

# Traditional and Customary Justice Systems

Selected International Sources



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Cover Photo: Traditional leaders preside over a case in B-Court, Nyang Payam, Torit County, South Sudan.  
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For more information, see <https://www.icj.org/gf2017/> or contact Matt Pollard, Senior Legal Adviser, [matt.pollard@icj.org](mailto:matt.pollard@icj.org)

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For details of ratifications for most UN treaties, see <https://treaties.un.org/Pages/ParticipationStatus.aspx>.

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# General Treaties and Standards



# Universal Declaration of Human Rights (1948)

- ...
2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...
- ...
5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
- ...
7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
9. No one shall be subjected to arbitrary arrest, detention or exile.
10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.
- ...
21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country. ...
- ...
27. (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.



# International Covenant on Civil and Political Rights (1966)

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.  
...  
(3) Each State Party to the present Covenant undertakes:
  - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
  - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
  - (c) To ensure that the competent authorities shall enforce such remedies when granted.
3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.  
...  
7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.  
...  
9. ... (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. ...  
  
(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.  
...  
14. (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

- (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
  - (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    - (c) To be tried without undue delay;
    - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    - (g) Not to be compelled to testify against himself or to confess guilt.
  - (4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  - (5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
- ...
24. (1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. ...
25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- ...
- (c) To have access, on general terms of equality, to public service in his country.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.





## Human Rights Committee

*General Comment no. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial (2007)*

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

*Concluding Observations on Swaziland (2017)*

10. While noting the delegation's explanation that both customary and common law are subject to the authority of the Constitution and that the courts apply the set of laws that "best gives effect to the rights set forth in the Constitution", the Committee remains concerned that the presence of several conflicting sets of laws impedes the efficient implementation of the provisions of the Constitution. It is also concerned about reports that courts do not subject customary law to the Constitution in practice.

11. ... The State party should take measures, by establishing a law reform commission or otherwise, to systematically harmonize customary law and common law with the Constitution and ensure that they are in line with the provisions of the Covenant. The State party should also ensure that judges, prosecutors and lawyers across the country, including in traditional courts, are trained with regard to the primacy of the Constitution.

...

25. The State party should, as a matter of urgency:

(a) Review its Constitution and domestic laws, including customary laws, on the status of women and repeal or amend all provisions that are inconsistent with the Covenant...;

(b) Step up its efforts to combat discriminatory customary practices, including by ... increasing awareness-raising measures in rural areas, including among men and traditional leaders;

...

(d) Take all measures necessary to promote the equal participation of women in both the public and private sectors, in decision-making positions, including by adopting, if necessary, temporary special measures and collecting comprehensive data on women's representation in both the public and private sectors.

...

38. ... The Committee is also concerned that the traditional justice system does not meet the fair trial standards provided under the Covenant and that its jurisdiction is not sufficiently limited (art. 14).

39. ... The State party should align the traditional justice system with fair trial standards under the Covenant. It should also ensure that the jurisdiction of traditional courts is limited to minor civil and criminal matters and that their judgments may be validated by State courts.

*Concluding Observations on Madagascar (2017)*

45. ... The Committee is further concerned at: (a) the considerable delays in the administration of justice; (b) the limited coverage of judicial services across the State party; and (c) the high cost of proceedings, which forces a large number of people to turn to traditional justice systems. In this connection, the Committee is concerned about reports that dina courts consider cases outside their jurisdiction, which is limited to civil matters (art. 14).

46. The State party should: (a) ensure that the judiciary is independent from all political interference and continue its efforts to implement an accessible and effective justice system; (b) allocate additional human and financial resources to the judicial system, including to ensure broader coverage and effective, good quality legal assistance; and (c) ensure that dina courts consider only civil cases, and pursue its efforts to prevent the implementation of dina decisions that breach provisions of the Covenant.

*Concluding Observations on Bolivia (2013)*

22. ... The Committee is also concerned at the long delays in the administration of justice, the poor geographical coverage of the judicial system and the limited number of public defenders. It is also concerned at the lack of information on mechanisms for ensuring the compatibility of the native indigenous campesino justice system with the Covenant (art. 14).

... The State party should also develop, as a matter of priority, a national policy for reducing the backlog of court cases, increasing the number of courts and appointing more judges and public defenders, in particular in rural areas. The Committee urges the State party to set up the necessary mechanisms to ensure that the native indigenous campesino justice system is at all times compliant with due process and other guarantees established in the Covenant.

*Concluding Observations on Botswana (2008)*

12. The Committee notes with concern that the precedence of constitutional law over customary law is not always ensured in practice, due especially to the low level of awareness the population has of its rights, such as the entitlement to request a case to be transferred to a constitutional law court and the right to appeal customary courts' decisions before constitutional law courts (arts. 2 and 3). The State party should increase its efforts to raise awareness of the precedence of constitutional law over customary laws and practices, and of the entitlement to request the transfer of a case to constitutional law courts, and of appeal before such courts.

...

21. The Committee is concerned that the customary court system does not appear to function according to basic fair trial provisions, and notes the rule which forbids legal representation in customary courts. The Committee reiterates its General Comment No. 32 on article 14 which provides that customary courts "cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts." (para. 24) (art. 14). The State party should ensure that the customary law system and its courts function in a manner consistent with article 14 and General Comment No. 32, paragraph 24, and in particular allow legal representation in customary courts.



## **International Covenant on Economic, Social and Cultural Rights (1966)**

1. (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- ...
3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.
- ...
15. (1) The States Parties to the present Covenant recognize the right of everyone:
  - (a) To take part in cultural life; ...
  - (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.





## Committee on Economic, Social and Cultural Rights

### *General Comment no. 21 on the Right of everyone to take part in cultural life (2009)*

6. The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

7. The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality. This is especially important for all indigenous peoples, who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

...

18. The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms. Thus, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.

19. Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

### *General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017)*

52. Effective access to justice for indigenous peoples may require States parties to recognize the customary laws, traditions and practices of indigenous peoples and customary ownership over their lands and natural

resources in judicial proceedings. States parties should also ensure the use of indigenous languages and/or interpreters in courts and the availability of legal services and information on remedies in indigenous languages, as well as providing training to court officials on indigenous history, legal traditions and customs.

## Convention for the Elimination of Racial Discrimination (1965)

2. (1). States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation; Article 5

...

5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

...

## Committee on the Elimination of Racial Discrimination

*General recommendation no. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (2004)*

Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system

5. States parties should pursue national strategies the objectives of which include the following:

...

(e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law;



# Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

1. (1) For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

2. (1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

(2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

...

16. (1) Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

(2) The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.



## Committee against Torture

### *General Comment no. 2 on Implementation of Article 2 by States Parties*

5. Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. ... The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition.

### *Concluding Observations on Namibia (2017)*

28. ... The Committee is further concerned at the low rate of prosecution of perpetrators of rape, the lack of a mechanism for immediate protection orders and reports that cases of rape are being decided by customary courts, which do not impose criminal liability and may not provide full compensation to victims.
29. The State party should strengthen its efforts to raise awareness about violence against women and children. ... The State party should strongly discourage the settlement of sexual violence cases outside the formal justice system and ensure that all courts, including customary courts, function in accordance with respect for the rule of law and international human rights standards.

### *Concluding Observations on Madagascar (2011)*

11. The Committee is particularly concerned about the population's systematic recourse to the traditional justice system (Dina) [A traditional parajudicial system designed to maintain social cohesion by settling civil disputes at the community level], which is apparently attributable to a lack of confidence in the formal system of justice. In addition to decisions in civil cases, the use of such courts has reportedly resulted in criminal verdicts as well, and also in torture and summary and extrajudicial executions (arts. 2 and 16).

In the light of its general comment on the implementation of article 2 of the Convention, the Committee does not accept references to respect for tradition as a justification to derogate from the absolute prohibition on torture. The State party should set up an effective system for monitoring decisions by Dina courts and investigate any violation of the law or provisions of the Convention. The State party should ensure that the Dina system is compatible with its human rights obligations, in particular those under the Convention. It should also explain the hierarchical relationship between customary law and domestic law.

The State party should take urgent measures to closely monitor the decisions of Dina courts in line with Act No. 2001-004 of 25 October 2001, which inter alia requires the approval of Dina court decisions by



ordinary courts. It should also ensure that all decisions by Dina courts are appealed before the ordinary courts. The State party should work to increase the public's confidence in the system of justice. It should undertake judicial reforms to resolve the main problems in the administration of justice that are undermining the credibility of the justice system and find appropriate solutions to make it work effectively and to the people's benefit.

*Concluding Observations on Ethiopia (2011)*

23. The Committee notes with concern that the jurisdiction of Sharia and customary law courts in family law matters, although subject to the consent of both parties, may expose women victims of domestic or sexual violence to undue pressure by their husbands, families and to have their case adjudicated by customary or religious rather than by ordinary courts (arts. 2 and 13).

The State party should provide for effective procedural safeguards to ensure the free consent of parties, in particular women, to have their case adjudicated by Sharia or customary courts, and ensure that all decisions taken by those courts can be appealed to higher courts (courts of appeal and Supreme Court).

# Vienna Declaration and Programme of Action (1993)

(Adopted by the World Conference on Human Rights in Vienna on 25 June 1993)

...

Emphasizing that the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, ...

## I

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question. ...

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

...

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

...

18. The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community.

Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated. This can be achieved by legal measures and through national action and international cooperation in such fields as economic and social development, education, safe maternity and health care, and social support.

The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.

The World Conference on Human Rights urges Governments, institutions, intergovernmental and non-governmental organizations to intensify their efforts for the protection and promotion of human rights of women and the girl-child.

19. Considering the importance of the promotion and protection of the rights of persons belonging to minorities and the contribution of such promotion and protection to the political and social stability of the States in which such persons live,

The World Conference on Human Rights reaffirms the obligation of States to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without any discrimination and in full equality before the law in accordance with the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

The persons belonging to minorities have the right to enjoy their own culture, to profess and practise their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.

20. The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.

21. The World Conference on Human Rights, welcoming the early ratification of the Convention on the Rights of the Child by a large number of States and noting the recognition of the human rights of children in the World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children, urges universal ratification of the Convention by 1995 and its effective implementation by States parties through the adoption of all the necessary legislative, administrative and other measures and the allocation to the maximum extent of the available resources. In all actions concerning children, non-discrimination and the best interest of the child should be primary considerations and the views of the child given due weight. National and international mechanisms and programmes should be strengthened for the defence

and protection of children, in particular, the girl-child, abandoned children, street children, economically and sexually exploited children, including through child pornography, child prostitution or sale of organs, children victims of diseases including acquired immunodeficiency syndrome, refugee and displaced children, children in detention, children in armed conflict, as well as children victims of famine and drought and other emergencies. International cooperation and solidarity should be promoted to support the implementation of the Convention and the rights of the child should be a priority in the United Nations system-wide action on human rights.

The World Conference on Human Rights also stresses that the child for the full and harmonious development of his or her personality should grow up in a family environment which accordingly merits broader protection.

...

27. Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.

...

## **II.B**

38. In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. ...

## **II.C**

66. The World Conference on Human Rights recommends that priority be given to national and international action to promote democracy, development and human rights.
67. Special emphasis should be given to measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable. In this context, assistance provided upon the request of Governments for the conduct of free and fair elections, including assistance in the human rights aspects of elections and public information about elections, is of particular importance. Equally important is the assistance to be given to the

strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and to the real and effective participation of the people in the decision-making processes.

## **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998)**

(Adopted by UN General Assembly resolution 53/144 of 9 December 1998)

10. No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.

11. Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession. Everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.

...

14. (1) The State has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights. ...





# **Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels (2012)**

(adopted by General Assembly Resolution 67/1, 2012)

2. We recognize that the rule of law applies to all States equally, ... and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.

...

5. We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.

6. We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights and fundamental freedoms for all, without distinction of any kind.

...

13. We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice.

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.

15. We acknowledge that informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms.

16. We recognize the importance of ensuring that women, on the basis of the equality of men and women, fully enjoy the benefits of the rule of law, and commit to using law to uphold their equal rights and ensure their full and equal participation, including in institutions of governance and the judicial system, and recommit to establishing appropriate legal and legislative frameworks to prevent and address all forms of discrimination and violence against women and to secure their empowerment and full access to justice.

17. We recognize the importance of the rule of law for the protection of the rights of the child, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and recommit to the full implementation of the rights of the child.

...

## Specialized Instruments on Discrimination against Women



# Convention for the Elimination of Discrimination against Women (1979)

1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
  - (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
  - (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
  - (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
  - (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
  - (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
  - (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
  - (g) To repeal all national penal provisions which constitute discrimination against women.
- ...
5. States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; ...
- ...
7. States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the

country and, in particular, shall ensure to women, on equal terms with men, the right:

...

- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

...

- 15. (1) States Parties shall accord to women equality with men before the law.

