforts (Amos and Petraeus, 2008). Major Western donors have elevated rule of law promotion to a foreign policy priority. The rule of law assumes a central legal system that can project binding regulations uniformly over its territory and monopolize legitimate violence. Most developed states meet these conditions, however, they are the exception globally (Krasner and Risse, 2014). Thus, while all states feature legal pluralism wherein “two or more legal systems coexist” (Merry, 1988: 870), the relative importance of non-state justice varies dramatically.²

In most countries that receive foreign aid, the vast majority of legal disputes are handled by non-state justice systems rooted in custom, tradition or religion (Kyed, 2011: 5).³ The prevalence of non-state justice dramatically influences the prospects of international efforts to promote the rule of law and related goals such as ensuring access to justice, promoting gender equality, protecting human rights, and supporting transitional justice (Stromseth, Wippman and Brooks, 2006; Kochanski, 2020). Beyond their adjudicatory role, non-state justice authorities can help maintain stability or trigger violent conflicts that show little concern for international borders (Migdal, 1988; Menkhaus, 2007). Engagement with non-state justice frequently underpins internationally-backed counterinsurgency, stabilization, and state-building efforts (Kilcullen, 2010; Wimpelmann, 2013). This article explores an important but under-researched question: How have major rule of law donors conceptualized and approached non-state justice in their foreign policy?

The paper explores foreign policy towards non-state justice in both theory and practice. In terms of theory, it develops a new typology of foreign policy approaches towards non-state justice based on the donor’s level of risk tolerance and their strategic objectives. It proposes five main strategies: acceptance, transformation, acknowledgement, denial, and rejection. It also theorizes that foreign policy strategies toward non-state justice generally pursue at least

---

¹ At minimum, the rule of law requires law to be general, clear, stable, prospective, public, and universally applicable. It also demands sufficient regulations and mechanisms to adjudicate legal disputes nationwide and a government bound by the law. More extensive understandings of the rule of law can include significant political, cultural, and economic requirements.

² Non-state justice refers to systematized, quasi-legal processes not involving the state’s implementation of state laws.

³ State law may be based on custom, tradition, or religion. Still, fundamental differences exist depending on what concepts are codified in state law and whether state power is harnessed to regulate behavior.
one of four goals, namely judicial reform, symbolic recognition, counterinsurgency, and state-building.

This paper also makes three main arguments about donor behavior in practice. First, foreign donors view non-state justice as distinct from state justice and this is manifested in official policy documents. Second, independent of their overarching risk profile, foreign donors favor approaches toward non-state justice with less risk. Risk-averse approaches are favored, even at the expense of policy coherence and, potentially, effectiveness. Acknowledgement and transformation strategies are strongly preferred over acceptance and rejection. Third, foreign donors only approve riskier strategies when a goal exists that justifies taking additional risks. Such policies tend to be efforts to stabilize existing regimes and/or defeat insurgencies. Foreign donors, however, are not willing to bear this reputational risk if circumstances change. Policy returns to more risk-averse strategies when riskier approaches have not achieved the desired results and there is little prospect of future success. If the conflict ends or victory no longer appears feasible, policy also became more risk averse. On the whole, major rule of law donors displayed risk-averse, superficial policy towards non-state justice, minimal stakeholder engagement, a failure to grapple with the nuances of legal pluralism, and a lack of evidence to support existing policies.

The paper consists of six main sections. Section 1 provides an overview of non-state justice and the need for more scholarship on how international actors relate to it. Section 2 proposes a new theoretical framework to better understand and explain foreign policy towards non-state justice. Section 3 describes the research approach. Sections 4 and 5 probe the plausibility of the theory and finds that donor states displayed policy preferences consistent with the theory. Section 4 compares how the nine largest rule of law-assistance donor nations approached non-state justice from 2008 to 2018. Section 5 explores case studies from the donors within this group that had the most proactive approaches, namely the United States (US), the United Kingdom (UK), Australia, the Netherlands, and Germany. Section 6 examines the implications of the research.

1. Understanding Law Beyond the State

Non-state justice systems can vary dramatically between states and even within states. Nevertheless, non-state justice falls into three main clusters: 1.) Religious, 2.) Customary, and 3.) Alternative Dispute Resolution (ADR). Religious legal systems are predicated on principles

---

4 Based on 2016 OECD data, see section 3 for more details.
of conduct rooted in established structures of belief and worship. Customary law reflects expected behavior within a community (Faundez, 2011). ADR consists of arbitration, mediation, and other structured dispute resolution involving a third party. Though not necessarily required to follow all state law, these processes are regulated by, and may even depend on, state enforcement (Hale, 2015). While analytically distinct, they can overlap in practice. Custom, for instance, may reflect religious beliefs or ADR could incorporate customary practices.

Non-state justice poses major opportunities and risks for international actors. Engaging non-state justice can promote or undermine access to justice and human rights. Non-state mechanisms may enjoy greater local legitimacy and effectiveness, but they can also be biased towards powerful individuals and families (Mcloughlin, 2015). They tend to be less bureaucratically entrenched than state judicial institutions but difficult to reform without compromising their utility (Isser, 2011). In countries with weak or heavily contested state institutions, non-state authorities can help preserve local stability or bolster insurgencies (Arjona, Kasfir and Mampilly, 2015). Successful non-state justice initiatives generally require extensive local knowledge and nuance that makes it difficult or less rewarding for donors seeking large-scale, demonstrable change. Non-state justice programs also raise serious implementation and monitoring challenges.

Foreign aid providers have long sought to promote the rule of law aboard. While scholars have increasingly explored the role for, and various forms of, legal institutions beyond the state, they rarely examine the implications of legal pluralism on international assistance (Mampilly, 2011; Author, 2018a; Provost, 2021). There are notable exceptions that address legal pluralism and assistance to developing countries in general (Tamanaha, Sage and Woolcock, 2012; Baker, 2010; Corradi, 2014; Faundez, 2011) and after conflict (Isser, 2011; Baker and Scheye, 2007). This article focuses on some important areas that remain underexplored by proposing a new theoretical framework to illustrate how donors understand and approach non-state justice, and by exploring how it comports with actual policy.

2. Theory

This section develops a theoretical approach to explain strategies and goals associated with policy towards non-state justice. In other words, it engages in inductive “theory building” by positing distinct policy strategies and goals for policy towards non-state justice based on donors’ keen awareness of risk and a clear, distinct aversion to it. The theoretical argument
Draft- Not for Distribution or Citation without Permission

consists of two parts. First, it argues risk aversion primarily determines foreign policy towards non-state justice. Risk tolerance is a particularly useful way to analyze policies across settings because this criterion is neutral regarding the content of non-state justice systems, which invariably differ, while still allowing a systemic examination of foreign policy approaches. Second, it argues if policy is risk averse rather completely risk avoidant, there must be goals that occasionally justify assuming additional risk. Towards this end, it proposes a new framework of major strategic approaches that classifies policies according to risk. Donor states can pursue five main strategies towards non-state justice: acceptance, transformation, acknowledgement, denial, and rejection (Table 1). While distinct conceptually, donors may pursue multiple, and even contradictory, approaches simultaneously. This section then identifies and explains the main policy goals that these strategies have sought to achieve: judicial reform, symbolic recognition, state-building, and counterinsurgency.

Risk and Non-State Justice

‘Risk’ as used here means the probability of an unwanted event occurring. As historical, cultural, and socio-economic factors all influence understandings of risk, both conceptualizing risk and responding to risk requires making subjective determinations (Peterson, 2012). Foreign donor states are highly attuned to risk and generally prefer avoiding risk rather managing it (Glennie and Sumner, 2016: 19; Venugopal, 2018). As an Organization for Cooperation and Development (OECD) report explained, “Development agencies are naturally aware of risks that foster scepticism of development assistance” and that “even small transgressions can become a major scandal if taken out of context” (OECD, 2014: 13). At the same time, risk tolerances vary. Some donor agencies have notably higher risk tolerances in general (Honig, 2018). The United States Agency for International Development (USAID), for instance, had a “conservative risk appetite” (2014: 16), while the UK’s Department for International Development (DFID) claimed to have “a relatively high risk appetite” (2010: 6).\(^5\) Non-state justice, however, is different. As discussed in sections 4 and 5, all actors overwhelmingly favored risk-averse approaches to non-state justice.

