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Engagement with Non-State Service Providers in Fragile States: Reconciling State-Building and Service Delivery

Richard Batley and Claire Mcloughlin*

The OECD questions whether non-state services in fragile states may delegitimise the state in the eyes of citizens, arguing that 'state-building' depends on governments' engagement in service management. This article reviews the available evidence to identify what types of engagement are feasible and most likely to contribute to service delivery, or not to damage it. It considers the capacity requirements and the risks associated with state intervention through policy formulation, regulation, contracting and mutual agreements, and concludes by identifying ways of incrementally involving the state, beginning with activities that are least likely to do harm to non-state provision.

Key words: Non-state services, fragile states, state-building

1   The issue: managing the tension between state-building and non-state service delivery

In fragile and conflict-affected states, there may be tensions between the imperative to provide basic services to the population urgently, by any means, and the imperative to prioritise state-building.[1] At a general level, according to the OECD Principles for Good International Engagement in Fragile States and Situations (OECD, 2007), service delivery supports the building of 'effective, legitimate and resilient states'. Together with the maintenance of security and the enablement of economic development, the provision of services to satisfy the essential needs of the population is a core state function and a manifestation of the social contract with citizens (OECD, 2008c). How, then, does the tension between state-building and service provision arise?

   First, as the OECD (2008b) recognises, the effect of state fragility and conflict is likely to be that service provision by government is weak and other actors have stepped

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1. We recognise that the term 'fragile states' is contested. Here we use the term to refer to states which are 'unable to meet [their] population's expectations or manage changes in expectations and capacity through the political process' (OECD, 2008a). State-building is 'purposeful action to develop the capacity, institutions and legitimacy of the state in relation to an effective political process for negotiating the mutual demands between state and societal groups' (OECD, 2008b). See Mcloughlin (2009) for an exploration of the debates and controversies surrounding the use of these terms.

in to fill the gap. Private entrepreneurs, households, communities and non-governmental organisations are likely to be major providers of the services that exist. Second, at least in the short term, faced with weak state systems and low capacity, international agencies may find it necessary to further bypass the state by funding urgent services through international NGOs to generate quick and visible improvements in living conditions (Rocha-Menocal, 2009: 3). But what is good for service delivery may not be good for state-building.

A legacy of state-avoidance strategies, particularly after a prolonged conflict, can embed a parallel structure in the service-delivery landscape, leaving the state relatively weak and under-resourced in favour of NGOs (Zivetz, 2006: 17). An internal review of DFID's portfolio in fragile states notes that there are 'unintended consequences' of non-state services, including unsustainable operational standards and facilities; lack of upward and downward accountability of service providers; the failure of humanitarian agencies to develop sustainable local capacity; and the tendency for service providers to attract hostility from the state, because of their unintended political role (DFID, 2009: 35). Ghani et al. (2005: 11), with Afghanistan particularly in mind, warn of the negative impact that non-state provision of core functions can have on the accountability, legitimacy and sovereignty of the state.

On the other hand, to insist on direct provision by the state where there is very weak ability to fulfil the task makes no sense. The OECD deploys a typology of fragile states which differentiates levels of 'capacity' and 'willingness' and underpins its operational guidance on whether and how donors should engage the state in service-delivery management.[2] Whereas in extreme cases of declining states with arrested development it accepts that 'parallel initiatives independent of the state can be used' (OECD, 2008b: 33), in stabilising states it advocates arrangements where government may not be the direct provider of services but nevertheless assumes responsibility for making policy, contracting other providers, and regulating and monitoring services. These indirect 'stewardship' roles are increasingly seen by donors as important to restoring government responsibility and accountability in service provision (DFID, 2009; OECD, 2008c; WHO, 2005). If effectively fulfilled, they offer a way of reconciling the dual imperatives of service delivery and state-building.

But there are questions regarding whether and how states with weak capacity can effectively perform the indirect roles. The broad conclusion from research on service provision in fragile and non-fragile developing countries is that these roles are generally poorly undertaken; most non-state provision is rarely controlled or supported by any systematic intervention. In fragile situations, the state may be lacking in basic legitimacy and/or capacity, and in some cases may hardly be present (DFID, 2009: 33). Even in the more promising cases, 'often there is no strong leadership championing reform within government, and capacity to implement reform is generally weak' (Zivetz, 2006: 1). The question then, not only but particularly for fragile states, is what sorts of engagement by government with non-state providers (NSPs) are feasible –

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2. According to OECD (2008b: 14), 'Capacity means having the core features that enable the state to mobilise resources for key objectives, and is determined by territorial control, effective exercise of political power, basic competence in economic management and sufficient administrative capacity for policy implementation'. 'Willingness refers to explicit political commitment to policies supporting human welfare'. See Brinkerhoff (2007) for a full discussion.

given these capacity constraints – and most likely to contribute to service delivery, or at least not to damage it. If the capacity does not exist and cannot be quickly 'built', there is a risk that intervention may not only damage the non-state sector but also further undermine the legitimacy of the state.

This article draws on case studies of NSP-government engagement and recent donor material on service delivery in fragile and conflict-affected states in order to identify the factors that can enable or constrain the state's performance of the indirect roles. The literature has some limitations. There are few empirical case studies of government-NSP engagement in fragile and conflict-affected settings; the information that is available specifically in relation to the types of roles states can perform is dominated by contracting; and there appear to be few publicly available evaluations of donor programmes which have aimed to strengthen state capacity to perform the indirect roles. As far as possible, the article draws on examples from fragile and conflict-affected states; however, the evidence base is thin (OECD, 2008b: 39). Much of what is written about them is based on normative, scenario-type statements, with isolated examples. We therefore also refer to the slightly broader literature on state/non-state relations in non-fragile states where capacity deficits may be comparable. It is the exceptional cases of effective collaboration and co-ordination that have to be explained.

