

CHAPTER 2

OUTSOURCING: RISKS AND BENEFITS

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A number of services provided by the state in the field of criminal justice could be delivered by private and non-state institutions. Contrary to what may immediately spring to mind, not all forms of non-state service delivery need to involve profit-making activities. The alternatives to state provision range from “community action, to private non-profit making organizations, to voluntary organizations, as well as various combinations of these options”.²⁵

Most of the services provided by the criminal justice system are not amenable to complete privatisation. There is, however, much scope for greater private sector participation in the provision of criminal justice services through outsourcing schemes (also referred to as contracting out, or public-private partnership arrangements).²⁶ Indeed, the state can benefit in a number of ways by outsourcing some of its functions and services to the private sector. Provided outsourcing contracts are properly conceptualised, and the implementation thereof effectively monitored, benefits of outsourcing can include providing services at lower cost and higher quality, greater flexibility in the provision of services, and a more rapid response to changing service and customer needs.

Some argue that the outsourcing of state services can undermine the reliable provision of essential state services, diminish the accountability of those responsible for the delivery of services, labour disputes and the provision of unequal services.²⁷ These are real concerns that need to be addressed, especially in developing economies where private competition is limited and government contracts are not always awarded in a competitive and optimally transparent manner. However, while these concerns are valid, on balance, private contractors have a greater incentive to avoid such concerns or problems than public service managers.

What can be Outsourced?

To determine what kind of state services are amenable to greater private sector participation – especially of the profit-making kind – a distinction must be made between public, private, and hybrid goods and services.

A *public* good or service is one which is provided collectively and from the benefits of which non-payers cannot be excluded. An example is national defence, from which everyone within a territory benefits, whether or not they pay the costs. As a result, public goods and services are generally produced in the public sector and paid for via taxation.²⁸

A *private* good or service is provided to a specific user or consumer, to the exclusion of everyone else. A service which is consumed privately and available only to those who pay for it is thus a private good. For example, people who buy oranges get the enjoyment and nourishment which oranges provide. People who do not buy oranges are excluded from these benefits.

Moreover, there are *hybrid* goods and services which are consumed collectively, but can be charged for individually in proportion to use. For example, electricity provided by a power station to a city, cable television, or toll roads. While the provision or production of pure public goods or services is not easily privatised, private and hybrid goods and services are.

The criminal justice system does not provide one service, but various kinds of services, many of which fall outside the strict public good definition. One example is the public police. Some of its functions are the provision of services which fall within the ambit of a private good. The inspection of a house when its owner is away on holiday, responding to an alarm at a bank, or providing security at a private sporting event, are all services which fall within the definition of a private good. These services could be – and are – provided by private firms. (In some countries police charge the users of such services.)

Other police services, such as the patrolling of a shopping centre or a particular residential area, allow those who live and work there to feel safer than they would otherwise do. In such cases everyone consumes and benefits from the service. In many cases such services can be categorised as hybrid services. The fact that private security companies provide such services, even though non-paying users also benefit from them, shows that this kind of service can be provided by the private sector.

Fixler and Poole of the Reason Foundation – an American research and educational organisation that explores and promotes public policies based on classical liberal values – point out that an “essential ingredient in a privatisation analysis is an understanding of the possible forms of privatisation”.²⁹ Two questions need to be asked about any service which is delivered by the state: Who pays for the service, and who delivers it? The classic form of public serv-

ice (and the common assumption for all criminal justice functions) has the state providing the funding via taxes, and producing the services directly, through state employees. Fixler and Poole hold that private mechanisms may be used in either or both of these areas.

If the state retains responsibility for funding a service, but hires the provider of the service in the open marketplace, one has a form of private sector involvement known as outsourcing or contracting out. Alternatively, if the state and its employees produce a service, but charge individual users in proportion to their use, the funding (but not the delivery) of the service becomes a hybrid private-public good, as in the case of a state-owned and managed museum or game reserve, for example. Finally, if both the funding mechanism and the service delivery are shifted to the private sector, the service is essentially privatised. The state may, however, retain some degree of control over the terms and conditions of the service, as is the case with toll roads in South Africa.