As non-state justice operates extralegally or even illegally, the perception of risk tends to be higher than comparable support to the state justice sector. These risks manifest in two main ways. First, there are program risks wherein the particular initiative aimed at non-state

\(^5\) DFID merged with the Foreign Office to create the Foreign, Commonwealth and Development Office in 2020.
justice actors does not achieve the desired goals, such as advancing the rule of law or supporting counterinsurgency. Programing may even be counterproductive. Non-state justice presents significant program design, staffing, and implementation issues that substantially increases risk. Monitoring and evaluation challenges are endemic as non-state justice often thrives in more remote or contested areas, which increases the risk that program activities are undertaken improperly or that program results are inaccurate. These challenges present concerns about misallocation of funds or support for groups deemed unsavory. As authority in non-state systems may be opaque to outsiders, aid providers often support the most cooperative actors rather than the most influential.

Second, there are reputational risks that exist independently of program activities. Programmatic failure can damage reputations, but reputational risks abound even if the program performed its stipulated activities or met its stated goals. International engagement with non-state justice, particularly when not unambiguously focused on reform, may be seen as acquiescing to or even encouraging human rights violations. For example, if aid supports a customary justice forum that uses discriminatory procedures or cruel punishments, donors may face sharp criticism for tolerating such practices (Murdie and Peksen, 2015). While these types of risk are analytically distant, in practical terms they overlap and tend to militate towards more risk-averse policies and programs.

Both program and reputational risk can generate unfavorable publicity, which can spur reallocation of funds, increase legislative oversight or additional regulation (Carothers, 2009). Programmatic failures and reputational harms risk the loss of funds for an organization, programing area or even country (Cooley and Ron, 2002). Donor agencies are highly attuned to these concerns. DFID’s official risk guidance places risks such as “outputs not achieved” on equal footing with the risks that “failure would attract UK headlines” and “a scandal with a partner would attract UK headlines” (2013b: 2). Thus, when assessing donor policy, risk should be examined holistically rather than attempting to disaggregate program and reputational risk.

As it is generally easier to design and implement, support to state justice institutions presents far less programmatic and reputational risk. Nearly all states have signed human rights treaties that promise extensive procedural and substantive protections even if such protections frequently do not exist in practice (Posner, 2014). Risk tends to be seen as lower as even unsuccessful international support to a state that fails to uphold human rights can be cast as a laudable attempt to encourage compliance.

*Strategies towards Non-State Justice*
Acceptance- Acceptance strategies do not demand reforms of existing practices and work directly with non-state justice systems as currently constituted. The logic behind acceptance is straightforward: when non-state justice is more legitimate or effective than state courts, it may offer a promising avenue through which to increase access to justice, advance state-building initiatives, or even undermine insurgent challenges to the state. Moreover, acceptance strategies can directly support effective systems with less risk of undermining them.

The appeal is obvious, but so are the dangers. Acceptance strategies generally carry the most risk. Acceptance clearly links international donors to existing non-state justice systems. If they contravene human rights ideals or raise other concerns, there is little space for plausible deniability. Donors may still accept non-state justice, even systems that violate human rights, to further a compelling policy objective, such as maintaining order or bolstering regime stability. In conflict-prone settings, non-state justice authorities can be valuable partners in state-building and counterinsurgency efforts. For example, US policy in Afghanistan attempted to harness the legitimacy and authority of tribal-based justice to defeat the Taliban insurgency and bolster the regime – goals deemed more important than preventing unsavory legal practices or risking reputational harm or programmatic failure (DOD, 2012: 113).

Transformation- Transformation strategies recognize that non-state justice plays a vital role in maintaining order and resolving disputes, while simultaneously asserting that these systems must be changed. Reforms generally seek to eliminate the rules, procedures, or punishments that violate fundamental human rights. Transformation efforts can take various forms. Donors may only support non-state institutions that strengthen human rights protections or uphold procedural due process norms. Increased state or international monitoring could be introduced. Donors may sponsor educational initiatives that aim to modify behavior. New institutions could be established that seek to retain some key characteristics and legitimacy of non-state systems while shedding unwanted elements or transforming them into quasi-state or even officially state-sanctioned entities. The US, Netherlands, Germany, Australia, and the UK have all endorsed transformation. Transformation through regulation may appear straightforward, but it can pose serious risks. Not only can non-state justice be difficult to reform, but changes may

6 While these human rights are rarely articulated in detail, nearly all donor states use the term to imply, at minimum, basic procedural fairness, equality before the law, and protection for certain foundational substantive rights.
undercut its effectiveness and create a justice vacuum (Isser, 2011). Transformation efforts may also spark a backlash especially if they appear to be a top-down or external imposition.

**Acknowledgement**- Acknowledgement strategies understand that non-state justice is important but, recognizing the risks it poses, do not meaningfully engage with it. Unlike transformation, acknowledgement does not offer actionable policy guidance or explicitly seek to change non-state justice systems. It simply notes its significance in official documents. Nevertheless, acknowledgement has a discernable policy logic. Acknowledging non-state justice allows foreign states to demonstrate a more nuanced understanding of local environment and even extol non-state justice authorities’ virtues without incurring the risks associated with serious engagement. Acknowledgement policies often emphasize the need for a case-by-case approach, but without clear guidance or assessment criteria. For example, New Zealand’s 2011 foreign aid strategy acknowledged that aid “can be provided for legal systems (including traditional systems…))”, but offered no further details (MFAT, 2011: 9, emphasis in original).

Donor states also pursue acknowledgement by funding research about how non-state justice systems operate and what external initiatives might be promising. As highlighted in section 5, however, donor-funded research had no discernable impact on policy despite ostensibly being designed to shape policy. Commissioning research allows donors to symbolically recognize non-state justice without incurring the risks that accompany direct engagement.

**Denial**- Denial strategies refuse to recognize the existence of non-state justice and focus exclusively on state justice thereby avoiding risk from association with non-state justice altogether. These strategies may still note that people’s behavior can be influenced more by culture, religion, or custom than by state law. Unlike acknowledgement, however, denial strategies do not even attempt to grapple with the empirical realities of non-state justice. Denial strategies may nevertheless impact non-state justice by influencing where and how people resolve disputes. For example, increasing access through legal aid or increasing quality through training or anti-corruption initiatives may bolster the relative appeal of state courts. Canada and Japan, for instance, do not address legal pluralism even as they fund efforts to promote rule of law and strengthen state courts.