2   Non-state provision and relationships with the state

Non-state provision is a large-scale and 'normal' phenomenon at least in Africa and South Asia. It deals with the poorer as well as better-off sections of the population; it is supplied by a wide variety of commercial, voluntary, traditional and community organisations; and relationships between NSPs and governments have evolved differently between countries. It is important to recognise the prevalence of the non-state sector, because policy documents have tended to imply that non-state provision is a special feature of fragile states. Its diversity is also rarely understood.

Systematic information on the scale of non-state provision is not available, given that much of it is unregistered, unregulated and unnoticed. But there are estimates from some countries – though the figures are rarely comparable. Research in six countries of Africa and South Asia,[3] drawing on a wide survey of the available literature (Moran, 2006), found that non-state actors were the predominant providers of primary health-care, water supply and sanitation, and important providers of basic education to all sections of the population. This is probably true in the majority of developing countries, and not exclusively where states are fragile.

Whereas NSP in water and sanitation is largely for the poor and for areas beyond the reach of public systems, non-state health and education services address a broader span of consumers. Non-state health services are probably as likely to serve the poor as the rich; in Pakistan, even the most 'vulnerable' population is as likely as the better-off to use private health care. Government remains the main provider of primary education

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3. This section is based mainly on research reported in articles by Batley, Palmer, Rose and Sansom (all 2006). Though this study did not cover post-conflict situations, it is the only one we know of that has compared non-state provision across several countries (Nigeria, Malawi, South Africa, India, Pakistan and Bangladesh) and service sectors.

to all groups including the poor, but in South Asia, as in Nigeria and Malawi, non-state schools, particularly the unregistered ones, also serve poor families (Rose, 2006; Rose and Greeley, 2006; Andrabi et al., 2006). It is wrong to assume that the poor choose non-state provision simply for want of access to public services. Surveys in Pakistan have found that users report dissatisfaction with government services and greater satisfaction with non-state provision of health care, education and water supply (CIET, 2003; Planning Commission, 2003), and there are similar findings for aspects of health care in Enugu, Nigeria (McClean and Salui, 2003), and in Malawi (Lule and Ssembatya, 1994).

There is a great variety of types of provider. Individual entrepreneurs operate in health, education and water and sanitation, and are often the most abundant but least known category. Faith-based organisations (FBOs) and NGOs appear as direct providers in health and education, but very rarely in water supply except as facilitators. Community and household provision is most prevalent in water and sanitation. Even this categorisation of NSP organisations describes only the tip of the iceberg of organisational variety. First, the categories are not wholly distinct; the same professional practitioners frequently operate in both public and private sectors (Mills et al., 2001; Balabanova et al., 2008). Second, broad categories such as community-based organisations (CBOs), NGOs, FBOs and entrepreneurs disguise the variety of organisational forms and capacities that they include, making it difficult to generalise policy for governments' relations with the non-state sector.

Most private, mainly small-scale, commercial providers operate independently from government, occupying the gaps and deficiencies in public services or competing with them, and trying to avoid state attention. On the other hand, many service-delivery NGOs work in collaboration with government, either to improve public services or to complement them. The case for 'partnership' is now widely promoted by donors and acknowledged, in principle, by governments and many NGOs (Bano, 2007; Nurul Alam, 2007; Nair, 2007). However, the relationship is frequently beset by ambivalence and mutual mistrust, built on histories of rivalry and policy instability. Underlying this is a struggle for the control of scarce resources, in which donor funding has often played a significant part. Government officials, beset by the inadequacy of their own services, often prefer to fight against the ceding of territory to NGOs and the private sector.

While there are elements in common, national histories affect the nature of the non-state sector and of its relationships with the state. For example, in Malawi, large-scale mission-hospital and school systems work closely with government, while retaining some management autonomy (Kadzamira et al., 2004). Bangladesh is also characterised by its history of large-scale NGO activity, and by a small number of very large NGOs that work across sectors channelling donor funding to smaller organisations, in systems that have a high degree of autonomy from government (Nurul Alam, 2007). In Pakistan, commitment to partnership with NGOs and the private sector grew under donor influence and was consolidated under military government, at least partly as a way of bypassing the civil bureaucracy and provincial political leaders (Bano, 2007). In Southern Sudan, political, military and logistical factors determined the development of a rural health service that was fragmented, heavily dependent on NGO provision and with weak links to the urban-based tertiary hospital (Pavignani and Colombo, 2009).

3   The case for indirect forms of state engagement

Relationships between government and non-state service providers are driven more by historical evolution, ideology, power and the capacity of public and private agencies than by technical considerations. There can be no standardised prescriptions for state engagement with NSP, but we can conceive of some broad technical options.

One response to non-state provision might be to allow it to operate unhindered. This is the *de facto* though not *de jure* policy in most of the low-income countries for which there is evidence. States are often unable or unwilling to control or substitute for non-state provision. Indeed, why *should* they intervene in competitive 'market' provision? With regard to fragile states, the OECD (2008b, c) offers two answers. First, where state-building is the central objective, states gain legitimacy by being seen to provide services as part of the social contract with citizens. Second, even if non-state actors are the *direct* providers of services to clients, there are some *indirect* functions that independent providers if left alone will not provide efficiently or at all. These are essentially the 'backroom' tasks of supporting, co-ordinating and regulating within and between services: for example, setting policy frameworks, enforcing standards, establishing common school curricula and exams, ensuring universal take-up of basic services, training staff, building mains pipelines, and ensuring the standards of drugs. Through these indirect functions, the state assumes overall responsibility for provision without necessarily being involved in delivery at all.

