



Human Rights Institute

Submission of the International Bar Association’s Human Rights Institute on the upcoming report on legal empowerment by the UN Special Rapporteur on the independence of judges and lawyers

About the International Bar Association’s Human Rights Institute (IBAHRI)

The International Bar Association (“IBA”), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of 80,000 individual lawyers and more than 190 Bar Associations and Law Societies, spanning all continents. The IBA’s Human Rights Institute (IBAHRI), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

Definitions, understandings, and varieties of legal empowerment approaches and practices

The various approaches to conceptualising legal empowerment has an implication on how the tool is used in practice. Similarly, the design and implementation of state policies that integrate legal empowerment tools depends on their individual understanding. Some of the ways that the concept has been used in African countries include improving legal literacy training by creating awareness-raising radio programmes that are targeted to lower income populations, supporting community-based paralegals who defend local community rights and strategic use of public interest litigation.¹ The broad conceptualisation in developing countries incorporates pillars that are livelihood-oriented, involving property rights (mainly involving land), labour rights and (mainly micro and small) business rights.²

Additionally, at the heart of it is the broadened view of access to justice that goes beyond the work of lawyers, judicial access and law enforcement, legal empowerment also pays attention to the work of paralegals and informal dispute resolution.³ The U.N Secretary-General’s report

¹ Lorenzo Cotula and Paul Mathieu (Mathieu, 2008), <https://www.iied.org/sites/default/files/pdfs/migrate/12552IIED.pdf> pg 2.

² (Golub, 2010) https://www.files.ethz.ch/isn/138100/Golub_Introduction.pdf pg 3.

³ (Golub, 2010) pg 4.

of 2009 on legal empowerment stated that legal empowerment fosters development through empowering and strengthening the voices of individuals and communities, starting at the grassroots and from within.⁴

- *What legal empowerment is not*

Before breaking down the various elements of legal empowerment, it may be of importance to explain what it is not. According to the International Development Law Organization (IDLO), law reforms and development-oriented activities that only have an indirect benefit on the disadvantaged do not qualify as legal empowerment initiatives. judicial administration reforms that only indirectly aid the disadvantaged.⁵

Given the above, it is further important to avoid the trap of infantilizing the disadvantaged which tends to happen in general empowerment discourse. Historically, there was a top – down approach that viewed the beneficiaries of developmental aid as populations to be helped rather than people who are capable of helping themselves with the right kind of support. In this vein, other crucial elements of legal empowerment are suggested by Stephen Golub in *Beyond Rule of Law Orthodoxy The Legal Empowerment Alternative*:

1. attorneys support the poor as partners, instead of dominating them as proprietors of expertise;
2. the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda;
3. addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; and
4. even more broadly, the use of law is often just part of integrated strategies that include other development activities.⁶

These elements of legal empowerment make it a preferred alternative to the dominant paradigm of socioeconomic development. Much of the early conceptual framing of legal empowerment points to the limits of focusing on formal laws and policies, noting that informal practices are key in shaping individuals' rights realisation.⁷ More modern conceptualisations of legal empowerment have described it as: “bottom-up efforts to help marginalized people to learn about law and policy, and to use this knowledge to obtain concrete improvements in a relatively short period”.

The progression of understanding what comprises legal empowerment is evident in the various definitions offered. The narrowest understanding of legal empowerment is redress for rights violations related to national laws and policies, attempts to ensure existing laws are implemented and engaging with the judicial system. In contrast the broadest understanding of legal empowerment includes violations of rights that are enshrined in international human

⁴ (Assembly, 2009) <https://www.un.org/esa/socdev/documents/reports/Legal%20empowerment%20of%20the%20poor.pdf> paragraph 4.

⁵For example: law reforms pertaining to contracts, property, foreign investment, bankruptcy and a host of other financial matters may trickle down to benefit disadvantaged populations, but do not specifically focus on them; Projects that offer incentives to landlords to abide by land titling laws, which could indirectly benefit impoverished farmers, target the landlords rather than the farmers; efforts to promote more honest, transparent and accountable performance by government personnel do not specifically strengthen the disadvantaged; and governments or NGOs that only pay lip service to legal empowerment while ignoring or abusing the rights of women, farmers, low-income workers, indigent criminal defendants, minorities or other disadvantaged populations. See (Golub, 2010) https://www.files.ethz.ch/isn/138100/Golub_Introduction.pdf pg 7.

