



**STATEMENT BY THE DULLAH OMAR INSTITUTE (FORMERLY  
COMMUNITY LAW CENTRE) UNIVERSITY OF THE WESTERN  
CAPE (334) TO THE AFRICAN COMMISSION ON HUMAN AND  
PEOPLES' RIGHTS AT THE 63<sup>RD</sup> ORDINARY SESSION**

**REALISING ACCESS TO JUSTICE FOR VULNERABLE AND  
MARGINALISED GROUPS IN AFRICA**

**24 OCTOBER - 13 NOVEMBER 2018  
BANJUL, THE GAMBIA**

Your Excellences, Honourable Commissioners of the African Commission on Human and Peoples' Rights, Representatives of the African Union Member States, Colleagues, ladies and gentlemen.

The Dullah Omar Institute (formerly Community Law Centre) at the University of the Western Cape wishes to express some concerns about the state of access justice for vulnerable and marginalised groups in the region.

A greater number of the African population live below the poverty line, and this has a direct impact on their access to justice. The cost of securing legal representation and filing of court papers can be prohibitive for many Africans, particularly disadvantaged groups. As a result, many people in the region are unable to or reluctant in seeking justice to remedy any wrong. In many African countries, the justice system is inadvertently designed to create barriers to disadvantaged groups or persons seeking justice for breached rights. Given the pervasive level of poverty in the region, high costs of securing legal representation may discourage many people from using the formal justice system. The situation can be very dicey for vulnerable and marginalised groups including people living in the rural areas.

Most formal courts are located in urban areas- this further poses a challenge of distance and added transportation costs to impoverished and marginalised citizens.

In many African countries, the legal systems inherited from colonial systems and are antiquated. Cumbersome parliamentary processes have led to slow pace of reforms of these systems. Citizens are thus trapped in a web of systems that are sometimes too formalistic or difficult to understand. The process of initiating or defending a case can be cumbersome and unappealing to marginalised groups.

Procedures in courts are sometimes intimidating and may discourage vulnerable and marginalised groups seeking justice.<sup>1</sup> Again in this instance, the language disparity in African indigenous languages of rural and marginalised groups vis a vis formal language of the courts interplay to constitute further barriers to accessing justice.<sup>2</sup> In some situations, the court procedures may be conducted in a language that a disadvantaged litigant may not understand, thereby making it inaccessible to a significant number of people, particularly those with low level of education and those from the rural areas. Moreover, the adversarial nature of the formal justice system tends to undermine the need for dialogue and reconciliation, which are essential elements of the informal justice system.<sup>3</sup>

Recognition of the challenges which a vast majority of Africans face in accessing justice through the more formalised system of the courts have over the years spurred the growth of alternative methods via which citizens can access justice. With an awareness of this responsibility, a number of African States have taken the initiative, in conjunction with other actors, to provide legal aid for indigent

<sup>1</sup> Penal Reform International (2000) *Access to Justice in sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* 6

<sup>2</sup> Kane M, Oloka-Onyango J and Tejan Cole A (2005) 'Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor' Paper presented at Arusha Conference 'New Frontiers on Social Policy' Dec 12-12 2005. 10

<sup>3</sup> Kane M et al (2005) *Ibid* 11

citizens. This is mostly with regard to criminally accused persons who are unable to afford the services of a paid lawyer. Legal aid has thus become a bridge between the poor and access to justice.<sup>4</sup> In South Africa for instance, the Legal Aid Act 1969, heralded the provision of legal aid services to indigent citizens who were criminally accused and to whom substantial harm would result if they did not have legal representation.<sup>5</sup>

Considering the pervasive level of poverty in Africa, many of the national legal aid schemes were soon overburdened. Other forms of legal aid schemes thus emerged as an adjunct to those at the national levels and have manifested across the continent in different forms and styles including non-governmental organisations (NGOs), Law clinics, Legal AID Board and Paralegals (community paralegals)

Some have cited the use of informal traditional systems as a redress and possibly a replacement for the barriers within the formal justice system to accessing justice. The informal traditional system has certain salient features which make it an appealing alternative to accessing justice, especially for rural and marginalized groups in Africa. Some of the most prominent features in this regard are the reconciliatory nature of the system which takes into account social cohesion, an inclusive and public participatory process, a sense of ownership on the process as it is largely community based, the voluntary and procedurally flexible nature of the process and a case-by-case approach. Notwithstanding its limitations and challenges, the traditional justice system still provides a beacon for hope for many disadvantaged people in the region.

