

# The Illusion of Inclusion

*Women's Access to Rights in Northern Kenya*

*Bonita Ayuko  
Tanja Chopra*



JUSTICE  
for the POOR



Legal Resources Foundation Trust

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Research Report | December 2008

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Women in East Pokot

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## Abbreviations

ALRMP	Arid Lands Resource Management Project
BNPP	Bank-Netherlands Partnership Program
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEI	The Commonwealth Judicial Education Institute
CLAN	Children Legal Action Network
CSO	Civil Society Organisation
DC	District Commissioner
GAP	Gender Action Plan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
IDEG	The Institute of Democratic Governance
J4P	Justice for the Poor
LRF	Legal Resources Foundation Trust
NGO	Non-Governmental Organisation
NSC	National Steering Committee for Peacebuilding and Conflict Management
USAID	United States Agency for International Development

## Acknowledgments

This report is based on qualitative research data collected during field visits between July and November 2007 in three districts in Northern Kenya, namely Isiolo, Baringo/East Pokot and Garissa. Research areas were selected to gain insight into conflict and legal dynamics among a variety of ethnic groups and in differing ecological and political environments. Research tools mainly consisted of semi-structured interviews, focus group discussions and participant observation. New research tools, such as legal aid days, were piloted during the study. About 80 interviews were conducted with a broad range of resource individuals, ranging from formal authorities to peace committee members, NGOs, CSOs, informal authorities, women groups, youth groups and others. The research team worked in district capitals and remote locations in order to observe peace meetings and communal life in general.

This research effort further served as a capacity-building exercise for the Research and Advocacy Unit of the Legal Resources Foundation Trust in: a) the design of research methodology; b) the development of key research questions; and c) the practical and logistical implementation of field research. The research was supported by The World Bank and implemented by Justice for the Poor Program / Kenya (J4P) and Legal Resources Foundation Trust (LRF).

The arid land areas were selected for the first engagement of J4P in Kenya. The rationale was that the region lacked access to general government services and had long existed on the periphery of development assistance. The World Bank has further been implementing the 'Arid Lands Resource Management Project (ALRMP)' since the mid-1990s.

The arid lands have received significant support from donors and government in conflict management and peacebuilding activities, and a variety of data and literature exists on this topic. However, it was obvious at the time of J4P's first engagement that there was not much data available on conflict management in the arid lands produced through a legal/judicial lens. The study was therefore designed to serve a more exploratory purpose by aiming at understanding local conflict management processes in relation to socio-cultural systems, the official justice system and peace initiatives. The main theme that emerged from the first set of research data concerned the tensions between 'justice and peace' that seemed to dominate the relation between local level dynamics and the work of judicial institutions. Following the post-electoral violence in January 2008, this theme has become the topic of national debates. While the results of this study do not respond to the post-electoral violence directly, they are intended to inform this debate by demonstrating how the question of 'justice versus peace' can play out at the local level.

Research results are presented in three separate papers for greater clarity and to better target specific audiences. This paper is therefore a companion paper to 'Reconciling Society and Judiciary in Northern Kenya', which focuses on the role of the judiciary in the arid lands; and 'Building Informal Justice in Northern Kenya', which focuses on the peace initiatives in the region. Given that this research was exploratory and aimed at gaining insights in local level dynamics, the research team expects that the qualitative research results will help shape quantitative questions and encourage future survey work.

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The findings and conclusions expressed in this paper are entirely those of the authors. They do not necessarily represent the views of The World Bank.



*ALRMP staff addressing women in Oldonyiro*

## Executive Summary

Kenya's arid lands are predominantly inhabited by pastoralist societies. The main kin groups are defined through male lineages, and the male members, such as heads of families, husbands or elders, are responsible for decision-making processes regarding issues of political relevance and conflict resolution. Conflicts and grievances can be reported to the local chiefs, which are part of the Provincial Administration. Often, the chiefs assume the role of gatekeepers by deciding whether grievances or conflicts are dealt with through informal local mechanisms, or whether they should be reported to the police and a case filed with the official justice system. The situation of women and their grievances is dire in this area. Women are subject to a male-dominated informal structure and have barely any access to the formal justice system.

Judicial institutions, such as Magistrate Courts are located in most district capitals. However, because of geographical distances in the arid lands, it takes some citizens a two-day journey to reach the nearest district capital. There are many other hurdles that bar people from seeking redress from courts if they wish to do so, including lack of legal awareness, lack of legal aid, high costs, difficult judicial procedures and more. Differences between local concepts of justice and the concepts underlying the official law are another important factor that prevents local communities from deciding to address the court with a grievance. Local systems focus on the maintenance of social harmony and the protection of social safety nets, while the formal system focuses on the individual perpetrator. Local conflict resolution is predominantly based on the understanding of communal rather than individual responsibility for misconduct. It is therefore not surprising that local level authorities will prefer that many grievances or conflicts be tried under the informal systems.

This can pose particular challenges for women, whose individual rights are technically protected under the official law. However, the male-dominated authority structure in the community can prevent women from seeking redress from the formal system. Even if women do manage to file reports of domestic violence or other crimes with the police, they often encounter rejection, since male police officers feel that such issues are domestic and better handled at the local level. Some women claim that conflict resolution inside the community produces results that do not promote women's rights, since it is implemented by male community members.

The laws of Kenya clearly prescribe that domestic violence is a criminal offense. In practice, however, most of these cases are referred to community elders or mediated by chiefs and other community leaders, instead of being prosecuted under the official criminal system. While the communities acknowledge such offenses as misconduct, informal procedures do not focus on the woman as the victim. This contradicts western concepts of individual rights, as provided under official laws. However, the results of cases that have passed through the official system have not centred on the victim either. When husbands are imprisoned, their wives are left in dire economic circumstances, lacking any income to support themselves and their children.

Cases of rape or defilement are often dealt with at the local level, where both are considered shameful and prevented from becoming public. In a case of defilement, the family of the victim will be most concerned with ensuring that someone will still be willing to marry her. The Sexual Offences Act is very strict. Since it does not allow for much discretion in sentencing, it is not widely accepted by the local community. In some cases it has a deterrent effect on peoples' willingness to report cases to the police, since they do not

always have an interest in imprisoning the perpetrator, but prefer compensation payments.

Defilement charges can occur in cases of early marriages, where an under-aged girl is simply expected to consummate a marriage. Similar to female circumcision, early marriages are engrained elements in local socio-cultural systems and the fact that they were rendered illegal by law is not really appreciated among local communities. Even formal authorities at the local level have defended the practice.

In regards to civil matters, Kenya's succession laws require an overhaul in order to strengthen equal rights. Local concepts of succession and inheritance leave women dispossessed in many scenarios. Traditionally, women inherited little from their fathers or dead husbands, but other safety nets were in place. For example, widows were required to marry their brothers-in-law in order to secure their survival and property. Daughters usually do not inherit from their fathers, since they marry into different families and would consequently alienate the property of the father from his family by transferring it to a different family.

Custody and child maintenance can also pose serious challenges for some women. Men may abandon their wives and children and stop paying for their subsistence. In divorce cases, the man's family can try to keep the child from the mother. There are grave conceptual differences in these matters between the official law, the *Sharia* and the local systems. Some NGOs have done significant work in supporting women to claim their official rights in these cases. More support is required.

Equally challenging for women is the difficulty of assuming more decision-making powers in their communities. While involvement of women in local level development initiatives has been high on

the agenda of donor organizations and government, in reality, many women claim that they struggle to be heard. Only in some areas has the integration of women been successful, such as in local committees that deal with food aid and water. These issues are locally perceived as ‘women’s issues’, and there is little male resistance when women take decisions.

This has had little effect on the general voices of women in the arid lands. Women’s organizations have been formed, but are still not very strong in comparison to other areas of Kenya, and men render them irrelevant when they say they are only places of gossip.

Similarly, the attempt to integrate women in the peacebuilding initiatives in the arid lands, by fostering a women’s quota in the ‘Peace and Development Committees’, has proven to be only minimally successful. It may require more to actually give women a voice on these committees. At present, women claim that they are often not invited to meetings.

Although there is a variety of avenues through which women can seek redress in grievances, in reality their choices are limited. Male family members or heads of families often take decisions on their behalf. If they do file cases at court, community elders may attempt to withdraw them. The reason for this may be male bias, but also a community interest in maintaining social harmony, which only the informal systems guarantee. Progressive laws are therefore meaningless if they are disconnected from social reality, and their application can even serve as a deterrent to the community for further engagement with the formal system.

The problem for women is that they lose under both the formal and the informal systems. Approaches to addressing these shortcomings will need to focus on the whole community, and will need to



increase access to the formal system, while also engaging with informal systems in order to make them less biased. Only a gradual, simultaneous approach to both formal and informal systems, and a steady support for social change, can help overcome the hurdles for women to claim their rights.