⁶ (Golub, BEYOND RULE OF LAW ORTHODOXY *The Legal Empowerment Alternative*, 2003). <https://www.plecana.org/wp-content/uploads/2019/04/Golub-Beyond-Rule-of-Law-Orthodoxy.pdf> pg 4.

⁷ (Anuradha Joshi, 2022) <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-022-01731-3>.

rights law, attempts to transform the law and engaging with bureaucratic processes that translate laws into people's experience of their rights.⁸

IBAHRI proposes adopting the most progressive approach to legal empowerment that emphasises a bottom-up model and maximises the benefits for the local community.

Examples of legal empowerment modalities and innovations at the community, local, national, and international level

- Fostering Indigenous Legal Institutions and Indigenous Legal Fora

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) asserts that indigenous peoples have the right to 'maintain and strengthen' their distinct legal institutions, which operate to provide dispute resolution and criminal justice at a community level.⁹ The UNDRIP does not specify the form that these institutions should take, because of the great diversity of indigenous cultures across the globe. This provides greater access to justice as indigenous peoples are more likely to approach traditional courts and to honour their rulings. The United Nations Expert Mechanism on the Rights of Indigenous Peoples has found that indigenous peoples often view tribal justice systems as more legitimate and less alienating than official civil courts.¹⁰

The Expert Mechanism found that tribal courts systems often offered greater access to justice for indigenous peoples. Beyond the cultural relevance of these courts, they were also often conducted in indigenous languages and geographically positioned in the remoter regions of states with higher concentrations of indigenous people living.¹¹ In this way, tribal courts systems offered both practical and cultural advantages in terms of access to justice.

In 2007, the UNDRIP affirmed the right of indigenous people to access conflict and dispute resolution procedures that are just and fair (art 40).¹² Any traditional court system established within the State in accordance with article 40 must also give due consideration to the relevant traditional law and customs of the indigenous peoples seeking recourse.¹³

- Australia - Koori Courts

In recognition of inequity of settler law and courts when dealing with First Nations peoples, laid bare in the damning findings of several inquiries (see *Royal Commission into Aboriginal Deaths in Custody*¹⁴ and the *National Inquiry into Racist Violence*¹⁵), various state and territory governments have created 'Koori Courts'. Koori Courts are specialist courts that aim to

⁸ (Anuradha Joshi, 2022) <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-022-01731-3>.

⁹ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, art 5.

¹⁰ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> , [49].

¹¹ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> , [49].

¹² UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, art 40.

¹³ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples (adopted on 2 October 2007) A/RES/61/295, art 40.

¹⁴ Royal Commission into Aboriginal Deaths in Custody, Volume 5 [1991] AURoyalC 5 (15 April 1991) available at < [Royal Commission into Aboriginal deaths in custody - Volume 5 \[1991\] AURoyalC 5 \(15 April 1991\) \(austlii.edu.au\)](#)>.

¹⁵ Human Rights and Equal Opportunity Commission, *National Inquiry into Racist Violence: Report of National Inquiry into Racist Violence* (Sydney, 1991).

improve the experience of indigenous people when interacting with the settler legal system.¹⁶ The Koori Courts involve Indigenous elders and lawyers who can advise in matters such as sentencing offenders, aiming to ensure that sentences are more culturally appropriate.¹⁷ Cunneen and Porter, in the *Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, describe the Koori Court system as ‘improving a sense of inclusiveness; transparency and accountability in sentencing outcomes for Indigenous offenders; and providing the opportunity for community input over the sentencing process’.¹⁸ The exact configuration of Koori Courts can vary between states, but generally includes a common law magistrate advised by two or more local elders or respected persons. By way of example, the Shepparton Koori Court, empanelled in regional northern Victoria, has finalised matters for over 3000 people over 20 years.¹⁹