Matthews distinguished between the *provision* and *administration* of services.³⁰ Traditionally the state both supplied and took responsibility for the implementation of criminal justice services. In the case of an outsourcing contract, the state subcontracts the provision of a service to a private sector service provider. However, through the outsourcing contract the state retains control over the level and standard of service supplied. While Matthews is critical of excessive private sector participation in the provision of criminal justice services, he concedes that the final responsibility of providing outsourced services remains with the state agency which draws up the outsourcing contract and pays for its implementation: "As long as the State exercises ultimate responsibility, it can effectively disengage from the immediate provision of certain services within the criminal justice system without necessarily incurring any significant disadvantages."³¹

Provinces taking the lead on PPPs³²

According to the South African treasury, formal Public Private Partnerships (PPPs), through which the private sector provides the initial finance for public infrastructure and takes on operational responsibility and risks associated with service provision, are growing in importance. At the time of writing, pioneering PPP transactions had been concluded for the N3 and N4 toll roads, two high security prisons and a number of tourism concessions.

Several provincial departments engage in, or are exploring, the use of Public Private Partnership arrangements in the delivery of services. In fact, all but one of the six PPPs concluded in 2002 in accordance with Treasury Regulations were provincial projects. Of these, two were hospital projects, based at the Albert Luthuli Central Hospital in KwaZulu-Natal, and the Universitas and Pelonomi Hospitals in Bloemfontein. The Albert Luthuli Hospital project was cited as “Best Health Sector PPP of the Year” by *Euromoney* magazine.³³

The Albert Luthuli Hospital PPP covers facilities management, medical equipment, and IT systems and maintenance, as well as equipment and IT refurbishment. According to the treasury’s 2003 Budget Review, the project is a milestone in South Africa’s PPP experience. Shouldn’t it be: As the first provincial PPP in the country, it demonstrated a high degree of cooperation between the different spheres of government, highlighting the state’s ability to design and procure through PPP-type arrangements.³⁴

In the Bloemfontein project, the private sector will invest some R206 million (in nominal terms over 15 years) in Universitas and Pelonomi hospitals, in return for concession rights to operate hospital facilities within the public hospitals over the period. The project presents an example of alternatives to competition for revenue between private and public health services. Both projects have strong black economic empowerment components.

Benefits of Outsourcing

The state can benefit in a number of ways by outsourcing some of its functions and services to the private sector. Benefits include the provision of public services at lower cost and higher quality. Outsourcing can also bring about greater flexibility in the provision of services, and a faster response to changing public needs. These potential benefits of outsourcing are discussed in greater detail below.

Reduced costs

The state has to follow rigid costly, strict bureaucratic procurement procedures to purchase goods or services. A private contractor can avoid these, and is in a position to purchase more quickly, maintain lower inventories, and negotiate

better prices than a government department can. Private contractors can also avoid public service restrictions that interfere with efficient personnel management. They are in a more flexible position to hire, fire, promote, reassign and delegate authority to an employee than the public service. Moreover, private contractors' need to remain competitive and generate a profit, is an incentive to limit waste and maximise productivity – pressures that do not exist in the public service.³⁵

In *The Enterprise of Law: Justice Without the State*, Bruce Benson, an economist from Florida State University, says the following about the public service in the United States (which applies equally to South Africa):³⁶

The organizational inflexibility inherent in the civil service system prevents management from disciplining inefficient employees unless their behaviour is extreme. Lateral movements to adjust manpower needs in the face of changing demands are virtually impossible, as is hiring at any but the lowest grades. Such dysfunctional qualities of civil service systems commonly reflect employee pressure which tends to emphasize continuity and seniority over competence as qualifications for higher-level positions, and by employee unions which emphasize the traditional union goals of more pay, less work, and job security.

