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| THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERSOHCHR-UNOG 8-14 AVENUE DE LA PAIX,1211 GENEVE 10, SWITZERLAND |  | PaUL DALTONCHIEF AdViser Access to JUSTICEINternational AreaDanish institute forhuman rightsphone + 45 5369 2018Mobil PDA@humanrights.dkhumanrights.dkDoc. no. 5 may 2023 |

Submission to the report on legal empowerment by THE Special Rapporteur on the independence of judges and lawyers

The International Programmes Area of the Danish Institute for Human Rights (DIHR), Denmark’s national human rights institution[[1]](#footnote-1), welcomes the opportunity to present this submission in connection the Special Rapporteur’s forthcoming thematic report on legal empowerment.

DIHR has a unique legislative mandate for an NHRI, in that we are mandated to work both in Denmark and to engage in international human rights cooperation activities.

An earlier submission submitted by DIHRs national area addressed aspects of the Danish national context.

This submission describes DIHRs conceptual approach to legal empowerment work and presents examples of good practice in legal empowerment drawn from DIHRs programme cooperation experiences with national partners (State and non-state) in Kenya and Zambia.

**A human-rights based approach to legal empowerment and access to justice**

DIHR’s approach to access to justice is **human rights-based, contextual, and holistic**.

We strongly encourage the Special Rapporteur to situate ‘legal empowerment’ specifically in terms of a human rights-based approach, using the language and framework of international human rights law.

The added value of taking a human rights-based approach (HRBA), is that it emphasises the right to a just remedy within a reasonable time for violations of rights laid down in national and international standards and norms, rather than mere access to mechanisms capable of adjudicating complaints and disputes[[2]](#footnote-2). In other words, it situates government legal aid and justice policy and financing discussions within a framework of IHRL and State party responsibility to ensure the availability of adequate, appropriate, and accessible justice services of good quality for all people living within its area of jurisdiction. Further, it underscores that access to justice is essential for the protection and promotion of all other civil, cultural, political, economic, and social rights and for achieving the SDGs.[[3]](#footnote-3)

The principles of participation, inclusion, non-discrimination, and accountability are inherent to a HRBA. Empowering rights-holders to claim their rights as active agents, including through securing their participation in decision-making over matters that impact their ability to access appropriate remedies, is a primary focus of a HRBA. Active participation and inclusion of women, youth, and members of marginalised or vulnerable groups, including as justice service providers and adjudicators, is also an important focus of a HRBA. Justice and rule of law indicators should go beyond an assessment of legal and institutional frameworks and measure the extent to which justice services are delivering effective justice outcomes for users on the ground.

**DIHR’s approach to legal empowerment and access to justice**

To fully meet their human rights obligations, States should provide, or support the provision of, justice forums in sufficient quantity that are available, accessible, acceptable, and of good quality. The delivery of justice services, whether by State or non-state actors, should be responsive to changing social needs and have necessary checks and balances in place to ensure human rights protection. This serves the joint purpose of allowing people to pursue legal entitlements and interests with confidence, combating and alleviating violations of human rights, while strengthening the legitimacy and accountability of public institutions, and thereby also increasing cohesion and resilience.

DIHR’s approach to access to justice is consistent with the definition of ‘legal empowerment’ proposed by the Commission on Legal Empowerment and endorsed by UNDP:[[4]](#footnote-4)

First, in taking a HRBA to access to justice we seek to empower people (particularly those from marginalised communities) to be subjects rather than objects of the law.

Second, we take a country and context-based approach by working at both national and local level, recognising the limited reach of the formal justice system in many countries, as well as the costs associated with accessing courts. Depending on the context, approaches can be both ‘top-down’ e.g., working with formal justice actors to strengthen legislative or policy frameworks, institutional processes, and formal justice services, or ‘bottom-up’ e.g., engaging with non-state justice providers or community-based organisations who provide legal services to the poor or marginalised.

Third, DIHR promotes a holistic approach to delivery of legal services. For clients from indigent or marginalised communities, access to legal services should go hand in hand with access to other advisory services or forms of social support. Some problems can be addressed satisfactorily through administrative or legal pathways; others (e.g., obtaining access to public goods or services that can also be characterised as rights) may require other kinds of assistance.

DIHR applies methodologies that focus on strengthening community justice, legal aid and legal services, and capacity-building of justice actors to implement legislation and policy aimed at ensuring access to justice for all. Examples of two of these methodologies – ‘*community justice’* & ‘*lawyer-paralegal partnerships’* - are described in the following paragraphs.

**Community Justice**

DIHR’s community justice model seeks to increase access to justice for all by improving the effectiveness of justice services provided by local justice actors, within an overarching framework of respect for human rights principles and constitutional guarantees. The model has a special focus on addressing justice needs of women and children, as well as members of marginalised or vulnerable groups. A particular emphasis is placed on increasing the representation of women as adjudicators and as paralegals / community justice volunteers, and on ensuring that cases decided by alternative justice mechanisms are adjudicated in compliance with the principles of due process, non-discrimination, and equal opportunity of participation.