(2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

(3) States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

...

## Committee on the Elimination of Discrimination Against Women

### *General Recommendation no. 23 on Article 7 (political and public life) (1997)*

...

The right to hold public office and to perform all public functions (article 7, para. (b))

30. The examination of the reports of States parties demonstrates that women are excluded from top-ranking positions in cabinets, the civil service and in public administration, in the judiciary and in justice systems. Women are rarely appointed to these senior or influential positions and while their numbers may in some States be increasing at the lower levels and in posts usually associated with the home or the family, they form only a tiny minority in decision-making positions concerned with economic policy or development, political affairs, defence, peacemaking missions, conflict resolution or constitutional interpretation and determination.

31. Examination of the reports of States parties also demonstrates that in certain cases the law excludes women from exercising royal powers, from serving as judges in religious or traditional tribunals vested with jurisdiction on behalf of the State or from full participation in the military. These provisions discriminate against women, deny to society the advantages of their involvement and skills in these areas of the life of their communities and contravene the principles of the Convention.

### *General Recommendation no. 33 on Women's Access to Justice (2015)*

#### I. Introduction and Scope

...

5. The scope of the right to access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on the one hand, and religious, customary, indigenous or community laws and practices on the other. Therefore, plural justice systems include multiple sources of law, whether formal or informal, whether State, non-State or mixed, that women may encounter when seeking to exercise their right to access to justice. Religious, customary, indigenous and community justice systems — referred to as traditional justice systems in the present general recommendation — may be formally recognized by the State, operate with the acquiescence of the State, with or without any explicit status, or function outside of the State's regulatory framework.

...

#### II. General Issues and Recommendations on Women's Access to Justice

##### *A. Justiciability, availability, accessibility, good quality, provision of remedies and accountability of justice systems*

8. Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence, which affects women in particular, has an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition,

discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, property ownership and identity as a lesbian, bisexual or transgender woman or intersex person. These intersecting factors make it more difficult for women from those groups to gain access to justice.

...

13. The Committee has observed that the concentration of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to gain access to them, the complexity of proceedings, the physical barriers for women with disabilities, the lack of access to high-quality, gender-competent legal advice, including legal aid, as well as the often-noted deficiencies in the quality of justice systems (e.g., gender-insensitive judgements or decisions owing to a lack of training, delays and excessive length of proceedings, corruption) all prevent women from gaining access to justice.

...

14. Six interrelated and essential components — justiciability, availability, accessibility, good quality, provision of remedies for victims and accountability of justice systems — are therefore necessary to ensure access to justice. While differences in prevailing legal, social, cultural, political and economic conditions will necessitate a differentiated application of these features in each State party, the basic elements of the approach are universally relevant and immediately applicable. Accordingly:

- (a) Justiciability requires the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements under the Convention;
- (b) Availability requires the establishment of courts, quasi-judicial bodies or other bodies throughout the State party in urban, rural and remote areas, as well as their maintenance and funding;
- (c) Accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination;
- (d) Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also requires that justice systems be contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive and take account of the increasing demands by women for justice;
- (e) Provision of remedies requires that justice systems provide women with viable protection and meaningful redress for any harm that they may suffer (see art. 2); and
- (f) Accountability of justice systems is ensured through monitoring to guarantee that they function in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and of their legal responsibility when they violate the law.



15. With regard to justiciability, the Committee recommends that States parties:

- (a) Ensure that rights and correlative legal protections are recognized and incorporated into the law, improving the gender responsiveness of the justice system;
- (b) Improve women's unhindered access to justice systems and thereby empower them to achieve de jure and de facto equality;
- (c) Ensure that justice system professionals handle cases in a gender-sensitive manner;
- (d) Ensure the independence, impartiality, integrity and credibility of the judiciary and the fight against impunity;
- ...
- (f) Confront and remove barriers to women's participation as professionals within all bodies and levels of judicial and quasi-judicial systems and providers of justice-related services, and take steps, including temporary special measures, to ensure that women are equally represented in the judiciary and other law implementation mechanisms as magistrates, judges, prosecutors, public defenders, lawyers, administrators, mediators, law enforcement officials, judicial and penal officials and expert practitioners, as well as in other professional capacities;
- (g) Revise the rules on the burden of proof in order to ensure equality between the parties in all fields where power relationships deprive women of fair treatment of their cases by the judiciary; ...

16. With regard to the availability of justice systems, the Committee recommends that States parties:

- (a) Ensure the creation, maintenance and development of courts, tribunals and other entities, as needed, that guarantee women's right to access to justice without discrimination throughout the entire territory of the State party, including in remote, rural and isolated areas, giving consideration to the establishment of mobile courts, especially to serve women living in remote, rural and isolated areas, and to the creative use of modern information technology solutions, when feasible; ...

17. With regard to accessibility of justice systems, the Committee recommends that States parties:

- (a) Remove economic barriers to justice by providing legal aid and ensure that fees for issuing and filing documents, as well as court costs, are reduced for women with low incomes and waived for women living in poverty;
- (b) Remove linguistic barriers by providing independent and professional translation and interpretation services, when needed, and provide individualized assistance for illiterate women in order to guarantee their full understanding of judicial and quasi-judicial processes;
- (c) Develop targeted outreach activities and distribute through, for example, specific units or desks dedicated to women, information about the justice mechanisms, procedures and remedies that are available, in various formats and also in community languages. Such activities and information should be appropriate for all ethnic and minority groups in the population and designed in close cooperation with women from those groups and, especially, from women's and other relevant organizations;

...

- (e) Ensure that the physical environment and location of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women, with consideration given to the creation of gender units as components of justice institutions and special attention given to covering the costs of transportation to judicial and quasi-judicial institutions and other services for women without sufficient means; ...

18. With regard to the good quality of justice systems, the Committee recommends that States parties:

- (a) Ensure that justice systems are of good quality and adhere to international standards of competence, efficiency, independence and impartiality, as well as to international jurisprudence;

...

- (e) Implement mechanisms to ensure that evidentiary rules, investigations and other legal and quasi-judicial procedures are impartial and not influenced by gender stereotypes or prejudice; ...

19. With regard to the provision of remedies, the Committee recommends that States parties:

- (a) Provide and enforce appropriate and timely remedies for discrimination against women and ensure that women have access to all available judicial and non-judicial remedies; ...

20. With regard to the accountability of justice systems, the Committee recommends that States parties:

- (a) Develop effective and independent mechanisms to observe and monitor women's access to justice in order to ensure that justice systems are in accordance with the principles of justiciability, availability, accessibility, good quality and effectiveness of remedies, including the periodic auditing/review of the autonomy, efficiency and transparency of the judicial, quasi-judicial and administrative bodies that take decisions affecting women's rights;
- (b) Ensure that cases of identified discriminatory practices and acts by justice professionals are effectively addressed through disciplinary and other measures;
- (c) Create a specific entity to receive complaints, petitions and suggestions with regard to all personnel supporting the work of the justice system, including social, welfare and health workers as well as technical experts;
- (d) Data should include but need not be limited to:
  - (i) The number and geographical distribution of judicial and quasi-judicial bodies;
  - (ii) The number of men and women working in law enforcement bodies and judicial and quasi-judicial institutions at all levels;
  - (iii) The number and geographical distribution of men and women lawyers, including legal-aid lawyers;
  - (iv) The nature and number of cases and complaints lodged with judicial, quasi-judicial and administrative bodies, disaggregated by the sex of the complainant;

- (v) The nature and number of cases dealt with by the formal and informal justice systems, disaggregated by the sex of the complainant;
  - (vi) The nature and number of cases in which legal aid and/or public defence were required, accepted and provided, disaggregated by the sex of the complainant;
  - (vii) The length of the procedures and their outcomes, disaggregated by the sex of the complainant;
- (e) Conduct and facilitate qualitative studies and critical gender analyses of all justice systems, in collaboration with civil society organizations and academic institutions, in order to highlight practices, procedures and jurisprudence that promote or limit women's full access to justice;
  - (f) Systematically apply the findings of those analyses in order to develop priorities, policies, legislation and procedures to ensure that all components of the justice system are gender-sensitive, user-friendly and accountable.

*B. Discriminatory laws, procedures and practices*

21. Frequently, States parties have constitutional provisions, laws, regulations, procedures, customs and practices that are based on traditional gender stereotypes and norms and are, therefore, discriminatory and deny women full enjoyment of their rights under the Convention. The Committee, therefore, consistently calls upon States parties, in its concluding observations, to review their legislative frameworks and to amend and/or repeal provisions that discriminate against women. This is consistent with article 2 of the Convention, which enshrines obligations for States parties to adopt appropriate legal and other measures to eliminate all forms of discrimination against women by public authorities and non-State actors, be they individuals, organizations or enterprises.

22. ... In its general recommendation No. 28, the Committee, therefore, notes that judicial institutions must apply the principle of substantive or de facto equality, as embodied in the Convention, and interpret laws, including national, religious and customary laws, in line with that obligation. ...

23. ... discriminatory procedural and evidentiary rules and a lack of due diligence in the prevention, investigation, prosecution, punishment and provision of remedies for violations of women's rights result in contempt of obligations to ensure that women have equal access to justice.

...

25. The Committee recommends that States parties:

(a) Ensure that the principle of equality before the law is given effect by taking steps to abolish any existing laws, procedures, regulations, jurisprudence, customs and practices that directly or indirectly discriminate against women, especially with regard to their access to justice, and to abolish discriminatory barriers to access to justice, including:

(i) The obligation or need for women to seek permission from family or community members before beginning legal action;

(ii) Stigmatization of women who are fighting for their rights by active participants in the justice system;

(iii) Corroboration rules that discriminate against women as witnesses, complainants and defendants by requiring them to discharge a higher burden of proof than men in order to establish an offence or seek a remedy;

(iv) Procedures that exclude or accord inferior status to the testimony of women; ...

...

*C. Stereotyping and gender bias in the justice system and the importance of capacity-building*

...

29. The Committee recommends that States parties:

- (a) Take measures, including awareness-raising and capacity-building programmes for all justice system personnel and law students, to eliminate gender stereotyping and incorporate a gender perspective into all aspects of the justice system;
- (b) Include other professionals, in particular health-care providers and social workers, who potentially play an important role in cases of violence against women and in family matters, in the awareness-raising and capacity-building programmes;
- (c) Ensure that capacity-building programmes address, in particular:
  - (i) The issue of the credibility and weight given to women's voices, arguments and testimony, as parties and witnesses;
  - (ii) The inflexible standards often developed by judges and prosecutors for what they consider to be appropriate behaviour for women;
- (d) Consider promoting a dialogue on the negative impact of stereotyping and gender bias in the justice system and the need for improved justice outcomes for women who are victims and survivors of violence;
- (e) Raise awareness of the negative impact of stereotyping and gender bias and encourage advocacy to address stereotyping and gender bias in justice systems, especially in gender-based violence cases;
- (f) Provide capacity-building programmes for judges, prosecutors, lawyers and law enforcement officials on the application of international legal instruments relating to human rights, including the Convention and the jurisprudence of the Committee, and on the application of legislation prohibiting discrimination against women.

*D. Education and raising awareness of the impact of stereotypes*

30. The provision of education from a gender perspective and raising public awareness through civil society, the media and the use of ICT are essential to overcoming the multiple forms of discrimination and stereotyping that have an impact on access to justice and to ensuring the effectiveness and efficiency of justice for all women.

31. Article 5 (a) of the Convention provides that States parties must take all appropriate measures to modify social and cultural patterns of conduct, with a view to eliminating prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either sex. In its general recommendation No. 28, the Committee emphasized that all provisions of the Convention must be read jointly in order to ensure that all forms of gender-based discrimination are condemned and eliminated.<sup>11</sup>

*1. Education from a gender perspective*

32. Women who are unaware of their human rights are unable to make claims for the fulfilment of those rights. The Committee has observed, especially during its consideration of periodic reports submitted by States parties, that they often fail to guarantee that women have equal access to education, information and legal literacy programmes. Furthermore, awareness on the part of men of women's human rights is also indispensable to guaranteeing non-discrimination and equality, and to guaranteeing women's access to justice in particular.

...

*E. Legal aid and public defence*

36. A crucial element in guaranteeing that justice systems are economically accessible to women is the provision of free or low-cost legal aid, advice and representation in judicial and quasi-judicial processes in all fields of law.

37. The Committee recommends that States parties:

- (a) Institutionalize systems of legal aid and public defence that are accessible, sustainable and responsive to the needs of women, ensure that such services are provided in a timely, continuous and effective manner at all stages of judicial or quasi-judicial proceedings, including alternative dispute resolution mechanisms and restorative justice processes, and ensure the unhindered access of legal aid and public defence providers to all relevant documentation and other information, including witness statements;

...