# Introduction

*Women are there to be seen but not to be heard!*

Kenyan law is drafted with the intent to conform to various international human rights conventions and documents.<sup>2</sup> Many of these laws are conducive to promoting gender equality; however, there are still major setbacks in achieving such equality in practice. Various factors make women unequal users of justice in the official system. Local power dynamics, for example, can prevent women from choosing where to address their grievances.<sup>3</sup> The cost of accessing formal justice may also be prohibitive and a lack of legal awareness may prevent women from benefiting from the formal system's legal protections.<sup>4</sup> In promoting gender equality, informal justice systems may not necessarily present an alternative. They are often based on different concepts of justice which may not comply with the concept of individual rights on which international human rights standards are based. Informal systems are also subject to asymmetric power hierarchies which can prevent women from becoming equal partners.

Women are equally confined in accessing their right to take part in community-based decision-making processes. Issues that are locally perceived as part of the male domain are usually decided without the

1. Interview with elder, August 2007.
2. For example, Kenya has ratified key international instruments relating to the furtherance of women's rights, including: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR); the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on Human And Peoples' Rights; Establishment of an African Court on Human and Peoples' Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and the Beijing Platform for Action. Some of the provisions of these international instruments have been domesticated in legislations like the Children Act, the Sexual Offences Act, the HIV-Aids and Prevention Act among others.
3. Interview with participants during a legal aid day, August 2007.
4. P. Kameri-Mbote, 'Property Rights of Women in Kenya vis-à-vis the East African Position,' A paper presented at the 7<sup>th</sup> Annual Jurists Conference held by ICJ-K, August 2003.

input of the women in the community, despite donor and government programs encouraging their participation.

The dynamics of the communities in Kenya's arid lands region are no exception to this. The arid lands are an interesting example, as they comprise a vast region mainly in north and north-eastern Kenya. Its pastoralist societies have been consigned to the periphery of government and development assistance since independence. While the rest of Kenya is inhabited by predominantly farming communities, which enjoy greater access to government services and development assistance, the pastoralist communities have been excluded from most of these amenities.

The role of government in the arid lands remains minimal, especially in the justice sector institutions. The police find the arid lands region a difficult environment to execute their duties, while judicial institutions, particularly Magistrate Courts, play only a peripheral role in solving disputes. Communities prefer to solve conflicts on the basis of their understanding of justice which reflects their ideas and values, social realities and religious laws, rather than relying on state institutions. This has a detrimental effect in realizing women's official rights. Women have to take up their grievances with the informal systems, most of which can be dominated by male authorities.

This paper shows how official laws can be difficult to apply when they are not socially acknowledged, contextualized or received, and therefore have minimal impact on women's lives. It demonstrates that the inclusion of women through international conventions, domestic legal reform and gender quotas in participatory processes is illusory. While these are all important instruments in women's empowerment, the paper calls upon access to justice practitioners and policy makers to place equal emphasis on fostering the practical implementation

of laws and to emphasize opportunities for increased equality in informal systems.

# Power Structure and Access to Justice

## Authority Structure

Pastoralist communities have distinct value systems which are the organizing principles of their social fabric. Most arid lands communities are patrilineal, and older male community members dominate in issues such as property, livelihood, and political decision-making. The family, lineage or clan is considered a central unit in the social cosmos, while the individual is less significant. The family includes ascendants and descendants, mostly of the male line. The family, and particularly its male members, also constitutes the core unit that is held responsible if a member is accused of breaking communal rules. The family units, therefore, usually constitute the main parties of a conflict, since they are responsible for the actions of their kin.

When women want to air their grievances, the male head of the household, be it the husband or father, is the main addressee. If the grievance or conflict is in relation to domestic life, a woman has the option of taking it up with her husband's family, or she can address her own family. The male head of a family decides whether cases should be taken up with the head of the opponent family, whether they should be brought before elders to help identify a solution, or whether they should be taken to the formal court.

The main gatekeepers between the informal and the formal system are the chiefs and their assistant chiefs. Each location is headed by a chief,<sup>5</sup> who supervises his assistant chiefs, each heading a sub-location. The chiefs and assistant chiefs are civil servants, employed by the Provincial Administration, but they usually originate from their location. They are part of the civil service, and are usually also knowledgeable in the local socio-political systems of their community.

5. The 'location' is an administrative unit that is part of a 'division', and the 'division' is part of a 'district'.

Though they are not trained as legal officers, the chiefs are mandated to maintain order in their communities and are therefore closely involved in dispute resolution.<sup>6</sup> In practice, they make use of both statutory and informal law in dispute resolution.

The chief usually decides whether a case should be handled by informal leaders or passed on to higher-level government authorities. The latter can comprise the District Commissioner (DC), who is the highest authority of the Provincial Administration at the district level. However, the DC is more likely to get involved in serious cases such as assaults, killings or cattle raids between communities, than in women's grievances. For the latter, a chief can refer a woman to the next police station in order to report a crime, or, in the case of family-related matters, to the nearest Magistrate Court. This is



*Women in East Pokot*

6. The Chiefs' Authority Act Chapter 129 of the Laws of Kenya provides at section 6, "It shall be the duty of every chief or assistant chief to maintain order in the area in respect to which he is appointed, and for such purpose he shall have and exercise the jurisdiction and powers by this Act conferred upon him over person residing or being within such area".

particularly the case in grievances that are less likely to pose a threat to social harmony in the community.

Most districts in Kenya comprise a Magistrate Court, located at the district capital. Magistrate Courts are staffed with at least one magistrate, who, depending on his or her level, can deal with different criminal offences or civil cases. If cases are outside their jurisdiction, they have to be filed at the High Court. For family related matters, Muslim community members can decide to address the *Kadhis* court instead of the magistrate.<sup>7</sup> *Kadhis* courts are usually co-located with magistrates in areas with Muslim populations. These courts have jurisdiction over civil cases, and they rule on the basis of *Sharia* law.<sup>8</sup> Their decisions can be appealed at the High Court.

### Access to Justice

In Kenya, most disputes in the rural areas are generally dealt with through non-formal justice mechanisms.<sup>9</sup> People do not necessarily see the official system as the best place to sort out their grievances. One of the foremost reasons for this is that local communities have different ideas of what is ‘just’ and how conflicts ought to be resolved. The formal system has little ability to re-install social harmony, since the formal paradigm can contradict local ideas of justice. The formal system, for example, does not respond to the understanding of communal responsibility, but targets the individual perpetrator. It also does not provide restorative measures of justice and often leaves the victim’s party empty-handed.

7. The Constitution establishes the *Kadhis Courts* which have jurisdiction regarding determinations of Islamic law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties are Muslims. Section 66 of the Constitution of Kenya.

8. See Chapter 11, *Kadhis’ Courts Act*.

9. ‘Customary law’ is not wholly recognized in Kenya but the Judicature Act of 1967 allows the use of the customary law of an ethnic group in civil cases as long as it does not conflict with the written law and is not repugnant to justice. The person it applies to must be subject to or affected by the custom.

Furthermore, there are barriers in accessing the official justice system, such as long delays, perceived bias, complex language and procedures, a lack of affordable legal aid, and corruption.<sup>10</sup> While informal systems are more accessible, less costly, and more legitimate in the eyes of the community, conceptually they do not conform to official laws promoting gender equality.

In the case of the arid lands, some of these hurdles are even more prevalent. Pastoralist communities have their own specific concepts of justice that differ significantly from the official law and judicial processes. Furthermore, the distances in the arid lands are vast, and travel to the often distant district capital, in order to visit a court or *Kadhis'* court, may not be affordable for those in grievance.<sup>11</sup> Physical access to courts may even be more restrictive for women, since it can be socially unacceptable for women to travel to town by themselves, and since women may lack familiarity outside their routine areas, or may not be able to stop their domestic duties in order to be able to travel.

However, the most insurmountable barrier for access to justice for women in the formal system, but also in relation to informal solutions, is local power dynamics. Women seeking an avenue to the official laws often report to the chief first. The chief may or may not support the woman in addressing the formal judiciary or reporting to the police. Chiefs and other community leaders may have an interest in keeping cases at the local level, given that informal systems are better suited to re-establishing social harmony. However, in the application of informal means, there is a chance that the chief acts are biased, and his decisions can reflect and perpetuate local power asymmetries. This can prevent women from accessing their rights,

10. Legal Resources Foundation Trust, 'Balancing the Scales: A Report on Seeking Access to Justice in Kenya,' Nairobi, 2005.

