

“Judicial Independence and Judicial Accountability”

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Introduction

I have been asked to talk about “*Judicial Independence and Judicial Accountability*” from a peacebuilding perspective in Timor-Leste, in response to John’s presentation. Even though I am not a lawyer, I wanted to accept the invitation to share about Timor-Leste’s experiences with this topic. Since its inception in 2007, the work CEPAD (Centre of Studies for Peace and Development) has been doing for the past 10 years, in the area of peacebuilding, has provided me a practical insight, which I am happy to share with you, on the subject of judicial independence and judicial accountability, from a local peacebuilding perspective.

Having listened to John’s presentation, it is clear to me that the importance of the two concepts, judicial independence and accountability, is universally well recognised as vitally important, in the consolidation of democracy in every context. In the post-conflict context of Timor-Leste, it is important to note that when discussing this, with a specific focus on ‘*international best practices*’, we are in fact insulating individual judges to the confines of having to protect themselves against outside political interferences, the judges may be unable to resist for fear of reprisals; and exposing the wider Timorese society to the most complex undertaking of having to monitor judges’ misconducts, against citizens’ capacities.

One of the judiciary aims should be to help establish a ‘*governance of laws*’, so that not only everyone must be treated equally before the law, but the law itself must be equal for everyone. Such due process should form the cornerstone of any just and sustainable peace; for this to be possible, the laws regulating public sector institutions, including the judiciary, must be inclusive and peace sensitive.

Independence and accountability in the local context

As a territory formerly colonised by Portugal and occupied by Indonesia, Timor-Leste never had a tradition of an independent and accountable judicial system. The judiciary that had existed, had always been exposed to the Portuguese colonial power and the Indonesian military occupation.

Timor-Leste’s final stage in the process toward securing full political independence, took place on 30 August 1999, when some 98% of over 450,000 eligible and registered voters (among a population of just over 800,000 the majority of which were underage) went to the polls to reject the proposal of a limited political autonomy under the Indonesian rule. The

announcement of the result in favour of independence, was followed by a massive campaign of violence which led to the arbitrary destruction of the country's key infrastructures. This included the judicial system, its structures, the departure of all the judges, prosecutors and lawyers who undertook the judicial functions under the Indonesian regime, and the displacement of over half of the Timorese population.

As Timor-Leste prepared for its full political independence, under the auspices of the *United Nations Transitional Administration in East Timor* (UNTAET), it was urgent to address the legal vacuum, and the re-establishment of the judicial system, to safeguard Timor-Leste's rights-based State. In October 1999, the UNTAET Regulation No. 1/99, adopted the Indonesian law as the subsidiary law for the administration of justice in Timor-Leste; Article 3 (1) of the same Regulation established that "... laws which applied in Timor-Leste prior to 25 October 1999 shall continue to apply unless they are contrary to the international standards of human rights or the mandate which has been given to UNTAET".

In practice, this created confusion, because by the time Timor-Leste restored its independence in May 2002, members of the re-established judiciary came from Portuguese-speaking countries, while the applied laws were those of Indonesia. Because of historical associations under colonisation and occupation, the legal systems of Portugal and Indonesia served as particularly important reference points.

From 2007–2009, CEPAD ran a consultation process to map the Key Obstacles to Peace - a process consisting of a series of community dialogues at district, regional and national levels engaging all stakeholders in identifying and broadening the understanding of complex obstacles to peace. This process highlighted the need to improve these systems to ensure judicial accountability and equal treatment for all Timorese citizens, as the laws applied were inherited from the former occupying power, and they were used as an instrument to apply arbitrary power and control.

In fact, communities remained cynical of the new judiciary and all those participating in the countrywide consultations, identified and selected "*the ineffective formal judicial system and the culture of impunity*" as one of the four most important obstacles to peace in Timor-Leste. One of the reasons, is the fact that the applied laws are Indonesian but the judiciary process takes place in Portuguese. This is highly significant, as Portuguese even though is one of Timor-Leste's official language, it is a language not spoken by the vast majority of the Timorese (in fact just over 20% and that's probably being generous), and the judicial system remains severely understaffed and poorly equipped. Such limitations have fuelled frustrations among Timorese and strengthened the culture of violence, mob justice and impunity.