- (d) Develop partnerships with competent non-governmental providers of legal aid and/or train paralegals to provide women with information and assistance in navigating judicial and quasi-judicial processes and traditional justice systems;

...

III. Recommendations for specific areas of law

...

*A. Constitutional law*

41. The Committee has observed that, in practice, States parties that have adopted constitutional guarantees relating to substantive equality between men and women and incorporated international human rights law, including the Convention, into their national legal orders are better equipped to secure gender equality in access to justice. Under articles 2 (a) and 15 of the Convention, States parties are to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation, including through the establishment of competent national tribunals and other public institutions, and to take measures to ensure the realization of that principle in all areas of public and private life as well as in all fields of law.

42. The Committee recommends that States parties:

- (a) Provide explicit constitutional protection for formal and substantive equality and for non-discrimination in the public and private spheres, including with regard to all matters of personal status, family, marriage and inheritance law, and across all areas of law;

- (b) When provisions of international law do not directly apply, fully incorporate international human rights law into their constitutional and legislative frameworks in order to effectively guarantee women's access to justice;
  - (c) Create the structures necessary to ensure the availability and accessibility of judicial review and monitoring mechanisms to oversee the implementation of all fundamental rights, including the right to substantive gender equality.
- ...

#### *C. Family law*

45. Inequality in the family underlies all other aspects of discrimination against women and is often justified in the name of ideology, tradition and culture. The Committee has repeatedly emphasized that family laws and the mechanisms of their application must comply with the principle of equality enshrined in articles 2, 15 and 16 of the Convention.

46. The Committee recommends that States parties: ... (c) In settings in which there is no unified family code and in which there exist multiple family law systems, such as civil, indigenous, religious and customary law systems, ensure that personal status laws provide for individual choice as to the applicable family law at any stage of the relationship. State courts should review the decisions taken by all other bodies in that regard.

...

#### IV. Recommendations for specific mechanisms

##### *D. Plural justice systems*

61. The Committee notes that State laws, regulations, procedures and decisions can sometimes coexist, within a given State party, with religious, customary, indigenous or community laws and practices. This results in the existence of plural justice systems. There are, therefore, multiple sources of law that may be formally recognized as part of the national legal order or operate without an explicit legal basis. States parties have obligations under articles 2, 5 (a) and 15 of the Convention and under other international human rights instruments to ensure that women's rights are equally respected and that women are protected against violations of their human rights by all components of plural justice systems.

62. The presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to effectively exercise a choice of forum. The Committee has observed that, in some States parties in which systems of family and/or personal law based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems or at liberty to decide which regime applies to them.

63. The Committee has observed a range of models through which practices embedded in plural justice systems can be harmonized with the Convention in order to minimize conflicts of laws and guarantee that women have access to justice. They include the adoption of legislation that clearly

defines the relationship between existing plural justice systems, the creation of State review mechanisms and the formal recognition and codification of religious, customary, indigenous, community and other systems. Joint efforts by States parties and non-State actors will be necessary to examine ways in which plural justice systems can work together to reinforce protection for women's rights.

64. The Committee recommends that, in cooperation with non-State actors, States parties:

- (a) Take immediate steps, including capacity-building and training programmes on the Convention and women's rights, for justice system personnel, to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments;
- (b) Enact legislation to regulate the relationships between the mechanisms within plural justice systems in order to reduce the potential for conflict;
- (c) Provide safeguards against violations of women's human rights by enabling review by State courts or administrative bodies of the activities of all components of plural justice systems, with special attention to village courts and traditional courts;
- (d) Ensure that women have a real and informed choice concerning the applicable law and the judicial forum within which they would prefer their claims to be heard;
- (e) Ensure the availability of legal aid services for women to enable them to claim their rights within the various plural justice systems by engaging qualified local support staff to provide that assistance;
- (f) Ensure the equal participation of women at all levels in the bodies established to monitor, evaluate and report on the operations of plural justice systems;
- (g) Foster constructive dialogue and formalize links between plural justice systems, including through the adoption of procedures for sharing information among them.

*E.S. and S.C. (represented by the Women's Legal Aid Centre and the International Women's Human Rights Clinic) v United Republic of Tanzania (2015)*

7.2 The Committee recalls that, under articles 2 (f) and 5 (a) of the Convention, States parties have an obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women, including when States parties have multiple legal systems in which different personal status laws apply to individuals on the basis of identity factors such as ethnicity or religion. The Committee also recalls that the accountability of States parties to implement their obligations under article 2 is engaged through the acts or omissions of acts of all branches of the Government, including the judiciary. Under article 16 (1), States parties

have an obligation to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations. ...

7.6 In the present case, the Committee notes that inheritance matters are governed by multiple legal systems in the State party and that the authors have been subjected to Sukuma customary law on the basis of their ethnicity. The Committee also notes that, although the State party's Constitution includes provisions guaranteeing equality and non-discrimination, the State party has failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions with regard to widows. Consequently, the authors were deprived of the right to administer their husbands' estates and excluded from inheriting any property upon the death of their spouses. The Committee considers that the State party's legal framework, which treats widows and widowers differently in terms of their access to ownership, acquisition, management, administration, enjoyment and disposition of property, is discriminatory and thereby amounts to a violation of article 2 (f) in conjunction with articles 5, 15 and 16 of the Convention.

7.7 Furthermore, the Committee notes that, despite having acknowledged in its judgement of 8 September 2006 that the authors were discriminated against by the application of the State party's customary law provisions, the High Court refused to impugn the relevant provisions on the ground that it was impossible to effect customary change by judicial pronouncement and that doing so would be opening a Pandora's Box. The Committee further takes notes of the absence of a response to the authors' appeal by both the Attorney General and the Court of Appeal over a period of four years, the dismissal of the case by the Court of Appeal on a mere procedural technicality for which the authors were not responsible and the absence of any action by the Registrar of the High Court to provide a corrected version of the drawn order. The Committee is of the view that such shortcomings on the part of the judiciary constitute a denial of access to justice and thereby amount to a failure to provide an effective remedy to the authors, in violation of article 2 (c).

7.9 In the circumstances and in the light of the foregoing, the Committee considers that the State party, by condoning such legal restraints on inheritance and property rights, has denied the authors equality in respect of inheritance and failed to provide them with any other means of economic security or any form of adequate redress, thereby failing to discharge its obligations under articles 2 (c), 2 (f), 5 (a), 13 (b), 15 (1), 15 (2), 16 (1) (c) and 16 (1) (h) of the Convention.

8. In accordance with article 7 (3) of the Optional Protocol and taking into account all the foregoing considerations, the Committee considers that the State party has violated the rights of the authors under articles 2 (c), 2 (f), 5 (a), 13 (b), 15 (1), 15 (2), 16 (1)(c) and 16 (1)(h) of the Convention, read in the light of general recommendations Nos. 21, 28 and 29.

9. The Committee makes the following recommendations to the State party:

- (a) Specifically to the authors of the communication: grant the authors appropriate reparation and adequate compensation commensurate with the seriousness of the violation of their rights;



(b) In general:

- (i) Expedite the constitutional review process and address the status of customary laws to ensure that rights guaranteed under the Convention have precedence over inconsistent and discriminatory customary provisions;
- (ii) Ensure that all discriminatory customary laws applicable in the State party, in particular provisions of the Local Customary Law (Declaration) (No. 4) Order, are repealed or amended and brought into full compliance with the Convention and the Committee's general recommendations, including by district councils where applicable, with a view to providing women and girls with equal administration and inheritance rights upon the dissolution of marriage by death, irrespective of their ethnicity or religion;
- (iii) Ensure access to effective remedies by guaranteeing that courts will refrain from resorting to excessive formalism and/or unreasonable and undue delays;
- (iv) Provide mandatory capacity-building for judges, prosecutors, judicial personnel and lawyers, including at the local and community levels, on the Convention, the Optional Protocol thereto and the Committee's jurisprudence, as well as on the Committee's general recommendations, in particular Nos. 21, 28 and 29;
- (v) Encourage dialogue by holding consultations between civil society and women's organizations and local authorities, including with traditional leaders at the district level, with a view to fostering dialogue on the removal of discriminatory customary law provisions;
- (vi) Conduct awareness-raising and education measures to enhance women's knowledge of their rights under the Convention, in particular in rural and remote areas; ...

*Concluding Observations on Vanuatu (2016)*

10. The Committee recalls that the Constitution recognizes customary law as part of the State party's law, and hence customary law and the formal justice system exist side by side. It notes the establishment of a high-level working group to address women's access to justice, and that legal assistance is provided through the Public Solicitor's Office. The Committee remains concerned, however, about women's limited access to justice, in particular on the outer islands, due to their limited knowledge about their rights and limited access to legal assistance. It is also concerned about the difficulties that women face in obtaining effective remedies and redress in both the traditional and formal justice systems, and about the lack of study on this dual legal system. ...

11. The Committee recommends that the State party:

- (a) Raise women's awareness of their rights and of the means to enforce them, in cooperation with civil society organizations, in particular on the outer islands;
- (b) Establish effective remedies in both the formal and traditional justice systems to enable women to obtain redress for violations of their rights, provide capacity-building to judges, lawyers and law

enforcement officers on women's rights and undertake research on the impact of the dual justice system on women's access to justice;

(c) Develop a strategy with clear time frames to ensure that traditional justice mechanisms comply with the human rights standards set forth in the Convention when addressing complaints by women. The strategy should include capacity-building and training programmes on the Convention and on women's human rights for traditional justice authorities.

(d) Allocate further resources to enhancing the infrastructure, quality and accessibility of the formal justice system, especially on the outer islands.

*Concluding Observations on Myanmar (2016)*

...

Gender-based violence against women

26. The Committee notes that the State party is making efforts to review its laws. It is concerned, however, at the lack of information on steps taken to review the Penal Code in order to address various issues... The Committee expresses particular concern at:

...

(d) ... the use of traditional justice mechanisms, which often perpetuate gender-based violence against women, such as that requiring a victim of rape to marry the perpetrator.

27. Recalling its general recommendation No. 19 (1992) on violence against women, and its previous recommendations (see CEDAW/C/MMR/CO/3, para. 25), the Committee recommends that the State party:

...

(g) ... curb the use of traditional justice mechanisms that do not provide effective redress for women and girls who are victims of violence.

*Concluding Observations on Ecuador (2015)*

12. The Committee takes note of the information provided by the State party's delegation during the dialogue concerning the implementation of an agreement among branches of the Government to facilitate access to justice in rural areas. Nonetheless, the Committee observes with concern that specialized judicial units to enforce legal provisions relating to violence against women do not cover all areas of the State party. The Committee also notes with concern that various factors limit women's access to justice, in particular a lack of gender-sensitive procedures, the stigmatization of women who bring their cases to court and the limited training of police officers. It notes the barriers faced by indigenous women in gaining access to both the regular and the traditional justice systems and the absence of information on redress and reparations available to them.

13. The Committee calls upon the State party:

(a) To allocate the human, financial and technical resources necessary for the establishment and functioning of specialized judicial units on violence against women in all cantons and, in particular, in rural and remote areas, and adopt guidelines to ensure that the agreement between branches of the Government on the provision of justice in cases of violence against women is implemented promptly;

...

(c) To adopt measures to harmonize the competencies of the regular and traditional justice systems to deal with complaints from women belonging to ethnic groups, ensuring that women have access to remedies through appropriate provision of interpreters, legal aid, if necessary free of charge, and adequate reparations in accordance with their culture and traditions.

*Concluding Observations on Malawi (2015)*

12. The Committee notes the adoption of the Legal Aid Act in 2010. The Committee is, however, concerned that women continue to face multiple barriers in obtaining access to justice, including the unavailability of courts, legal fees and women's lack of legal literacy, especially in rural areas. It is particularly concerned that customary judicial mechanisms, to which women have to resort, are not gender-sensitive and continue to apply discriminatory provisions. The Committee notes with concern that insufficient human, technical and financial resources have been allocated to the Legal Aid Bureau and that its services are not yet available in all areas of the State party.

13. Recalling its general recommendation No. 33 (2015) on women's access to justice, the Committee recommends that the State party:

(a) Ensure that women have effective access to justice throughout the State party, by establishing courts, including mobile courts, and by enhancing women's legal literacy, raising awareness of their rights, providing legal aid and ensuring that fees are reduced for women with low incomes and waived for women living in poverty;

(b) Enact legislation to regulate the relationship between formal and customary justice mechanisms and strengthen measures to ensure that customary judicial mechanisms comply with the Convention, including gender-sensitive training and capacity-building for customary justice authorities;

(c) Provide adequate human, technical and financial resources to the Legal Aid Bureau to ensure its effective functioning and facilitate access to it for all women, with particular attention to remote areas;

(d) Monitor and assess the impact on women of efforts to improve access to justice, including gender-sensitive customary justice mechanisms.