For particular services, there are specific reasons why governments (or local governments and community organisations) would assume the indirect roles, and perhaps also advance into direct provision. Health care (and other forms of professional service including education) is particularly associated with problems of information asymmetry, where consumers are unable to judge the quality of the service, may be misled by professionals, or may choose less effective services. Education provided only with regard to individual benefits will fail to realise the wider benefits (positive externalities) associated with a universally educated population, including the nation-building that may result from a common syllabus and identity. Of all the services examined here, it is the one most often associated with the call for direct state provision (Rose and Greeley, 2006: 4). Clean water and sanitation are associated with the positive externalities (health and environment) that accrue to the whole population as a result of extending consumption to others. Finally, all these services have 'merit goods' characteristics, meaning that government intervention may be necessary to get people to consume 'what is in their own best interests', regardless of their own preferences (Stiglitz, 2000). Moreover, 'left to itself the market will serve only those who have purchasing power' (Besley and Ghatak, 2007), implying the case for subsidised public or private provision.

This article makes no judgements about who (state or non-state) *should* be the direct provider of services. Its starting point is that, in practice, in the context of most developing countries, non-state actors have an important role in service delivery.

The questions are whether, particularly in the case of fragile states, governments have the capacity to perform the indirect roles that only they can perform, and whether inadequate performance risks bringing about damage to service delivery. In the following section, roles are grouped as follows:

- engaging non-state actors in policy dialogue, and formulating policies that provide the framework for service providers;
- regulating by setting minimum standards and enforcing them, licensing, accrediting and facilitating providers, and safeguarding consumers;
- contracting out government-financed services to NSPs or contracting in the support of NSPs to government services;
- entering into mutual agreements for jointly financed collaboration between the state and NSPs.

4   Experience of the performance of indirect roles

This section surveys the experience of state performance of the indirect roles in fragile and low-capacity settings in order to identify i) the level of capacity required to perform the different roles effectively (i.e. to promote pro-service outcomes), and ii) the potential risk or possibility of doing harm to non-state services. Our aim is to identify the major constraints on the state undertaking these roles in fragile situations, as well as the factors that have enabled cases of successful engagement. Under 'capacity' we include organisational and wider institutional factors, as well as the connections between the actors, including government, state agencies, NSPs and donors. Brinkerhoff (2007: 4) summarises this broad view of capacity as having 'the aptitudes, resources, relationships and facilitating conditions that are necessary to act effectively to achieve some intended purpose'. Most studies (as also the OECD) focus on the capacity of state agencies but, recognising that the concern is with the functioning of *relationships*, some examine the other side – the willingness and capacity of non-state bodies that might provide services or take on the state's core roles. By 'risk' we mean the danger that state intervention may have an adverse impact on non-state provision without achieving compensatory benefits. This may arise from malevolence as well as lack of capacity on the part of state agencies.

4.1 Policy environment and dialogue

In principle, government is responsible for setting the legal framework, defining policy goals and priorities, and planning systems of service delivery (Balabanova et al., 2008: 22). These activities affect the general environment of non-state provision, establishing the rules of engagement between government and NSPs. They constitute a non-intrusive form of engagement because they do not usually impose obligatory conditions on service providers. Creating the policy environment, for instance, can begin with the principle of recognising but not interfering in acceptable NSP activities.

Service providers benefit from a stable and predictable policy environment in which to operate (WHO, 2005). A recent Asian Development Bank programme to improve relations between the government of Pakistan and NGOs concluded that confidence and continuity in policy and practice can be guaranteed through 'suitable legislation that grasps the ethos of … engagement allowing the Government to look upon NGOs as allies, while NGOs engage with Government without expectations of patronage or fear of coercion' (ADB, 2008: 11). But the policy continuity required for

the development of long-term relationships is likely to be absent in fragile and conflict-affected settings. Even in relatively stable countries such as Pakistan, Bangladesh, Nigeria and Malawi, the environment of non-state provision is typically one of policy unreliability and legal instability (Batley, 2006: 243). Nigeria and Pakistan, for example, have seen historical lurches from state takeover to severe public-service decline, through the incremental growth of market provision, to the advocacy of partnership (Larbi et al., 2004; Batley et al., 2004).

General and sector-level policy frameworks, which in more stable environments can establish clear roles and relationships, may be unworkable in fragile settings where state capacity is weak. The Health SWAp in Bangladesh is an example of how such an approach can enable greater and more effective public engagement with the non-state sector (Chowdhury et al., 2004). However, 'the slow, patient, inclusive negotiations leading to a SWAp in a stable health sector are out of place in an unstable one' (Pavignani and Colombo, 2009: 278). In post-conflict situations, international agencies can prematurely put pressure on national governments to formulate comprehensive health policies before capacity and information are in place, as Pavignani and Colombo (2009) describe in relation to Kosovo, Liberia and Angola. In practice, governments of 'disrupted health sectors' are unable even to assemble information about the activities of NGOs and private providers (Pavignani and Colombo, 2009: 19), and this stands in the way of government adopting co-ordination and planning roles (Balabanova et al., 2008: 38).

Formal dialogue usually takes place in 'set-piece events' that are focused on policy design and the development of strategies, rather than in continuous interaction about policy implementation. It therefore privileges the participation of well-organised advocacy organisations rather than the often small-scale, local and informal organisations that actually deliver services. A World Bank study of the health sector in Bangladesh observed that: 'alternative private providers have very little interaction with government. Thus, public-private engagement has largely excluded service providers of greatest importance to the poor' (World Bank, 2003, cited in Chowdhury et al., 2004). In Nigeria, while umbrella associations of formal private schools and mission hospitals have engaged with government on behalf of their members, the much larger number of unregistered schools is excluded from formal dialogue (Larbi et al., 2004). Even among NGOs, Collinson (2006) notes that formal policy spaces in Malawi are dominated by national-level and urban 'representative' NGOs, whilst smaller district-level NGOs lack the resources to participate.