**The Community Justice model in practice: innovative policy and practice from Kenya**

DIHR’s **Kenya** community justice programme[[5]](#footnote-5), which is being implemented in Baringo and Meru counties, is supporting the implementation of the Supreme Court’s ground-breaking 2020 Alternative Justice Systems’ (AJS) Policy Framework and Plan of Action.[[6]](#footnote-6) This AJS Policy seeks to give fuller effect to s.159(2)(c) of the 2010 Constitution of Kenya, which requires courts to be guided by the need to promote alternative dispute resolution, including traditional dispute resolution mechanisms (TDRMs). The AJS Policy Framework maps out an agenda for direct engagement with TDRMs, with the aim being to ‘deliver on the transformative vision of the Constitution: reversal of structures that lead to gender oppression; social injustice and stigma; cultural domination; distributive and social injustice and other forms of oppression.’ [[7]](#footnote-7)

Constitutional and judicial support for alternative dispute resolution, including TDRMs, is also a recognition of the shortcomings of the formal Kenyan legal system as a vehicle for dispute resolution. Whereas the formal system is often perceived as expensive, time-consuming, and complicated, AJS is typically more participatory in nature, focuses principally on substantive and restorative justice, and has the potential to enhance public participation in the justice system, through the involvement of local community members as paralegals and on adjudication panels.

At the same time, there are inherent weaknesses in the operation of many TDRMs in Kenya at the present time, both from a human rights perspective and from the perspective of the Constitution itself, s.159(3) of which provides that TDRMs shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

There are *three principal weaknesses* of existing TDRMs, which are being addressed through DIHR’s community justice programme in Baringo and Meru, as well as by similar programmes in other parts of the country:

Firstly, the *low percentage of women as AJS decision-makers*, despite women being the main users of such mechanisms. If women are not represented on adjudication panels, then the specific legal problems faced by women and girls, and the familial and social contexts in which these problems emerge, are unlikely to be given sufficient consideration by the TDRM in reaching its decision. Women and girls are also more likely to be given the opportunity to participate and speak openly, as applicants or witnesses, if there is a reasonable gender balance on the adjudication panel. It is only through an ongoing process of constructive dialogue with local community members, including with chiefs and members of tribal councils, that a better gender balance can be achieved. Support for the equitable representation of women in all aspects of community justice service delivery – from grassroots volunteers to members of AJS panels – comes not only from equality advocates but from Kenyan chiefs themselves. The National Council of Elders has been a strong advocate for redressing existing gender imbalances and has supported AJS reform initiatives by participating in discussions with tribal elders in different parts of the country, making the case for organic development of informal justice mechanisms that take a HRBA and conform with Constitutional guarantees of equality and non-discrimination.

Secondly, decision-makers within TDRMs have *limited knowledge of* human rights principles, constitutional standards, other laws, or the broader justice landscape. In some communities, punishments have been awarded by TDRMs in clear violation of human rights standards, for example various forms of corporal punishment, public beatings, or banishment. There are also instances where allegations of serious crimes have been dealt with by AJS rather than being referred to the criminal justice authorities.

Members of TDRMs are provided with training on human rights principles and procedural justice standards, as well as on the Kenyan Constitution and other laws. Guidance is also provided on those categories of cases that are not suitable for resolution by TDRMs, and which must always be referred to the formal justice system.

Thirdly, informal justice mechanisms *can lack transparency and accountability*. Most decisions are oral, and record-keeping is at best inconsistent; payment in cash or in kind is often expected for a case to be heard, and there are traditionally no codes of conduct for decision-makers to adhere to. Leaving aside the various procedural or substantive justice concerns, these weaknesses make it difficult for AJS to retain or share knowledge, including examples of good adjudication practice, with other AJS mechanisms or with the formal justice system. The AJS Policy Framework and Plan of Action places emphasis on the importance of engagement between local courts and TDRMs, including in documentation of decisions and maintenance of records. Decision records can be stored at local courts, and TDRMs can also make use of court facilities to carry out their work if they wish to do so. There is also a focus in the Policy on gathering and disseminating emerging TDRM jurisprudence and examples of good practice.