*Concluding Observations on Timor Leste (2015)*

10. The Committee notes that a non-governmental organization, Asistencia Legal ba Feto no Labarik, provides free legal assistance to women and girls in criminal, civil and family law matters and that the State party has deployed four mobile courts to reach out to remote areas in 13 districts. The Committee is nevertheless concerned about:

(a) The fact that women largely continue to use the traditional rather than the formal justice system, which limits the enjoyment of their rights by perpetuating and reinforcing discriminatory social norms; ...

11. Recalling its general recommendation No. 33 (2015) on women's access to justice, the Committee recommends that the State party:

...

(d) Enhance women's awareness of their rights and their legal literacy in all areas covered by the Convention and allocate further resources to enhancing the infrastructure, quality and accessibility of the formal justice system, especially in rural areas, including by providing assistance for illiterate women;

*Concluding Observations on Bolivia (2008)*

22. While congratulating the State party for its recognition of cultural diversity and the differences and specificities of indigenous communities in legislation, the Committee is concerned that the emphasis placed on such specificities might detract from compliance with the provisions of the Convention relating to non-discrimination and formal and substantive equality between men and women. The Committee is particularly concerned that, while the recognition of community justice by the State party might make it easier for the indigenous and rural people to have access to justice, it might operate to perpetuate stereotypes and prejudices that discriminate against women and violate the human rights enshrined in the Convention.

23. The Committee urges the State party to ensure that indigenous concepts and practices are in conformity with the legal framework of the Convention and to create the conditions for a wide intercultural dialogue that would respect diversity while guaranteeing full compliance with the principles, values and international norms for the protection of human rights, including women's rights.

*Concluding Observations on Bolivia (2015)*

10. The Committee welcomes the efforts made by the State party to offer comprehensive services of plurinational justice, but is concerned about:

(a) The persisting structural barriers in the "rural indigenous jurisdiction" and in the formal justice system that prevent women from gaining access to justice and obtaining redress, such as an insufficient number of courts across the territory, limited information regarding rights and judicial procedures available in the

main indigenous languages and the limited coverage of legal aid schemes, given that only 45 per cent of municipalities have established comprehensive municipal legal services;

(b) The lack of an institutional career path at the low and middle levels of the judicial system that limits the independence and impartiality of the judiciary;

(c) The gender stereotypes and limited specialized training and expertise among prosecutors, the police and judges on women's rights;

(d) The delayed establishment of specialized courts exclusively dedicated to cases of violence against women, as envisaged in Act No. 348 of 2013 (Comprehensive Act to Guarantee Women a Life Free of Violence).

11. The Committee calls upon the State party:

(a) To accelerate the creation of courts and tribunals that guarantee women's access to justice without discrimination throughout the territory of the State party, provide reliable official interpretation into indigenous languages in all judicial proceedings and ensure that women have effective access to free legal aid to claim their rights;

(b) To ensure the establishment of a professional career system at the lower and middle levels of the judiciary;

(c) To provide specialized training to all public officials involved in cases relating to the protection of women's rights in all specific areas of law;

(d) To give priority to and allocate appropriate human and financial resources for the functioning of specialized courts that exclusively deal with cases of violence against women, in accordance with Act No. 348.



# Working Group on the issue of Discrimination against Women in Law and in Practice

(Mandated by the UN Human Rights Council)

*Report on eliminating discrimination against women in cultural and family life, with a focus on the family as a cultural space (2015)*

(...)

## 3. Plural legal systems

52. Plural legal systems are systems in which various laws coexist. They may include various combinations of codified civil law, religious law systems, indigenous or customary legal codes, community arbitration or other dispute settlement procedures. Plural legal systems may be formal or informal. They most often affect personal status law and family law. In States with plural legal systems, the State legal system, which is generally civil and codified, and the State courts address matters relating to the public sphere.

53. Several States have adopted this type of legal system as a way of acknowledging cultural diversity. However, legal pluralism is also used by some actors to promote political and ideological interests. Approximately 80 per cent of claims or disputes are resolved by parallel justice systems, signifying that most women in developing countries access justice in a plural legal environment. The existence of social, economic, institutional and cultural barriers and the lack of confidence in formal systems may explain the widespread use of these parallel systems. Poverty and a lack of information on accessing formal justice and education are the main factors that lead women to use parallel justice systems.

54. Parallel justice systems apply religious, customary or indigenous laws, which, as shown above, are patriarchal. These systems are mostly dominated by men and therefore tend to perpetuate inequalities and patriarchal interpretations of culture, resulting in discrimination against women. Regardless of whether the law is religious or customary, its provisions are often interpreted differently for men and women. The rulings and procedures of these legal mechanisms generally discriminate against women. Moreover, gender-based violence is seldom punished and is sometimes downplayed by religious or customary law courts.

## Formal legal pluralism

55. Legal pluralism is formal when the State, through its constitution, laws or judicial decisions, has granted authority to a religious, indigenous or customary court, tribunal or arbitrator to exercise jurisdiction over personal status matters for women. Such systems are generally recognized in State legislation and some are regulated by the State, which may establish appeals procedures, ensure compliance with State legislation or even provide financial or material support.

56. Good practice in protecting women's right to equality in formal plural legal systems takes several forms. The adoption of constitutional laws that require autonomous courts, tribunals or arbitrators to respect women's right to equality in terms of both women's representation in justice systems and the formulation and application of procedural and substantive rules is a good practice implemented in several States. Since the 1980s, 11 Latin American States have formally recognized indigenous laws and courts in their constitutional laws, requiring the legal systems of indigenous communities to respect and enforce women's rights.

57. The right to appeal, before the State courts, discriminatory decisions of indigenous courts, tribunals or arbitrators is another good practice. The commitment of indigenous women in some countries, such as Mexico and Ecuador, to securing State recognition of parallel systems has enabled them to challenge, in the State system, the discrimination they suffered in indigenous legal systems. Women's participation as legal arbitrators, and also as lawmakers, is needed to draw attention to discrimination and to sensitive subjects such as rape or domestic violence, most victims of which are women.

58. Affirming the primacy of international human rights law and constitutional laws over religious, customary and indigenous laws is a key step towards ensuring women's emancipation and autonomy. Customary, religious and indigenous laws and provisions on family affairs must be consistent with the constitutional norms on equality. To ensure more effective application of the principle of equality, State monitoring and oversight bodies must be put in place, as has been done in Canada, Colombia and South Africa.

#### Informal legal pluralism

59. Jurisdiction is exercised informally when jurisdictional powers are not the result of an express grant of judicial authority by the State. Such jurisdiction is generally not recognized by the State. Such situations may arise when religious, indigenous or customary authority is exercised by judges, arbitrators or other alternative dispute settlement procedures that are not authorized or tolerated by the State and/or of which the State is unaware. These systems operate without oversight by the State, and, while some may have been recognized previously in law, often under former colonial systems, they are now beyond State control.

60. When the State becomes aware of such informal systems, it must put in place oversight mechanisms and procedures for appeals to the State justice system to quash decisions that discriminate against women. The State must make an effort to provide alternatives to these informal legal systems, for example, by rendering the formal State system more accessible.

61. Plural legal systems create complex and confusing legal situations. Various United Nations treaty bodies have sought to show how these systems limit women's enjoyment of the right to equality in their private and public lives, while acknowledging the richness of cultural diversity. Even if there is no special recognition by the State of informal legal systems or formal delegation of functions by the State to traditional chiefs, the State should extend its protection, as referred to in article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

#### D. The role of the State in ensuring respect for women and girls' right to equality in cultural and family life

62. The State has an obligation to respect women's right to equality within the family and should eliminate any laws, including customary or religious laws, that discriminate against women and any discriminatory acts carried out by State authorities. The obligation not to discriminate against women is direct and absolute. A State will be in violation of this obligation if it has a law that discriminates against women, regardless of whether its family law system is secular, religious or plural.

63. The State has a direct obligation to protect and respect women's right to equality in all the forms of family law considered above. It is held responsible for any breach of its obligations, including in cases where it has, through its



constitution, laws or judicial decisions, assigned jurisdiction over family law matters to a religious, indigenous or customary court, tribunal or authority. Moreover, the State has an obligation to exercise due diligence to guarantee and protect women's right to equality in informal plural legal systems.  
(...)

68. In the event of violations and discrimination against women, the State has an obligation to investigate and prosecute. The State must take measures to guarantee privacy, confidentiality and safety of victims, and to address women's needs and fears, while ensuring that they are not subject to stigmatization, social ostracism or reprisals. The State must be able to foster confidence in the police and the judicial process, including within plural legal systems. To this end, it must ensure that State bodies and courts systematically apply the principle of equality when interpreting and enforcing the law and that they do so in conformity with international standards. The Committee on the Elimination of Discrimination against Women has pointed out that, where this is not possible, the State is still liable and must take appropriate action.  
(...)

72. The State must act as an agent of change as regards women's place in cultural and family life, by fostering and creating a culture free of all forms of discrimination against women. A transformative approach to women and girls' status in the family is crucial. There needs to be awareness that, in the past, a patriarchal concept of family pervaded all secular, religious, customary and indigenous laws and institutions and that some States and groups are now trying, in a retrograde manner, to subject women to the most oppressive forms of patriarchy, particularly in the context of religious fanaticism. It should also be understood that the transition towards equality between women and men, and girls and boys, in the culture and in the family is a prerequisite for a decent society.

73. The Working Group recommends that States:

- (a) Establish a national legal framework recognizing gender equality in cultural and family life, in accordance with regional and international standards:
  - (i) Recognize and enshrine, in their constitutions and laws, the right to equality, which should apply in all areas of life and have primacy over all religious, customary and indigenous laws, norms, codes and rules, with no possibility of exemption, waiver or circumvention;
  - (ii) Promote access to, participation in and contributions by women to all aspects of cultural life, including the definition, creation and interpretation of cultural and religious norms and practices, by providing equal resources, adopting special measures and policies, and facilitating women's access to decision-making positions and policymaking processes, at all levels;
  - (iii) Develop national strategies to eradicate cultural practices that discriminate against women and girls, as well as gender stereotypes, through awareness-raising campaigns, educational and informational programmes and stakeholder mobilization. Engage men, as appropriate, in prevention and protection efforts in respect of gender-based discrimination and violence;

- (iv) Develop effective mechanisms to combat the multiple and intersecting forms of discrimination suffered by all marginalized women, including minority women, women living in poverty, women with disabilities, refugee and displaced women, migrant and immigrant women, rural women, indigenous women, older women and single women;
- (b) Promote a culture free of discrimination:
  - (i) Establish an executive body that applies the due diligence framework (prevention, protection, prosecution, punishment and redress), addressing all forms of discrimination against women in cultural and family life, including by non-State actors;
  - (ii) Reject any cultural or religious practice that violates human rights and the principle of equality or prevents the establishment of an egalitarian society free of gender-based discrimination;
  - (iii) Punish institutions, State officials and non-State actors whose actions threaten women's rights, even where the grounds for such actions are the preservation of culture and religion;
- (c) Guarantee women's de jure and de facto right to equality in family diversity:
  - (...)
  - (vii) Respect, protect, fulfil and promote the right to gender equality in the family in the various types of legal system – secular family law systems, State-enforced religious family law systems and plural legal systems. The adoption of a family code or personal status laws free of any reference to culture or religion is encouraged;
  - (viii) In countries where several legal systems coexist, establish and implement national mechanisms to ensure the effective implementation of guarantees of equality and non-discrimination between men and women in all areas and at all levels, offering women, especially rural and indigenous women, the possibility of removing themselves from the arbitral authority and jurisdiction of customary institutions. Bring parallel customary, religious and indigenous law systems into line with international human rights law, particularly in respect of gender equality, while acknowledging the importance of the wealth and diversity of culture and traditions. Grant women the right to appeal, in State courts, decisions of religious, customary or indigenous authorities, whether formal or informal, that have violated their right to equality;
  - (ix) Make the formal State legal system accessible to all women, regardless of their social status, and address the shortcomings of the formal system. Formal justice should be preferred to informal justice for the settlement of all family matters, including those relating to sexual violence and domestic violence;
  - (x) Set up gender-awareness training for all State civil servants involved in education, health, social services, law enforcement and judicial decision-making. Include women, on an equal basis, in all bodies that interpret and apply family law;

## Specialized Instruments on the Rights of the Child



## Convention on the Rights of the Child (1989)

2. (1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.  
  
(2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.
3. (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.  
  
(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.  
...
5. States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.  
...
12. (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.  
  
(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.  
...
30. In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.  
...

40. (1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

(2) To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

(3) States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.





## Committee on the Rights of the Child

### *General Comment no. 10 on Juvenile Justice (2007)*

27. It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

...

44. It is obvious that for a child alleged as, accused of, or recognized as having infringed the penal law, the right to be heard is fundamental for a

fair trial. It is equally obvious that the child has the right to be heard directly and not only through a representative or an appropriate body if it is in her/his best interests. ...