Other commentators are less certain that outsourcing automatically reduces costs. This is primarily because comparisons between the costs of public and private institutions are difficult to make: "The differences in roles, level of training and range of functions, make direct comparisons difficult. Also, there may be critical functions which are not amenable to quantification (for example, the rehabilitation of convicted offenders, or crime prevention)."³⁷

Popular outsourcing

South Africa's labour legislation, and a strong and political powerful trade union movement, have pushed up labour costs to the point where outsourcing has been adopted by many private employers. According to a survey, conducted in the late 1990s, of more than 1,000 organisations across the economic spectrum by human resources consultants FSA-Contact, 68% were outsourcing a variety of activities such as security and cleaning, 61% catering, 42% printing, 36% information technology, and 33% recruitment.³⁸

Better quality

Outsourcing contracts with private entities allow the state to determine and specify minimum performance and service delivery standards. Without outsourcing, where the state has a monopoly over the provision of all services, this rarely happens. For example, the public police is expected to uphold certain standards. If this does not occur, the state (i.e. the cabinet or parliament) is not in a position to go to a different service provider. At best, the president can fire the responsible minister, or the minister can fire the national police commissioner, and hope that a successor will perform better. In practice, this hardly ever occurs, and the public has to wait for an election to demonstrate its dissatisfaction.

Benson argues that “private entrepreneurs are residual claimants”.³⁹ That is, they accrue the profits and bear the losses of their business endeavour. It is this profit motive which provides an incentive for entrepreneurs to produce goods, or provide services, at good quality and low cost. As consumers (in the case of this outsourcing discussion, the state) are free to choose how they spend their money, the best way an entrepreneur can legally obtain customers and profits is by persuading potential customers that a quality service is being offered at a reasonable price. Private producers or providers of services are consequently unable to lower costs by sacrificing quality if they want to stay in business. Should they do so, consumers will invariably turn to substitutes that provide a service of a higher quality for the same price, or of the same quality with an even lower price. “Thus, competition forces private firms to offer relatively high-quality services at relatively low prices.”⁴⁰

Flexibility and innovation

Private contractors have greater management flexibility than state departments. They can respond faster to changing circumstances, and tend to be more innovative. The state can terminate or decline to renew a contract if a private contractor is too expensive or delivers an unsatisfactory service. By contrast, it would be almost impossible to halt the activities of government departments which are staffed by tenured public servants. Experience in the United States has shown that it is extremely difficult to terminate a government department, or an established unit within a government department.⁴¹

Where the aim is to overcome the inertia that characterises many existing criminal justice departments, or to move away from entrenched principles,

outsourcing the provision of services can provide a catalyst for change by introducing new personnel and methods:⁴²

The greatest promise of the private sector may... lie in its capacity to satisfy objectives that might be difficult if not impossible to achieve in the public sector – introducing public sector managers to the principles of competitive business, quickly mobilising facilities and manpower to meet immediate needs, rapidly adapting services to changing market circumstances, experimenting with new practices, in satisfying special needs with an economy of scale not possible in a single public sector jurisdiction.

Concerns about Outsourcing

Critics of outsourcing argue that the outsourcing of state services can lead to security risks, accountability problems, labour-related disputes and the provision of unequal services. These are reasonable concerns, especially in developing economies where private competition is limited and government contracts are not always awarded in a competitive and transparent manner. While these concerns need to be taken seriously, on balance, private contractors have a greater incentive to avoid such problems compared to public service managers.

Security risk

Outsourcing critics fear that private security or prison guards can place the safety of the public at risk by going on strike or being absent from work. Professor Charles Logan of the University of Connecticut, a specialist in crime and justice matters, is critical of this argument: “Unemployment as the result of a strike is a more credible threat to private than to public guards, because a strike or other disruption would allow the government to terminate its [outsourcing] contract.”⁴³ Moreover, the absence of a right to a protected strike has not prevented South African public police officers, prison guards or prosecutors from striking. For example, in 1996/97 there were 21 strikes by employees of the Department of Correctional Services, one as long as 29 days, another for 17 days.⁴⁴ Also in 1996/97, there were 62 work stoppages in the SAPS.⁴⁵ In 1996 alone, some 1.3 million person-days were lost because of absenteeism in the SAPS (in addition to vacation and special leave taken during that year).⁴⁶

Outsourcing contracts can make provision for emergencies such as strikes and labour unrest. For example, legislation permitting private contractors to build and manage South African prisons, grants the state the right to take over the management and control of any privately managed prison facility if the contractor risks losing control thereof.