11. Interview with women, September 2007.

even under the informal system. In addition, the ad hoc application of either formal or informal law by the chiefs allows those who are powerful within a community to make reference to customary law when it suits them at the expense of other parties, thereby denying them justice.

In Isiolo District, for example, some women indicated they saw no use in reporting cases since they felt they had nowhere neutral to report them. In their view, cases are always decided in favour of men. In places where religious law provides an alternative, women complained of difficulties in receiving fair judgment from the *Kadhi*.<sup>12</sup>

Lack of legal awareness prevents women from approaching formal institutions. In some cases it was reported that if men in the community see a woman succeed in a case brought before the *Kadhi* or the Magistrate, they insist that customary law be applied. It is particularly easy for men to take advantage of women in this manner as many women are unaware of their rights under the formal law or *Sharia* law, leaving them vulnerable to manipulation.<sup>13</sup> Women are at times compromised by community members who do not want to see them providing evidence at court. This leads women to fear they will not be accepted by the community should they state anything contrary to what community members want.<sup>14</sup>

Similar difficulties occur if a woman wishes to report a criminal case to the police. Although police stations are more numerous than courts, the fact that most police officers are male constitutes a major psychological hurdle for women. If a woman eventually decides to report an incident to the police, the community power-holders can

12. Interview with participants, September 2007.

13. Interview with participants, arid lands district, September 2007 and with the women water group, arid lands district, July 2007.

14. Interview with NGO staff, November 2007.

prevent the case from actually going to court. Elders have been known to force women who register complaints at the police station to withdraw them, insisting they will solve them outside the official justice system – especially complaints against husbands. Elders insist that matters should be dealt with inside the community, since in their view only the local system can provide adequate solutions. However, in the long run, women claim that these matters were never sorted out and that they ended up being blamed instead.<sup>15</sup> The intention of the elders is to solve issues in accordance with local concepts, which can contradict formal law. The requests for withdrawal of such cases from the official system are commonly supported by the police.<sup>16</sup> As a senior police officer stated, in some instances the police would rather not deal with cases they feel are family related and domestic. They therefore refer such cases back to the elders.<sup>17</sup> Women thus affirm that they no longer bother to report domestic issues to the police.

15. Interview with women's group, August 2007.

16. Interview with a participant, August 2007.

17. Interview with senior police officers, September 2007.

# Grievances Related to Crimes

## Domestic Violence

As in many other communities, domestic violence appears rampant among the pastoralist societies, manifesting itself both physically and psychologically.<sup>18</sup> Official law is very clear on matters of domestic violence. Under the current Constitution, the application of customary law is restricted to matters of personal law.<sup>19</sup> In this regard, any laws that contravene the Constitution are *ultra vires* and unenforceable. As such, the issue of domestic violence must be dealt with under the Penal Code and not under any informal system.<sup>20</sup> According to the Penal Code, physical domestic violence constitutes the offence of assault.<sup>21</sup> Offenders can receive either a prison sentence or a fine.

However, most cases of domestic violence never reach the formal system. Different communities in the arid lands deal with domestic violence in various ways. Among the Borana community, for instance, visible physical injuries on women are unacceptable.<sup>22</sup> If physical injuries are visible, the elders punish the individual responsible. The measure of compensation and/or punishment depends on the degree or severity of the injuries. If a woman feels offended from the beating, she is required to approach the elders of her husband's clan and it is their responsibility to sort out the matter. If they do not act, she is at liberty to approach the elders of her clan.<sup>23</sup> The perpetrator may be forced to pay compensation. If it is her husband, he will be required to slaughter a sheep for his wife. In any case, only a husband is allowed to 'discipline' his wife and if someone other

18. The Federation of Women Lawyers Annual Report for 2007 states that a total of 622 domestic violence cases were reported to them in 2007- 263 were reported in Nairobi, 38 were reported in Mombasa and 321 in Kisumu. There are unfortunately no figures available for the arid lands region.

19. Personal law refers to the law which relates to an individual for example issues related to family and succession laws.

20. Chapter 63 of the Laws of Kenya.

21. See Section 250 of the Penal Code (Cap 63 of the Laws of Kenya).

22. Interview with an elder, September 2007.

23. Interview with elder, September 2007.

than the husband caused harm, that person will be required to give her a cow which then becomes her property.

The Pokot community has a particularly interesting custom:<sup>24</sup> if a husband beats his wife, the women in the community will gather at night and secretly invade the perpetrator's house to avenge the beating. However, if a woman beats a man, all the men in the community have the right to avenge the deed by beating all the women in the community.

A woman may be in a disadvantaged position in defending herself in domestic violence cases – unless the men of her family step in for her. The rules and dynamics of local conflict resolution appear to favour men. Among the Samburu community, for example, women are not given adequate means to defend themselves before the council of elders. When women ask to defend themselves – especially in the presence of men – they are required to do so while seated on the ground and while holding a grass reed above their heads. Men are not required to do this but instead are required to address the other men while standing and holding a long rod understood to be a symbol of respect. According to a chief, some male community members think women have nothing sensible to say and therefore their views may not be taken seriously in these forums.<sup>25</sup>

Most domestic violence cases are handled by male community elders. In particular instances, if the conflicts relate to domestic issues, elderly women can be consulted as advisers.<sup>26</sup> The aggrieved party is also allowed to appeal against the decision of the elders but it will be the same elders who consider the merits of an appeal.

24. Interview with ALRMP staff, October 2007.

25. Interview with chief, August 2007.

26. Interview with elderly women, August 2007.

Some women complained that even if they reported domestic violence to the police, the male community members would try to make them withdraw the complaint. In one case, for example, a woman complained that she was frequently beaten by her husband, and that he neglected his children by not paying for their food and subsistence. The male community members had mostly stood by the husband once the conflict became apparent. When the woman finally decided to report her husband to the police, the community elders followed her and managed to withdraw the case, in order to deal with it at the community level. The woman complained about the elders in her community, and that they got involved in all personal cases and solve them with a male bias.<sup>27</sup>

In another case, a woman complained that she received beatings from her husband and that he did not provide for his children, who were all under the age of 18. Twice she reported the issue to the police, but her husband kept getting released upon the intervention of the community elders, who saw domestic issues as a matter under their 'jurisdiction'. The woman claimed that she was now afraid of pursuing the case further through the official system, since she feared that her husband would retaliate. She explained that she still lived in his homestead, and would have no means to move out.<sup>28</sup>

Some domestic violence cases that have been reported to the official system have had a rather negative impact on the community's perception of the official law. Tried by the official system, imprisonment of the husband can be economically damaging for the wife and her children. Some women stated they only reported domestic violence cases to the police so they would give their husband a warning. They did not intend to cause the imprisonment of their providers.

27. Interview with woman, August 2007.

28. Interview with woman during a legal aid day, August 2007.

## Rape and Defilement

Rape and defilement are other criminal acts that women and girls endure.<sup>29</sup> Section 3 and section 8 of The Sexual Offences Act of 2006 define the offences of rape<sup>30</sup> and defilement<sup>31</sup> respectively. The Sexual Offences Act is in conformity with Kenya's obligations under various international conventions to promote and protect the rights of its citizens. The Act specifically and comprehensively seeks to deal with sexual offences. The Act also expands offences previously defined in the Penal Code to include both males and females as potential victims.<sup>32</sup> The Act does not recognize informal methods of dealing with rape and requires all cases be reported to the police for the purposes of state-led prosecutions.

While the Act also provides that chiefs can receive complaints, ultimately every complaint is to be forwarded to the police station and recorded in the Occurrence Book as soon as possible for an investigation to commence. Despite (or because of) the stringent provisions contained in the Act,<sup>33</sup> arid lands communities still prefer to apply communal systems when dealing with rape.

Communities are not very open when issues of rape or the defilement of under-aged girls arise, and usually do not mention the occurrence of such cases. Rape is assumed to be shameful for the girl or woman, and should the rape become public the victim runs the risk of being

29. The Sexual Offences Act of 2006 (sections 3 and 8) treats sexual relations with persons below the age of 18 years as 'defilement', while sexual relations without the consent of a person above the age of 18 years is considered 'rape'.

30. The offence of rape is created by section 3 of the Sexual Offences Act and has the following ingredients: a person intentionally commits an act; which act causes the penetration of his or her genital organs of another; without the consent of the other person or the consent is obtained by means of force or threats or intimidation. It should be noted here that in most communal systems rape of males is not recognized and thus rape is considered to be an offence against women. The Act envisages situations where there is a possibility of rape of males. This is a recent development.

31. The section states that 'a person who commits an act which cause penetration with a child is guilty of an offence termed defilement'.

