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LESSONS LEARNED ON JUSTICE INTERVENTIONS IN COUNTRIES WITH INDIGENOUS POPULATION

Jaume Guardans

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IDEABORN CONTACTS

Ms CHIARA GUIDETTI, Executive Director

cguidetti@ideaborn.com

Mr JAUME GUARDANS, Director and consultant

jguardans@ideaborn.com

www.ideaborn.com

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INTRODUCTION

Ideaborn's participation in justice support projects follows a clear pattern. That is to advice in ways to improve on one hand the performance of each stakeholder of the justice sector and the other hand the performance of the sector as such.

The offer of justice is strengthened by advocating the coordination of the different stakeholders and underlying that the independence of each actor is not incompatible with common planning and coordination towards a holistic and high quality service.

The demand of justice is promoted by:

(i) the support of the external evaluation mechanisms of the justice offer;

(ii) the support of primary crime-prevention mechanisms like human rights literacy, human rights advocacy and pre-crime mediation and

(iii) supporting access to justice of poor people and other vulnerable groups.

In the following lines we describe three evaluation missions: two of them have been carried our in countries with dual jurisdictions, Panamá and Colombia, and one in a country that does not have such division, Guatemala. The latter is a country with large indigenous population where the debate focuses on how to ensure that justice can reach all the population. There to guarantee access to justice in the countryside implies a proactive policy to enhance its cultural diversity. In the other two countries, Panama and Colombia, the indigenous issue is more a subject of protecting minority rights.

If required, *ideaborn* could also provide details about two other experiences of identification missions in the *Democratic Republic of Congo* and in *Pakistan*, where there is a duality and a coexistence of modern system of justice versus traditional systems of justice. Yet there this duality is not divided in lines of white versus indigenous people, since all the people are "indigenous" and the white community is irrelevant. Hence the discussions and possible solutions on whether or how to incorporate traditional justice into the general offer of justice is not based on race or ethnicity but rather on the respect of women and children rights.

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GUATEMALA

Evaluation of a Justice Reform Support programme
(European Union and Government of Guatemala/Coordinating Body for the Modernization of the Justice Sector)

The direct beneficiary of this 13M euro programme was the "*Instancia Coordinadora para la Modernización del Sector Justicia*" (ICMSJ), an entity created in the aftermath of the 1996 peace agreements.

The evaluated project was structured around 5 expected results. The first one aiming at straitening the Public Defence system; the second one focusing in equipping and training the personnel belonging to the different Justice Sector institutions; a third one directed towards improving the prisons and the respect of Human Rights and the due procedure with them. This third result put special attention in reducing the preventive detention and sifting it from the general rule to the exception. The forth result was related to human rights advocacy, with special accent in making known to the general public the rights of the imprisoned people. The fifth one aimed at consolidating the justice cluster and the ICMSJ as its secretariat.

The support to the Public Defence office and system (R1) turned out to be very successful and it was 100% demand driven. The equipment and training (R2) was not as successful. The reason was that beneficiaries themselves did not plan properly for the efficient use of their training structures and nor they received proper advice to do so. Consequently many training programs were established apart from, for instance, the Judicial school and the police academy. The improvement of the conditions in prisons was partly achieved and the only partial success was mainly due to the highly rotation of the personnel with the beneficiary. Yet it was also explicable because the criminal policy today in force in Guatemala is not especially sensitive with the idea of using the prison as a place to form and prepare convicted people to better integrate into society once their punishment is fulfilled.

Facing this situation the project managers concentrated their efforts in improving the Due Process. This effort was successful in preventive detention.

The due process was tackled in several fronts: (i) construction and equipment, (i) training; (ii) elaboration and dissemination of protocols to enhance a proper articulation among the police, the prosecutor, the public defence, the investigation laboratories (ballistic, ADN etc), the judicial secretary and the judge.

This effort build upon a previous USA supported initiative: Judicial Palaces where the justice is provided nonstop day and night, the *Judgados Penales de Turno* (JPT). The project financed the construction and equipment of five of these centres. The positive impact in the speediness and quality of judgements was remarkable. And so were the challenges they had ahead, because the envisaged articulation of the different players ensuring quality and transparency in the procedure from the moment of the detention of the indicted person until the judgement required still sophisticated monitoring and selective training.

In the same framework of strengthening the due procedure the evaluated project had provided support to Guatemala's Commission to fight against impunity.

Moreover, opposed to the "*Centros de Administración de Justicia*" (CAJ), the JPT house included not only the Judiciary bodies but also the prosecutor, the police, the Public Defence and a specialized and autonomous institution for forensic and ballistic investigation (INECIF). For the prisoners human rights dissemination the project conducted several conferences and prepared publications all the way from the beginning to the end of the project. In this area what was remarkably well done was the incorporation of this issue within the curricula of the university degree of Journalism.