Government agencies may enter into dialogue under pressure and reluctantly, given that this implies that they no longer have the monopoly of donor support for the service-delivery role (Sansom, 2006). Political agreement that NSPs are legitimate actors is an important precursor to effective engagement. Government capacity to sustain dialogue is often hampered by a shortage of human resources to lead and manage collaboration. In post-conflict Uganda, for example, lack of both skill and willingness on the part of government to engage with mission health facilities at sub-national level was evident (Balabanova et al., 2008). In this case, the capacity of the non-state sector to organise and represent itself through the development of 'bureaux' was key to enabling dialogue with government (Seengooba et al., cited in Balabanova et al., 2008: 34). Similarly in the education sector, Rose (2006) notes that, in most cases,

national-level dialogue has been initiated by non-state umbrella organisations that see the opportunity to pressurise governments to recognise their contribution.

Given the constraints in terms of both capacity and will outlined above, it is not surprising that, even where there is formal dialogue, it may have no significant effect on service provision. There is little evidence to indicate that government engagement with NSPs has resulted in government actually accommodating its views, as Rose (2007) concludes for the education sector. Real policy is likely to be made in other forums. In post-conflict Mozambique, certain NGOs did engage in dialogue with government through a donor-supported 'co-ordination scheme', but in reality policy was made behind closed doors (Pavignani and Durão, 1999).

Even where formal policy-making is closed, in practice there is usually a continuous 'informal dialogue' between local government officials and providers at the operational level – about policy implementation rather than design. Informal dialogue changes the risk of exclusion from one based on formality to one based on informal relationships. It may not be transparent, and is often about doing deals in return for favours to allow certain non-state actors (water vendors, unregistered schools and medical practitioners) to operate or at least not to be harassed (Batley, 2006: 250). However, local and informal engagement has advantages: it is the point at which the history of mistrust and rivalry needs to be addressed, it raises fewer capacity issues than national policy dialogue, and it can be iterative and long-term. NGOs have often played intermediary roles in facilitating more open dialogue between government, community organisations and enterprises, particularly in water and sanitation – for example in the Orangi Pilot Project in Karachi (Sansom, 2006; Ahmed and Sohail, 2003) and the community-led total sanitation scheme in Bangladesh (Chowdhury et al., 2004). In Somalia, NGOs initiated engagement by inviting local government staff to training and presentations; and regional education bureaux were set up in some areas to review alternative basic education programmes. Low-key and consensual models of co-ordination offer the possibility for government to learn lessons directly from NGO innovations, while understanding the constraints they face (Rose, 2007: 40).

The major constraints on the performance of the roles of creating the policy environment and engaging in policy dialogue are at the level of i) incentives, or willingness on the part of both NSP and government to engage, and ii) lack of information and technical and administrative capacity to engage effectively. In low capacity settings, formal policy dialogue may be imperfect, unrepresentative and unhelpful. It is often constrained by mistrust and is prone to being hijacked by large NGOs. It is debatable whether such dialogue has any real impact on the provision of services by non-state providers, in which case the risks of doing harm are minimal. However, the risks of dialogue being exclusionary and ineffectual appear to be more apparent at the more formal end of the spectrum of dialogue, where the capacity demands are also greatest.

4.2 Regulation

Whereas policy frameworks and dialogue affect the general environment of service delivery, regulation is much more interventionist; it imposes obligatory requirements on non-state actors. While the promotion of policy dialogue is one of the main spheres of

donor action, the improvement of regulatory practice is one of the least. This is perhaps because regulation is clouded by ambiguity for donors, governments and NSPs: it can act as a negative as well as a positive instrument, suppressing non-state activity or promoting its more efficient operation. It can take the form of 'command and control' approaches (for example, imposing minimum qualifications for permission to operate) or of 'regulation by facilitation', which involves the use of incentives (for example, subsidies) in return for compliance with required standards (Palmer, 2006).

While most governments have a hefty legal armoury of regulations regarding service provision, these are rarely effectively applied in practice because of capacity constraints. Regulatory organisations often lack staff, skills, enforcement powers, or information on the sector to be regulated (Mills et al., 2001). Even in relatively strong states, capacity to regulate successfully – particularly in relation to enforcement and monitoring – has been weak. Mills et al. (2001) and Balabanova et al. (2008) analyse the failure of the Indian government to regulate the private health sector, in spite of comprehensive legal instruments being in place. In the case of fragile states, weak and contested public authorities are particularly likely to face difficulties in enforcing rules that limit private interests. The Liberian pharmaceutical sector is an example where a combination of lack of commitment and political will to enforce the laws, together with conflicts over vested interests, has resulted in regulations and policies that are confused and contradictory, with unclear allocation of responsibility for implementation and enforcement (Osmond et al., 2007).

Regulation that seeks to place controls on 'entry' into the market often takes the form of highly bureaucratic schemes that place an enormous burden on the capacity of the regulator and can be prohibitively cumbersome or expensive for NSPs.[4] This type of regulation typically focuses on monitoring inputs and restricting competition, rather than on the quality of outputs (Batley, 2006). Based on studies in sub-Saharan Africa and South Asia, Rose (2006) finds that regulation gives much less attention to the quality and accessibility of non-government schools than to stipulations regarding inputs: for example, requirements for equipment, the dimensions of school buildings and ensuring that they maintain a certain distance from government schools. This form of regulation is unlikely to impact positively on service outcomes. Moreover, command and control regulation may be used against the non-state sector where there is a direct government service to protect and there is competition for resources and customers (Batley, 2006). Double standards, whereby the government asks private operators to abide by requirements far beyond those attained in public facilities, are common in weak and disrupted health systems, for example in Afghanistan, Northern Uganda and Angola (Pavignani and Colombo, 2009: 341).

Given the combination of questionable incentives and weak capacity for regulation, it is not surprising that regulation does not always address the performance of the providers that are most important to the poor. In Bangladesh, for instance, the focus has been on undertaking and enforcing the registration of qualified doctors. In contrast, there was no control of the unqualified providers in the private sector, even though these were the most important providers for the poor (Chowdhury et al., 2004).

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4. For example, in Nigeria, schools have to register with the Environment Agency, Ministry of Health, Fire Brigade, and Water Corporation, each of which requires a registration fee (see Rose, 2007).