32. Chapter 63 of the Laws of Kenya.

33. For example, a term not less than 20 years imprisonment for defiling a child aged between twelve and fifteen years; Section 8 of the Sexual Offences Act of 2006.

unable to be married and/or being stigmatized by society. The victim's family thus has a strong interest in preventing such cases from becoming public.<sup>34</sup> Should the matter be taken to court, there is a high likelihood the community will learn the girl was raped. To avoid this, the victim's family members take it upon themselves to find the offender and force him to marry the girl – especially if she becomes pregnant as a result of the rape, though it may be simply to ensure someone marries her after the shameful event.

Should cases be revealed, reports are mostly received by the chief or elders. The chiefs sometimes do assist women in reporting the matter to police by helping them draft written statements. However, the challenge is that women often file a report days after the event, and the evidence may already be lost. The law related to admissibility of evidence at court requires that women have to undergo medical tests, but since almost no doctors are likely to be nearby, this is often impossible. Thus the evidence adduced may be insufficient and a case may be lost. Most cases, however, are exclusively settled within the community as this is the preferred method of dealing with them by community power holders.

Settlement of rape or defilement cases within the community usually includes the payment of a fine to the victim and her family. Among the Borana, for example, a man found guilty of rape will be required to pay five cows as compensation to the victim's family.<sup>35</sup> If the woman was married, the perpetrator would be required to pay two cows as compensation.<sup>36</sup> When the cows are given to the girl, they belong to her, but her father is expected to take care of them. For a married woman, the husband receives the cows, but they belong to the woman and she has control over them.

34. Interview with NGO staff, July 2007.

35. Interview with elder, September 2007.

36. Respondents indicated the variance in compensation was that, despite similar sexual assaults, a married woman would be more likely to withstand it than a young girl. Rape is therefore a lesser evil for married women.

In some cases the strict application of the Act has served as a deterrent for the community and they have stopped reporting defilement cases to the official system. In one defilement case, for example, the Magistrate explained he issued a sentence of life in prison to the perpetrator because he wanted to make the point to the community that defilement was an unacceptable crime. The community was outraged over the punishment. For the victim's family the case had not been solved as they had not received any compensation, and they faced the trouble of having to find a man who would marry their daughter after the shameful event.<sup>37</sup> From their perspective, withdrawal of such a case would be more attractive because it would avoid social stigma, while informal negotiations may grant them compensation and they may be able to negotiate a marriage.

In some cases communities have tried to enforce the application of their informal systems despite the fact that cases had been reported to the official system, or they have been known to ensure the complainant and witnesses do not go to court, thereby forcing the judicial officer to acquit the accused person.<sup>38</sup> Community leaders have also approached the judicial officer to request a case be withdrawn; however, in instances where the complainant is a minor, the court refused such a request and instead insisted the case go to full trial.<sup>39</sup>

Another example is a case of defilement which was reported to the local police chief in one of Isiolo's remote divisions. By the time the case was reported to the Magistrate Court in the district capital, the family of the perpetrator and the family of the victim had already negotiated a sum of money to be paid to the victim's kin. They requested the withdrawal of the case from the official system. The

37. Interview with Magistrate, October 2007.

38. Interview with judicial officer, November 2007.

39. Interview with judicial officer, November 2007.

fact that the case was now at court, and the perpetrator had been arrested was of inconvenience to both parties. Before the court, the girl, who was articulate at first when reporting the case to the police, now claimed that the crime had not taken place. This caused some uproar in the court, and as a consequence, members of both families, who wanted to avoid official trial of the case, ended in the police cells that day. It could be assumed that the families pushed the girl to make a false statement, which, under Kenyan law, can lead to two years of imprisonment.<sup>40</sup>

The Act also provides for a witness protection program as long as the guardian consents to having a child<sup>41</sup> committed to the program. Questions arise, however, as to what would happen were the guardian also the offender. It is noted the Act needs to give a third party<sup>42</sup> powers to consent. This is provided for in section 119 of the Children Act, which states that a child under such circumstances shall be placed in facilities separate from child offender's facilities.<sup>43</sup> Community members – especially complainants – interested in pursuing their cases using the formal courts are often unaware of these provisions and they have to return to their community where they may be ostracized for having used the formal courts.

Civil society organizations have been instrumental in trying to ensure that among other issues, the offences of rape and defilement are dealt with and penalized through the formal justice system due to their perception of the severity of the crimes. Organizations such as Womankind and the Children Legal Action Network (CLAN) both based in Garissa District and the 'Pastoralist Women for Health Education and Development' based in Isiolo District, have

40. Interview with community members, September 2007.

41. This refers to cases where the child is a victim. It however does not apply to adults but this is dealt with under the Witness Protection Act as the Sexual Offences Act does not provide for adults in witness protection.

42. These include guardians or custodians who may be appointed by the court.

43. Act No.8 of 2001. It happens that due to scarcity of facilities, it is very likely that if these children are taken under witness protection, they may be held together with offenders and therefore the statement is expressly made in the Act.

been approached by the residents of the area for purposes of court representation and arbitration.<sup>44</sup> These organizations have assisted the residents to understand and appreciate the formal court system. Nevertheless, they are still constrained in the activities they undertake as they lack the capacity to cover the entire arid lands region.<sup>45</sup>

### **Female Circumcision and Early Marriage**

The Children Act prohibits female circumcision and marriage of persons below the age of 18 years – provided that such practices are likely to negatively affect the child’s life, health, social welfare, dignity or physical or psychological development.<sup>46</sup> Section 2 of that Act defines a child as ‘... any human being under the age of eighteen (18) years’.<sup>47</sup> Section 20 further states that any person who infringes on the rights of the child which include protection from harmful cultural rites, like female circumcision and early marriage, is liable to imprisonment for one year or payment of a sum not exceeding fifty thousand shillings.<sup>48</sup>

It is evident that despite appropriate provisions to protect children, the laws are not followed as they contradict local socio-cultural systems of communities in the arid lands districts. The Penal Code does not expressly outlaw female circumcision but it outlaws the offence of intention to cause grievous bodily harm, and this covers instances where women are circumcised against their will.<sup>49</sup>

44. Interview with NGO staff, November 2007.

45. Interview with NGO staff, July 2007 and November 2007.

46. Section 14 of the Children Act No. 8 of 2001.

47. Likewise, the caveat that such practices must be likely to negatively affect a child’s life, health, social welfare, dignity or physical or psychological development means that even were the law fully applied, it would appear drafters (perhaps unintentionally) left a loophole in the Children Act which would enable female circumcision and early marriage in a limited number of circumstances.

48. Section 20 of the Children Act states thus, “Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of one year imprisonment or a fine not exceeding fifty thousand shillings or to both such imprisonment and fine”.

49. Section 231 of the Penal Code (Cap 63 of the Laws of Kenya).

Female circumcision preparing girls for early marriages is an additional problem that women face in the arid lands. Despite the fact that female circumcision has been outlawed for girls under the age of eighteen if it is likely to negatively affect their life, health, social welfare, dignity or physical or psychological development,<sup>50</sup> the practice remains prevalent in many pastoralist communities. It is usually done before a girl is married (which can be at the age of 14-15). Circumcision methods vary among communities in the arid lands districts. In the most extreme form, the scar resulting from circumcision prevents the stretching of skin during childbirth; this makes the process both difficult and extremely painful.<sup>51</sup> Such women often require hospitalization as their conditions are regarded as medical emergencies. In some cases women have bled to death.

Girls who resist circumcision are regularly ostracized and regarded as social outcasts. Such girls are not considered 'real women' and cannot socialize with other circumcised women of their age group. They are forced to leave their homes and, in addition, cannot get married.<sup>52</sup> The result is that these girls become stressed, bow to pressure, and eventually undergo circumcision – regardless of their age. Many girls agree to be circumcised as a result of social pressure, part of which comes from their mothers. Often women who have undergone circumcision are the most ardent custodians of the practice.

Despite the fact that female circumcision has been criminalized, local socio-cultural systems related to it are strong and the practice remains widespread. The typical male view is that a man cannot marry an uncircumcised girl. Most respondents admitted being aware that

50. The Children Act No. 8 of 2001 outlaws the practice of female circumcision for persons under the age of eighteen (18) years. However, this is not the case for persons who are above the age of eighteen though they may resort to the provisions in the Penal Code Cap 63 of the Laws of Kenya. Section 14 of the Act provides that "no person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development."

51. Interview with the parish Priest, August 2007.

52. Interview with the parish Priest, August 2007.

female circumcision is illegal but were afraid of what would happen to them if they disregarded the cultural practice. It is not known whether anyone within the arid lands areas has ever been prosecuted for the offence since most of the communities do not consider this to be an abuse and therefore do not report to the police.