As it is well-known, specific laws should reflect the system and context in which they are formulated and applied. Communities CEPAD consulted in 2007 – 2009, focussed on three key aspects of the functioning of the judicial system: the substance of the law, its structure, and culture.

The '*legal substance*' was discussed in terms of what and how laws are applied and enforced in practice to any given question. At present, these laws include the constitution,

regulations, ratified conventions, penal code, civil code and a code for court proceedings held in the Portuguese language, to name just a few.

When we were talking to the communities about the *'legal structure'*, it was raised in the context of human resources and infrastructure. What was meant were the court, transport and relevant office equipment and facilities, at the disposal of the judicial system in terms of quantity, quality, and remuneration, including security of human resources.

The *'legal culture'* was addressed in terms of the perception of the communities regarding the justice system. It was agreed that an effective functioning legal system, should not be the sole responsibility of the judicial authorities, but should reflect the collective contributions and commitment of the society and of all institutions of the State.

A community policeman participating in one of the consultation meetings said: *"when people bring us complaints, we take them to the court. But the suspect can come and kill those who made the complaint. Our nation will not find peace when justice is not respected"*.

Local understanding of judicial independence and accountability

As I listened to John's presentation I recalled that one of the many important questions raised by participants during the consultation phase. This question was whether the adopted legal substance and legal structure inherited from the Portuguese and Indonesian systems would be sufficient to respond to the realities of justice and give adequate basis for the realization of judicial independence and accountability.

Most community participants were concerned about the inefficient functioning of the judiciary. They saw this had exposed the judicial system to outside interferences in the decisions of the courts, and made the system vulnerable to impunity based on wealth, power and immunities.

Many Timorese participating at the community consultations meetings during the mapping phase in 2007 – 2009, were unaware of the characteristics of the existing judicial system and of their rights and means of seeking justice. Generally, Timorese have limited knowledge of the laws in force in the country and of the functioning of the judicial system. The participants expressed confusion over the functions of and relationships between the Courts, the Public Ministry and Ministry of Justice, claiming the country needs legal experts who can interpret the language in which the law is written, as only that way we can move forward correctly.

In terms of judicial independence, it is interesting to note that whenever a comment was made on the subject, participants by and large referred to neutrality, bravery, courage, transparency and impartiality of the judiciary as an institution; even though they had no information regarding 'decisional independence' in terms of freedom of interference in the decision made by an individual judge. Judicial independence is therefore understood by communities as synonymous with transparent and courageous decisions made by the judiciary.

Judicial accountability was hardly mentioned during the consultations. This seems to confirm that communities either find 'judicial accountability' a relatively new concept in the local context, (since they have had no experience of an independent and accountable judicial system before), or, the concept itself has been simply overlooked at the expense of judicial independence, during the post-independence period.

Nevertheless, accountability is a common word used by communities when referring to the performance of political leadership. They see the need for political leaders to account for their actions, a discussion which very often leads to the issue of personal integrity. The absence of robust mechanisms to deal with the lack of accountability and transparency in the public sector, often creates opportunities and openings for corruption. Any member of the community would likely equate this understanding of judicial accountability with 'personal integrity' i.e. the need for judges to be honest when making decisions.

When considering these very basic communities' expectations or understanding of judicial independence and accountability, we are in fact exposing the wider Timorese society to the most difficult task of having to monitor judges' misconduct.

Timor-Leste is still paying the price for the confusion and the degree of this inefficiency today. In October 2014, a group of foreign judicial officers including judges, public prosecutors and legal advisors working in the Timorese judiciary, were dismissed by a parliamentary motion citing government's loss over legal tax dispute against foreign oil companies operating in the Timor Sea, as the main reason. The rationale behind this 'parliamentary motion', remains doubtful, given the fact that judges were dismissed by a simple parliamentary motion which was perhaps an indication of government attempts to directly influence judicial outcomes.

Given the post-conflict political context and community's legal traditions as discussed, it is not an easy task to strike the right balance between judicial independence and judicial accountability. If one takes judicial accountability as a judge's internal integrity and honesty, then accountability has to be addressed first. This can be done by empowering the existing Superior Council of the Judiciary (SCJ) to discipline members of the judiciary, including establishing review boards, strict penalties with easier methods of removal to encourage judges to do the right thing. Once a judge's internal integrity is well ingrained, it is expected that judicial independence will take place naturally, as it takes integrity to make courageous decisions, and not the otherwise.