**Rejection**- Rejection strategies go beyond expressing neutrality or ignoring non-state justice systems. They explicitly reject non-state justice systems’ claims to be legitimate dispute
resolution forums. Rejection can take various forms. International actors could support criminalization of non-state justice forums and punishment for people that organize or even simply participate in them. More extreme rejection efforts could entail the use of force against non-state justice sector personnel. While rejection strategies may seek to address human rights concerns, these policies most frequently occur when non-state justice presents an unacceptable challenge to the recipient state’s authority. When non-state authorities enjoy significant authority and autonomy, rejection strategies tend to generate strong opposition by those targeted and may even spark violence. Consequently, this strategy is rare outside of conflict-prone settings where non-state justice authorities appear particularly threatening. For example, in Afghanistan, US rule of law assistance was fully integrated into military-led counterinsurgency efforts and sought to "eliminate Taliban justice and defeat the insurgency" (Checchi and Company Consulting, 2013: 3).
Table 1: Foreign Policy Strategies towards Non-State Justice

<table>
<thead>
<tr>
<th>Strategy</th>
<th>Key Features</th>
<th>States That Have Used This Strategy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance</td>
<td>Policy tolerates preexisting non-state justice authorities even if they violate human rights standards or engage in other problematic practices.</td>
<td>US (towards shuras and jirgas in Afghanistan only), Netherlands (conflict-prone states)</td>
</tr>
<tr>
<td>Transformation</td>
<td>Policy recognizes the importance of non-state justice but seeks to reform or remove unacceptable aspects – usually those deemed to violate human rights.</td>
<td>US, UK, Germany, Australia, Netherlands</td>
</tr>
<tr>
<td>Acknowledgement</td>
<td>Policy recognizes the benefits and risks of non-state justice but does not offer specific guidance or explicitly endorse interventions to change how non-state justice operates.</td>
<td>US, UK, Germany, Australia, Netherlands, Norway, New Zealand</td>
</tr>
<tr>
<td>Denial</td>
<td>Policy refuses to recognize the existence of non-state justice as a distinct foreign policy concern and focuses exclusively on state justice institutions. Nevertheless, policy may note that religious or customary practices, for example, pose challenges.</td>
<td>Japan, Canada</td>
</tr>
<tr>
<td>Rejection</td>
<td>Policy seeks to undermine and ideally eliminate non-state justice systems that operate without state authorization.</td>
<td>US (towards the Taliban in Afghanistan only)</td>
</tr>
</tbody>
</table>

Non-State Justice Policy Goals

Strategies towards non-state justice seek to advance at least one of four policy goals, specifically judicial reform, symbolic recognition, state-building, and counterinsurgency (Table 2). Judicial reform aims to change how non-state justice operates and/or its relationship to state courts. Reform efforts commonly aim to increase access to justice, promote human rights, strengthen the rule of law, and streamline judicial administration. Judicial reform is generally a goal of transformation strategies. Symbolic recognition is the practical policy application of acknowledgement strategies. Symbolic recognition allows donors to tangibly demonstrate their understanding of the complex legal environment in the host country. State-building seeks to bolster the recipient state’s legitimacy and capacity through association with
respected non-state justice forums. State-building is commonly a goal of acceptance and transformation strategies. Finally, aid to non-state justice may support counterinsurgency. Counterinsurgency can mean establishing partnerships with respected religious or customary legal authorities to bolster the state and undermine popular support for insurgents as part of acceptance strategies. Counterinsurgency can likewise underpin rejection strategies that seek to destroy a rival justice system.

<table>
<thead>
<tr>
<th>Goal</th>
<th>Rationale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Reform</td>
<td>Policy seeks to change how the non-state justice sector operates and/or its relationship to state justice forums. Common aims include increasing access to justice, promoting human rights, strengthening the rule of law, and streamlining judicial administration. Judicial reform is a common aim of transformation strategies.</td>
</tr>
<tr>
<td>Symbolic Recognition</td>
<td>Policy seeks to demonstrate that the donor understands the complex legal environment in the host country. Symbolic recognition is the practical application of acknowledgement strategies.</td>
</tr>
<tr>
<td>Counterinsurgency</td>
<td>Policy seeks to aid counterinsurgency efforts by enlisting the support of non-state authorities and/or to undermine or eliminate non-state justice venues that challenge the authority of the state. Acceptance and rejection strategies often have counterinsurgency goals.</td>
</tr>
<tr>
<td>State-Building</td>
<td>Policy seeks to help the host state enhance its legitimacy and/or capacity through association with popular and respected non-state justice forums. State-building is frequently a goal of acceptance and transformation strategies.</td>
</tr>
</tbody>
</table>

Table 2: Foreign Policy Goals of Engagement with Non-State Justice

3. Research Approach

The preceding section outlined a new theoretical framework to illuminate and explain foreign policy strategies and goals towards non-state justice. This section investigates the plausibility of this framework based on an analysis of major rule of law donor states’ policies towards non-state justice authorities from 2008 through 2018 and through exploration of five heuristic case studies, which elucidate the existence of distinct strategies and the preference for risk aversion in practice. Case selection is explained before discussing data analysis and collection.
Case Selection

This paper focuses exclusively on state actors, specifically the nine largest bilateral rule of law donors based on the OECD foreign aid category 15130: Legal and judicial development (Table 3). These countries are the US, Japan, Germany, Australia, Norway, Canada, the Netherlands, the UK, and New Zealand, based on data from 2016. These donors contributed the vast majority of bilateral rule of law funding. A grand total of $1,905.754 million (US dollars) was spent promoting the rule of law in 2016. The nine largest donors directed $1,821.51 million towards these efforts. The remaining 22 bilateral rule of law donors allocated $84.224 million. Thus, the nine largest donors examined here constituted over 95.579% of total bilateral spending to promote the rule of law. The decision to limit case analysis to the nine largest donors was based on the significant difference in rule of law aid expenditure between the ninth and tenth largest donors. The ninth largest donor, New Zealand, allocated $26.890 million. This amount is similar to the seventh and eighth highest donors: the Netherlands allocated $31.150 million and the UK $29.181 million. In contrast, the tenth largest donor, Italy, allocated $16.929 million, which is approximately $10 million less than New Zealand.

Once the largest donors were identified, their policy was examined over time, specifically from 2008 to 2018. The timeframe was selected for four main reasons. First, states do not necessarily publish policy related to the rule of law annually. Ten years, however, is long enough that states will almost certainly have published a policy if they have determined that addressing non-state justice warrants specific guidance. Second, it is a sufficient period of time to assess if and, if so, how policy evolved. Third, as these are all democratic states, the timespan accounts for elections and the policy shifts that can occur under new governments. Finally, the time period ensures a full ten years of policy is covered as donor agencies can have different annual aid cycles. The US, UK, Australia, the Netherlands, and Germany were selected as heuristic case studies because these were the states that moved beyond acknowledgement or denial and that endorsed tangible policy action towards non-state justice. Thus, they are well suited to the task of “inductively identify[ing] new variables, hypotheses, causal mechanisms, and causal pathways” associated with heuristic case studies (George and Bennett, 2005: 75).

Only state-sponsored bilateral aid is examined. Studying state agencies intuitively makes sense when analyzing official foreign policy. Donor preferences are much clearer in

---

7 The 2016 data was the most recent OECD data available when the research project started.
bilateral assistance than in multilateral aid or aid funneled through an international organization, such as the United Nations or World Bank. Bilateral aid policy can be the product of extensive negotiations, but the result is still clearly the donor state’s policy. In contrast, multilateral organizations have greater autonomy, distinct incentive structures and logics of behavior. Moreover, under the widely-used OECD definition, “A multilateral contribution…can be delivered only by an international institution conducting all or part of its activities…[and] the flow itself must lose its identity and become an integral part of the recipient institution’s assets such that donors cannot track and pre-define its uses” (Gulrajani, 2016: 7).

While rule of law aid remained overwhelmingly focused on state justice, the largest donors were the most likely to allocate some resources to non-state alternatives. More spending tends to generate more scrutiny. Larger donors face greater pressure to produce policy that justifies both their expenditures and overarching goals. While each state shared a commitment to promoting the rule of law, these cases offer sufficient scale and range to produce generalizable insights about how to better understand international engagement with non-state justice across settings. Each state has its own foreign policy, geographic priorities, aid investment levels, and organizational structures for foreign aid.