Accountability issues

The perceived lack of accountability of private service providers is central to the potential negative impact the private provision of criminal justice services may have on human rights.⁴⁷ Logan, however, argues that outsourcing increases accountability as governments are more willing to monitor and control contractors than themselves:⁴⁸

Contractors – just as their governmental counterparts – are accountable to the law, to governmental supervisors, and ultimately, to the voting public through the political system. In addition, they are accountable, through a competitive market, to certain forces not faced by government agencies. They are answerable to insurers, investors, stockholders, and competitors. As a mechanism of accountability and control, the force of market competition is unmatched.

Nevertheless, states with limited human and capital resources may find it difficult to monitor and administer its outsourcing contracts. State departments which elect to outsource some of their services can face problems developing adequate criteria for the monitoring and implementation of outsourcing contracts. Competitive tendering does not necessarily guarantee the most effective or desired result. Matthews in *Privatizing Criminal Justice* points out: “There are problems [with outsourcing] concerning measurement, the establishment of clear comparative criteria between the performance of competing agencies, the development of procedures for monitoring contract compliance, and in enforcing sanctions for non-compliance.”⁴⁹ For outsourcing to work it is crucial that both contracting parties enter into detailed service level agreements to, among other things, establish two-way accountability of service, document service levels in writing, clearly define criteria for service evaluation, and standardise methods for communicating service expectations.⁵⁰

Unfortunately some individuals, whether publicly or privately employed, abuse their positions by cutting costs, doing poor-quality work, and generally abusing the rights of people over whom they have control. According to

Benson, institutional arrangements within which people perform their tasks determine whether such abuses can be carried out, and that competitive markets are one of the best institutional arrangements to discourage abusive, inefficient behaviour.⁵¹

Individuals not fully responsible for the consequences of their actions are likely to be *relatively* unconcerned about those consequences. But private firms must satisfy customers to stay in business. Therefore, a security officer who abuses shopping-mall patrons will not remain an officer for long. Furthermore, even if a firm fails to respond to market incentives, a civil suit brought against an abusive private security firm can be costly, perhaps even destroying the business. In contrast, public police departments rarely go out of business, no matter how corrupt and abusive their members may be.

Employee opposition

A benefit of outsourcing is its cost effectiveness. This often means that the same amount or more work is performed than before the outsourcing exercise with less labour. The organisation outsourcing its work invariably sheds jobs. If this were not the case, there would be no, or little, cost savings to the outsourcing organisation. As a result unions view outsourcing with suspicion and tend to resist it.⁵² Senior management in the criminal justice system and governmental policy makers will consequently have to be resolute in their commitment to an effective outsourcing policy if the impact of trade union opposition is to be minimised.

For example, the SAPS' then chief executive, Meyer Kahn, found that personnel restructuring exercises (such as redeploying police officers from police headquarters in Pretoria to the provinces and out on to the streets) proceeded slowly because of the need to consult with each affected employee.⁵³

The work environment and conditions of service in the police (as in some other state departments) are often such that a substantial number of staff leave each year through natural attrition. For example, the SAPS loses some 5,000 members per year through this process. Consequently, the resignation and retirement of staff employed by the departments which make up the criminal justice system will allow the government to relocate most of the staff who would need to be retrenched in the execution of an effective outsourcing programme. The two unions representing police employees are the Police and

Civil Rights Union (Popcru) and the South African Police Union (SAPU). In principle both unions support the outsourcing and civilianisation (replacing uniformed members with civilians) of certain SAPS functions, with the proviso that none of their members lose their jobs or are otherwise adversely affected by the process.⁵⁴

Unequal service

In a society based on the rule of law and the constitutionally enshrined principle of equality before the law, access to police services and recourse to the courts must be available to all. Every person, however indigent, should have access to police protection and the administration of justice.