45. The child should be given the opportunity to express his/her views concerning the (alternative) measures that may be imposed, and the specific wishes or preferences he/she may have in this regard should be given due weight. Alleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law (see paragraph 46 below). It goes without saying that the judges involved are responsible for taking the decisions. But to treat the child as a passive object does not recognize his/her rights nor does it contribute to an effective response to his/her behaviour. This also applies to the implementation of the measure(s) imposed. Research shows that an active engagement of the child in this implementation will, in most cases, contribute to a positive result.

46. A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.

...

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be free of charge. The Committee recommends the State parties provide as much as possible for adequate trained legal assistance, such as expert lawyers or paralegal professionals. Other appropriate assistance is possible (e.g. social worker), but that person must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law.

50. As required by article 14 (3) (b) of ICCPR, the child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40 (2) (b) (vii) of CRC, and the right of the child to be protected against interference with his/her privacy and correspondence (art. 16 of CRC). A number of States parties have made reservations regarding this guarantee (art. 40 (2) (b) (ii) of CRC), apparently assuming that it requires exclusively the provision of legal assistance and therefore by a lawyer. That is not the case and such reservations can and should be withdrawn.

...

60. The child has the right to appeal against the decision by which he is found guilty of the charge(s) brought against him/her and against the measures imposed as a consequence of this guilty verdict. This appeal

should be decided by a higher, competent, independent and impartial authority or judicial body, in other words, a body that meets the same standards and requirements as the one that dealt with the case in the first instance. This guarantee is similar to the one expressed in article 14 (5) of ICCPR. This right of appeal is not limited to the most serious offences.

...

68. The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.

69. In this process of offering alternatives to a court conviction at the level of the prosecutor, the child's human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

...

73. As far as alternatives to deprivation of liberty/institutional care are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement these alternatives by adjusting them to their own culture and tradition. It goes without saying that measures amounting to forced labour or to torture or inhuman and degrading treatment must be explicitly prohibited, and those responsible for such illegal practices should be brought to justice.

*General Comment no. 11 on Indigenous children and their rights under the Convention (2009)*

75. States parties are encouraged to take all appropriate measures to support indigenous peoples to design and implement traditional restorative justice systems as long as those programmes are in accordance with the rights set out in the Convention, notably with the best interests of the child. The Committee draws the attention of States parties to the United Nations Guidelines for the Prevention of Juvenile Delinquency, which encourage the development of community programmes for the prevention of juvenile delinquency. States parties should seek to support, in consultation with indigenous peoples, the development of community-based policies, programmes and services which consider the needs and culture of indigenous children, their families and communities. States should provide adequate resources to juvenile justice systems, including those developed and implemented by indigenous peoples.

*Joint general recommendation no. 31 of the Committee on the Elimination of Discrimination against Women / general comment no. 18 of the Committee on the Rights of the Child on harmful practices (2014)*

16. For the purposes of the present joint general recommendation/general comment, practices should meet the following criteria to be regarded as harmful:

(a) They constitute a denial of the dignity and/or integrity of the individual and a violation of the human rights and fundamental freedoms enshrined in the two Conventions;

(b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

(c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children, on the basis of sex, gender, age and other intersecting factors;

(d) They are imposed on women and children by family members, community members or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.

...

43. In States parties with plural legal systems, even where laws explicitly prohibit harmful practices, prohibition may not be enforced effectively because the existence of customary, traditional or religious laws may actually support those practices.

44. Prejudices and weak capacity to address the rights of women and children among judges in customary and religious courts or traditional adjudication mechanisms and the belief that matters falling within the purview of such customary systems should not be subjected to any review or scrutiny by the State or other judicial bodies deny or limit the access to justice of victims of harmful practices.

45. The full and inclusive participation of relevant stakeholders in the drafting of legislation against harmful practices can ensure that the primary concerns relating to the practices are accurately identified and addressed. Engaging with and soliciting input from practising communities, other relevant stakeholders and members of civil society is central to this process. Care should be taken, however, to ensure that prevailing attitudes and social norms that support harmful practices do not weaken efforts to enact and enforce legislation.

...

55. The Committees recommend that the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices. In doing so, they should ensure:

(a) That the process of drafting legislation is fully inclusive and participatory. For that purpose, they should conduct targeted advocacy and awareness-raising and use social mobilization measures to generate broad public knowledge of and support for the drafting, adoption, dissemination and implementation of the legislation;

(b) That the legislation is in full compliance with the relevant obligations outlined in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child and other international human rights standards that prohibit harmful practices and that it takes precedence over customary, traditional or religious laws that allow, condone or prescribe any harmful practice, especially in countries with plural legal systems;

...

73. The Committees recommend that the States parties to the Conventions:

...

(b) Provide training to individuals involved in alternative dispute resolution and traditional justice systems to appropriately apply key human rights principles, especially the best interests of the child and the participation of children in administrative and judicial proceedings;



## Specialized Instruments on the Role of Judges and Lawyers





# Basic Principles on the Independence of the Judiciary (1985)

(Endorsed by UN General Assembly resolutions 40/32 and 40/146 of 1985)

...The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

...

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

...

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

...

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.



## Basic Principles on the Role of Lawyers (1990)

(Endorsed by UN General Assembly resolution 45/166 of 18 December 1990.)

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.
- ...
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
- ...
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.



# Guidelines on the Role of Prosecutors (1990)

(Endorsed by UN General Assembly resolution 45/166 of 18 December 1990.)

## Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
  - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
  - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

## Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

...

## Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

13. In the performance of their duties, prosecutors shall:

- (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
- (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

#### Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

#### Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.

19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

#### Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

# Special Rapporteur on the Independence of Judges and Lawyers

(Mandated by UN Human Rights Council)

## *Report on Access to Justice (2008)*

38 ... In many countries, the culture and/or the religion have led to the formal justice system existing side by side with customary and/or religious courts. This makes for a broader range of judicial services and, in the case of customary courts, "neighbourhood" justice. Nonetheless, it should be pointed out that the Human Rights Committee has indicated that such courts cannot hand down binding judgements recognized by the State unless the proceedings are limited to minor matters, they meet the basic requirements of fair trial and other procedural guarantees, and their judgements are validated by State courts and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant; judgements that do not conform to international human rights standards are not acceptable. Nevertheless, complaints received by the Special Rapporteur show that such conditions are frequently not met, especially with regard to the existence of an independent system of legal defence and an appellate body to which convicted persons may apply.

...

49. The areas where indigenous peoples are most vulnerable are labour and land, where there are no judicial mechanisms to ensure protection of their rights. In the course of some country visits, the Special Rapporteur observed not only a lack of adequate procedural mechanisms, but also that the judicial workers who devote themselves to these issues are subjected to threats and attacks. These problems go hand in hand - notwithstanding certain interesting developments - with the marginalization of indigenous peoples' customary approaches to conflict resolution and the administration of justice. In this regard, particular mention should be made of General Recommendation No. 31 of the Committee on the Elimination of Racial Discrimination, on the prevention of racial discrimination in the administration and functioning of the criminal justice system, which, in keeping with the Bangalore Principles of Judicial Conduct, calls upon States to "guarantee the right of every person ... to an effective remedy against ... acts of racial discrimination" and "ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law".

50. In one of his reports (E/CN.4/2004/80), the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people spoke about the relationship between discrimination against indigenous peoples and the justice system, noting the physical isolation and poor communications in indigenous areas, and the absence of an effective judiciary designed for the needs of indigenous communities. In addition, lack of access to justice may indicate that the official legal culture in a country is not adapted to deal with cultural pluralism and that the dominant values in a national society tend to ignore, neglect or reject indigenous cultures. Within the justice system, particularly in the area of criminal justice, women, young people and children are particularly disadvantaged.

*Report on Gender and the Administration of Justice (2011)*

24. In many countries, a lack of access to the formal justice system, sometimes due to economic reasons, demonstrates that women's access to justice is frequently through traditional or community-based justice mechanisms, and sometimes through alternative dispute resolution mechanisms.

25. While the Special Rapporteur welcomes the availability of those mechanisms in some States, and acknowledges their advantages in terms of proximity, costs and efficiency, she wishes to draw attention to the need to establish oversight mechanisms to ensure that traditional, community and alternative justice mechanisms uphold human rights norms and effectively protect and empower women. In this regard, the Special Rapporteur is concerned that, in some instances, traditional or community-based justice mechanisms reinforce gender stereotypes and disregard gender considerations and women's rights. Furthermore, in most places, they are constituted by male elders, and sometimes reportedly apply a male-biased interpretation of customary laws.

26. In line with the foregoing, the Special Rapporteur wishes to recall that, under international law and human rights standards, States have the obligation to remove socio- economic barriers which impede access to justice. ...

87. States that have not yet done so should:

(a) Ratify and incorporate the applicable legal and policy framework on women's human rights and gender equality, including the elimination of discrimination and violence against women, into their national laws, plans, policies and programmes, and their bilateral and regional agreements regarding the justice sector;

(b) Review their national and regional laws and policies in order to harmonize them with the international legal framework on the protection of women, with particular attention to the goal of eliminating discrimination against women, and achieving gender equality, including equal representation of women and men in public office;

...

(e) Promote the participation of women (and men) from various segments of society, as key actors within the justice sector in their roles as judges, prosecutors, lawyers, legal counsel and court administrators;

(f) Develop procedures, policies and practices that are gender-tailored to promote equal access to justice for all, in formal, informal and alternative justice systems, as well as in transitional justice mechanisms and other mechanisms to adjudicate rights. ...

91. The judiciary and the bodies in charge of their administration and oversight should:

(a) Incorporate gender considerations in the day-to-day operations and overall planning of the judicial sector;

...



(d) Redouble efforts to ensure that women are not only considered as victims or clients within the judiciary, but also as key actors in the administration of justice, as legal professionals with strengths and capacities to contribute to the integrity of the justice system;

(e) Include knowledge of women's human rights and demonstrated commitment to the goal of gender equality as requirements in the selection and appointment of judges and justices at all levels. Proposed lists of judicial candidates for appointments and promotions should ensure adequate representation of women and minorities at all levels within the judicial system;

(f) Create equal conditions based on merit for appointment of judges to any kind of courts, not only family and children courts;

*Report on Protecting children's rights in the justice system (2015)*

45. In many parts of the world, informal justice systems “form a key part of individuals’ and communities’ experience of justice and the rule of law, with over 80 percent of disputes resolved through informal justice mechanisms in some countries”. Informal justice systems encompass many mechanisms of differing degrees and forms of formality, whether or not their role is officially recognized by the State. These informal mechanisms, whose role often includes the resolution of disputes and the regulation of conduct by adjudication or assistance to a third party, include tribal, culture and religion-based courts and often exist side by side with the formal justice system.

46. In many contexts, such informal justice systems “deal with issues that have a direct bearing on the best interests of women and children, such as issues of customary marriage, custody, dissolution of marriage, inheritance and property rights”. Yet, little research seems to have been done on the issues arising when children enter into contact with informal justice systems.

47. People reach out to informal justice systems rather than the formal one for diverse reasons. Informal justice systems are often more accessible, comprehensible, familiar and affordable, and less formal. Informal justice systems are also often seen as providing for potentially quicker and less expensive remedies, which are perceived as more in accordance with specific cultural, religious or other traditional values and beliefs. Contrary to formal justice systems, informal justice systems’ outcomes are also often perceived as emphasizing reconciliation, restoration, compensation and reintegration rather than custodial sanctions.

48. Informal justice systems nevertheless present extremely worrying aspects, in particular when it comes to the treatment of children. In reality, many informal justice systems reinforce existing societal or structural discrimination and power relations, in particular to the detriment of children, women and various minorities. In particular, in many societies, traditional values attribute little or no importance to the opinions and wishes of children, and, as a result, many informal justice systems ignore the rights of children, especially the rights to be heard in matters that affect them and to have their best interests protected.

49. It is important to recall that “such courts cannot hand down binding judgements recognized by the State unless the proceedings are limited to minor matters, they meet the basic requirements of fair trial and other procedural guarantees, and their judgements are validated by State courts and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant” (A/HRC/8/4, para. 38). Judgements that do not conform to international human rights standards are simply not acceptable. It is essential to ensure that international human rights norms and standards concerning children are known and applied by informal justice systems, as the obligation to respect, protect and fulfil human rights extends to them as well.

...

Recommendations:

...

102. Where they exist, informal justice systems should integrate and apply international human rights norms and standards concerning children in all their decision-making procedures.

...

*Report of Mission to Guinea-Bissau (2016)*

83. Recourse to community and religious leaders to settle disputes is deeply rooted in the culture and traditions of Guinea-Bissau. The “justice” system established during colonization, which consisted of administrative police and ad hoc tribunals that served as organs of repression under the command of the colonial capital, has left pervasive traces in people’s minds. This historical lack of trust in the judicial authorities is compounded by the current dire state of the formal justice system, which is unable to deliver justice to most of the population.