<table>
<thead>
<tr>
<th>Donor State</th>
<th>Rule of Law Funding Level (million US dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>$1,194.497</td>
</tr>
<tr>
<td>Japan</td>
<td>$145.833</td>
</tr>
<tr>
<td>Germany</td>
<td>$145.281</td>
</tr>
<tr>
<td>Australia</td>
<td>$128.918</td>
</tr>
<tr>
<td>Norway</td>
<td>$67.010</td>
</tr>
<tr>
<td>Canada</td>
<td>$52.745</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>$31.150</td>
</tr>
<tr>
<td>UK</td>
<td>$29.181</td>
</tr>
<tr>
<td>New Zealand</td>
<td>$26.890</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>$1,821.51</strong></td>
</tr>
</tbody>
</table>

Table 3: Nine Largest Foreign Aid Donors for Legal and Judicial Development, OECD, 2016
**Data Analysis and Collection**

This article examines major donor policy towards non-state justice through a focused, structured comparison (Bennett and George, 2005). This research focuses on clear, stated policy as opposed to trying to infer the existence of one. Codified statements of policy and practice were prioritized. Qualitative content analysis was used to determine what policy exists and the underlying rationale as well as any policy shifts over time. Relevant data for the nine largest rule of law promoting states was collected through online archival research, most notably the relevant websites and internet databases of governmental organizations. For all countries, data was collected from national development agencies, ministries of foreign affairs and other relevant entities, external evaluations, and pan-governmental sources.\(^8\) State agencies were also contacted directly to see if they had relevant documents that were not readily accessible online.\(^9\) In sum, over 400 documents were reviewed.

While official state documents were prioritized, this research benefited from insights gained from working in Timor-Leste from 2010 to 2012 implementing US policy towards non-state justice, and professional work in Afghanistan, Nepal, and Namibia as well as research on legal pluralism programing conducted for a major European foreign affairs ministry. It also reflects academic fieldwork conducted in Timor-Leste in 2014, 2017, and 2019, Afghanistan in 2009 and 2014, and Namibia in 2008 and 2019, including semi-structured interviews with relevant foreign and domestic government officials, non-state justice actors, local and international non-governmental organizations (NGOs), and other relevant stakeholders.\(^10\) While this paper critically examines donor policy towards non-state justice, it does not independently assess whether specific programmatic interventions were successful. Rather, it aims to understand the policy approaches utilized, their underlying assumptions, and strategic implications.

The fact that certain views become official policy does not guarantee that policy will deliver the intended results or even be consistently followed. Understanding foreign policy still has immense value by showing how the state conceptualizes itself and what it is attempting to signal to others. A vast number of policies are contemplated, but very few become official

---

\(^8\) This included searches in English for relevant terms related to the rule of law, legal pluralism, non-state justice as well as traditional, customary, tribal, and informal law. In circumstances where the database was not exclusively in English, local language searches were also undertaken for their equivalents.

\(^9\) Responses were received from USAID, DFID, and JICA.

\(^10\) These interviews provided important context, but policy descriptions are based exclusively on approved, official, and independently verifiable documentation.
policy articulated in formally approved documents. Approved policies convey important value judgments above and beyond any practical consequences (Miller, 2012). They also provide baselines against which to measure actual behavior and can offer crucial insights into how decision-makers see the world and what they hope to achieve.

4. Major Donor State Approaches towards Non-State Justice

The following section summarizes each major donor state’s posture towards non-state justice between 2008 and 2018 (Table 4). Along with the major strategies and policy goals of each state, the section identifies the key implementing agencies. Rule of law donors are divided into states with a policy approach to non-state justice and those without. The US, UK, Australia, the Netherlands, and Germany had policy approaches that envisioned meaningful engagement with non-state justice, and they are discussed in more detail as case studies in the next section. Norway11 and New Zealand12 acknowledged non-state justice but offered little guidance about how non-state justice related to their overarching strategy. Japan and Canada did not have discernable approaches to non-state justice though both states sought to promote the rule of law.

11 While never developing a comparably detailed policy, Norway acknowledged non-state justice (Norwegian Ministry of Foreign Affairs, 2016: 8).
12 New Zealand’s MFAT acknowledged “traditional systems” can help protect human rights, property and mitigate conflict (2011: 11). While symbolically recognizing non-state justice, no practical guidance was offered. MFAT’s strategic plan for 2015 to 2019 omitted non-state justice entirely (2015: 13).
<table>
<thead>
<tr>
<th>State</th>
<th>Implementing Agency</th>
<th>Foreign Policy Towards Non-State Justice</th>
<th>Strategy/ies</th>
<th>Goal/s</th>
</tr>
</thead>
<tbody>
<tr>
<td>US</td>
<td>USAID</td>
<td>Yes</td>
<td>Acceptance (towards shuras and jirgas in Afghanistan only), Transformation, Acknowledgement, Rejection (towards the Taliban in Afghanistan only)</td>
<td>Judicial Reform, Symbolic Recognition, State-building, Counterinsurgency (towards the Taliban)</td>
</tr>
<tr>
<td>US</td>
<td>State Department</td>
<td>Yes</td>
<td>Acknowledgement, Transformation</td>
<td>Judicial Reform, Symbolic Recognition, State-building</td>
</tr>
<tr>
<td>US</td>
<td>Department of Defense</td>
<td>Yes</td>
<td>Acknowledgement</td>
<td>Symbolic Recognition</td>
</tr>
<tr>
<td>US</td>
<td>US Mission to Afghanistan</td>
<td>Yes</td>
<td>Acceptance (towards shuras and jirgas), Transformation, Acknowledgement, Rejection (towards the Taliban)</td>
<td>Judicial Reform, Symbolic Recognition, State-building, Counterinsurgency (against the Taliban)</td>
</tr>
<tr>
<td>UK</td>
<td>DFID</td>
<td>Yes</td>
<td>Transformation, Acknowledgement</td>
<td>Judicial Reform, Symbolic Recognition, State-building</td>
</tr>
<tr>
<td>Australia</td>
<td>AusAID (merged into Department of Foreign Affairs and Trade in 2013)</td>
<td>Yes</td>
<td>Acknowledgement, Transformation</td>
<td>Judicial Reform, Symbolic Recognition</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Ministry of Foreign Affairs</td>
<td>Yes</td>
<td>Acceptance (conflict-prone settings), Transformation, Acknowledgement</td>
<td>Judicial Reform, Symbolic Recognition, State-building</td>
</tr>
<tr>
<td>Germany</td>
<td>BMZ/GIZ (GIZ was established in 2011 through a merger of three agencies)</td>
<td>Yes</td>
<td>Transformation, Acknowledgement</td>
<td>Judicial Reform, Symbolic Recognition, State-building</td>
</tr>
<tr>
<td>Germany</td>
<td>German Federal Government</td>
<td>Yes</td>
<td>Transformation, Acknowledgement</td>
<td>Judicial Reform, Symbolic Recognition, State-building</td>
</tr>
</tbody>
</table>
Table 4: Foreign Policy Approaches towards Non-State Justice

The US, UK, Germany, Australia, the Netherlands, Norway, and New Zealand all explicitly viewed non-state justice as a distinct policy concern. Even Canada and Japan, which did not have discernable policies, recognized non-state justice as a distinct issue. Furthermore, the US, UK, Germany, Australia, the Netherlands all favored the risk-averse options of transformation and acknowledgement. Norway and New Zealand exclusively utilized acknowledgement, the most risk-averse option. Evidence from Japan and Canada lends further credence to the prevalence of risk aversion among donors as both countries highlighted challenges related to legal pluralism despite not engaging with non-state justice (see e.g., JICA, 2009: iv; Global Affairs Canada, 2017: 35). Finally, while the UK and Australia pondered it, they never formally approved an acceptance strategy. The Netherlands used the riskier strategy of acceptance in fragile and conflict-prone settings and even then, only briefly. The US pursued acceptance and rejection in Afghanistan during an active counterinsurgency campaign. These riskier approaches, however, faced domestic and international criticism. As it became clear that acceptance and rejection strategies were not delivering their desired results and that outright victory over the Taliban was very unlikely, US policy returned to the less risky strategies of transformation and acknowledgement.