- *Canada - Cree Courts*

The Saskatchewan Provincial Court in Canada has created the ‘Cree Court’, mandated to hear criminal and child protection matters involving litigants from the indigenous Cree population.²⁰ The first court of its kind in Canada, judicial proceedings are conducted either entirely or mostly in the traditional Cree language.²¹ Like Australian First Nations peoples, indigenous Canadians have been historically brutalised and excluded by the settler Canadian legal system. In a further similarity, indigenous people make up 75% of Saskatchewan’s adult prison population.²²

Unlike in Australian Koori Courts, prosecutors and judges in Cree Court also generally speak in the Cree language.²³ However, beyond the linguistic elements, Cree Courts also incorporate traditional legal principles into their judgments and sentences, attempting to include indigenous people in the judicial process and thereby improving trust in the legal system.²⁴ It is also crucial that Cree people work as judges and prosecutors within the system, leading to a greater transparency and legitimacy in the eyes of the community they are to serve.

- *South Africa*

In South Africa, they used public interest litigation built on a base of community and political activism. This has yielded a string of landmark court victories that are referenced around the globe. An example of community-based paralegals is Thusang Morwalo paralegal office in West Rand of Johannesburg where the local priest is one of the board members of the office.

¹⁶ C Cunneen, and A Porter, ‘Indigenous Peoples and Criminal Justice in Australia’, in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, (2017: Palgrave Macmillan, Basingstoke) 667-682, 670 (available at [Microsoft Word - Chapter 45 revised AP_CC.docx \(uts.edu.au\)](#)). 668.

¹⁷ C Cunneen, and A Porter, ‘Indigenous Peoples and Criminal Justice in Australia’, in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, (2017: Palgrave Macmillan, Basingstoke) 667-682, 670 (available at [Microsoft Word - Chapter 45 revised AP_CC.docx \(uts.edu.au\)](#)). 668.

¹⁸ C Cunneen, and A Porter, ‘Indigenous Peoples and Criminal Justice in Australia’, in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, (2017: Palgrave Macmillan, Basingstoke) 667-682, 670 (available at [Microsoft Word - Chapter 45 revised AP_CC.docx \(uts.edu.au\)](#)). 671.

¹⁹ Courtney Howe, ‘Victoria’s first Koori Court marks 20 years of improving experience of First Nations people in justice system’ *ABC News* (8 October 2022) [Victoria's first Koori Court marks 20 years of improving experience of First Nations people in justice system - ABC News](#).

²⁰ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [31].

²¹ Courts of Saskatchewan, ‘Cree Court: Provincial Court’ (access 28 April 2023) available at [CREE COURT | Saskatchewan Courts \(sasklawcourts.ca\)](#)>.

²² Bonnie Allen, ‘Saskatchewan’s first cree-speaking judge reflects on legacy of Cree court as he retires’ *CBC News* (24 February 2019) < [Saskatchewan's first Cree-speaking judge reflects on legacy of Cree court as he retires | CBC News](#)>.

²³ Courts of Saskatchewan, ‘Cree Court: Provincial Court’ (access 28 April 2023) available at [CREE COURT | Saskatchewan Courts \(sasklawcourts.ca\)](#)>.

²⁴ Courts of Saskatchewan, ‘Cree Court: Provincial Court’ (access 28 April 2023) available at [CREE COURT | Saskatchewan Courts \(sasklawcourts.ca\)](#)>.

They describe themselves as a an independent, community owned, non-profit organization. They received their first case in 2011 and after the first successful case, people heard of the centre and started approaching them for help. Now the types of cases that they deal with address the basic socio – economic needs of communities which have a direct bearing on them accessing their human rights and making it possible to lead a humane and dignified life.²⁵

- *Mozambique*

Trained paralegals and Village Health Committees took a variety of steps to resolve cases regarding availability of key inputs, such as essential medicines. They educated health workers and administrators about how to solve a certain problem and assisted them to do it; facilitated a dialogue between the client and the allegedly offending provider; and helped the client and/or the health facility to use formal administrative processes to solve the problem.²⁶

The empirical research reports on these two cases indicate that it is important to place legal empowerment in the broader context of the problem one is trying to solve – in other words the ultimate objectives.²⁷ There is a call for more scoping to identify the particular challenges faced by each individual community. Therefore, implementing legal empowerment programmes in that specific political and economic context.