Despite its illegality, government officials have not been actively involved in trying to stop the practice. An assistant chief in one of the arid lands districts proudly stated as fact that most of the men in his village would not marry women who were not circumcised.<sup>53</sup> There have been a few deliberate actions to increase awareness (e.g. information sessions) to sensitize the community as to the dangers of female circumcision, but they have not been followed through. There are neither children's offices nor gender desks in some of the arid lands districts visited and where one is present, it is based in the main town making it difficult for those living outside the town to access it.<sup>54</sup> Therefore, these practices go undetected and unreported.

A related problem is early marriage. Female circumcision is viewed as a precursor to marriage. Once a girl has undergone circumcision, she is seen as ready for marriage irrespective of her age. In this regard, girls as young as twelve are married to older men recommended by their fathers. Within these marriages, girls engage in sexual activities which legally amount to defilement. Defilement is a crime in and of itself, whether the child is married or not.<sup>55</sup> A Magistrate who works in a Maasai community explained how if he implemented the Sexual Offences Act, he would need to imprison the groom in many marriages that take place in his area.<sup>56</sup>

53. Interview with assistant chief during circumcision time, August 2007.

54. The team visited Isiolo, Baringo, East Pokot and Garissa districts. Isiolo and Garissa districts have children officers in the main town while Baringo and East Pokot districts have none.

55. The children Act outlaws marriage of persons below the age of 18yrs. The Marriage Act and African Christian Divorce and Marriage Act allows for person who are 16yrs and below 18yrs to marry but to get the consent of their parents. However, the children Act is the latest and therefore it supersedes the Marriage Act and African Christian Divorce and Marriage Act.

56. Interview with Magistrate, April 2008.

Early marriages among the Samburu, for example, are also very common and they have substantially increased following the initiation of *Morans* (warriors) to ‘middle elders’ in 2006, who are now expected to start their families.<sup>57</sup> The marriage ceremonies can go undetected as they are conducted in secret so as to hide them from local leaders – including chiefs and other administrative leaders.<sup>58</sup> In one of the arid lands districts, during the food distribution exercise, a girl aged ten years fainted. She was said to be married to a man over the age of thirty.<sup>59</sup>

57. Samburu society is based on age sets, every 8 or 15 years all the young boys are initiated into one age set. They remain members of the same set all their lives. Members of the first age set are the ‘morans’, the warriors, of society, cannot get married. However, once they enter the next age set, they are expected to start a family.

58. Interview with a chief, July 2007.

59. Interview with ALRMP staff, August 2007.

## Grievances Related to Civil Matters

### Property and Succession

In the case of succession, legal reform is required to create more equality for women, even before access to the official system can be promoted. Kenya's succession laws are progressive and provide equal treatment of women. However, some sections of the law contradict or reverse the overall intention.

Section 70 of the Constitution guarantees every Kenyan enjoyment of fundamental rights and freedoms irrespective of their sex, but these rights can be limited to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Section 82 deals with discrimination and provides that no law shall make a provision that is discriminatory either in itself or in its effects, and neither should a person be treated in a discriminatory manner by a person acting by



*Section of women at legal aid day held at Bula Pesa, Isiolo District*

virtue of any written law or in performance of functions of a public office or public authority.<sup>60</sup> Section 82(3) defines discrimination as “affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex...” Section 84 empowers any citizen whose rights and/or freedoms are infringed upon to apply to the High Court, which has original jurisdiction in such cases, for redress. However, section 82(4)(b) excludes section 82 from applying to “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”, and section 82(4)(c) applies likewise to cases governed by customary law.<sup>61</sup> The laws exempted by this Section are in areas that directly affect women. Women’s enjoyment of the fundamental freedoms guaranteed by the Constitution is thus severely restricted. The result is that at no time are women guaranteed protection from sex-based discrimination.

Section 82(4) legitimizes the ‘traditional’ position which accords women fewer privileges than men in matters concerning their families, marriage, divorce and succession. This presents problems when applying statutes such as the Law of Succession Act<sup>62</sup> which seeks to give both men and women equal rights in matters of succession. As the key piece of legislation with regard to the inheritance of property, the Law of Succession Act<sup>63</sup> was passed with the main objective of unifying all succession matters under different personal laws. It applies to both testate and intestate succession.<sup>64</sup> In addition to unifying the laws, the Act sought to correct defects of the previously applicable regimes by improving the status of women, whether as daughters or widows. The Law of Succession however exacerbates the situation of women as it provides men an absolute right over a

60. Section 82 (1) and (2) of the current Constitution of Kenya.

61. P. Kamari-Mbote, ‘Violence Against Women in Kenya: An Analysis of Law, Policy and Institutions,’ International Environmental Law Research Centre Working Paper, 2000-1.

62. Chapter 160 of the Laws of Kenya.

63. Chapter 160 of the Laws of Kenya.

64. Under the customary law domain, cultural rules and norms dictate who is entitled to inherit the property of the deceased and it is not subject to the modern notion of a ‘will’.

deceased wife's property<sup>65</sup> while widows only receive a 'life interest'<sup>66</sup> in their husband's property.<sup>67</sup> Women hold the property in trust for their children who acquire the right to own it upon attaining the age of majority.<sup>68</sup> Further, while a widow's inheritance is terminated once she re-marries, the law is silent regarding a widower's rights upon re-marriage.

In many pastoralist systems women are not supposed to 'own' any property, or are restricted to only small amounts. Women are entitled to animals which are given to them on particular occasions (such as marriage), their house and items inside the house. It is common for women to build the houses they live in. In case of divorce, women are allowed to take this property. Ownership rights beyond the house can be complicated since most women are part of polygamous unions.

Among the Pokot community, for example, when a woman gets married she is given property by her husband's family. This property is later inherited by her children. Men do not use their wife's property as it is for the benefit of their children. Men do not own any property given to women at marriage but only supervise its handling.<sup>69</sup> In most cases, if a husband takes property from one of his wives, he is expected to replace it. He is, however, not allowed to sell it without his wife's consent. Every woman has responsibility over her own house while men have responsibility over the women and children and are thus considered managers of the homestead. Men use their property for the benefit of the whole family. When a man dies, his property is not shared with his wife.

65. Property in this context refers to real property, or land, forming part of a deceased's estate.

66. This Common Law concept stops widows from exclusively owning property that has been passed onto them by their deceased husbands and disposing of the property at will. Widows are alienated from the property that would have been under their control and thus cannot empower themselves economically in the same way as widowers are able to.

67. Law of Succession Act (Cap 160 of the Laws of Kenya) at section 35(1) and section 36(1).

68. In Kenya, this age is stipulated in the Children Act, section 2 as at eighteen years.

69. Interview with ALRMP staff, October 2007.

These concepts of property ownership play a significant role in inheritance. A major concern amongst the pastoral communities is the possession of livestock. It is generally feared that when livestock ownership is vested in a widow, and she decides to marry someone else, her husband's clan will lose the livestock.<sup>70</sup> As a result of this, women are not supposed to inherit and become full owners of men's livestock.

The traditional practice of 'wife inheritance' provided a social safeguard for women in the case of their husbands' death. The widow was expected to get married to her brother-in-law who would inherit the livestock of her deceased husband. Hence, the woman was economically protected, while the livestock were taken care of by the brother-in-law and secured for inheritance by her sons. However, in recent times, some women have become opposed to being 'inherited' in this fashion. In such an event, the elders usually have the last say and aim to implement traditions. They argue women are owned by the male lineage and therefore are the property of the deceased husband. If a widow still chooses to leave the homestead of her husband, she is often allowed to do so but the livestock and children must remain with the clan of the husband.

Women are equally disadvantaged in their position as daughters. In most of the arid lands societies, male children are the prime inheritors. Among the Borana, for example, daughters are not allowed to inherit from their fathers. However, some respondents indicated that fathers take pride if their daughters are educated and would allow them to take a little property.<sup>71</sup> This is a reflection that education is likely to play a role in advancing property ownership. The concern however is that when a girl inherits property she will take it to her new home upon getting married, and it would therefore belong to her husband and his family. The husband would then hold the property for his

70. Interview with ALRMP staff, October 2007.

71. Interview with NGO staff, July 2007.

male children. Thus the woman deprives her father's clan and her brothers of a source of livelihood.

Among the Samburu community, the situation is somewhat similar to that of the Borana in that when the husband dies, the son inherits his property. If there is no male child or the male child is still underage, the widow's brother-in-law takes over the property and manages it for the benefit of his deceased brother's family.<sup>72</sup> There is no need for the widow to re-marry because her husband's family is expected to take care of her. In some cases, in spite of this, the deceased husband's family has been known to chase the widow away. Where a woman does not have a male offspring she has been known to return to her family of origin. Like the Borana woman, a Samburu woman would not inherit livestock or property from her father.