5. Case Studies

United States of America

The US was the largest international funder of rule of law assistance between 2008 and 2018. During the presidential administrations of Republican George W. Bush (2008-2009), Democrat
Barack Obama (2009-2017), and Republican Donald Trump (2017-2018)\(^{13}\), the US funded rule of law programs worldwide through three main agencies: USAID, the State Department Bureau of International Narcotics and Law Enforcement Affairs (INL), and the Department of Defense (DOD). Policy in Afghanistan is addressed independently because the US invested heavily in promoting the rule of law there and crafted a distinct, independent policy towards non-state justice authorities.

**General US Policy**

For USAID, the main US overseas development agency, promoting the rule of law was a core development goal. During the Bush Administration in 2008 and the Obama Administration in 2010, USAID endorsed both *transformation* and *acknowledgement*. USAID’s programmatic framework took an acknowledgement approach that symbolically recognized non-state justice by highlighting that its legitimacy, popularity and “impact on the rule of law may make them worthwhile to engage” (2008: 15; 2010: 19-20). The official approaches from 2008 and 2010 were functionally identical though the latter framework added some examples of representative programing.

USAID endorsed transformative judicial reform and state-building while keeping risk firmly in mind. Policy sought to “build on the strengths of non-state systems to improve access to justice, while seeking to minimize the potential for unfairness and abuse” (2010: 38). First, USAID supported programing to put “non-state justice institutions under the realm of democratic accountability or to expand access to justice and human rights protections” (2010: 32). Elected representatives, for instance, could incorporate elements from non-state justice into “state-based law” (USAID, 2010: 32). USAID likewise supported transformation by “introducing international human rights standards into the non-state bodies of law” (2010: 32). Under this approach, “revised systems might allow religious courts to have jurisdiction in certain cases” while ensuring they comply with human rights standards (USAID, 2010: 32). Finally, foreign assistance could support improved legal protections and “appeal rights from the non-state customary or religious system” (USAID, 2010: 32). Representative programs included offering “information about human rights and justice issues, supporting paralegals

---

\(^{13}\) Years in parentheses refer to the time during the case study period of 2008 to 2018 that the individual was in office, not overall tenure.
and NGOs to bridge state and non-state justice institutions, establishing linkages between state
and non-state institutions, and improving oversight of non-state justice” (USAID, 2010: 38).

USAID’s 2008 and 2010 rule of law promotion frameworks declared, “USAID is
developing technical guidance on engaging with non-state justice institutions” and listed
Improving Access to Justice through Non-State Justice Institutions: Issues to Consider as
“forthcoming” (2008: 15, 51; 2010: 20, 59). While this document existed since 2009, it was
never published and did not guide subsequent USAID policy. A review of the unpublished draft
guidance, however, shows that even if it had been published and subsequently approved, policy
would have remained ambiguous. The draft guidance surveys previous donor interventions and
the complexities of engaging non-state justice without stipulating what USAID should do
(USAID, 2009).14 USAID’s rule of law promotion frameworks proved to be the high-water mark of organizational interest. USAID never issued the long-promised guidance or articulated
a new comprehensive approach to non-state justice. The subsequent USAID strategy (2013) on
democracy, human rights, and governance discussed judicial reform and the rule of law
extensively but lacked any guidance relating to non-state justice.

While USAID was stepping back from non-state justice after 2010, the State
Department became more engaged. In 2013, the State Department’s INL bureau endorsed
symbolic recognition focused on acknowledgement and judicial reform-oriented
transformation. INL policy recognized non-state forums could not only be cost effective and
relatively speedy, but “necessary and legitimate alternatives to formal courts and dispute
resolution mechanisms, which can be plagued by corruption and inefficiency or simply
inaccessible or nonexistent” (State Department, 2013: 11). INL acknowledged non-state justice
authorities can provide justice and security, but they risked perpetuating discrimination (State
Department, 2013: 7). Consequently, “INL assistance must be calibrated to improve the rights
and well-being of all members of society, especially women and girls” (State Department,
2013: 7). INL simultaneously sought to transform non-state justice. It envisioned programing
to “Ensure customary and informal mechanisms comply with basic human rights standards,
including due process and non-discrimination” and to strengthen coordination between state
and non-state justice (State Department, 2013: 11). INL recognized the risks and rewards posed
by non-state justice, but did not specify how to balance them and no further guidance was
issued.

14 For a publicly available overview, see McLoughlin (2009).
DOD rule of law assistance routinely confronted non-state justice systems. In response, the DOD adopted an acknowledgement approach that symbolically recognized the vital role of non-state justice in fluid security environments. The Army’s Rule of Law Handbook (2010: 115-116) explained that non-state authorities “can be particularly effective in restoring the rule of law”, may enjoy greater local legitimacy, and avoid the complications of “establish[ing] a novel legal system”. Yet, even for a military organization working primarily in conflict-prone settings, risk aversion was crucial. The handbook stressed any efforts required “particular caution and a very strong awareness of the social and cultural context,” and that non-state justice can be “arbitrary or even discriminatory” (US Army, 2010: 116). Consequently, while “Judge Advocates are wise to consider traditional dispute resolution methods”, the relative lack of transparency and the high degree of variance within and between non-state systems renders “any systematic approach to it impossible” (US Army, 2010: 116).

The DOD Handbook for Military Support to Rule of Law and Security Reform likewise embraced acknowledgement. It symbolically recognized the vital importance of non-state justice for stabilization, governance, and access to justice, particularly in post-conflict settings (DOD, 2016: D29). These justice systems, however, may be discriminatory, hinder development, and undercut state authority (DOD, 2016: D30). The handbook advocated for a case-by-case approach. Other policy options were discussed, but none were explicitly endorsed.

During the Trump Administration, policymakers took minimal interest in non-state justice. The joint State Department, USAID, and DOD stabilization assistance review (2018) included an acknowledgement that symbolically recognized that non-state justice matters in conflict-prone settings. Risk was once again a prominent consideration. Rather than specific guidance, the review called for further research and “a balanced approach in our reaction to and willingness to work with informal and formal systems” though what that entailed was not specified (State Department, USAID, and DOD, 2018: 15). The 2018-2022 State Department and USAID Joint Strategic Plan (2018) prioritized promoting the rule of law but ignored non-state justice entirely despite its continued importance on the ground.

US Mission in Afghanistan

---

15 This handbook was updated regularly but the non-state justice content was only revised slightly and consistently emphasized acknowledgement.
Afghanistan was by far the largest recipient of US rule of law funding from 2008 to 2018 (Government Accountability Office, 2020). While rule of law assistance initially focused on state justice institutions, the Obama administration increasingly emphasized engagement with non-state justice. It pursued acknowledgement and transformation alongside the riskier approaches of acceptance for traditional jirgas and shruas and rejection of the Taliban justice system.

Policy acknowledged that “Traditional dispute resolution mechanisms are integral to Afghan society” in a symbolic recognition of customary justice (DOD and State Department, 2009: 7). Beyond that, US policy accepted justice forums rooted in tribal culture and Islam to promote state-building, facilitate dispute resolution, and bolster counterinsurgency by stabilizing the state against the resurgent Taliban (DOD and State Department, 2009: 7-8). US policy simultaneously aimed to transform customary justice to promote judicial reform and state-building. The unified US government approach to Afghanistan (2011-2015) sought to link “the informal and state systems” and ensure non-state systems protect human rights (US Mission Afghanistan, 2010: Annex 1, pg. 5). Finally, the US supported transformative regulations, proposed by the Afghan government, envisioned bolstering state courts while putting tribal dispute resolution firmly under state control (US Mission Afghanistan, 2010: Annex 1, pg. 5).

To advance counterinsurgency efforts, the US attempted to destroy the Taliban’s parallel justice system (DOD and State Department, 2009: 1-2, 7). In partnership with the Afghan government, the US strove “to facilitate access to justice, restricting insurgency efforts to offer illegitimate substitute systems” (DOD and State Department, 2009: 17). Likewise, the “Afghanistan and Pakistan Regional Strategy” proclaimed that US “Justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited with their own brutal form of justice” (Office of the Special Representative for Afghanistan and Pakistan, 2010: ii).