Promising approaches to partnership between lawyers and paralegals and other grassroots justice advocates

There is a burgeoning complementary relationship between paralegals and traditional legal administrators in many parts of the Global South, whereby specially trained paralegals assist community courts with logistics and rights-protection. The IDLO conducted research into the crucial role paralegals could potentially play in delivering better access to justice at community-level across Kenya and Africa more broadly.²⁸ The IDLO estimated that up to 90% of legal disputes in the Global South are settled informally or through customary law avenues.²⁹

The IDLO acknowledged that, whilst it was important to preserve the abilities of these customary courts and bodies to offer alternative dispute resolution mechanisms to the community, access to justice would suffer if the legal training of those adjudicating was not sufficient to deal with the complexity of disputes.³⁰ As a compromise, trained paralegals participate at this community level to provide technical and clerical support to these traditional bodies.³¹

For example, by providing logistical and technical support to allow for remote giving of evidence, and by providing more meticulous record-keeping, paralegals ensure that the justice administered by these bodies is more transparent, consistent and accessible.³² Specifically, such measures could ensure that those living remotely, or with a physical or mental disability, are

²⁵ <https://thusangmorwalo.org/about-us/> .

²⁶ (Anuradha Joshi, 2022) <https://equityhealth.biomedcentral.com/articles/10.1186/s12939-022-01731-3/tables/2>.

²⁷ (Anuradha Joshi, 2022).

²⁸ International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf \(idlo.int\)](#).

²⁹ International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf \(idlo.int\)](#), 8.

³⁰ International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf \(idlo.int\)](#), 23.

³¹ International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf \(idlo.int\)](#), 25.

³² International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf \(idlo.int\)](#), 29.

properly included in the proceedings in instances where they may previously have been excluded.³³

There is also a cost and resources benefit to allowing paralegals to aid in access to justice modalities. This has been recognised officially by the Philippines Government, where the Department of Agrarian Reform allows paralegals to represent clients in certain land disputes and provides specialised training in the field to improve access to justice.³⁴

It must be stressed that paralegals' participation in customary legal processes must be complementary in substance, and not subvert or threaten the legitimacy of traditional laws and customs. The IDLO cites examples of tensions arising amongst traditional law adjudicators in Uganda, some of whom viewed the paralegals assisting in legal proceedings as undermining or usurping their traditional function.³⁵ Through proper training on cultural practice and sensitivity, paralegals can ensure customary rules are preserved whilst simultaneously protecting the rights of any marginalised groups within the traditional community who may not be expressly provided for by customary law (i.e: women, children, people with disabilities).³⁶

The strategic entry points for legal empowerment initiatives between paralegals and lawyers can include the following strategies: referral systems, legal aid clinics, awareness-raising, dispute resolution, and structural policy and legal reform.

- *Referral systems*

Lawyers have established referral systems with paralegals and other grassroots justice advocates, enabling them to refer clients to each other based on their respective areas of expertise. An example of this is the Access to Justice Program in Nigeria. This is a non-profit organization that seeks to promote access to justice for marginalized and vulnerable communities in Nigeria. The program uses a referral system to connect clients with appropriate legal services. This referral system involves a network of lawyers and paralegals who work together to provide legal assistance and support to clients.

- *Community based legal aid clinics*

A further strategic partnership is the formation of community-based legal aid clinics. Lawyers can partner with paralegals to establish these clinics. This approach can provide a platform for legal professionals and grassroots advocates to work together to provide legal services to marginalized and vulnerable communities. A good example is the National Agency for Legal Aid (NALA) which delivers legal aid to the people of The Gambia. Since its establishment, NALA has made tremendous efforts in providing free legal aid services, especially in the Greater Banjul area. It comprises of lawyers and paralegals. NALA, with the support of UNDP, launched the Mobile Legal Aid Clinics Project to decentralize legal aid services and ensure access to justice for even the poorest citizens in the most far-flung areas of the country.³⁷

All in all, to identify the most compelling entry point requires critical knowledge of a given community, with the right kind of approach and strategy, it is possible to harness a community's knowledge to empower them to ultimately access justice.