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<sup>4</sup> Adeyemi A (2007) 'A Demand Side Perspective on Legal Aid: What Services do People Need. The Nigerian Situation' in Penal Reform International and Bluhm Legal Clinic of the Northwestern University School of Law *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* 117

<sup>5</sup> Mc Quoid-Mason D (2007) 'The Supply Side: The Role of Lawyers in the Provision of Legal Aid- Some Lessons from South Africa' Penal Reform International and Bluhm Legal Clinic of the North-western University School of Law *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* 98

Honourable members of the Commission, a discussion on access to justice in Africa is not complete without mentioning the pivotal roles of paralegals. Paralegals, specifically, community based paralegals, have continued to play an important role in bridging the gap between marginalised, vulnerable groups in rural areas and the more formal legal institutions through advocacy and education on the law to larger groups of people. Paralegals also help in removing obstacles to access to justice for vulnerable and marginalised groups. In addition, paralegals help in empowering and educating disadvantaged groups about issues relating to their rights and ultimately facilitating access to justice for them. This has ensured access to justice for millions of disadvantaged groups across the region.

Despite these important roles of paralegals, they encounter challenges in many African countries including lack of funding, lack of capacity and non-recognition under the law.

Ensuring access to justice for all is a human rights issue that is addressed in human rights instruments. These human rights instruments in one way or another explicitly recognise elements of access to justice as a human right. In addition, in September 2015 the international community adopted the Sustainable Development Goals (SDGs)<sup>6</sup> with a view to addressing various social and economic challenges facing the world. One of the agreed goals was to realise access to justice for all, especially vulnerable and marginalised groups by 2030. Indicator 16.3 aims at promoting the rule of law at the national and international levels and ensure equal access to justice for all. This is a commitment on the part of the international community in eliminating barriers to access to justice for vulnerable and marginalised groups.

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<sup>6</sup> United Nations General Assembly adopted on 25 September 2015.

Commitments contained in SDG 16.3 is similar to one of the 7 aspirations of African Union Agenda 2063 which is to envision an Africa where good governance, respect for human rights, justice and the rule of law is the norm. Under this aspiration, it is envisaged that Africa will become a continent where its people will have access to ‘independent courts and judiciary that dispense and deliver justice with neither fear nor favour’. Moreover, this Honourable Commission on different occasions has developed norms and standards including Resolution on the Right to Recourse and Fair Trial in Africa,<sup>7</sup> Resolution on the Right to a Fair Trial and Legal Assistance in Africa and Principles<sup>8</sup> and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>9</sup> In addition to this, other consensus statements on the region include the Kampala Declaration on Prison Conditions in Africa and Plan of Action<sup>10</sup> and the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action.<sup>11</sup>

These various norms and standards impose obligations on African governments to ensure that vulnerable and marginalised groups enjoy impeded access to justice.

In light of the above, Dullah Omar Institute makes the following recommendations to the African Commission:

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<sup>7</sup> Adopted by the African Commission on Human and Peoples’ Rights at the Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992. The African Commission on Human and Peoples’ Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992

<sup>8</sup> Adopted by the African Commission on Human and Peoples’ Rights adopted meeting at its 26th Ordinary Session, held in Kigali, Rwanda, from 1–15 November 1999

<sup>9</sup> Available at [www.achpr.org/instruments/principles-guidelines-right-fair-trial](http://www.achpr.org/instruments/principles-guidelines-right-fair-trial)

<sup>10</sup> The participants at the International Seminar on Prison Conditions in Africa held in Kampala from 19 to 21 September 1996

<sup>11</sup> The second pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso between 18–20 September 2002

- Remind African governments of their obligations under the African Charter and other international human rights instruments to ensure access to justice to all
- Call on African governments to remove barriers to access to justice or disadvantaged groups in Africa
- Call on African governments to live up to their commitment under SDG 16.3 by investing in programmes that will deliver easy, cheap and accessible justice system to all
- Consider the adoption of a resolution calling for the formal recognition of the work of Community paralegals in ensuring access to justice to vulnerable and marginalised groups across the continent.