Acceptance and rejection approaches failed to produce the desired results for either counterinsurgency or state-building and generated substantial criticism (Wimpelmann, 2013). US policymakers also determined that outright military victory would be unlikely. By 2014, non-state justice was no longer a major policy focus and policy approaches became more risk averse (Author, 2017). Subsequent USAID policy in Afghanistan (2015-2018) still acknowledged non-state justice, but no longer endorsed rejection and acceptance (2016: 21-22). Nevertheless, a transformation agenda continued with a focus on judicial reform to improve administrative procedures, linkages between justice systems, and state-building
through enhanced “process[es] to receive, review and register traditional dispute cases” (USAID, 2016: 21). Substantively, it sought to change how non-state justice operated by offering “training to local leaders on Afghan law and basic human rights” to increase legal certainty and better protect legal rights (USAID, 2016: 21). Support for acknowledgment and transformation was briefly reiterated in USAID’s strategy for 2019-2023 (2018: 53). Policy symbolically recognized the widespread use of non-state justice. Transformation sought to advance both judicial reform and state-building by “aligning formal and non-formal systems” to promote access to justice and build an effective, high-capacity legal system. These transformative changes remained aspirational. The quality of state justice continued to deteriorate, while the influence of Taliban’s rival justice system continued to grow (Provost, 2021).

**United Kingdom**

Promoting the rule of law remained a UK foreign policy priority between 2008 and 2018. Under the leadership of the Department for International Development (DFID), aid was closely linked to security goals in fragile and conflict-prone states. During the Labour government of Gordon Brown (2008-2010), DFID rule of law policy guidance symbolically recognized non-state justice through a relatively candid acknowledgment of its advantages and disadvantages. Policy also endorsed transformation to support state-building and judicial reform through government regulation of non-state actors, sponsoring training for non-state actors, promoting equitable outcomes, increasing sensitivity to disadvantaged groups, and even “establish[ing] alternative NSJS [non-state justice and security] systems to which cases can be appealed” (DFID 2008: 8). At the same time, DFID was keenly aware of the risks. It stressed “Where NSJS systems violate basic human rights, donor engagement is both inappropriate and unlikely to achieve reform” (DFID, 2008: 8). DFID considered, but did not explicitly endorse, rejection, noting that it “may be preferable not to engage with NSJS, or even see them dissolved” (2008: 8).

In 2011, the new Conservative-Liberal Democrat government coalition (2010-2015) headed by David Cameron issued the joint DFID, Foreign and Commonwealth Office, and Ministry of Defence stabilization strategy. It included an acknowledgment that symbolically recognized the prominence of non-state justice in local dispute resolution but did not endorse any specific initiatives and transformation was no longer endorsed (DFID, Foreign and Commonwealth Office and Ministry of Defence, 2011: 12). In 2013, the coalition government
published DFID’s *Policy Approach to the Rule of Law*. Policy towards non-state justice remained murky. There was an *acknowledgement* that non-state justice forums may offer faster, cheaper, and more legitimate local justice (DFID, 2013a: 6). However, policy once again equivocated, stressing the risks that non-state justice may “perpetuate abuses, such as unequal treatment of women and minority groups” and may “be discriminatory, corrupt and coercive” (DFID, 2013a: 6). It argued for context-based engagement. Assistance could be worthwhile “when it expands access to dispute resolution mechanisms,” but “harm[ful] if it increases inequality or leads to violence” (DFID, 2013a: 3). Coalition policy diagnosed the tensions inherent in engaging non-state justice but did not outline how to reconcile them.

After the 2015 general election, the Conservatives could govern independently, but under Cameron and Theresa May, who became Prime Minister in July 2016, this tentative approach continued. The 2016 Stability Framework *acknowledged* non-state justice can help maintain order and prevent conflict but again did not stipulate how to approach it (DFID, 2016: 5, 12). May’s government took a strikingly similar tact. In 2018, The *UK Government’s Approach to Stabilization* reiterated an *acknowledgement* approach (Stabilisation Unit, 2019: 66). It proclaimed that non-state justice systems were “often more accessible and have greater legitimacy than the formal security and justice system”, and they could potentially work together constructively (Stabilisation Unit, 2019: 67). Engaging non-state systems could be risky, however, as they may violate human rights and “reinforce discriminatory norms which enable impunity and undermine the transition away from violence” (Stabilisation Unit, 2019: 67).

For conflict-prone settings, the guidance considered *acceptance* and *rejection* but once again policy stopped short of endorsing them. The logic of acceptance underpinned the claims that “Security and justice interventions will inevitably involve engagement with institutions who are parties to the conflict and who may have a poor human rights record,” in support of efforts “to establish basic security and promote political processes” (Stabilisation Unit, 2019: 61). It is not clear when, or how, justice systems that violate human rights should be engaged. *Rejection* was considered but not explicitly endorsed, noting “Organised crime and terrorist groups may also provide valuable functions to the local population, including the provision of security and justice” (Stabilisation Unit, 2019: 149). Any attempt to “undermine these groups must be aware of the costs this may impose on the civilian population” and reduce these harms “because failure to do so is likely to lead to a lack of support or resistance from local communities” (Stabilisation Unit, 2019: 149). In short, while UK policy consistently outlined
the risks and opportunities posed by non-state justice from 2008 to 2018, it never clarified how these should be reconciled.

**Australia**

During both Labor governments (2008-2013) and Liberal governments (2013-2018), Australian foreign policy strove to promote the rule of law. Under Labor Prime Ministers Kevin Rudd (2008-2010, 2013) and Julia Gillard (2010-2013), the Australian Agency for International Development (AusAID) acknowledged non-state justice. AusAID symbolically recognized that non-state justice has major implications for the rule of law, access to justice, and reducing violence against women as well as international security, stability, and development (AusAID, 2009; AusAID, 2010; AusAID, 2011). Australian aid primarily targeted South-East Asia and the Pacific where legal pluralism abounds, and Australia had a compelling national security interest in promoting stability and preventing conflict. Yet, policy guidance towards non-state justice was decidedly lacking.

Against this backdrop, AusAID undertook a comprehensive review. While recognizing the risks, the 2012 review advocated for a more robust approach:

In the countries where Australia provides law and justice assistance, the main providers of justice for the majority of the population are often informal institutions. However, like other donors in the law and justice arena, Australia has very little engagement with them. The reasons for this include their inherent complexity, the difficulty of finding appropriate entry points for assistance and fear of associating Australia with local practices that may not meet international human rights standards. The evaluation team’s view is that Australia is justifiably cautious about engaging with informal actors in the justice system, but that this caution should not prohibit experimentation and innovation.

While informal justice has only limited capacity to absorb financial or technical support, Australia could do more to support these informal systems and their linkages with the formal justice system, and to support intermediaries…to raise awareness among local justice providers about constitutional principles, human rights and gender equality (Cox, Duituturaga and Scheye, 2012: viii).

Implementing the policy vision articulated by the comprehensive review would require buy-in from high-level policymakers and an increased tolerance for risk. Neither occurred. After the election of Liberal Prime Minister Tony Abbott in 2013, the proposed shift towards more robust engagement with non-state justice never materialized. AusAID was subsumed into the Department of Foreign Affairs and Trade (DFAT). Australia reversed decades of increasing
aid expenditure and imposed major budget cuts (Day, 2016). Australian ambitions towards justice programming, and by extension non-state justice, were scaled back dramatically. No policy toward non-state justice was promulgated under Abbott’s premiership (2013-2015).