³³ International Development Law Association, 'Navigating complex pathways to justice: Paralegals and customary and informal justice systems' (2021) available at [paralegals_and_cij_final.pdf\(idlo.int\)](#), 8.

³⁴ International Development Law Association, 'Navigating complex pathways to justice: Paralegals and customary and informal justice systems' (2021) available at [paralegals_and_cij_final.pdf\(idlo.int\)](#), 27.

³⁵ International Development Law Association, 'Navigating complex pathways to justice: Paralegals and customary and informal justice systems' (2021) available at [paralegals_and_cij_final.pdf\(idlo.int\)](#), 23.

³⁶ International Development Law Association, 'Navigating complex pathways to justice: Paralegals and customary and informal justice systems' (2021) available at [paralegals_and_cij_final.pdf\(idlo.int\)](#), 14.

³⁷ (Mauro, 2014) <https://www.unv.org/Success-stories/mobile-legal-aid-clinics-vehicles-empowerment-and-justice-gambia>.

Shortcomings of existing judicial and other legal systems

- *Indigenous Peoples and Access to Justice*

Indigenous peoples in colonial-settler nation states continue to enjoy poorer access to justice³⁸ as compared to the broader, non-indigenous population.³⁹

Due to generations of colonial oppression and displacement at the hands of the state, indigenous people have lower levels of trust in the ability or willingness for state courts to provide justice. As a result, indigenous victims are less likely to report the crimes that are committed against them to state authorities.⁴⁰ The Expert Mechanism also cited a lack of appropriate policing and resources allocated to the regions populated by indigenous persons.⁴¹

Furthermore, a lack of qualified interpreters in the court systems often mean indigenous plaintiffs and defendants have their procedural rights violated as they are unable to comprehend the language of the proceedings.⁴² For example, a study found that the *majority* of indigenous detainees in Guatemalan prisons had not been afforded legal assistance or information about their detention in their own language.⁴³

Specifically, indigenous people in Australia continue to face significant and disproportionate impediments to accessing justice as compared to the non-indigenous population, despite some positive steps towards reconciliation.⁴⁴ The rigidly monolegal Australian settler legal system is often alienating to Indigenous people seeking access to justice.

Challenges experienced by those seeking to advance and/or implement legal empowerment approaches

- *Ensuring that Access to Customary Justice is Gender Equitable*

It is important to note that improving access to justice through the legal empowerment of traditional or customary law is not without its challenges. Primarily, there is a concern that traditional legal principles, some of which favour communitarian rather than individual

³⁸ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [25].

³⁹ The United Nations Expert Mechanism identified the following non-exhaustive list of factors that contribute to this phenomenon worldwide: Structural discrimination; Poverty; Lack of access to health and education (including knowledge of official languages); and Lack of recognition or lands, territories and resources. See: Expert Mechanism on the Rights of Indigenous People, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities' (7 August 2014) A/HRC/27/65 [A-HRC-27-65_en.doc \(live.com\)](#) [5].

⁴⁰ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [42].

⁴¹ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [42].

⁴² Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [29].

⁴³ Expert Mechanism on the Rights of Indigenous Peoples, 'Access to justice in the promotion and protection of the rights of indigenous peoples' (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)> [29]; Further see: Procurador de los Derechos Humanos, "Los derechos humanos de personas indígenas privadas de libertad en el marco de pluralismo jurídico" (2012)

⁴⁴ C Cunneen, and A Porter, 'Indigenous Peoples and Criminal Justice in Australia', in Deckert, A. and Sarre, R. (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice*, (2017: Palgrave Macmillan, Basingstoke) 667-682, 670 (available at [Microsoft Word - Chapter 45 revised AP_CC.docx \(uts.edu.au\)](#)).

remedies, may not adequately protect the rights of marginalised groups within the community. Importantly, article 34 of the UNDRIP emphasises that indigenous juridical systems must conform to international human rights standards.⁴⁵