In DIHRs programme, support to TDRMs in Baringo and Meru counties is combined with activities to support the introduction of paralegalism at community level, and engagement and coordination with provincial and county-level Court User Committees, with a view to improving justice outcomes for members of local communities in line with human rights principles and standards. Community justice volunteers (paralegals) are selected from local communities, in dialogue with local community members including local Chiefs and village elders. The volunteers are trained to provide basic advice on legal rights and to assist with navigating available pathways to access justice and other support services, e.g., the police, medical or counselling services, the local Children’s Office. They also play an important role in promoting awareness of legal rights by regularly participating in public meetings, in Kiswahili ‘barazas’. Further, DIHR’s implementing partner in Baringo, CIPAF, is a member of the Baringo County ‘Court Users Committee’ (CUC). The CUC is a forum for horizontal-level justice sector cooperation, coordination, and problem-shooting. At CIPAFs suggestion, a twice-weekly mobile court facility was recently launched in Baringo South, to address the large backlog of cases involving SGBV and land and property disputes and ensure more effective access to justice for marginalised rights-holders, particularly women and children.

**Lawyer – paralegal partnerships: a success story from Zambia**

In **Zambia**, DIHR, the Ministry of Justice, and other local partners have supported the establishment of ‘Legal Service Units’ (LSUs), with a view to improving and expanding legal aid services delivery at local level. The first LSU commenced operations in January 2013. To date, seven LSUs are operational, managed by the state Legal Aid Board, in cooperation with civil society organisations and the national paralegals association. The LSU model is now officially endorsed in the Zambia National Legal Aid Policy (adopted in 2018) as a preferred model for legal aid service delivery at subordinate court level.

The LSUs operate from within the local court premises and are staffed with a combination of State-appointed legal aid lawyers and civil society-managed paralegals, all of them operating under the professional supervision of a senior State-appointed legal aid lawyer. LSUs have daily outreach to prisoners and detainees in remand scheduled to appear in court, other criminal defendants at court level, and litigants in civil cases. They offer a variety of legal services, ranging from legal education and information to mediation, legal advice, assistance, and representation in court. LSU clients are assisted at various stages of the judicial process, from first appearance in court onwards.

The adoption of the LSU model is an explicit recognition by the State of the role and added value of paralegals in delivering legal services. It is also a recognition that legal aid is more than just representation by a practicing lawyer but also encompasses a variety of different types of legal services, from provision of legal information, public legal education, and advice, to facilitated (informal) mediation, legal assistance in formal proceedings, and representation in court.

The LSU is a mixed delivery legal aid model, where different types of services are provided by different legal aid service providers, thereby increasing the overall reach and effectiveness of access to justice services. It can be a sustainable platform for cooperation and a coordination mechanism between the State legal aid institutions (who manage and deploy legal aid lawyers) and civil society justice service provision organisations (who offer legal services delivered by trained and accredited paralegals).

The Zambian LSU model could provide inspiration for legal empowerment advocates and legal aid policy makers in other jurisdictions where the justice system also faces serious congestion, where there are not enough practicing lawyers to meet the need for legal services, or where the state legal aid system has very limited financial and human resources. It is also important to ensure that legal service delivery innovations – LSU’s or others - are linked to broader national processes, so that lessons learned can inform the development of legal aid policy and legislation.

In Zambia, the LSU model filled a recognised gap in justice services. The success of the LSU in harnessing the respective skills and availability of lawyers and paralegals, for the benefit of local communities, has shown that it is possible for lawyers and paralegals to cooperate successfully.

Paralegals are not a threat to the legal profession or to the standard of legal aid service delivery. They are providing much needed services that would otherwise not be available, and they do so in a professional environment where they obtain training, certification, and can seek advice from or refer matters to a legal aid lawyer as appropriate. Most importantly, the LSU model has the support of all national justice stakeholders, including the Law Association of Zambia, and is a vehicle for delivering the promise of access to justice for all.

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1. [www.humanrights.dk](http://www.humanrights.dk) [↑](#footnote-ref-1)
2. E.g. in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [↑](#footnote-ref-2)
3. UN SDG 16 calls on states to ‘Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions, at all levels’ [↑](#footnote-ref-3)
4. The Commission on Law Empowerment of the Poor and United Nations Development Programme defines ‘legal empowerment’ as "a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens". The foundation is the rule of law and access to justice, understood broadly as a basic public service and better justice outcomes. See: [Justice and Development: Challenges to the Legal Empowerment of the Poor | United Nations](https://www.un.org/en/chronicle/article/justice-and-development-challenges-legal-empowerment-poor) [↑](#footnote-ref-4)
5. The programme is implemented together with two community-based organisations: Citizen Participation Forum (CIPAF) in Baringo County and Ripples International in Meru County. [↑](#footnote-ref-5)
6. Alternative Justice Systems Framework Policy, August 2020, to be read in conjunction with the Alternative Justice Systems Baseline Policy. Available at: <https://www.unodc.org/documents/easternafrica/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf> [↑](#footnote-ref-6)
7. Ibid, p. ix (Foreword by the Chief Justice of the Republic of Kenya and the President of the Supreme Court, Hon. Justice David K. Maraga, EGH). [↑](#footnote-ref-7)