Rushing to promote judicial independence over accountability, in a context where the judiciary itself and the people have no history of accountability; where the institutions of the State are unable to resist personal and party agendas for fear of reprisals; where an informal patron-client system has developed as a style of governance undermining the rule of law; the risk of the judiciary perpetuating impunity and becoming vulnerable to outside influence based on power and positions, is very real.

The correlation between peace and justice

As I mentioned in the beginning of this talk, one judiciary goal should be to help establish a 'governance of laws' so that not only everyone must be treated equally before the law, but the law itself must be equal for everyone. Such due process should form the cornerstone of any just and sustainable peace. This creates an ideal process to establish and consolidate judicial accountability in a natural development, so that justice for the victims and reconciliation in the post-conflict situation is ensured.

In this context, some communities consulted by CEPAD in our recent *'Frameworks for Assessing Resilience'* project, reported their frustrations about those in positions of power, often place themselves above the law. As stated by a participant "...*there is always this difference between the leaders and the people, even though the law says that all people are equal in the eyes of the law.*" This was seen as weakening the ability of the law to protect people.

The emphasis placed during community dialogues on the importance of consulting citizens in the development of laws and policies was highlighted by communities countrywide. There are significant obstacles to the effective communication of laws; as mentioned previously, this includes the fact that legal proceedings are carried out in the official language of Portuguese. There is significant misunderstanding or incomprehension of key laws due to the use of foreign concepts and principles in key legal documents, without sufficient effort to adapt to local culture and context.

It should now be obvious that insulating judges from external critics to ensure judicial independence, without addressing properly judicial accountability, we are in fact contributing to further weakening an already debilitated judiciary, with poor mechanisms in place to enforce accountability. There is a real concern that the current legal system is inadequate, and that the numerous problems facing the judicial system, will mean it will continue to perform poorly. This has impacted on the building of the community's trust in justice.

Judicial reform

It is important for Timor-Leste as a country emerging from conflict, to undertake serious reforms of its justice sector. We need to do this by taking into account a peacebuilding approach to promoting judicial independence and accountability. Peacebuilding instruments can create opportunities for reducing the risk of a post-conflict society, to relapse into conflict, by strengthening national capacities at all levels to effectively address key causes of conflict and violence. These tools include accountability for past abuses as well as serious crimes and crimes against humanity, fighting corruption and human rights monitoring.

According to the *"Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda"*, to achieve peace, it is imperative to tackle the problems that matter most to people, such as ensuring respect for human rights and dignity; prosecuting corruption; delivering basic social services; and access to justice without discrimination to name few.

Peace and justice are therefore complementary, and the issue is not to achieve one at the expense of the other, but to accomplish both in the process of peacebuilding and statebuilding. The stronger the correlation is between peace and justice, the more effective is the way to eradicate the causes of conflict, which delays positive peace.

As a final point, a judicial reform to be effectively comprehensive in the Timor-Leste's post-conflict context, the approach to judicial reform must be peace-sensitive, and must be followed by a thorough assessment of the legal substance, its structure and culture. In other words, when assessing the substance of the law it is important to know if the existing laws constituting the legal framework of Timor-Leste are sufficient to respond to the realities of justice; whether the existing laws and regulations have been fairly and effectively implemented; and whether there have been outside interferences with court decisions affecting negatively or positively judicial independence and accountability. Whereas, when assessing the legal structure it is important to note what the relevant legal institutions the country has and whether these institutions are properly staffed, trained and funded; this must also look at what initiatives have been taken in support of judicial independence and accountability.

Finally, when assessing the legal culture, it is important to understand the perceptions of the Timorese society regarding the justice system, and the level of public awareness about applicable laws, and the consistency of society in using existing laws to resolve problems; and whether community traditions are likely to affect positively or negatively, judicial independence and accountability.

The international community should support such comprehensive process of legal assessment and judicial reform, to ensure accountability, and the capacity of the judiciary to uphold the rule of law in the post-conflict situation of Timor-Leste.

References

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