The strengthening of the project beneficiary (ICMSJ) was carried out manly by supporting the CAJs. One of the firsts programmes of the ICMSJ or "*Instancia*" was the creation of those centres in 8 strategic areas of the country inhabited mainly by indigenous population, areas where the State had not had full presence in the past.

In the CAJs all the branches of the Judiciary are represented, although they have no space reserved for the prosecutor, the public defence or the police as they do have JPT. Yet the CAJ do houses Alternative Resolution mechanisms (mediation) not included in the JPT, even though the coordination between conciliation mechanisms and formal justice is not developed at length.

The CAJs are quite relevant in a long term plan to strengthen the trust in the State Justice in the countryside. That means dealing with denounced crimes as well as working to have more and more crimes being denounced. Dealing therefore with the existing demand of justice as well as trying to bring into the surface the no reported and non satisfied demand of justice.

Originally the centres were set up with the support of the Inter American Development Bank. The support provided by the project we evaluated focused in equipment and training. In the same vein the project we evaluated supported the design and implementation of a university degree in "*peritaje cultural*". The graduates were professionals that assisted in judgements to make sure that the due process was fulfilled, since they assisted not only in translation but also in preventing cultural misunderstandings.

The indigenous population in Guatemala is very important in number, although figures diverse greatly going from 40% to 60 %. The *ladino* and (mainly) mix population live in middle size and big towns where the number of crimes reported to the police is greater in relative and absolute terms. The criminality problem is hence mainly concentrated in towns and there the cultural/ethnic issue is not as important for the Guatemalans as it is, for instance, the potential abuses of the police on people in preventive detention. Therefore the JPT and the CAJ were and are complementary tools towards providing good and promptly delivered quality justice and towards facilitating access to justice in remote areas with different cultural sensitivities.

PANAMA

Mid-term evaluation of a programme for the institutional modernization of the Judiciary (European Union and Government of Panama/ Supreme Court of Panamá)

The beneficiary of this 10M EURO Project was the Supreme Court of Panamá. The project was structured around 4 expected results.

The first one aimed at achieving an efficient and transparent administration, speeding up the case-flow terms: increasing the number of process received and attended, increasing the rate of judicial resolution and reducing the average time per resolution of: (i) *Habeas Corpus*; (ii) the "*Recursos de amparo*" (court protection cases[1]) and (iii) the claims related to a constitutional breaches.

The second one aimed at improving existing infrastructure at the disposal of the Supreme Court by building and equipping new tribunals in rural and urban areas.

The third one aimed at establishing a competitive system to enter and be promoted within the Panama's judicial branch (*carrera judicia*l).

The forth one aimed at strengthen the population Access to Justice by: (i) the establishment of a service to certify the validity of legal norms, (ii) the development of the alternative means of resolution of conflicts, (iii) the creation of a coordination system with the indigenous justice; (iv) the support to Public Defence System, the creation of information kiosk at the courts and tribunals and improving the lawyers code of ethics.

The outcome of R1 was not achieved as expected in spite of producing high quality assessments product of short term international technical assistance. For instance one of the TA planed very well the redistribution of tasks among the judge and the judicial secretary and clerks but, like others TA products, it underestimate the importance of building up changing process within the institutions. In other words the TAs was mostly provided by outstanding jurists and yet there are organizational issues that take long time and require a different kind of expertise.

The outcome of the R2 was well managed as far as cost-efficiency is concerned. The project managed to build up 22 courts widespread around the country. Yet they did not coordinate with the other stakeholders such us the office of the prosecutor or the Public Defence. That would have been most convenient to truly facilitate access to justice to the population, since the justice offer does not depend only from the judiciary. By the same token the construction was not precede by a "judiciary chart" that could allow to provide constructed space and/or land not only to cover the existing needs but also those foreseen for the next decade. Things that could have been done without increasing significantly the costs

As for the equipment provided to the new buildings, a similar pattern was followed. During the evaluation we identified that the equipment and software was good and yet it

[1] Expedite judicial remedy of constitutional origin that looks for the restitution of another constitutional protected right that is infringed or threatened.

was missing a plan to allow a progressive assimilation of the new equipment. In many cases the new computers were used as typing machines and the files continued to be only in paper. In the few cases where software had been developed to link tribunals and share data it turned out that the several buildings did not have internet connection.

Last but not least in the evaluation mission we pointed out the importance of modernising simultaneously the (judicial) police, the prosecutors, the defenders and the judges. One needs to bear in mind that their work is extremely interrelated and if one of the parts is behind all of them are.