Applying a regulatory framework in informal markets is extremely difficult, partly because information on small-scale, informal non-state providers is usually severely lacking, especially in fragile settings. Moreover, 'the scattered nature of small-scale health providers makes traditional monitoring (e.g. in terms of visits or inspections) a formidable challenge' (Palmer, 2006: 235). Appropriate instruments to regulate this sector are likely to be of an incremental, indirect and informal nature, beginning with simply building information on the scale and nature of NSP activity (Pavignani and Colombo, 2009: 17).

If universal regulation is impractical, a more selective alternative is to reward those non-state providers that achieve certain performance standards through incentive-based regulation. This requires less capacity on the part of government, presents less risk of harming NSP without achieving compensatory benefits, and is voluntary, not impositional. An example is government provision of training and equipment for immunisation to traditional birth attendants who register with government in Enugu State, Nigeria. Another is the programme of the Government of Bangladesh with WHO, under which poor pregnant women are issued vouchers that can be used only to pay accredited providers of antenatal care and delivery (Palmer, 2006; Chowdhury et al., 2004).

Substitutes for state regulation, such as franchised service provision and community monitoring, are another less demanding alternative. They allow for the regulator to be divorced from the predatory interest of government and at least partly from the interests of providers (Batley, 2006). Franchised service provision involves an NGO or private company franchising others that meet its standards. An example is Social Marketing Pakistan, an NGO which franchises private clinics and pharmacies to provide a defined package of reproductive health services, whose quality is monitored (Palmer, 2006; Batley et al., 2004). Communities or client-users can also become part of the process of regulation. In Mozambique, for example, government plans to strengthen its capacity to regulate informal providers by identifying key aspects of service performance at the local level, and inviting community committees to monitor them (Trémolet, 2006).

Overall, the assessment of risk of harm associated with regulation must be considered in the light of the fact that much of it is unenforced or avoided because capacity for implementation in fragile settings is weak. Nevertheless, it is clear that certain types of regulation, if enforced, require more capacity and present greater potential for harm than others. Command and control regulation has been unnecessarily elaborate, has not usually focused on the quality and accessibility of services, and has placed unrealistic capacity requirements on both the implementing agency and NSPs. Universal regulation has been more demanding than localised approaches and is unrealistic in fragile settings. It is also least likely to address the performance of the providers that are most important to the poor. Forms of regulation where the rules are slimmed down, focused more on the quality of outputs and based more on incentives than controls, and substitutes for state regulation, such as external and self-accreditation, franchised service provision and community monitoring, place fewer imposed demands on the actors and are more capable of being focused on improving services.

4.3 Contracting

Contracting NSPs to deliver services (contracting out) or to support government delivery (contracting in) are increasingly supported by donors in states with high will but low capacity (OECD, 2008b: 34). Whereas regulation usually seeks (unsuccessfully) to impose government standards and requirements on all actors in a policy field, contracting locks particular non-state actors into a more direct and obligatory relationship with government. The legal and one-to-one nature of the contractual relationship gives government a much more direct stake, as well as greater opportunity to observe non-compliance and to enforce requirements. Through contracting, government can set and enforce standards for the non-state sector, and expectations of measurable results (Loevinsohn and Harding, 2005: 676).

But contracting requires strong organisational capacity in design, management and monitoring (Balabanova et al., 2008: 42). Even where there is experience of contracting, contracts are often designed and managed poorly because of basic administrative failures and unclear roles and responsibilities (Batley and Larbi, 2004). Without a supportive external environment of public-sector rules, regulations, laws and policies, it is difficult for public-sector organisations to maintain commitments and therefore to gain the confidence of contractors. Contracting may also require a strong relational element. Recent research in India, Pakistan and Bangladesh has shown that, even where contractual relationships are formally hierarchical (the government paying NGOs to produce a service – often with donor funding), the most effective agreements were those that had a strong relational element (Batley and Rose, forthcoming).

In fragile contexts, where governments cannot guarantee political and economic stability or a legal system that would ensure contractual rights, formal contracting can hardly be effective (Batley, 2006). In Cambodia, for example, the effectiveness of public-private partnerships has been hampered by the widespread lack of transparency, the government's failure to negotiate contracts openly and the tendency of government officials to bypass laws and administrative processes in awarding contracts (Rondinelli, 2006: 26). There can also be profound cultural and institutional constraints that manifest themselves as social and political resistance to the involvement of non-state providers, and lack of political capacity to face down official interests. Some forms of contract require more capacity on the part of government than others, as was found in a study of the contracting out of urban water supply and health-care in Africa and South Asia (Batley and Larbi, 2004; Mills et al., 2001). Short-term 'spot' contracts for one-off inputs (for example, building works, or the supply of materials) are likely to be easier to design and manage than longer-term, more complex arrangements, such as management contracts and concessions. The design of these contracts requires a great deal of information and experience to anticipate all the risks and uncertainties that may occur during the term of the contract.

Designing contractual requirements, assessing bids and developing and overseeing performance measures are particularly difficult in fragile settings where there is likely to be a lack of basic information on the cost and quality of public and private service provision. Monitoring has been constrained by insufficient human resources and/or lack of incentives across a broader range of sectors and contexts (Mcloughlin, 2008). In the case of large-scale, performance-based contracting for the delivery of a Basic Package

of Health Services in Afghanistan, it was acknowledged that lack of current data necessitated a pragmatic and imperfect approach to costing (Ameli and Newbrander, 2007: 1). Similarly, in Liberia and South Sudan, lack of baseline information on health activity and financing has constrained the development of a policy framework for contracting (Carlson, 2007: 10). In Afghanistan, even where technical capacity is in place, specifying and monitoring contracts for the delivery of services in remote areas has been challenging (Palmer et al., 2006: 720).