Gender-based divisions of labour with respect to land significantly impact upon women's rights – not just to access land, but also to exercise control over land. Control over food crops and poultry or goats, and other benefits derived from food surpluses, tends to rest with women. However, control over larger livestock and cash crops rests with men even where women have contributed their labour. Women in the pastoralist areas have wide-ranging responsibilities including childcare, milking livestock, and building the local homestead. However, they have no decision-making power when it comes to selling livestock or making decisions over settlements. They are only at liberty to sell smaller domestic animals, for example, chicken.<sup>73</sup>

72. Interview with ALRMP staff, October 2007.

73. Women undertake the bulk of the activities around the home. They are the main controllers of the homestead and they undertake most of the duties. For example, during a community session conducted by the ALRMP facilitators in a location in Isiolo district, the community members were asked to list their daily activities and the time spent on them. The results: women worked 15 hours per day while men only worked 2 hours per day. The community members themselves were surprised with the disparate outcome. While women seem to undertake the majority of the work, they have little control over livelihood issues.  
ALRMP session attended in September 2007.

Some educated women defy these patterns. Such women are usually not popular with the men in the community.<sup>74</sup> However, while men seem to eye them suspiciously, they appear to have some respect for them and they assume more powers of decision-making. Most respondents thought that this was the case because they are empowered by an awareness of their official rights.

In the research areas where most of the residents profess Islamic faith, ownership of property seemed to lead to fewer conflicts as *Sharia* is followed. When disputes arise as to the distribution of property, the parties refer the matter to the *Kadhi* or the elders of the community who implement *Sharia*. Unlike statutory law, Muslim communities – even in remote areas – usually have a number of elders or Imams who have knowledge of *Sharia* law. This makes *Sharia* law accessible to people in remote settlements.

### **Custody and Divorce**

As *Sharia* allows divorce, the divorce rate in the Muslim population of arid lands communities is higher than in others.<sup>75</sup> Divorce is considered better than remaining married in a troubled relationship; *Sharia* facilitates this by allowing marital property to be shared between spouses upon dissolution of marriage.<sup>76</sup> It is possible for women to refuse to get divorced as sometimes it is difficult to get re-married. Women are at liberty to approach the *Kadhi* directly with divorce issues. However, common legal problems and major grievances for women going through separation and divorce are child custody and maintenance.<sup>77</sup>

74. Interview with ALRMP staff, August 2007.

75. Other societies even stated that it is impossible for women to get divorced, in particular if they have already given birth to a child. This is in strong contrast to the Muslim communities, in which divorce is common and considered appropriate if a couple does not get along any longer.

76. Interview with chief, September 2007.

77. This became clear during legal aid days held in a number of locations in the arid lands districts to acquire information on the types of cases community members' experience. It is worth noting the legal aid days were a popular avenue for women to air their grievances. Some of the issues that arose during the legal aid days pertained to custody of the children and maintenance. It was noted from the cases reported that putative fathers are common. Legal aid days were used as a research tool in order to gather data on conflicts and grievances in the communities,

Men are frequently reported to have abandoned their wives and children and to have ceased providing for them. Women have stated they do not feel they can approach the official justice system with such grievances, since they feel it is male-biased. The Children Act<sup>78</sup> requires a mother to live with the father of the child for twelve months before she can claim maintenance. If the father has taken any steps to support the family, for instance, paying the hospital maternity bill, he has responsibility for the child. It was expected that the Act would ensure the protection of women's custody and maintenance rights and to ensure wayward fathers assist women in caring for their children; yet in its strictest application it has at times the Act resulted in the opposite. Thus if a man has been careful not to stay with a child for twelve months or taken few responsibilities in respect of the child, he could escape the application of the law and may not be compelled to provide for the child.<sup>79</sup> This leaves the woman with the burden of providing for the child on her own.

Another problem area is when local systems prescribe different custody arrangements than the official law. In one case, for example, a married couple originated from different ethnic groups. Upon her marriage, the woman had moved to the compound of her new in-laws. The woman claimed that her in-laws made their life so difficult that she saw no other way than to separate from her husband. However, given the fact that the 'bride price' had been paid, her sister-in-law insisted on keeping the children that had been a result of the marriage. In accordance with the informal system of the husband's group, the children belonged to his family. The woman wanted to keep custody over her children and reported the case to the Children's Department. This, however, proved difficult, as her husband did not want to be

but also to understand what types of grievances communities would report to a lawyer. 2 legal aid days were implemented in the course of the research. For these events a handful of lawyers were brought into a community and people were encouraged to ask them for legal advice if needed.

78. Section 25(2) of the Children Act No.8 of 2001.

79. It was hoped that the Children Act would ensure that putative fathers compelled to provide for their children.

part of these proceedings. The woman even complained that the police ‘mistreated’ her, since they sided with the husband.<sup>80</sup>

Kenyan law provides for special courts in which matters pertaining to children are to be tried.<sup>81</sup> However, as magistrates need a special license to be allowed to preside over a Children’s Court, there are not a great number of such courts available. This makes access for some communities difficult as they might be located far away. Cases in Isiolo District, for example, would need to be taken to Meru Town (about fifty kilometres away from Isiolo Town)<sup>82</sup> which hosts the nearest Children’s Court. There is a Children’s Office, which is part of the government structure, in Isiolo Town with officers who offer assistance in some ways. However, they face practical difficulties in enforcement and compelling putative fathers to attend meetings they convene to discuss custody and maintenance issues.<sup>83</sup> In addition, since Isiolo District is so vast, it remains difficult for communities outside of Isiolo Town to access the children’s officers based there. That these communities are living semi-nomadic lifestyles makes it even more difficult for the children’s officer to access, and be accessed by, aggrieved parties.

The few NGOs operating in the arid lands districts on these issues implement crucial work. In Garissa, for example, CLAN is known to offer legal aid to people in the area, arrange for legal representation and operate as a link between the community and the judiciary through education and awareness-raising sessions.

80. Interview with woman at legal aid day, September 2007.

81. The Children’s Court is a subordinate court established by the Children Act with jurisdiction to hear cases of a civil and criminal nature where the issues relate to children.

82. Though this distance may seem short, the transport costs incurred are not affordable for most of the residents living in Isiolo district. This journey would also prove to be hard in the company of a child.

83. Interview with a participant, September 2007.

## Participation in Community Decision-making Processes

As the above sections show, women face significant difficulties in accessing their formal rights and sometimes even rights as defined by local norms. Another area where the realization of their rights is limited is their right to have a voice and be part of decision-making processes. The Beijing Declaration and Platform for Action was passed to pave the way for the full participation of women in the progress of society as a whole. An important aspect of the Beijing Conference was that obstacles hindering the advancement of women in peace and development were regarded as societal challenges; removing these obstacles became a universal priority. The promotion of women's participation in Kenya has been on the agenda of donors and government throughout the arid lands. However, the practical implementation faces challenges.

### **Water and Food**

Given the above described local power structures, women's decision-making powers in communal issues is often restricted to issues that fall under their responsibility, such as water management. Water is a scarce commodity in the arid lands and the little that is available needs to be carefully managed. Water committees have been formed to manage various water sources. Both men and women are members of these water committees. The common sentiment observed is that women are the best managers of these committees since they do not 'indulge in corrupt practices'.<sup>84</sup> Women constitute a majority of the members in some of the local committees.<sup>85</sup> Despite the fact that men dominate the meetings, the women appear to be able to speak their minds on the various issues discussed.<sup>86</sup>

84. Interview with elder, September 2007.

85. Interview with elder, September 2007.

86. Interview with elder, September 2007.

Another area where women seemed involved is on issues concerning food and food aid. For example, there are women represented on the relief committees that distribute food aid among the Samburu communities. Some respondents were of the opinion that the women handle these duties better than men.<sup>87</sup> This may be due to the fact that women routinely handle food as part of their daily duties.

Within some of the food distribution committees, women have been trusted to make most of the decisions. Out of the thirty members of the relief committee in Isiolo Town, for instance, only six are men. Some respondents explained this through the assumption that women are more transparent. Some respondents felt that in dispute resolution regarding food issues, it is possible to bribe men while women are regarded as honest in reaching their decisions.<sup>88</sup> It was pointed out that in the past, men would sell the food that was to be distributed to



*Samburu women*

87. Interview with ALRMP staff, August 2007.

88. Interview with elders, September 2007.

the residents. Thus some community members felt that there is need to have women on the committee.<sup>89</sup>

However, when it comes to decision-making processes regarding livestock, security or political issues, women are hardly involved. Decision-making dynamics can be observed in general community meetings, where to the outside observer women are almost invisible. In one of the arid lands districts visited, for instance, while women were allowed to take part in community meetings, they had to sit on the floor at the periphery of the meeting ground and were not allowed to join men seated on benches.<sup>90</sup>

Only the educated minority of women are able to use their influence in decision making. The community respects the educated women and receives advice from them but men within communities have yet to fully accept them. The lack of adequate information and educational opportunities has resulted in the majority of women being denied their rights to have a voice.