The judicial carrier envisaged in R3 benefit like the R1 of high quality ITA. At the time of the midterm evaluation we found out that the project was stopped due to lack of will of the Panama's legislative and executive branches to implement it. In this framework it is important to underline that the professionalization means reduction of leverage in the procedure of contracting and promoting public servants.

The R4, aimed at strengthen the population Access to Justice, was remarkably successful with the establishment of a service to certify the validity of legal norms. This activity consisted in digitalizing all the laws of the country and identifying areas of duplicity, allowing the experts to determine which laws or parts of laws had been derogated by others. This imitative was 100% demand driven. Once finalized the activity the software and website was able to be consulted by judges and prosecutors on line and for free. For the defenders and other interested people it was also accessible but paying a fee.

The Alternative Dispute Resolution Mechanisms (ADRM) suffered of excess of legal formalities. In that sense during the evaluation mission we pointed out that alternatively of mediation make sense when there are not yet victim and victimizer nor accused and accusing part. In this context a psychologist training of the mediator is more important than a legal training. That was not the case of judicial branch driven mediation in Panamá, where the accent was put (as is often the case) in using mediation solely as means to easy the number of cases reaching the courts.

Moreover another weakness of the ADRM system was the lack of coordination among the different mediation systems. Since there was mediation guided by the municipal authorities, another guided by the judiciary and other systems too. We also pointed out that while the diversification of the offer is good, it is important to agree on systems of control of minimum standards. Likewise it is important to assure that mediators dispose of easy-to-implement mechanisms to refer to the courts the cases that cannot be mediated, due to the nature of the conflict and the legal prohibition to do so.

The support to Public Defence System was very successful. The creation of information kiosk at the courts was not. The kiosk benefit from a project sponsored software by which anybody that approached the kiosk could be informed in which stage of the legal procedure a particular case was. By the same token the interested person could be informed in which court was to take place the next hearing related to that case.

The main weakness of this system was the lack of personnel to manage it. In that sense we suggested to follow a similar pattern to the one we have learned in the Democratic Republic of Congo, by which a network of NGO received some funding to run co-

ordinately the citizens-orientation service. The service should start by advising which would be the more appropriate access to justice mechanisms according to the grievance (formal justice, mediation etc). It should continue by referring the person to the correct place accordingly. Likewise it should inform on which pro bono and not pro bono defence systems exist and where to reach them. We pointed out likewise that the strict information on ongoing cases is a service that in other countries is provided directly by the court's clerks.

There was another important feature envisaged for the kiosks: the possibility of becoming a place to receive claims on courts malfunctioning and corruption. Unfortunately this service was not enforced. The reason behind this failure was that before receiving claims you need to have a person or office responsible to study and follow up the claims. By the same token such office would need to have clear rules of procedure / protocol to guide its work.

The evaluated project tackled the indigenous justice first with a three month study that outlined the duplicity of jurisdictions and proposed a plan to narrow the gap between the two. Another study followed that proposed short term goals of training leaders. The training proposed by the study was assumed by the project and conducted in two directions. On one side the training was provided to the traditional justice leaders on the principles of the modern justice and on the other train was also provided to members of the modern justice system on the main features of the different traditional justice systems existing in the country. Moreover the project supported leaders of indigenous communities who expressed their will to follow up legal studies to become lawyers and judges in the modern justice system.

As long term goals the study proposed the writing of a new National Law to define the competences of the indigenous jurisdiction. By that law the different traditional systems will be respected in the judgment of minor cases. They would have similar authority that the one granted to the "*Jueces de Paz*" in other countries and similar to the one that the municipal authorities (*corregidores*) currently have in Panama. In the same vein cases not considered minor will require a professional judge and legal counselling for the accused and hence would be restricted to the modern judicial system. It should be noticed that what was proposed to be written in the new law was not far from what was a "fait accomplice" in reality. The sensitive issues for the indigenous people living in indigenous/ autonomous areas (called "*comarcas*") in Panama are minor penal cases, agro and property related issues, family law and intellectual property related to handcraft production.

The study suggested and our evaluation report backed the importance of setting up a permanent group. A commission or secretariat composed by members of the Panama Supreme Court and by members of the association representing the different Panama's ethnic groups. An entity that would be in charge of drafting the jurisdiction law and of the regular follows up of its implementation.

Complementary to strengthening the traditional justice mechanisms and framing their boundaries of responsibility, the evaluated project supported the establishment of preliminary courts and ADRM in the "*comarcas".* The mediation mechanisms were adapted to the different cultural realities of the different indigenous territories/

"*comarcas*" and peoples. This adaptation was facilitated by an agreement between the EU sponsored project, the Supreme Court and the IDB. The referred agreement made possible that: (i) a mediation section was set up in each preliminary court construed by the project within the "*comarcas*" and: (ii) by training the people of those areas in mediation techniques. The mediation was aimed to be an alternative and, eventually, a preliminary step of both traditional and modern justice. In the sense that should the mediation do not work the parts could go to either of them depending on the matter of the specific case.