To this end, a 2013 study by the Expert Mechanism on the Rights of Indigenous Peoples cited the particular difficulty facing indigenous women seeking justice.⁴⁶ Many traditional legal systems, are strictly male-dominated and may not adequately address the concerns of women looking to access justice.⁴⁷ Further, some traditional legal systems are strongly influenced by utilitarian ideologies that may preference community well-being over the individual rights of girls and women.⁴⁸ However, it should be noted that some traditional legal systems *do* allow women to fulfil important cultural rules – see for example the Naga women of North-East India.⁴⁹

Promoting women’s access to justice is essential for attaining gender equity and is a fundamental aspect of the rule of law.⁵⁰ However, this goal must be equally applied at sub-national traditional legal systems as it is through national and international systems to ensure that indigenous women are not excluded from benefiting from higher levels of equality.

Moreover, traditional legal systems can be afflicted by issues of consistency, given the complexity of some tribal laws and the fact that legal knowledge is often passed from generation to generation in spoken form.⁵¹ Complex traditional norms may vary greatly between communities or even within communities, making fair and consistent adjudication difficult.⁵²

- *Safeguarding Women’s Access to Justice in Alternative Justice Systems*

The Kenyan judiciary published the ‘Alternative Justice System Framework Policy’ in 2020, in order to bring alternative justice systems within the country into conformity with the 2010 Kenya Constitution.⁵³

Whilst affirming the utility of alternative justice systems (AJS) in improving access to justice, the Framework Policy acknowledged that AJS panels and tribunals were traditionally male

⁴⁵ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, art 34.

⁴⁶ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.

⁴⁷ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.
[64].

⁴⁸ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.
[51].

⁴⁹ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.
[49].

⁵⁰ UN Committee on the Elimination of Discrimination against Women, General recommendation No. 33 on women’s access to justice, (CEDAW/C/GC/33), 2015, [1], [5].

⁵¹ Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.
[51].

⁵² Expert Mechanism on the Rights of Indigenous Peoples, ‘Access to justice in the promotion and protection of the rights of indigenous peoples’ (30 July 2013) A/HRC/24/50 < [Microsoft Word - A HRC 24 50 FOR PROCESSING.DOC \(ohchr.org\)](#)>.
[51].

⁵³ The Judiciary of Kenya, ‘Alternative Justice Systems Framework Policy’ (August 2020) available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf. Article 48 of the Kenyan Constitution stipulates that the State shall ensure access to justice for all persons while article 159(2)(c) specifically requires the Kenyan judiciary to promote alternative dispute resolution mechanisms. The Constitution also specifically provides for the equal rights of women to participate in all spheres of civic life – including the cultural sphere.

dominated.⁵⁴Therefore, in order to improve access to justice for women seeking remedy in AJS, the judiciary has undertaken to introduce application guidelines providing for the training of more women as AJS practitioners.⁵⁵

There are also niche areas of law in which people may feel more comfortable approaching a paralegal with an issue, rather than someone intimately embedded in their own community. Specifically with respect to gendered crimes, women victims may face difficulty in seeking justice from tribal leaders who are acquainted with the alleged perpetrators.

‘...we have trust from the community because we maintain our integrity and legitimacy... Women victims often go to the traditional elders first, then they realize these have been corrupted by the perpetrator and they then take the case to us.’⁵⁶

This quote reinforces the issue that some traditional legal systems may encounter with impartiality and independence, given the close-knit nature of some indigenous communities.

For further information on this submission:

Francesca Restifo

Senior Human Rights Lawyer, UN representative, International Bar Association’s Human Rights Institute (IBAHRI)

Francesca.Restifo@int-bar.org

⁵⁴ The Judiciary of Kenya, ‘Alternative Justice Systems Framework Policy’ (August 2020) [2.2.4].

⁵⁵ The Judiciary of Kenya, ‘Alternative Justice Systems Framework Policy’ (August 2020) [5.2].

⁵⁶ International Development Law Association, ‘Navigating complex pathways to justice: Paralegals and customary and informal justice systems’ (2021) available at [paralegals_and_cij_final.pdf\(idlo.int\)](#), 23.