### **Women's Organizations in the Arid Lands**

In recent years some women's organizations have been established in the arid lands. However, in comparison to organizations in other areas of Kenya, the arid lands groups are not very vocal yet. They are not taken very seriously by the male community members and suffer financial constraints.<sup>91</sup> According to several respondents in Isiolo District, most of the men see the women's organizations as places for gossip and do not perceive them as useful institutions.<sup>92</sup> Furthermore, one respondent explained that men were not happy with the women's groups when it became evident they were able to generate resources

89. Interview with elders, September 2007.

90. Observed in a community meeting, September 2007.

91. Interview with NGO staff, July 2007.

92. Interview with elder, August 2007.

independently.<sup>93</sup> The groups formed in the few urban areas appear to be taken more seriously than those in rural areas.<sup>94</sup> The former are targeted for funding by international organizations and it is often through them that rural women's groups are empowered via civic education and other programs.<sup>95</sup>

In these groups, women assist each other to mitigate some of the problems they face. They organize themselves, attend various seminars and in turn disseminate information they have acquired to the other community members, most of whom are illiterate. Some of the activities women's organizations implement include civic education, the rescue of girls from early marriages, offering scholarships to needy children, and assisting women in starting micro enterprises. The women's groups see culture, religion and education, and other social issues as biased against women and have devised various interventions to raise the status of women in society.

## **Women in Peacebuilding**

One sector in which donors and government agencies have actively promoted the participation of women is peacebuilding and conflict management. Peacebuilding initiatives actually started with an outstanding action taken by a group of women in Wajir District in the early 1990s. Some women from Wajir gathered to tackle ongoing conflict in their area. They talked to different stakeholders, including community leaders, to resolve tensions.<sup>96</sup> This initiative set the stage for many others to follow. At present, the National Steering Committee for Peacebuilding and Conflict Management (NSC) in

93. Interview with Priest, August 2007.

94. Interview with women group, August 2007.

95. Interview with NGO staff, July 2007.

96. See T. Chopra, 'Building Informal Justice in Northern Kenya' Justice for the Poor and Legal Resources Foundation Trust, Nairobi, 2008; S. Krätli and J. Swift, 'Understanding and managing pastoral conflict in Kenya: A literature review,' Institute for Development Studies, University of Sussex, United Kingdom, 1999; D. Ibrahim and J. Jenner, 'Wajir community based conflict management,' presented at USAID Conference on Conflict Resolution in the Greater Horn of Africa, June 1996.

the Office of the President is coordinating the establishment of Peace and Development Committees throughout the arid lands districts. The Peace and Development Committees consist of local leaders and have been formed with the support of the communities, the government and donor agencies. They assist the Provincial Administration in managing conflicts. Donors and the government have insisted that one third of committee members have to be women.

Despite this requirement, participation of women in Peace and Development Committees is still minimal, especially at the lower levels, such as the division and location. Where women are present, they are not active members in the committees. Some of the female representatives interviewed claimed that they did not take part in discussions within the committees. One of the respondents even stated that she had never been invited to meetings at the next higher level.<sup>97</sup> Furthermore, some female committee members complained they were invited to meetings held at the district level simply because of the requirement that a female representative from each division be present.

Some of the women reported that they were not involved in the decision-making process because it was felt issues pertaining to conflict fell squarely on the shoulders of men in the community.<sup>98</sup> The view in many arid lands communities was that peacebuilding and security is the business of men. Male committee members felt that women fuelled problems and they therefore did more harm than good.<sup>99</sup>

It is an admirable aim of national stakeholders and donors to encourage women's participation in decision-making processes through a quota

97. Interview with peace committee member, August 2007.

98. Interview with peace committee member, August 2007.

99. Interview with peace committee member, August 2007. It was revealed in one of the arid lands areas that women spurred men on in times of retaliation and encouraged them to attack neighbouring communities.

for women on Peace and Development Committees, and it complies with the aims and goals of the Beijing Platform. However, as long as this contradicts the local perceptions of the role of women, it is a much more difficult undertaking to integrate women in reality.

Lack of women's participation in decision-making processes regarding peace and stability reflects a general lack of women's involvement in politics at the sub-national level. For example, the local authority council in Isiolo, (an elected council at the district level) had three nominated women out of twenty-four councillors. Currently, the number of women, all nominated, has increased to four. The women respondents stated they were unable to campaign as aggressively as their male counterparts since they lacked the resources.<sup>100</sup> Their male counterparts also do not take them seriously and in some instances intimidate them into bowing out of nomination and election races. Lobbying clan members – an important tool for success – by women is unheard of because it is felt women 'belong to their men'.<sup>101</sup> Women candidates also do not necessarily receive women's votes. It is not uncommon to find husbands telling their wives how and whom to vote for.<sup>102</sup> Despite the fact that some women actually succeed in becoming councillors within the local authorities, their voices may not be heard as they do not actively participate in decision-making processes within the council. Participation may not be perceived as a proper activity for women and often issues are seen as not relevant for women to comment upon.<sup>103</sup>

100. Interview with NGO staff, July 2007.

101. Interview with NGO staff, July 2007.

102. Interview with NGO staff, July 2007.

103. Interview with council official, July 2007.

## Conclusions

Theoretically there are various avenues that a woman can choose to air her grievances and seek redress in the arid lands, including family elders, chiefs and official institutions. However, in reality, the choices are limited and in most cases the decisions where to take a grievance are made for women by their husbands or male family elders. Even if women go so far as to report a case to the police or file it in court, elders often request the withdrawal of the case to pursue informal remedies. The official justice system contains progressive laws for the implementation of concepts of individual rights. However, the trajectories of grievances of women in the arid lands show a typical dilemma: even progressive laws are meaningless if they are disconnected from social realities. This disconnect is especially strong where local understanding of justice is based on a communal and restorative approach. Laws promoting gender equity are good, but they cannot be simply applied and enforced if not supported by society. In regards to other grievances or conflicts, informal justice systems come with a number of advantages for communities since they are closely intertwined with local value systems and social realities. In theft or assault cases, for example, they can deliver solutions in a time- and cost-efficient way that also comply with local understanding of how the conflict should be solved. However, in regards to women's grievances, only some features of the informal systems are supportive in fostering gender equality, others contradict the concepts of individual rights.

There are a variety of factors that prevent women in the arid lands from accessing their rights under the formal and the informal system:

- ❖ *Lack of legal awareness of formal rights:* Many women are unaware of their rights under official law and will therefore not demand them. They are unaware, for example, that property rights and succession laws provide for daughters to inherit an equal amount to their brothers, in case of their father's death. Most local systems do not grant inheritance for daughters, or only provide for smaller amounts. Lacking awareness about the provisions of the formal laws, many women in the arid lands will not complain about the unequal treatment under the informal systems, especially as local inheritance rules are an integral part of local socio-cultural systems and are logical within that framework. Equally important, however, is that male community members may lack legal awareness. Elders, head of families, and even formal authorities (such as the chiefs and assistant chiefs) may not be familiar with official laws and rights of women under those laws. However, limiting women's access to formal rights can also protect society. Granting equal inheritance to daughters, for example, can jeopardize the stability of family safety networks.
- ❖ *Local powers prevent women from reporting to official system:* Even if women are aware of their rights and wish to approach the formal system, local power holders may impede them. In domestic violence cases, rape or questions of child custody, for example, male interests can prevent them from accessing their formal rights. Husbands, elders, chiefs or family heads can all prevent women from addressing the official system. This is exacerbated since it is usually male family members who decides which institution should be approached for help in a grievance or conflict.
- ❖ *Lack of incentives to report to formal system:* It is evident women in the arid lands may have little to no interest in the application and enforcement of laws for criminal offences committed against them. One reason is that the application of the official law may

trigger the break-up of the victim's family if the perpetrator is a relative. For example, the main provider of the family may be detained, and the livelihood of the woman is in jeopardy. Another reason is that the criminal justice system does not provide for compensation for the victim. While informal systems, if they acknowledge the crime, can take care of the restorative needs of the victim and her family, the criminal justice system leaves the victim empty-handed.

- ❖ Barriers to access to the official system related to official institutions: If women indeed break through the boundaries of male control in their communities, and approach formal justice sector institutions, such as the police or courts, they have to pass a variety of barriers, such as great physical distances, poor infrastructure, high costs, and a lack of procedural understanding. Furthermore, women also complain about the mostly male police officers and male *Kadhis*, who they perceive as biased.
- ❖ Barriers to access to rights under the informal systems: Many women feel they are not treated equally under the informal system. They claim that local conflict resolution authorities, such as elders, may be biased toward men. From the perspective of individual rights, informal systems also do not focus on the victim.