It cannot be assumed that the necessary will or capacity to enter into contractual agreements exists within the non-state sector, any more than in government. There is a risk that tight performance-based contracts, in particular, may rule out the local and informal providers that are often most important to poor people. In Sudan, for example, the scale of the contracts being offered – to deliver health services in entire provinces – meant that some NGOs were unwilling, or unable, to take them on. The Ministry of Health has had to revise the terms to make them more appealing to NGOs (Carlson, 2007: 18). NGOs may also be unwilling to enter into contracts with government because of weak financial incentives, lack of trust in government, and lack of confidence in its ability and commitment to pay (Mcloughlin, 2008). Small NGOs may be particularly reluctant to see themselves as agents of government, displacing their independent perceptions of the means and ends of public policy.[5]

Given the capacity requirements, much of the large-scale, formal contracting adopted in fragile states has relied on heavy financial and technical support and leadership from donors. Questions therefore arise about the sustainability of these contracts, given their reliance on donors' presence and the corresponding tendency to marginalise governments. Partnerships are only likely to be effective 'if governments maintain an active role in the management of the agreements rather than being left as a third party as international donors collaborate separately with NGOs' (Waters et al., 2007). Where government retains a strategic space and a role in the allocation and monitoring of contracts, in principle it retains responsibility for the quality and delivery of services (Commins, 2006: 23). Whereas in Afghanistan, government has retained such a role in the donor-funded Grants and Contract Management Unit, in the Democratic Republic of Congo government has been more or less excluded from the process, amounting to a 'state avoidance' strategy whereby contracts are established between the donor and contractor (Waldman, 2006).

Direct funding of NGOs by donors may undermine government capacity-building, even where the plan is eventually to transfer the service-delivery function to the state. In Afghanistan, as Zivetz (2006: 8) observes, 'local health offices have little in the way of capacity, and resources flow directly to NGOs from Kabul. NGO salaries are higher and more reliable than government salaries, facilities where staff are only receiving government salaries were found to be largely non-functional … It is not surprising that local health departments find it difficult to exert their own authority in this situation.' Whilst contracts may incorporate clauses for 'transition planning' – i.e. planning for the hand-back of service functions to the state, or the development of state capacity to

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5. Economic and Social Research Council-funded research: 'Whose Public Action? Analysing inter-sectoral collaboration for service delivery'. Reports are available at: http://www.idd.bham.ac.uk/research/service_providers.shtml#Whose

manage them (Brinkerhoff, 2008; OECD, 2008 b) – there are real constraints on this in practice. An evaluation of the Basic Services Fund in Southern Sudan found that, whilst most NGO contracts included provision for training government staff, establishing community structures to oversee them, phasing out NGO incentives and handing over staff to the government payroll, there were almost no instances where this had actually occurred. Ministries were simply in no position to take over staff. Contact between NGOs and government was at the level of information-sharing and consultation rather than co-planning, with the result that there was little sense of government ownership (Morton and Denny, 2008; Mott McDonald, 2008: 7).

Institutional structures that completely bypass the state also risk creating confused and complex systems of local accountability. In Nepal, the World Bank contracted out rural water supply projects to NGOs and the private sector through a 'Fund Board' – an institution that was located separately from local government structures. This arrangement was criticised for encouraging accountability to the Fund Board rather than to the community being served. In addition, the rigid, input-focused nature of the contracts was seen to have restricted NGOs from using approaches to suit local conditions and needs (Clayton, 1999).

While it is accepted that contract management by public ministries shifts accountability from donors and NGOs to the state (Zivetz, 2006: 21), it is also recognised that, in the worst fragile situations, such an arrangement may not be feasible. Where there is no real prospect of reforming the civil service, Collier (2007) advocates the development of Independent Service Authorities (ISAs) to act as wholesale contractors of both public and non-state service provision.[6] While ISAs would be autonomous, government would have at least a symbolic presence in a system of joint management with donors and civil society that would evolve to phase out donor representatives (Bold et al., 2009). While this approach avoids bypassing the state completely, as Sondorp (cited in Balabanova et al., 2008: 37) argues with reference to Afghanistan, the relative autonomy and isolation of the contract management unit from the process of policy and strategy formulation can mean that contracted-out services are not fully aligned with policy priorities.

It is clear that the level of capacity required for contracting will differ according to the sector, and to the scale, level of formality and length of contract. But, in any form, contracting is a technically demanding and complex role. Since it imposes conditions and obligations on actors who are directly engaged in a formal relationship with government, it has the greatest potential to impact on their activities. Such direct impact may be damaging if it is not well-managed. Large-scale, monolithic approaches to contracting present the greatest capacity requirements and risks, and rely heavily on donor support. Institutional arrangements for contracting that are separate from or completely bypass governments do not directly address the need to build state capacity and local accountability channels. However, the technical and financial demands of contracting mean that in some fragile states such arrangements may be the only feasible option.

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6. Key features of ISAs are that they facilitate a high degree of civil-society scrutiny over service delivery, set up a basis of competition between public, private and NGO provision, and perform continuous evaluation to determine whether government, NGO or private provision works best.

4.4 *Informal and mutual agreements*

If large-scale, formal contracting presents particular difficulties, there are alternatives in small-scale, local and more informal arrangements. Small-scale, local-level contracting may occur more sporadically, may be less resource-intensive, and may allow a more incremental approach to the development of contracting capacity.

An example is the relationship between the district health board and faith-based hospitals in Enugu State, Nigeria. In this pilot case, the government agreed that, because Enugu had no district hospital, it would heavily subsidise selected faith-based hospitals to provide emergency obstetric care for women. An evaluation of the pilot noted that a key to success was the fact that the State Health Board devolved responsibility for the scheme to district level. Such small-scale, practical examples provide government with some experience to build on and to demonstrate that successful collaboration is possible (PATHS, 2008: 98).