It is worth pointing out a major difference between the treatment of the indigenous issue in Guatemala and in Panamá. In latter the issue is how to ensure that a minority (about 6 %) is not left aside while in the former the issue is how to guaranty that that justice reach the different layers of society being the indigenous (roughly half of the population) equivalent to poor people in rural areas rather than equivalent to a minority group.

COLOMBIA

Midterm evaluation of a programme for strengthening justice and reducing impunity (European Union and Government of Colombian/Ministry of Interior and Justice)

The direct beneficiary of this 10 M EURO project was the Ministry of Justice and Interior.

The evaluated Project tacked the judiciary the prosecutor's office, the public defender's office and the conciliation mechanisms related to the ministry of interior and justice. Like the one in Panama it included a great deal of short term national and international technical assistance and like the one in Guatemala substantial amount of training.

This project contemplated also the establishment of completion mechanisms (*carrera*) to enter to the Prosecutor's office (*fiscalía*) and a program to enhance the communication between the indigenous systems of justice and the modern justice.

The different factor of this project, that we were able to replicate later on in DRC, was the establishment of and independent observatory of Criminal Justice.

The Colombian constitution contemplates two special jurisdictions one of "*Jueces de Paz*" to deal with proximity justice everywhere, but with a greater relevance for promoting access to justice in those rural areas where the State is significantly weak. The other one is the "*jurisdicción indígena"* that pretends to do likewise in those areas of the territory granted to indigenous administration. It is worth pointing out that the indigenous population in Colombia is estimated in 3'4 % while the territory under its administration is about 28% of the country. It is also important to underline that those territories as well as the *"cabildos*" granted to African Colombian, are often ruled in reality by illegal groups such as drug producers, smugglers, and left and right wing guerrillas

Like in Panama, in Colombia a law helping to define what corresponds to the ordinary jurisdiction and what to the indigenous one is contemplated in the constitution. The problem that may justify the delay in implementing that mandate is that while there is only one modern jurisdictional system each indigenous community has it own justice system.

In Colombia the main work in the ground to strengthen access to justice by aborigines has been conducted by the Supreme Court with a consistent support of the IDB. This institution has been active in promoting the implementation of the ILO 169 indigenous and trivial people convention. Likewise the Colombian Constitutional Court has produced substantial doctrine useful to guide the action to be taken in Colombia and elsewhere:

There are several court decisions worth referring to, among them the T-254 de 1994 that outlines the following principles.

"A mayor conservación *de usos y costumbres, mayor autonomía":* The level of autonomy of each aborigine justice system should be proportionate with the level of

preservation of the tradition by the community. Hence not all the communities should necessarily have the same level of judicial and legal autonomy from the State system.

"Los derechos fundamentales son un mínimo obligatorio de convivencia para los particulares": The rights related to live and physical integrity and freedom of expression (known also as negatives rights) are considered a body of minimum and universal standards. They form a body of principles that should transcend any specific culture or tradition. Moreover the dialogue and development of local and indigenous systems of justice should try to build upon their respect.

"Las normas legales imperativas (de orden público) de la República priman sobre los usos y costumbres de las comunidades indígenas, siempre y cuando protejan directamente un valor constitucional superior al principio de diversidad étnica y cultural. Los usos y costumbres de una comunidad indígena priman sobre las normas legales dispositivas": A distinction is made between imperative and non imperative norms. Being the former the laws related to the civil and political rights and not susceptible of interpretation, whereas a door is open for the ingenious communities to develop their own standards for other issues even when those issues that are regulated differently at national level like, for instance, collective and individual property rights.

Likewise the Colombian constitutional court established (sentence T-1238-2004) and important criteria as far as who is susceptible to be judged under the umbrella of the "*jurisdicción especial indígena*". This is divided in a personal criterion, by which the person to by judged should belong to indigenous community that is producing the judgment and a geographical criterion, by which the facts being judged should have occurred within the territories of this specific indigenous community.

In this framework the evaluated Project focused in facilitating dialogues of ordinary and aborigine jurisdictions at local level. The encounters took place all over the country in the different places where the aborigine people live. We had the opportunity to take part in few of them and they proved very useful indeed to facilitate the implementation in practice of the constitutional principles.

Our evaluation report included some recommendations to move forward with the drafting of the law that should frame and enhance the indigenous jurisdiction. Our suggestions were in line of producing a general law embracing the main principles and areas that should be kept in State hands yet equally establishing which could be given to the communities for their own regulation. Moreover we suggested that the latter could be regulated in different manner by different indigenous communities.