Minimalist **acknowledgement** and **transformation** policies were eventually articulated by Malcom Turnbull’s government (2015-2018) in 2016 via a short overview on DFAT’s website (2016b). These policies continued when Scott Morrison became Prime Minister in August 2018. Policy symbolically recognized that non-state justice was important and indicated support, albeit rather vaguely, for a **transformation** of non-state justice through judicial reform to “empower poor and marginalised communities in the Indo-Pacific region to resolve disputes effectively through increased access to formal, quasi-formal and informal justice systems” (DFAT, 2016b; see also DFAT, 2016a: 11). In the end, Australia embraced a broad but shallow vision that provided little actionable policy guidance.

**The Netherlands**

Promoting the rule of law remained a priority during the Christian Democratic Appeal government of Jan Pieter "Jan Peter" Balkenende (2008-2010) and the People's Party for Freedom and Democracy-led governments of Mark Rutte from 2010 onward. Only in 2015 did non-state justice emerge as a significant policy concern as Dutch aid prioritized challenges related to fragile and conflict-prone states. The Ministry of Foreign Affairs (MFA) was the primary bureaucratic actor. Within the MFA, the Stabilisation and Humanitarian Department (DSH) unit articulated the most developed policy supporting **acknowledgement** and **transformation**. It symbolically recognized that non-state authorities may underpin stability and legal order (MFA DSH, 2015). The DSH argued that insufficient access to justice may spark conflict and that “more attention should be paid to the role and function of informal justice” (MFA DSH, 2015: 5). Transformation-oriented policy aimed to support both state-building and judicial reform. It sought to guarantee that people know “their basic rights and fundamental freedoms” and can “access formal and informal justice” (MFA DSH, 2015: 6). Aid could help state and non-state justice function with greater coordination, effectiveness and accountability, and “address legacies of human rights violations and serious crimes” along with the underlying causes of conflict (MFA DSH, 2015: 6).

The overarching 2017 MFA rule of law strategy reiterated support for **acknowledgement** and **transformation**. Non-state authorities were symbolically recognized as contributors to stability and access to justice in fragile and conflict-prone states (MFA, 2017:
Draft- Not for Distribution or Citation without Permission

3-4). MFA policy supported judicial reform initiatives to bolster “fairness, effectiveness, [and] accountability” within non-state justice institutions (2017: 4). Moving beyond the earlier guidance, the MFA embraced a state-building focused acceptance strategy that “supports the access of people to justice through formal or informal justice systems” and program evaluation indicators made no distinction based on which system people accessed (2017: 3).

Increased risk tolerance was coupled with a broader effort to craft a comprehensive non-state justice policy. In 2016, the MFA sought to operationalize principles for engaging non-state justice, so it “developed a study and policy paper on the policy implications of supporting informal justice systems” to mitigate risk and “help guide Dutch policy…by ensuring that all our interventions protect human rights, including women’s rights” (MFA DSH, 2017: 9). The research was completed, however the tensions between competing goals proved irreconcilable as the inherent risks and challenges of engagement became apparent. Operational policy was never clarified. While the 2018 comprehensive foreign aid strategy still prioritized the rule of law in conflict-prone and fragile states, discussion of non-state justice had been removed entirely (MFA, 2018: 41-43).

**Germany**

Christian Democrat Angela Merkel was the Chancellor during the entire period examined and promoting the rule of law was a consistent foreign policy goal. The Federal Ministry of Economic Cooperation and Development (BMZ) was the major funder for rule of law aid, while the German Corporation for International Cooperation (GIZ) was the largest implementing agency.16 There was an acknowledgement by BMZ in 2009 that symbolically recognized the importance of non-state justice for dispute resolution as well as supported transformation through judicial reform to ensure respect for human rights and gender equality (2009: 14). In 2012, the more detailed joint BMZ-GIZ policy (2012) supported both acknowledgement and transformation to improve judicial administration. Policy was notable risk averse and subject to extensive preconditions. While systems based on custom, tradition or religion were recognized often legitimate and effective, policy stressed the need for reform to ensure non-state justice systems comported with national and international law (GIZ and BMZ, 2012: 16). At the same time, policy emphasized that it did not seek to change existing

---

16 GIZ was established in 2011 through a merger of the German Technical Cooperation Agency (GTZ) and two other agencies. Prior to 2011, GTZ was the most prominent actor in German rule of law assistance.
non-state justice systems unilaterally. Instead, GIZ and BMZ sought to transform non-state justice systems by harmonizing law among multiple legal systems, including traditional, customary elements in national legislation (when consistent with human rights norms), and promoting respect for human rights, especially women’s rights.

In 2017, the German Federal Government (GFG) reiterated support for acknowledgement by symbolically recognizing that non-state justice may contribute to access to justice and to the rule of law (2017: 92-96). It also continued to support transformation in support of judicial reform and state-building albeit in a deeply cautious and risk-averse manner (GFG, 2017: 92-96). GFG stressed that all engagement must be consistent with human rights norms. Moreover, transformation should occur through ongoing dialogue with non-state partners to promote gradual integration between state and non-state justice based on a mutual commitment to human rights. German policy consistently recognized the importance of, and risk posed by, non-state justice. Germany supported major changes but did not want to be seen as imposing its preferences unilaterally. Policy emphasized consensual, transformative dialogue, but there was no indication of how this could work in practice or what, if anything, should be done if non-state actors did not want to change.

6. Implications

Most major rule of law donor states had a foreign policy towards non-state justice (albeit often a limited one). These states consistently displayed risk aversion as evidenced by the overwhelming preference for acknowledgement and, to a lesser extent, transformation strategies that emphasized caution and reduced the scope for criticism. When less risk-averse policies were occasionally adopted, these focused on fragile and conflict-prone states in service of state-building and counterinsurgency. Such efforts invariably proved temporary. Even among the donors most interested in non-state justice, there were minimal efforts to develop actionable policy guidance, limited interest in engaging with non-state authorities, minimal effort to grapple with the implications of legal pluralism in practical policy terms, and little evidentiary basis for policy.

*Risk-Averse, Superficial Policy*

Risk aversion both drives and defines donor state policy towards non-state justice. Risk tolerance varied among states and even among aid-implementing agencies within donor states.
As non-state justice was widely recognized as crucial to advancing several key policy goals, it would be logical that different donors would approach the risks associated with non-state justice differently. In reality, remarkable uniformity existed. Risk aversion was the dominant mindset for donor policy towards non-state justice. Moreover, in all instances where riskier approaches were tried, these were abandoned relatively soon thereafter. By 2018, not a single donor state endorsed either acceptance or rejection.

For all major donor states, official policy consisted mostly of platitudes and abstract formulations with little depth or sophistication. Even states that expressed a desire to construct more comprehensive guidance ultimately failed to do so. Australian policymakers never followed through on independent evaluators’ call for more robust, well-defined engagement with non-state justice in 2012. Efforts by USAID to craft actionable guidance were jettisoned after 2010. No other US agency even attempted to do so. Policymakers in the UK and the Netherlands understood the advantages and disadvantages of non-state justice initiatives, but could not, or would not, articulate a clear path forward. Germany required all activities be consistent with international human rights norms and that all change occurred through purely voluntary dialogue – preconditions which in practice precluded any meaningful policy engagement. This ambivalence raises uncomfortable, but important questions. When, if ever, should non-state justice be engaged? And if it is only possible to engage non-state justice institutions that fully uphold human rights norms, which very few, if any, do, what is the point of engagement? (After all, most, if not all, state justice systems would fail to uphold that standard.) Policymakers have largely eschewed these fundamental debates.

Inconsistent Policy with Minimal Engagement of Key Non-State Justice Stakeholders

Foreign assistance is invariably filtered through the recipient state’s priorities and institutions. Even initiatives focused on non-state actors rely on host state support or at least tolerance. Even where external donors have the most leverage, such as in Afghanistan which had a weak state and a significant international troop presence, domestic actors invariably had significant influence over international initiatives (Johnson, 2017).