Informal mutual agreements, based on independent contributions by the partners and non-hierarchic relationships between them, may also avoid the capacity problems and tensions implicit in formal contracting, and the need for institutional structures that bypass the state. Mutual agreements may involve government and NGOs in contributing their own separate funding to common or complementary ends and taking on distinct roles. They depend more on accumulated social capital and may be less technically demanding because parties bring their own financial and human resources, and neither stands in authority over the other (Batley, 2006; Batley and Rose, forthcoming).

One example of mutuality can be found in Bangladesh, where government and NGOs agreed Memoranda of Understanding outlining their respective tasks in the delivery of the National TB Control Programme. The government provided treatment protocols, policy guidelines, drugs supplies and overall monitoring, while the NGOs provided essential services in local implementation, management and awareness-raising. In this case, trust, recognition of comparative advantage, favourable regulatory frameworks, effective monitoring, transparency, and continued commitment were essential preconditions for successful and sustainable collaboration (Ullah et al., 2006). A similar arrangement has been successful in the Democratic Republic of Congo, where NGOs have supported the implementation of the government TB programme in remote provinces. This case demonstrates that collaboration is possible even in very poor socio-economic situations where the state is disorganised, but only if consultation and dialogue are in place, and if partners have clearly defined roles and responsibilities (Ndongosieme et al., 2007). But partnerships based on mutual contributions may be a means of achieving collective goals only when there is a good strategic fit between collaborators, and when the benefits outweigh individual action (Aga Khan Foundation, 2007: 25).

Research on NGO-government relations in service delivery in South Asia found that long-standing informal relationships provided an important basis of trust and mutual influence between the parties (Batley and Rose, forthcoming).[7] More durable contractual relations had often evolved out of these earlier informal agreements, and

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7. Working papers analysing experience across service sectors are available at http://www.idd.bham.ac.uk/research/service_providers.shtml#Whose

retained their earlier relational quality.[8] An example of this is the evolution of government relations with mission health facilities in Zimbabwe, Uganda, Tanzania, Uganda and Papua New Guinea. Historically these operated on the basis of missionary funding but, as this source declined, they were either taken over or part-funded by governments.[9] In Malawi, relationships initially based on trust, with no formal agreement, have moved from unwritten understandings to written MOUs, and from 2004 to formal service agreements. Within the framework of the service agreement, the managerial autonomy of hospitals to decide how to deliver the service is protected by the fact that they negotiate collectively through their association (Green et al., 2002; Kadzamira et al., 2004).

Co-production, which involves an informal agreement between formal organisations and communities or service recipients where both make substantial resource contributions (Joshi and Moore, 2004), is another form of mutuality. Water and sanitation are rich in cases of co-production, the most widely cited being that of the Orangi Pilot Project (OPP) in Pakistan (Ahmed and Sohail, 2003; Sansom, 2006). Here, public utilities provide large sewers in agreement with community committees to fund and develop local sanitation systems, facilitated by an experienced local NGO. The OPP has untied independent funding, avoids written agreements, and pursues its own approach to community sanitation in informal relational agreements with government and communities.

It is clear that local agreements involving joint financing or collaboration in complementary projects between either state and non-state service providers or providers and recipients require less capacity than formal contracting. Because they are voluntary, do not impose formal authority and may evolve as trust builds, they also present less chance of having a damaging impact on the non-state provider. Their informal relational origins allow for joint learning. They have worked best where responsibility for the relationship is devolved to the level of government responsible for implementing it. There is a need for clarity of roles, but also flexibility to allow non-state actors to draw on their strengths and to innovate. But small-scale informal agreements do not lend themselves to organised 'scaling up'. Their extension depends on slower processes of imitation, example and institutional replication (Batley, 2006: 250).

5   Hierarchies of risk and capacity

Based on the evidence from the preceding sections, Table 1 presents the types of engagement by governments with NSPs in two broad categories: (i) the level of capacity required to perform state roles, and (ii) the level of risk (or possibility of doing harm) to the non-state sector resulting from the poor performance of state roles.

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8. This is the opposite of the trajectory widely described in developed countries where formal contracts usually precede the development of trust and relational understandings (MacNeil, 1978; Gazely, 2007; Brown and Troutt, 2004; Van Slyke, 2006).

9. Mission hospitals are important providers, offering between 45% and 50% of health-care services in Zimbabwe, Tanzania, Uganda and Papua New Guinea, and 35% in Malawi and Zambia.

With regard to capacity, activities within each type of engagement are shown in a hierarchy running from those which demand less capacity to those that demand more. The potential for failed interventions increases as we move up each column. So, for reasons outlined in the previous section, making short-term contracts demands less capacity (and presents less possibility of failure) than long-term concession arrangements. Comprehensive contracting out, formal policy dialogue and universal regulation of providers are more demanding than localised approaches, including informal and mutual agreements and ongoing operational dialogue.

The risk of doing harm grows when state intervention is imposed obligatorily on and directly affects specific non-state actors. Certain functions – policy dialogue, setting the policy framework, and entering into mutual agreements – are unlikely to harm non-state provision if they are performed badly, but could support good service provision if they are done well. They are relatively risk-free because they affect only the general environment of service provision and/or do not impose directly on specific non-state actors. By comparison, those functions – regulation and contracts – which imply a direct controlling and co-ordinating role for the state and impose obligations on specific NSPs risk doing harm both to particular service providers and to the general level and quality of service provision.

The dilemma for donors and governments is that the most desirable interventions from a service-delivery viewpoint – for example, getting mass service delivery quickly operational by contracting it universally to NGOs – present a high risk of adverse effects, if government lacks the capacity to contract and the institutional conditions are not in place to enforce terms. From a service-delivery perspective, the weakness of services in fragile states may require large-scale and more interventionist approaches, and the fragmented nature of non-state provision may indicate the need for quick co-ordination. However, from a state-building perspective, the institutional conditions should be established before very concrete initiatives are taken to work with NSPs. The latter would argue for an incremental process of dialogue, leading to the design of legally and financially supported policy frameworks, and the step-by-step development of capacity to contract and regulate. This would recognise the difficulty of building capacity whilst also presenting opportunities to do so incrementally, 'learning by doing' as they move towards more complex and formal relationships with non-state actors.