84. While accurate data is unavailable, it is clear that few people resort to the formal justice system. As seen in the section above, in many places justice is not accessible, leaving ample room for community and religious leaders to continue to exercise their power without competition. Traditional leaders take advantage of the gap left by the absence of State agents. They also represent an alternative that is more attractive than the formal justice system. Indeed, they are perceived by most as providing quicker and less expensive remedies, which are more in accordance with the specific cultural, religious or other traditional values and beliefs of the community and therefore more acceptable.

85. Nevertheless, the Special Rapporteur is concerned about some characteristics of the enforcement of such “traditional justice”, in particular regarding the treatment of women (very few leaders are women), children and other vulnerable persons. Many traditions and customs are in contradiction not only with international human rights standards, but also with the State’s own constitution and laws. Traditional leaders’ decisions also depend largely on the circumstances of a case and how leaders interpret those circumstances, allowing for a substantial level of discretion.

86. There have been attempts at engaging with traditional leaders and familiarizing them with the content of positive law and fundamental rights, but those attempts are not generalized. Many leaders have also expressed some level of resistance to human rights discourse.

87. Traditional leaders said they normally deal only with what they deem as simple cases or disputes, most related to inheritance or land ownership. They reportedly refer to the formal courts cases involving violence, the use of guns or knives, or important sums of money. Many interlocutors of the Special Rapporteur expressed serious doubt about such a claim. For instance, during the six months preceding the visit of the Special Rapporteur, not one case was referred to the regional tribunal of Bafatá by traditional leaders.

88. The Special Rapporteur agrees with the position of her predecessors, i.e., that decisions made through informal justice systems must meet a series of basic procedural and fair trial guarantees and conform to international human rights standards to be considered acceptable. In the context of Guinea-Bissau, solutions to reduce the influence of traditional leaders to the benefit of positive law and the courts will have to be considered comprehensively; they cannot be disassociated from the measures that are to be urgently taken to improve the quality, functioning and reach of the formal justice system.

...

Recommendations:

...

102. Urgent measures should be taken to establish and operationalize the tribunals and prosecution offices provided for in law. Judicial police outposts should be created. The presence of lawyers outside of Bissau should also be promoted.

...

134. Public awareness should be raised about the content of laws, their application, the rights they recognize and the obligations they entail, and on how to access the formal justice system. Public awareness strategies and tools should take into account the high illiteracy rate in the country and information should be made available in a language people understand.

...

136. Efforts to familiarize and sensitize traditional leaders to domestic laws and international human rights obligations should continue and be reinforced.

*Report on Mission to Pakistan (2012)*

82. Reports of conflicts being resolved by informal justice systems, often at the grass- root or community level are distressing. Such informal dispute settlement systems are deeply rooted in conservative interpretations of tradition and/or religion and lead to conflict resolution and punishments which are in contradiction with laws in Pakistan, fundamental rights recognized in the Constitution, and international human rights standards.

83. In 2004, the Sindh High Court issued a decision declaring that trials by jirgas were illegal and in breach of provisions of the Constitution and directed that contravention would be prosecuted as contempt of court,

punishable by imprisonment. The Supreme Court itself has declared on several occasions that jirgas and panchayats are unlawful assemblies and that their decisions have no legal validity. Such fora for judicial-looking adjudication, which are often more accessible, inexpensive and speedy as compared to formal first instance courts, should be effectively discouraged and combated in practice.

84. The evident disconnection between the modern formal justice system and the tribal areas or local level demonstrates the urgency to better integrate the formal justice system into the communities it serves. A number of testimonies indicated that it was only in urban areas that one had the choice of accessing the formal justice system; in the villages, the only choice is between the village elders and customary laws. Such laws are sometimes also presented as Islamic laws or in an Islamic frame; they dominate dispute settlements through forced reconciliation, retribution and compensation, and are a source of power for local authorities, hence their reluctance to let go of them.

85. Besides, it seems that a great number of people do not trust the formal justice system, claiming that it is complex, difficult, slow and expensive, as opposed to the informal system which allegedly provides simple, cheap and quick relief. Yet, many interlocutors observed that if the formal justice system actually worked for people, they would certainly change their mind and opt for it instead.

86. It is of great concern that it is mostly women who are victimized by punishments awarded by jirgas and other informal dispute settlement fora. The Special rapporteur fully supports the National Commission on the Status of Women's petition demanding the ban of jirgas filed before the Supreme Court. The points of view of women are simply not represented in such informal adjudication settings. Furthermore, women are often pressured to settle for such reconciliatory systems and not to pursue justice.

## VII. Recommendations

...

102. The formal justice system must be urgently improved in order to discourage recourse to informal "justice" systems. Alternative dispute resolutions, like conciliation and mediation, should be incorporated into the formal justice system, be non-discriminatory and respect fundamental rights.

...

125. The Government should urgently provide strong political leadership and implement practical measures to ban informal justice systems, such as jirgas and panchayats, and pave the way for a change in behaviours and attitudes towards them.

126. The Supreme Court should take a clear stance on the illegality of jirgas, panchayats and other custom-based informal dispute settlement systems and adopt a clear guiding policy for lower courts to follow when confronted with cases relating to decisions or orders passed by such fora.

127. Those who participate in informal justice systems should be held accountable by the formal justice system and specific legislation should be elaborated and implemented in practice to facilitate such prosecutions.

# **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003)**

(African Commission on Human and Peoples' Rights)

## **Q. TRADITIONAL COURTS**

a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.

b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:

(i) equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances;

(ii) respect for the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhuman or degrading punishment or treatment;

(iii) respect for the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;

(iv) respect for the equality of women and men in all proceedings;

(v) respect for the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment;

(vi) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(vii) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;

(viii) an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;

(ix) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the traditional court;

(x) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions;

(xi) an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;

- (xii) all hearings before traditional courts shall be held in public and its decisions shall be rendered in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children;
- c) The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:
  - (i) they shall be independent from the executive branch;
  - (ii) there shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.
- d) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.
  - (i) The impartiality of a traditional court would be undermined when one of its members has:
    - (1) expressed an opinion which would influence the decision-making;
    - (2) some connection or involvement with the case or a party to the case;
    - (3) a pecuniary or other interest linked to the outcome of the case.
  - (ii) Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness any of its members or the traditional court appears to be in doubt.
- e) The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.
- ...

For the purpose of these Principles and Guidelines: ... "Traditional court" means a body which, in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.

## Other Instruments on the Administration of Justice





# **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)**

(Adopted by UN General Assembly resolution 40/34 of 29 November 1985.)

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.
4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
- ...
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.



## **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985)**

(Adopted by resolution 40/33 of 29 November 1985.)

### 1. Fundamental perspectives

...1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

...

### 2. Scope of the Rules and definitions used

2.1 The following Standard Minimum Rules shall be applied to juvenile offenders impartially, without distinction of any kind, for example as to race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts:

(a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult;

(b) An offence is any behaviour (act or omission) that is punishable by law under the respective legal systems;

(c) A juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence.

...

### *Commentary*

The Standard Minimum Rules are deliberately formulated so as to be applicable within different legal systems and, at the same time, to set some minimum standards for the handling of juvenile offenders under any definition of a juvenile and under any system of dealing with juvenile offenders. The Rules are always to be applied impartially and without distinction of any kind.

...

## 5. Aims of juvenile justice

5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

...

## 6. Scope of discretion

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

...

## 7 . Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

...

## 9. Saving clause

9.1 Nothing in these Rules shall be interpreted as precluding the application of the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations and other human rights instruments and standards recognized by the international community that relate to the care and protection of the young.

...

## 11. Diversion

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or

guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

#### *Commentary*

Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

...

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.)

Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

...

#### 14. Competent authority to adjudicate

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which

shall allow the juvenile to participate therein and to express herself or himself freely.

*Commentary*

It is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. "Competent authority" is meant to include those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards (for example the Scottish and Scandinavian systems) or other more informal community and conflict resolution agencies of an adjudicatory nature.

The procedure for dealing with juvenile offenders shall in any case follow the minimum standards that are applied almost universally for any criminal defendant under the procedure known as "due process of law". In accordance with due process, a "fair and just trial" includes such basic safeguards as the presumption of innocence, the presentation and examination of witnesses, the common legal defences, the right to remain silent, the right to have the last word in a hearing, the right to appeal, etc. (See also rule 7.1.)

15. Legal counsel, parents and guardians

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

...

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

...

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

...

17.3 Juveniles shall not be subject to corporal punishment.

...

*Commentary*

The main difficulty in formulating guidelines for the adjudication of young persons stems from the fact that there are unresolved conflicts of a philosophical nature, such as the following:

(a) Rehabilitation versus just desert;

(b) Assistance versus repression and punishment;

(c) Reaction according to the singular merits of an individual case versus reaction according to the protection of society in general;

(d) General deterrence versus individual incapacitation.

...

It is not the function of the Standard Minimum Rules for the Administration of Juvenile Justice to prescribe which approach is to be followed but rather to identify one that is most closely in consonance with internationally accepted principles.

...

The provision against corporal punishment is in line with article 7 of the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the draft convention on the rights of the child.

...

## 22. Need for professionalism and training

22.1 Professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases.

22.2 Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies.

### *Commentary*

The authorities competent for disposition may be persons with very different backgrounds (magistrates in the United Kingdom of Great Britain and Northern Ireland and in regions influenced by the common law system; legally trained judges in countries using Roman law and in regions influenced by them; and elsewhere elected or appointed laymen or jurists, members of community-based boards, etc.). For all these authorities, a minimum training in law, sociology, psychology, criminology and behavioural sciences would be required. This is considered as important as the organizational specialization and independence of the competent authority.

...

Professional qualifications are an essential element in ensuring the impartial and effective administration of juvenile justice. Accordingly, it is necessary to improve the recruitment, advancement and professional training of personnel and to provide them with the necessary means to enable them to properly fulfil their functions.

All political, social, sexual, racial, religious, cultural or any other kind of discrimination in the selection, appointment and advancement of juvenile justice personnel should be avoided in order to achieve impartiality in the administration of juvenile justice. This was recommended by the Sixth Congress. Furthermore, the Sixth Congress called on Member States to

ensure the fair and equal treatment of women as criminal justice personnel and recommended that special measures should be taken to recruit, train and facilitate the advancement of female personnel in juvenile justice administration.

...

25. Mobilization of volunteers and other community services

25.1 Volunteers, voluntary organizations, local institutions and other community resources shall be called upon to contribute effectively to the rehabilitation of the juvenile in a community setting and, as far as possible, within the family unit.

*Commentary*

This rule reflects the need for a rehabilitative orientation of all work with juvenile offenders. Co-operation with the community is indispensable if the directives of the competent authority are to be carried out effectively. ...



# Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (2002)

(UN ECOSOC)

*Recalling* that there has been, worldwide, a significant growth of restorative justice initiatives,

*Recognizing* that those initiatives often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people,

*Emphasizing* that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities,

*Stressing* that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs,

*Aware* that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime,

*Noting* that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into account legal, social and cultural circumstances,

*Recognizing* that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders,

## I. Use of terms

1. "Restorative justice programme" means any programme that uses restorative processes and seeks to achieve restorative outcomes.
2. "Restorative process" means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.
3. "Restorative outcome" means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

4. "Parties" means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.

5. "Facilitator" means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

## II. Use of restorative justice programmes

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.

10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.

## III. Operation of restorative justice programmes

12. Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in the present instrument and should address, inter alia:

(a) The conditions for the referral of cases to restorative justice programmes;

(b) The handling of cases following a restorative process;

(c) The qualifications, training and assessment of facilitators;

(d) The administration of restorative justice programmes;

(e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:

(a) Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;

(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;

(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.

14. Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.

15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.

17. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In that capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.

19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

#### IV. Continuing development of restorative justice programmes

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among

law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

#### V. Saving clause

23. Nothing in these basic principles shall affect any rights of an offender or a victim which are established in national law or applicable international law.

# Specialized Instruments on the Rights of Indigenous Peoples



# **ILO Convention no. 169, Indigenous and Tribal Peoples Convention (1989)**

1. (1) This Convention applies to:
  - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
  - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
- (2) Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
- (3) The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.
2. (1) Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
- (2) Such action shall include measures for:
  - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
  - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
  - (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.
3. (1) Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
- (2) No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

...

6. (1) In applying the provisions of this Convention, governments shall:
- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
- (2) The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

...

8. (1) In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
- (2) These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
- (3) The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.
9. (1) To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
- (2) The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

...

35. The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.



# United Nations Declaration on the Rights of Indigenous Peoples (2007)

(Adopted by UN General Assembly resolution 61/295 of 13 September 2007.)

5. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

...

34. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

...

40. Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

...