These challenges were largely unrecognized in existing policy. The US experience in Afghanistan provides a stark illustration. Customary justice remained the dominant and most legitimate form of dispute resolution (Wardak and Braithwaite, 2013). Under President Obama, US policy pursued an ambitious transformative agenda towards customary justice. It sought to ensure that non-state justice was incorporated into state regulatory structures, consistently
upheld human rights, and only handled matters that state legislation explicitly authorized (Ministry of Justice, 2009). Moreover, the US-backed policy mandated that non-state legal judgements must be consistent with Sharia, Afghan law, and international human rights standards even though these sources of law could be in tension with each other. At the same time, the US sought to capitalize on existing customary authorities to bolster state-building and counterinsurgency efforts. US policy, however, failed to address practical constraints stemming from a weak, highly corrupt state justice sector, and opposition from powerful non-state authorities and key officials within Afghan state itself.

The subsequent 2010 draft legislation incorporated customary justice into the state legal system by restricting non-state authorities’ jurisdiction to civil disputes and petty juvenile crimes upon referral from state officials (Ministry of Justice, 2010). Customary leaders faced criminal liability for breaking the law. Nevertheless, key Afghan government agencies still strongly opposed the law because they believed it violated human rights by legitimizing and institutionalizing jirgas and shuras (Coburn, 2013). The draft law was subsequently abandoned.

US efforts in Afghanistan highlight the challenges of partnering with a host government to regulate non-state justice. The Afghan government was divided, and its priorities did not fully align with US aims. US policy reflected an unrealistic vision of how the non-state justice sector should operate and the ease with which it could transformed. This transformative approach contradicted other US-backed initiatives that accepted customary actors as they existed. Finally, even though customary actors often enjoyed greater legitimacy and authority, internationally supported legal reforms failed to meaningfully engage them. Instead, the US sought to impose a legal framework, even though non-state authorities retained the autonomy necessary to resist it.

**Failure to Engage with the Nuances of Legal Pluralism**

Policy has not addressed how different types of legal pluralism influence policy options and outcomes. Non-state justice authorities can adopt very different postures towards the state that are more or less conducive to constructive engagement. Legal pluralism can be combative, competitive, cooperative, or complementary (Author, 2018a). Under combative legal pluralism, state and non-state systems are overtly hostile as often occurs in fragile and conflict-prone states. Donor policies predicated on a constructive relationship with non-state justice are not very promising. The most common dynamic in states that receive significant foreign aid is competitive legal pluralism. Here non-state actors can and do operate with autonomy from the
state even if they do not formally or violently contest its overarching legal authority. As most non-state legal systems reflect religious or cultural beliefs, they do not necessarily share the state legal system’s values. Scope for constructive programing exists, but non-state actors may be unwilling to work constructively with foreign donors, especially when initiatives challenge entrenched beliefs or practices. Under cooperative legal pluralism, “non-state justice authorities still retain significant autonomy and authority” but accept the state legal system’s authority and right to determine public policy, and thus are open to collaboration (Author, 2018a: 445). While policy disagreements can arise (for example, over women’s rights), these are the most promising settings to work with non-state justice authorities that retain significant autonomy. Finally, under complementary legal pluralism, state legal authority is undisputed. In these circumstances, foreign states rarely support programs aimed at non-state justice systems because these venues are already effectively regulated by domestic authorities. Policymakers should move beyond stressing the need for case-by-case analysis and instead articulate what should be done under specific conditions as well as the potential costs and benefits of different approaches.

Little Evidence Supports Existing Policies

This research focused on conceptualizing and understanding foreign policies toward non-state justice, rather than their practical consequences. It is worth noting, however, the evidentiary basis for policy towards non-state justice is limited and rather opaque. Both policy documents and subsequent policy make few detailed or empirically grounded claims of how donors were achieving or advancing their strategic objectives. International donors and implementors are quick to publicize successes no matter how modest. They have strong incentives to highlight the value of their work. The almost complete absence of claims by agencies of policy success for their non-state justice efforts is striking. Moreover, evidence generally focuses on individual program deliverables, such as trainings conducted or materials drafted, rather demonstrating that the policy itself achieved its stated objectives.

To the extent donor policies embraced specific initiatives, they overwhelmingly favored transformation. Yet, existing research raises serious doubts about the feasibility and effectiveness of internationally led non-state justice reform efforts, it suggests these initiatives can sometimes be counterproductive or destabilizing (Coburn, 2013, Isser, 2011; Author 2018b). For example, as Tamanaha observed, “To impose the due process requirements of formal court systems on customary tribunals not only would distort how they function, but it
is not actually achievable” (2021:85). Donor state policy almost invariably assumes more state control is not only feasible but better. The reality is often very different. The enduring popularity of non-state justice usually the reflects widespread distrust of state courts because they are seen as expensive, slow, confusing, and illegitimate. Worse, they are often corrupt and even predatory. Conversely, there was little discussion about potential negative externalities of transformation or the risks associated with empowering state courts.

More research is critical on the consequences of specific international efforts to engage non-state justice. Likewise, it is important to understand more about how international endeavors function alongside domestic efforts as well as the empirical consequences of failing to engage with non-state justice or doing so only superficially. Thus, while it is not possible to say for certain that no successes have occurred, the silence is telling. Donors, program implementers, and the researchers they commission, all showed few signs of strategic success. A lack of success may also help explain the broad trend of donors shifting away from serious efforts to develop policy towards non-state justice.

Conclusion

This paper offered a new theoretical framework to better understand how donor states conceptualize and approach non-state justice. It found that while most major rule of law donors acknowledge that non-state justice matters, they often eschew these forums as presently constituted because they rarely meet international human rights standards. This leads to a strong preference for risk-averse acknowledgement strategies that symbolically recognize the value of non-state justice while avoiding difficult choices and detailed policy guidance. Even donor states that supported meaningful engagement strongly favored transformation strategies to reform non-state justice or strengthen the state. These efforts, however, were vague or unrealistic about how changes could be realized. Moreover, policy guidance that sought to change how non-state justice operated ignored the weak empirical basis for such efforts and the potentially serious negative externalities. Certain goals, such as counterinsurgency or state-building, sometimes justified riskier strategies. These can include accepting the risk of working with non-state justice systems with less than stellar human rights records. These goals may also justify the risk of pushback and even violence that comes from rejecting these forums. Riskier approaches endured only when a compelling justification existed and donors believed they had a reasonable prospect of success. As of 2018, no major donor state was pursuing either acceptance or rejection strategies.
Waning interest in non-state justice over time, the shallowness of policy discourse, and tolerance of policy inconsistency and even incoherence, raises serious questions about donors’ commitment to promoting the rule of law, access to justice, state-building, and other related goals in legally pluralist states. While perhaps understandable, failure to engage with non-state authorities when promoting the rule of law comes at the serious cost of eschewing the dominant form of legal order in most countries that receive aid.

**Works Cited**


BMZ (2009) Promotion of good governance in German development policy.


DFAT (2016a) Gender equality and women’s empowerment strategy.


DFAT (2016a) Gender equality and women’s empowerment strategy.


DFID (2013a) Policy approach to the rule of law.

DFID (2013b) Risk management in DFID.


DOD and Department of State (2009) United States government integrated civilian - military campaign plan for support to Afghanistan.


Global Affairs Canada (2017) Canada’s feminist international assistance policy.

Government Accountability Office (2020) Rule of law assistance: agency efforts are guided by various strategies, and overseas missions should ensure that programming is fully coordinated.


Ministry of Justice (2009) Draft national policy on relations between the formal justice system and dispute resolution councils.


OECD (2014) Development assistance and approaches to risk in fragile and conflict affected states.


State Department (2013) INL guide to justice sector assistance.


State Department, USAID and DOD (2018) Stabilization assistance review: framework for maximizing the effectiveness of U.S. government efforts to stabilize conflict-affected areas.


USAID (2009) Improving the rule of law through non-state justice institutions: issues to consider (Unpublished report).


USAID (2013) USAID strategy on democracy, human rights and governance.