While there is no systematic evidence on how donor programmes have supported the development of governments' capacity to perform the indirect roles in fragile situations, the published material indicates that they have not followed this sort of logical progression of institutional development. Donor activity in fragile and non-fragile situations has focused on promoting only a few of the alternative forms of engagement, some of them at the higher end of demands on government capacity and risk to the non-state sector:

- formal national-level policy dialogue rather than the local and less formal dialogue that would be more likely to engage with service providers, including small private entrepreneurs;
- development of general and sector policy frameworks, with emphasis on promoting 'partnerships' in service delivery;

Table 1: Types and levels of government engagement with NSPs

Required levels of capacity	Types of Engagement				
	Lower risk – non-obligatory engagement			Higher risk – more obligatory engagement	
	Dialogue	Mutual agreements for service delivery	Creating the policy environment	Regulation	Contracting
Higher		Long-term compacts for wider, shared activities between governments & NGO/CBOs		Independent regulation of the output (quality, accessibility and price) of all government services	Long-term, wide-ranging contracts for concession or franchise of social service provision
Medium	National & local dialogue about standards of provision, roles, relationships & spheres of operation	Specific, local agreements of joint financing in complementary projects – MOUs & co-production between government & NGO/CBOs	General & sector policy frameworks identify roles & relations of state/NSP Legal recognition of NSPs & their rights to provide services	Application of legal requirements for government approved providers Publicising surveys of government & NSP performance & costs Encouragement of • consumer forums & watch groups • franchising by large to small NSPs • self-accreditation by NSP associations	Medium-term service or management contracts for government finance of localised private sector or NGO social service providers Medium-term service or management contracts for government finance of localised private infrastructure providers
Lower	Programme of informal encounters between government & NSP nationally Exploring options for collaboration at local level Exchange of experience at local & national levels	Agreement between specific NGOs & government agencies on target standards etc., arising from dialogue	Political agreement that NSPs are legitimate actors Non-interference in acceptable NSP activities Mapping of scale & type of NSP	Mutual planning of standards by government & NSPs wishing to collaborate Establishing (but minimising) basic 'entry' standards for NSP	Government contracting in of specific inputs into its own services in one-off 'spot contracts'

Source: The authors.

- contracting by governments (with donor financing) in large-scale, medium or long-term programmes;
- developing accountability of service providers to consumer groups.

Donors have left largely untouched the spheres of informal and more local-level dialogue; informal, more mutual agreements between governments and NSPs; and almost the whole sphere of regulation, including the less impositional, more incentive-based approaches described above. Informal, mutual and local-level engagements provide opportunities for learning and the development of trust between state and non-state actors, but, on the other hand, present problems of 'scaling-up'.

6   Conclusion

Non-state service provision is a universal feature of developing countries, though it is more prolific in some than others. However, 'it' is not one but many phenomena, varying between countries and localities in their organisational form and capacity, the importance of their activities, whom they serve, their accessibility to sections of the population, and the nature of this relationship with the state. The possibilities for state engagement therefore have to be assessed in particular contexts. What is striking is that scarcely any such assessment is ever made.

The case for state engagement with the non-state sector can be made on the grounds of the deficiencies of service provision by the market, left to its own devices. The OECD debate about fragile states adds the case that state legitimacy may depend on its being seen to provide services as part of the 'social contract' with citizens. However, this article has shown that there is good reason for caution: the literature indicates widespread deficiencies in the capacity of state actors to intervene supportively. It would be wrong to set the ambition of 'managing' or 'harnessing' (Vaux and Wisman, 2005) non-state provision in its entirety; this has not happened in any developing country.

The most acute constraints on government undertaking indirect roles in service provision in fragile and conflict-affected situations are at the general level of the state's legitimacy, coverage and competence. The lack of information on the nature, cost, quality, and coverage of non-state services – particularly in relation to the informal sector – constrains comprehensive state engagement whether through dialogue, policy planning, contract specification, or regulation. As much as government capacity, the capacity and willingness of non-state actors influences the potential for successful engagement. Understanding the nature of the non-state sector (its size, formality, level of organisation) in any given context, and the limits of its willingness to engage with government, is an important starting point for designing mutually beneficial forms of engagement.

Where the indirect roles are undertaken in the context of weak government and NSP capacity, there are risks, first, that interventions are exclusionary or ignore the smaller or informal providers that are important to the poor, and, second, that they may damage non-state service provision without providing compensatory benefits. Where the capacity demands of the roles are highest, there is a tendency towards greater

reliance on donors, which calls into question whether or to what extent the performance of the roles can contribute to state-building.

The capacity demands are probably greatest and the risks of damaging NSP without gains are probably largest where state intervention directly controls non-state actors – that is, in the case of formal regulation and long-term classical contracts. They are least significant in the case of functions that set the general environment and are permissive (policy dialogue, making local mutual agreements, and supporting accountability to consumers).

Governments and donors are faced with difficult strategic choices about how to deploy their limited capacity for engagement with NSPs most effectively, and without risk to pro-poor or pro-service outcomes. In fragile or conflict-affected settings, there is an overriding international goal of supporting state-building. There is no meaningful way of resolving these alternative priorities by deciding which of the possible functions (policy-making, regulation, contracting or direct service delivery) would be more inclined to build states, and then trying to bring them about regardless of capacity and context. The better approach is to accept that undertaking any of these functions can be a state-building activity, and then to identify, in the particular country context, which, if any, mode of engagement would most enable improved service provision, be most feasible in terms of capacity and willingness to undertake them, and present the lowest risk of failure and damage to non-state service provision.

<div align="right"><i>first submitted July 2009
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