46. (2) In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

(3) The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



# UN Expert Mechanism on the Rights of Indigenous Peoples

(Mandated by the UN Human Rights Council)

## **Advice No. 6: Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities (2014)**

5. In accordance with the Declaration, States must recognize indigenous peoples' right to maintain, develop and strengthen their own juridical systems, and must value the contribution that these systems can make to facilitating indigenous peoples' access to justice. In this regard, States must allocate resources to support the adequate functioning and sustainability of indigenous juridical systems and help ensure that they meet the needs of communities, in accordance with article 39 of the Declaration.

6. In States in which legal pluralism is recognized, the jurisdiction of indigenous juridical systems should be adequately clarified, recognizing that indigenous justice systems are highly diverse and context-specific. State justice systems should demonstrate respect for customary laws (which can be a means to increasing access to justice) and customary laws should respect international human rights norms.

...

8. States should adopt a holistic approach to access to justice for indigenous women, children and youth, and persons with disabilities, and take measures to address the root causes of multiple forms of discrimination facing these groups, including systemic biased use of discretionary powers, poverty, marginalization and violence against indigenous women.

...

12. Together with indigenous peoples, States should promote human rights education and training among indigenous women, children and youth, and persons with disabilities as a means for empowerment. Furthermore, links between indigenous and State legal institutions can benefit from dialogue on rights based notions of equality, centring on awareness of the rights of indigenous women and persons with disabilities. This can lead to improved gender balance and participation of indigenous persons with disabilities in juridical systems and indigenous peoples' juridical systems.

13. States should work in partnership with indigenous peoples so as to ensure harmonious and cooperative relations in the implementation of the Declaration's provisions regarding access to justice.

...

17. Indigenous peoples should strengthen advocacy for the recognition of their juridical systems; increased development of such systems can improve access to justice. Together with States, indigenous peoples should in particular raise awareness about their right to administer their own justice among policymakers and judicial and law enforcement officials.

18. Indigenous peoples must also ensure that these systems respond to the needs of the community, in particular indigenous women, children and youth, and persons with disabilities.

19. Reforms and strategies are critical to ensure traditional indigenous juridical systems and leadership are efficient and independent. This includes making more resources available to the indigenous leadership, supporting indigenous juridical systems and ensuring they perform their duties with independence and integrity. The participation of indigenous women as leaders within traditional indigenous juridical systems should be facilitated through targeted efforts, based on holistic and healing-based approaches.

20. Indigenous juridical systems should ensure that indigenous women, children and youth, and persons with disabilities are free from all forms of discrimination. The participation of indigenous women, children and youth, and persons with disabilities in indigenous justice institutions should be respected and promoted. Accessibility should be ensured for indigenous persons with disabilities.

21. Indigenous peoples should ensure that knowledge regarding their juridical systems and customary laws is transferred across generations, enabling every member of the community to understand indigenous concepts of justice.

22. The United Nations and its bodies and specialized agencies have an essential role in the promotion and protection of indigenous peoples' human rights, including their right to promote, develop and maintain their juridical systems. The work of international entities should be inclusive of indigenous peoples in both developing and developed States. Particular attention is required for indigenous women, children and youth, and persons with disabilities.

...

24. National human rights institutions can play a catalytic role in the promotion of access to justice for indigenous peoples. Jointly with indigenous peoples, they can encourage recognition of and provide support to indigenous juridical systems. They can also provide training on human rights to both State and indigenous judicial authorities and disseminate and promote the advice of the Expert Mechanism among the judiciary and the legal profession, so that it can be used to inform legal cases and opinions. National human rights institutions can bring together indigenous peoples and States, acting as facilitators in restorative justice processes.

# American Declaration on the Rights of Indigenous Peoples (2016)

(OAS General Assembly)

## Article XXII. Indigenous law and jurisdiction

1. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
  2. The indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems.
  3. The matters referring to indigenous persons or to their rights or interests in the jurisdiction of each state shall be conducted so as to provide for the right of the indigenous people to full representation with dignity and equality before the law. Consequently, they are entitled, without discrimination, to equal protection and benefit of the law, including the use of linguistic and cultural interpreters.
  4. The States shall take effective measures in conjunction with indigenous peoples to ensure the implementation of this article.
- ...

## Article XXXV

Nothing in this Declaration may be interpreted so as to limit, restrict, or deny human rights in any way, or so as to authorize any action that is not in keeping with international human rights law.

## Article XXXVI

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith.



## **Inter-American Commission on Human Rights**

### **Report on Human Rights of Indigenous Women in the Americas (2017)**

(footnotes omitted)

177. Access to justice for indigenous women is therefore linked to both access to the official justice system and to recognition and respect for indigenous law. When indigenous women can access their own justice systems, they do not face ethnicity-based discrimination. In addition, the indigenous women at issue are familiar with the rules and procedures available to them. Indigenous systems can also take into account the broader context of the dispute and a more culturally appropriate approach to reparations can be adopted. If international human rights standards are applied within these indigenous institutions, such culturally appropriate practices may be more efficient in affording access to justice and measures of redress to indigenous women.

178. The Commission must underscore, however, that indigenous women also face a variety of obstacles within indigenous justice systems. In its concluding remarks to Mexico, the CEDAW Committee expressed concern over harmful cultural practices, which are part of indigenous legal systems, inasmuch as they are based on the attribution of stereotyped roles of men and women in terms of gender perpetuating discrimination against indigenous women and girls. As for Bolivia, the CEDAW Committee noted it was concerned that emphasis on the particularities of indigenous peoples could hinder adherence to the standards of non-discrimination and formal equality between women and men. Special emphasis was placed on “the possibility that recognition of community justice by the State Party – though more accessible to the indigenous and peasant population- could become a mechanism of perpetuation of stereotypes and prejudices that constitute discrimination against women and violate human rights.”

179. Information provided to the IACHR indicates that indigenous authorities are usually men and therefore, in many instances, women stand trial before men of their communities and sometimes, of their own families, in keeping with the patriarchal structures of gender ideology. In Santa Cruz del Quiché, Guatemala, for example, it was found that despite the fact that cases of rape, domestic violence and rejection of recognition of paternity by men tend to be widespread, the community Mayors are not usually willing to acknowledge those types of complaints filed by women. The OHCHR-Guatemala has expressed concern because indigenous women and girls are victims of domestic and sexual violence in the following terms: “in practice, they do not have the ability to exercise their rights because of patriarchal prejudice.” The OHCHR indicated in its study on the situation of human rights of indigenous peoples of Central America that indigenous women in Nicaragua required an analysis of the application of indigenous law in their own communities, since practices used there were harmful to their rights.

180. The United Nations Expert Mechanism on the Rights of Indigenous Peoples has held that indigenous legal systems are highly dynamic and, consequently, respect for judicial autonomy of indigenous peoples and respect for international human rights law are not necessarily exclusive of each other. By way of example, it cites the office of the indigenous Mayor

of Santa Cruz del Quiche, Guatemala, where gender-based discrimination is starting to be addressed, and the number of women selected as Mayors has increased. In addition, in Cotacachi, Ecuador, development began in 2008 on the "Regulations for Good Coexistence and Good Treatment" or Sumak Kawsaipa Katimachick, which seeks to bring ancestral practices and women's human rights into harmony.

181. The Commission considers fundamental to strengthen the ability of indigenous justice systems to protect indigenous women, treating them fairly and equitably, in consonance with the international human rights system. Indigenous peoples have the right to promote, develop, and maintain their institutional structures and their own customs and legal systems, but they are not immune to the obligation to respect international human rights law. Consequently, the self-determination enjoyed by indigenous peoples also means that indigenous authorities, in the same way as State authorities, have the obligation to respect the human rights of the persons subject to their jurisdiction. In this regard, the indigenous justice system must act with due diligence and ensure access to justice, without discrimination, for indigenous women. This entails an obligation to generate better documentation of the situation of indigenous women and the human rights violations to which they are subjected, as well as culturally appropriate complaint mechanisms, which engage women in their design and implementation.

...

183. As noted above, the main obstacles to adequately justice for indigenous women are geographic, socio-economic, cultural and linguistic, but also flow from a State failure to act with due diligence, to adopt a holistic vision of the problem of violence against women, and to ensure an intercultural, gender-based and multidisciplinary judicial response. In order to contribute to increasing indigenous women's ability to obtain access to justice, States must adopt measures tending to empower indigenous women, give them access to meaningful participation in the civil and political spheres, as well as to improve their social and economic conditions. At the same time, the State must guarantee that its agents and justice officials are trained and sensitized about gender and the various indigenous cultures, beliefs, and worldviews in their country. Indigenous justice systems must also act with due diligence when human rights violations are committed against women.

184. The obligation to include gender equality principles as well as due diligence standards required under international law also applies to indigenous justice systems. Therefore, it is important to work comprehensively in both State justice systems and indigenous systems on the measures necessary to respect and ensure indigenous women's human rights, in order to contribute in this way to the removal of barriers to accessing justice.

...

230. Indigenous women also encounter different forms of discrimination and violence in their own communities. Consequently, indigenous justice systems must be compatible with internationally recognized human rights, just as State justice systems are required to be. Accordingly, they also have the duty to act with due diligence in preventing, investigating, and punishing violence against women, as well as to implement any necessary measures to eradicate the obstacles that prevent indigenous women from fully exercising their human rights without discrimination.



231. The Inter-American Commission on Human Rights concludes this report with ten recommendations to assist States in their ongoing efforts to prevent and respond to human rights violations affecting indigenous women, and confirms its disposition to collaborate in this process:

1. Design, adopt, and implement an action plan to repeal the domestic legal provisions that are inconsistent with the guiding principles laid out above, and refrain from adopting laws incompatible with these guiding principles. Incorporate in all laws and policies that affect indigenous women a holistic approach to address the multiple and interconnected forms of discrimination encountered by them in different contexts, protecting both their individual and collective rights. The holistic approach must recognize the special role played by indigenous women in their communities, with a view to transform and rectify the structural and historical forms of discrimination affecting them;

...

3. Generate spaces of coordination between the State justice systems and traditional indigenous justice systems to incorporate a gender and intercultural perspective to improve the judicial protection of indigenous women when they suffer human rights violations. These spaces must promote the active participation of indigenous women in the systems of administration of justice and in the development of approaches to reparations;

...



## Specialized Instruments on Rights of Minorities



# **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992)**

(Adopted by UN General Assembly resolution 47/135 of 18 December 1992.)

1. (1) States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.  
  
(2) States shall adopt appropriate legislative and other measures to achieve those ends.
2. (1) Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.  
  
(2) Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.  
  
(3) Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.
3. (1) Persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination.
4. (1) States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law.  
  
(2) States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.



## Special Rapporteur on minority issues

(Mandated by the UN Human Rights Council)

### *Report on Minorities and the Criminal Justice Process (2015)*

#### E. Rights in relation to judicial procedures and hearings

35. Minorities facing judicial proceedings may experience particular obstacles to realizing their rights to equality before the law, non-discrimination and a fair trial.

36. To overcome these challenges, some States include distinct courts or procedures that incorporate aspects of the cultural, religious, linguistic or other characteristics of a particular minority. In the Philippines, for instance, religious courts are provided in the Muslim Mindanao region. Such culturally adapted courts must always ensure full compliance with international human rights standards, including guarantees for a fair public hearing by a competent, independent and impartial tribunal under the rule of law.

37. Even in the absence of such courts, States should ensure that the cultural background of the accused, the victims and the witnesses is appropriately recognized, respected and accommodated by the authorities throughout criminal proceedings.

38. Where States have religious courts, they must ensure the rights of those not belonging to the same religion, through exercise of their right to choose whether they wish to be tried by a religious or a secular court, and the availability of appeals in all cases.





## Recommendations of the Forum on Minority Issues 8th session (2015)

(Mandated by the UN Human Rights Council)

### Judicial proceedings and sentencing

66. Whatever the character or customs of a court, States must ensure their full compliance with international human rights standards, especially equality before the law, and the guarantee of a fair trial by a competent, independent and impartial tribunal under the rule of law.

...

68. States should incorporate, where possible, and in consultation with minority communities, aspects of the cultural, religious, linguistic or other characteristics of the minority communities in culturally sensitized courts, proceedings and programmes. In the absence of such courts, States should ensure that the cultural background of the accused, victims and witnesses are appropriately recognized, respected and accommodated by the authorities throughout the conduct of proceedings within the justice system.

...

74. States should ensure that in adjudication and sentencing processes for minority children, children's rights and fair trial guarantees are applied without discrimination. Regardless of the child's background, sex or origin, sentencing should always comply with the best interest of the child. States should adopt appropriate measures, including legislative measures, to ensure that adjudicating bodies secure minority children's participation in court processes, ensuring that any sentence is clearly communicated by a judge or magistrate in a language they can understand.