Outsourcing criminal justice functions to the private sector may lead to inequality and injustice as criminal justice services could be made disproportionately available to those in power or those who can pay for it. It should be borne in mind, however, that even when the state provides security, all people do not receive equal protection. In most countries, especially in South Africa, the density of police personnel – and their willingness to intervene in violent situations – is lower in economically poor areas, or in areas inhabited by ethnic and racial groups with little economic power, than in more affluent areas.⁵⁵

Moreover, in South Africa poorer people are more likely to be victims of violent crime.⁵⁶ Reliant on public transport, resident in areas with inadequate street lighting and neglected and overgrown public spaces, poorer people are easy targets for criminals. Poor people are also likely to suffer greater personal loss from criminal attack. Under-insured and with a low savings base, poor people face financial hardship should, for example, their weekly wages be stolen. A poor person who is unable to work for a period of time because of an assault or criminal attack, stands to lose more than a wealthier person who is insured, and has sufficient financial reserves to see him through his convalescence.

Inefficiencies in the state-run criminal justice system may also disproportionately inconvenience the poor. For example, in South Africa, many court cases do not begin on time. Once started, they are often not completed on the same day, requiring one or more postponements. Victims of crime who are day labourers frequently forgo their wages on the day they have to appear in court to testify. Reliant on public transport, they experience an additional burden in getting to court.

Greater private sector involvement in, and the outsourcing of certain aspects of, the criminal justice system should not be rejected out of concern that the poor could be discriminated against. The outsourcing of state services and functions can be beneficial to everyone. With outsourcing, users of the justice system are likely to have a wider choice of services as private sector involvement will create new services. Moreover, the private sector should be able to provide services more effectively, with less delay and at a lower cost to the state and the taxpayer. By outsourcing the provision of some of its services, the state will no longer be expected to exclusively provide an increasing range of specialised services. Rather, the state will be able to concentrate on delivering its core functions: preventing serious crime, and investigating, prosecuting and rehabilitating serious offenders who pose a threat to the social order in South Africa.

Conclusion

The criminal justice system provides a wide array of services. Many of these services are not related to the core functions the criminal justice departments have the responsibility to perform. These non-core functions are particularly amenable to outsourcing to private or non-state service providers.

The traditional form of criminal justice service provision in South Africa has the state providing the funding via taxes and producing the services directly through state employees. That is, the state both pays for the services and delivers them. Yet, there are many criminal justice services, the provision of which the state could outsource to private sector service providers or appropriate not-for-profit civil society-based organisations, while retaining responsibility for funding such services. That is, making use of an outsourcing arrangement whereby a service is provided by a private sector company or civil society organisation. In such a case the private sector company or civil society organisation enters into a contractual obligation with the state, to provide the service traditionally provided by a government department. Moreover, the state can outsource the provision of a service or good which it is unable to provide. This could be a highly specialised service or product, the provision of which requires expertise or production techniques which the state does not have.

For a state-sponsored outsourcing arrangement to work, and deliver the benefits discussed in this chapter, it is crucial that the state is absolutely clear about what services – and the quality of those services – it wants to outsource.

Unlike the case of a privatised service, the state remains accountable for ensuring that outsourced services are, in fact, delivered. The final responsibility for the provision of an outsourced service remains with the state. To be effective, outsourcing contracts must contain detailed service level agreements between the contracting parties. These should include penalty clauses setting out the punitive consequences for the party providing the outsourced service, in instances where minimum service levels are not met. Beginning in the late 1990s, the South African Treasury began to develop comprehensive outsourcing norms and standards for government departments that elect to outsource the provision of some of their services. These norms and standards are discussed in the next chapter.