## Other Sources



## **Guidelines on Action for Children in the Justice System in Africa (2011)**

(Adopted at "Deprivation of Children's Liberty as the Last Resort: A global conference on child justice in Africa", 7 - 8 November 2011, Kampala, Uganda)

43. Traditional courts, religious courts or other similar structures, where they exist, are required to respect international standards on the right to a fair trial and children's rights. The following provisions shall apply, as a minimum, to all proceedings before traditional courts and other similar structures:

- (a) equality of all children without distinction as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, fortune, disability, birth, or other status;
- (b) respect for the inherent dignity of children, including the right not to be subject to torture, or other cruel, inhuman, humiliating or degrading punishment or treatment; no physical punishment of any kind shall be imposed by any such court or structure; undue pressure and duress shall not be used;
- (c) respect for the right to liberty and security of every child, in particular the right of every child not to be subject to arbitrary arrest or detention;
- (d) respect for gender equality in all traditional justice and religious proceedings, and the recognition of the special vulnerability of the girl child;
- (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
- (f) an entitlement to the assistance of an interpreter if the child cannot understand or speak the language used in or by the traditional court or other similar structure;
- (g) an entitlement to seek the assistance of and be represented by a representative of the child's choosing in all proceedings before traditional courts, religious courts and informal justice proceedings, unless the child chooses not to avail herself of such legal representation or where such choice is not in her best interests;
- (h) an entitlement to have rights and obligations affected only by a decision based on evidence presented to the traditional or religious court;
- (i) an entitlement to receive a decision without undue delay and with adequate notice of and reasons for the decision;
- (j) an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;

- (k) all hearings before traditional courts shall respect children's rights to privacy, including proceedings concerning matrimonial disputes, child support or the guardianship of children;
- (l) All proceedings shall also give due consideration to the human rights of parents, guardians or care givers representing the child;
- (m) State parties shall abolish systems for the administration of justice for children conducted by secret societies;
- (n) States parties shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter;
- (o) Religious leaders and educators are bound to exercise any jurisdiction on matters involving child justice in a manner that is fully compatible with these Guidelines and international standards.

# **Concluding Recommendations of the Southeast Asia Regional Judicial Colloquium on Gender Equality Jurisprudence and the Role of the Judiciary in Promoting Women's Access to Justice (2013)**

(Adopted by the colloquium of judges 4-5 September 2013 in Bangkok, organised by UN Women Regional Office for Asia and the Pacific, in collaboration with the Office of the Judiciary of Thailand and the International Commission of Jurists)

## Background

...

5. The participants emphasized the significant and critical role of the judiciary in promoting gender equality and women's access to justice and the judiciary should take a leadership role for this purpose.

6. The participants agreed that gender bias can impede women's access to justice, particularly where judicial decision-making is based on stereotypical attitudes about the nature and roles of women and men. Thus they noted the need to deepen appreciation of gender socialization, unequal power relations, and gender expectations and how these shape the experience of the administration of justice and contribute to the differential access to justice.

7. The participants recognized that South East Asia is a culturally rich and diverse region with a plurality of justice systems, secular, customary and religious norms. They stressed the need to value cultures while at the same time emphasized that culture, customary rules, religion and traditional practices should not be invoked as justification for violations of the rights and freedoms of women.

...

## Recommendations

...

6. Judicial training programs should include progressive gender-responsive interpretations of customary and religious norms, where applicable, in close cooperation with civil society experts.





## **Declaration on Collaboration Between the Judiciary and Indigenous/Home-Grown Community Justice Institutions (2017)**

(Adopted at the Continental Conference on Collaboration between the Judiciary and Community Justice Institutions on Access to Justice, in Kigali on 22-24 August 2017.)

BEARING IN MIND that access to justice is a fundamental principle that is essential to ensuring sustainable rights-based development;

NOTING that the global Sustainable Development Goals (SDGs); goal 16(3) aims to realise access to justice for all, especially vulnerable and marginalised groups by 2030;

RECOGNIZING that the African Union (AU) Agenda 2063 and the Shared Values agenda prioritize access to justice as a critical enabler of sustainable development, prosperity and peace in Africa;

RECALLING the commitments and resolutions made by previous gatherings in Kampala 1996, Kadoma 1997, Dakar 1999, Ouagadougou 2002, Lilongwe 2004, Bamako 2011 and Johannesburg 2014 towards the strengthening of the rule of law and access to justice in Africa and that these commitments envisage the creation of integrated, inclusive and holistic justice delivery services and institutions, including meaningful and effective legal services for all and especially the poor and vulnerable groups in society;

NOTING particularly that the delivery of effective legal aid should include paralegal services;

REITERATING that access to justice for most Africans begins with the often unrecognised primary and Indigenous/home-grown Community Justice Institutions (CJIs) and systems. These are more accessible, relevant and affordable especially to the poor, vulnerable groups and the communities in which they live;

FURTHER NOTING that whilst formal legal systems are often adversarial and do not necessarily provide an inclusive, timely, holistic and restorative solution to litigants; community based indigenous or home-grown justice institutions provide a critical bridge between communities, centres of power and the formal justice system;

AWARE that the growth in community-based paralegals and community advice offices have been effective in reducing the pressure on formal justice service providers and contributed immensely to social and economic justice through advocacy, community rights education, empowerment and capacity development; and particularly in situations of conflict and post-conflict settings where legal systems and/or transitional justice mechanisms are not able to function. These CJIs also play a critical role as enablers of healing, reconciliation, peace-building and mediation at the community level. They offer other services including providing mediation at the community level, referral services, legal empowerment

and access to justice at the frontline of the criminal justice system in police stations, prisons and in the lower courts. These notwithstanding, African Indigenous/home-grown community justice institutions continue to face numerous policy and operational obstacles and challenges;

CONSCIOUS of the enduring impact of colonial legacies that denigrated community courts, customary law, traditional and other Indigenous/home grown community justice systems used by African people across the continent as backward, inferior and only acceptable to the extent that they were not repugnant to Western law and culture;

NOTING the tension and relatively negative attitude of the legal profession across Africa towards paralegals and indigenous/home-grown Community Justice Institutions and processes, as well as the need to minimize and eradicate such tension;

REITERATING our collective commitment to strengthening the direct participation, leadership and ownership of access to justice ideas, innovations and institutions by Africans;

ACKNOWLEDGING that the values, needs and aspirations of African peoples and communities should shape the design of an inclusive and holistic justice ecosystem in which people's interests are central;

WELCOMING the growing efforts by some African governments across Africa to provide for legal recognition of paralegals and other Indigenous/home grown community justice institutions in providing access to justice;

EMPHASIZING the symbiotic and mutually beneficial relationship between CJIs and other key stakeholders and that the Judiciary and the legal profession have a unique role to play in the recognition of the value added by Indigenous/home grown community justice institutions in the African society;

COGNISANT of the inadequate representation within this Conference of certain regions and countries of the African continent and the urgent imperative of a truly inclusive process;

ACKNOWLEDGING the long-standing and urgent need to promote the African Centre of Excellence for Access to Justice to serve as a bridge and enabler between formal Western systems and home-grown community justice institutions;

We, therefore, DECLARE as follows:

#### African Values, Vision and Culture

1. Access to Justice in Africa should be infused with the values of community participation, co-operation, 'Ubuntu' and not atomized by the pursuit of individualism, self-interest and competition in the provision of legal and other justice services. In this regard, African justice practitioners should seek to integrate within the framework of Community/Indigenous/home-grown community justice; a human-based value system that promotes integrity, accessibility, effectiveness, affordability, transparency and collaboration as principal components.

### Legal Education and the Law in Practice

2. The uneven development of formal and indigenous/home-grown justice systems is a political choice that African leaders at all levels can remedy. Thus, balance is required and must begin with deliberate prioritization of African values and systems in amongst others: legal education (e.g. curricula development); legal empowerment; legal access and legal aid (i.e. State and non-State).

### Timely, Transparent and Accountable Justice Services

3. An inclusive, holistic and restorative justice system for most African communities is critical to releasing the pressure on justice systems including prison overcrowding, case backlogs in courts and delayed investigations by police through referral of appropriate cases to Indigenous/home grown justice systems. In order to sustain such an approach, African governments should formally recognize and invest in strengthening home-grown community-based justice systems.

### African Union (AU) Organs and Institutions

4. African governments, parliaments, judiciaries and the African Union organs and institutions should adopt policies, procedures and mechanisms to enable the development of indigenous/ homegrown justice institutions based on shared African values of “Ubuntu”.

### Africa Centre of Excellence for Access to Justice (ACE-AJ)

5. The newly established African Centre of Excellence for Access to Justice (ACE-AJ) shall be inclusive of linguistic, geographic, cultural and other diversities of the African continent. ACE-AJ shall also seek to serve as our common platform for supporting the work of Indigenous/home-grown community justice systems, service providers and users. Further, that the ACE-AJ shall ensure regular convening of the judiciary across Africa to evaluate progress made in the collaborative efforts with paralegals and other Indigenous/home- grown community justice systems.

### National Constitutions, Laws and Policies

6. African governments should legally recognize paralegals and other Indigenous/home-grown community justice service providers systems and structures. That independence of paralegals as well as Indigenous/ home grown justice systems shall be guaranteed through governance and accountability mechanisms. These shall where appropriate include: self-regulation.

### State and Non-State Financing

7. African governments should provide adequate funding for paralegals and indigenous/home-grown justice systems in their justice budgets.

### Regional and International Framework for Paralegals and Indigenous/ Home grown Justice Systems

8. The African Union and Regional Economic Communities (RECs) shall take measures to support paralegals, indigenous and home- grown access to justice institutions. The quality and consistency of community paralegal

efforts shall be strengthened through: certified training courses; ethical guidelines; monitoring and evaluation mechanisms; and procedures for community oversight. Also that standards and mechanisms will be developed in order to ensure that paralegals and other Indigenous/home-grown community justice systems adhere to Constitutional and International Human Rights standards.

#### Comprehensive Justice Eco-System Design and Coordination

9. African governments should put in place mechanisms and processes to ensure meaningful collaboration between the key stakeholders within the justice delivery system; including: the judiciary, legal profession, national human rights institutions, prosecution, police and community justice systems. The African Union, national post-conflict reconstruction authorities and development partners should formally recognize and integrate paralegals and other services of Indigenous/home grown community justice systems in the early recovery stage. African ideas, knowledge and experiences should inform the design, purpose and outcomes of a people-centred justice delivery system. In particular, governments should invest in research, evidence-based policy, capacity development for paralegals and other Indigenous/home grown community justice service systems. African Indigenous/home grown community justice practitioners should prioritize the use of data and research to shape their internal and external engagements with communities, governments and other stakeholders.

#### Harmonization of External Financing and National/Local Priorities

10. International development partners should invest in strengthening African paralegalism and other Indigenous/home grown community justice systems in their organizational development. Traditional and faith-based community justice mechanisms should be capacitated and supported to align with Constitutional values and principles.

#### Capacity Development for Justice Sector Stakeholders

11. Paralegals and other Indigenous/home grown community justice systems should:

- Be capacitated to optimise the use of relevant modern technologies and non-traditional media;
- Develop standards and 'how-to' develop tools for effective performance management of their programmes and processes, including monitoring and evaluation of impact of their work and;
- Develop codes of conduct and other forms of self-regulatory mechanisms.

Further that Africa-wide impact assessment, shared learning platforms for paralegals and other Indigenous/home-grown community justice systems shall be developed including, through skills sharing.

#### Broad-Based Partnerships for Access to Justice

12. Effective partnership with African governments, development partners, individuals, private sector players and application developers shall be put in place towards deepening and broadening access to justice in Africa as well as towards enhancement of data management and documentation.

Paralegal and Indigenous/home grown community justice service providers shall develop innovative sustainability mechanisms and processes.



## **The Bellagio Declaration on state obligation and role of the judiciary in ensuring access to justice for gender based violence, including sexual violence in an effective, competent manner and with a gender perspective (2017)**

(Adopted at the International Judicial Colloquium on Women's Access to Justice in the Context of Sexual Violence, held at Bellagio on 7 and 8 December 2017).

...

8. The participants emphasised that domestic laws should be enacted, reformed or interpreted to conform to the international and regional human rights standards on the elimination of sexual violence.

9. The participants agreed that members of the judiciary<sup>2</sup> at all levels have opportunities to develop or apply the law in ways which are consistent with women's equality in cases involving gender based violence against women, including sexual violence. The participants noted that the actions of judicial officers in interpreting and applying the law may engage the responsibility of their State under international law if their decision and practices result in the violation of the human rights of women.

10. The participants agreed that members of the judiciary have a responsibility to be aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws and apply them systematically. It is crucially important for them to be aware of and use the provisions of those instruments, which particularly pertain to women. In countries with a plural legal system, this responsibility applies also to the customary, traditional and/or religious authorities.

...

<sup>2</sup> This includes judges, judicial officers and others that exercise judicial powers within the court system.





## See also

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