## Operational Considerations

While the Government of Kenya should be applauded for pursuing the adoption of laws promoting gender equity, access to justice practitioners and policy makers need to accompany law reform with activities that promote the application of the laws and their appreciation by society. This holds particularly true for the communities of the arid lands, which are based on strong indigenous social systems that may be at odds with the norms of the official law. It is important to insert knowledge of formal laws into informal processes. Informal processes are legitimate in the eyes of the community, they are affordable and they are nearby and easy to address. While making use of these advantages, awareness of official laws and principles can be inserted into these informal processes. Increasing the knowledge of official rights in local communities can have ample effect on informal processes.

In addition, official institutions have to be made more approachable for women; and formal legal concepts need to be inserted in informal justice processes. Ways need to be identified to address male bias in both systems, and to ensure equal treatment for women in all justice systems.

### **Legal and Judicial Reform (Judiciary, Judicial Performance Improvement Project (JPIP):**

- ▶ *Make courts friendlier for women-users.* This can be achieved using simple measures such as increasing the number of help desks at courts so women can be guided through the court and have proceedings explained to them. Further, higher quality translation at court should be provided. The illiteracy among women in the arid lands is particularly high, and many women do not speak the national languages. Improved provision of translation will help

those women who address the official justice system to have a more transparent experience. In addition the procedures adopted serve to deter women's access, and the same need to be reviewed to ensure they are simple to understand and/or explained better to consumers of formal justice.

- ▶ Introduction of 'women advocates'. The introduction of more 'women advocates' could be considered. Such advocates could be specifically prepared to support women throughout the legal process.
- ▶ Training of Magistrates, Kadhis and Judges in social context. Providing training for judicial personnel posted to the arid lands communities about socio-cultural contexts can have a particularly positive effect and allow for more equality in judgments. This could also lead to judgments being perceived as 'more fair' by communities since they would better reflect the social context and women may especially be encouraged to report their cases to the official system which better reflects their values. A few other countries have successfully introduced social context training in their general curriculum. Canada was the first country to introduce training in social contexts for its judges. The model was subsequently exported to Australia and South Africa, among other countries. The rationale for the training was that these countries had multi-cultural societies and a lack of knowledge of social context by judges endangered the equal treatment of citizens before the law. Without being able to recognize forms of inequality and discrimination, judges were not able to deliver equality and access to justice for all.<sup>104</sup> In South Africa, the rationale for introducing social context training was to eradicate remaining discrimination that had developed

104. D. Hackett and R. F. Devlin with T. G. Puthucherril, 'Social Context Education for Realizing Equality Rights. Lessons from the Canadian Experience,' In: The Commonwealth Judicial Education Institute (CJEDI) Report, September 2007, pp. 13-17.

under the apartheid system. The aim was to establish a fair and unbiased justice system, which would take economic, social and cultural diversities into account. While the training in Canada focused on judges, in South Africa it targeted magistrates, who were considered to be at the frontline in providing justice to the majority of the population.<sup>105</sup> Social context training was even enacted by legislation through the ‘Promotion of Equality and Prevention of Unfair Discrimination Amendment Act’ (Act No. 52, 2002). Social context training for judges or magistrates has been called for since in other countries.<sup>106</sup> Canada has embedded judicial notice of social contexts in their legal systems.<sup>107</sup> Such a curriculum in Kenya would need to be modelled in regards to the specific context of Kenya, but could be of great benefit.

- ▶ *Train Magistrates and Judges in laws that allow social context to be taken into account.* There are some legal avenues in Kenyan law, which allow Magistrates or Judges to take social context into account. One of them is the ‘Victim Impact Statements’, in the Legal Notice no. 5/2003.<sup>108</sup> It focuses on the victim of the offense or on those affected by the action. It is rooted in ‘traditional’ justice systems and intends to restore social harmony that has been disrupted by a crime. This can give a sentence more legitimacy in the eyes of local communities, as it complies more with their understanding of an adequate punishment for a specific crime. This will not only raise people’s trust towards the judiciary, it will also allow a criminal sentence to create peace between communities. However, the Part is not often applied. Judges and Magistrates could be trained in its application.

105. S. Goodman, ‘The Social Context Training Cooperation between Sida and the Law, Race and Gender Unit, University of Cape Town,’ Sida Evaluation Report 07/19, Department for Africa, 2007.

106. See for example, AfriMap and Open Society Initiative for West Africa and The Institute for Democratic Governance, ‘Ghana. Justice Sector and the Rule of Law,’ 2007, p.12.

107. See for example: Committee for Justice and Liberty v. National Energy Board, [1978] 1 SCR 369. This case sought to clarify whether permitting a judge’s recognition of social context and previous personal knowledge of issues gave a reasonable apprehension of bias; it did not.

108. See Section 328A and 329B of the Criminal Procedure Code.

- ▶ Make application of official laws less destructive for families. Domestic violence cases or cases of defilement and rape often include the husband or a close kin as a perpetrator. If the woman turns to the official system for help, the perpetrator may be imprisoned and her livelihood endangered. The identification of the degree of discretion in certain laws can enable the Magistrates or Judges to give judgments that have less destructive effects on families. This will increase the incentives for women to report their cases to the official system. More victim-centred services could also be considered for such cases.

### **Informing Local Processes (Justice for the Poor, Arid Lands Resource Management Project (ALRMP):**

- ▶ Implement legal awareness campaigns for the whole community. Legal awareness campaigns should target both women and male community leaders. Increased legal awareness for the community as a whole, and specifically for those who act as gatekeepers, may allow change in conflict resolution dynamics and foster greater access for women to their rights in all systems. To foster access to justice for women in the arid lands, it is important for legal awareness campaigns to be tailored to their particular needs and situations in pastoralist communities.
- ▶ Expand male involvement in addressing gender bias. It is important to involve male community members in addressing gender bias. They can be trained in laws, and made active participants in their application. This can be achieved through innovative methods that provide messages through the lens of local systems. Such methods can encourage debate in the communities with the aim of allowing change from within. The Kenya National Commission of Human Rights has pioneered such methods in Nyanza Province. They facilitated community debates in which local values, such as the belief that ‘Luo

culture protects women' were challenged. The community meetings included widows, who had been chased away by the husband's clan and who had not been allowed to inherit any of their husband's property. Challenging the elders, as guardian of the local value systems, had the effect that they started promoting the right of women to inherit, in order to show that 'Luo culture' protects women.<sup>109</sup> Such activities should be scaled up and tested in other regions and new tools should be developed.

- ▶ *Support training of community paralegals.* Legal NGOs in Kenya have established a network of NGOs that train paralegals. They have developed training materials, and have coordinated their training activities regionally. However, more funding is required to cover the country more widely, especially in the arid lands. Current activities show how community paralegals provide an important alternative to local powers. Women can address them with their grievances where they feel the other community leaders would make male-biased decisions. They can advise women on their rights under official law and can help women to decide on the next steps in pursuing solutions for their grievances. They can also help in conflict mediation and by inserting their knowledge of formal laws. This type of information, for example that a husband could be imprisoned for abusing his wife, can change the power dynamics in local conflict resolution. Community paralegals can even be trained in specific subjects, such as women's rights. Training specifically women as community paralegals could overcome some of the barriers women face in accessing justice stemming from local power dynamics. Empowering women through basic knowledge in law may raise their status in the community. Lessons from the Justice for the Poor 'Women's Legal Empowerment Project' in Indonesia can be applied.

109. See T. Chopra 'Promoting Women's Right by Indigenous Means. An Innovative Project in Kenya,' Justice for the Poor / The World Bank, Briefing Note Vol.1.2, 2007.

- ▶ Promote and support the formation of women groups and give them legal training. Some NGOs have been successfully training women's groups so that they can assist women to defend and enforce their rights in other areas of Kenya. The women within communities constitute themselves into 'watchdog' groups that work with the local administration and raise pertinent issues that relate to women including but not limited to their participation in decision making. Such initiatives can be adapted to pastoralist systems and replicated among the arid lands communities.
- ▶ Support legal NGOs active in the rural arid lands. Some legal NGOs provide an important service as they give legal advice and even provide lawyers. They, for example, do important work in helping women to navigate the official system, and also by providing conflict mediation in custody or maintenance cases. They can work with local concepts, but can also integrate their knowledge on formal law in mediation and therefore can have a significant impact on men's positions.
- ▶ Training on negative impact of female circumcision and early marriages. Rather than criminalizing these cases, it may be worth to place more emphasis on awareness training on the negative consequences of female circumcision and early marriages. Furthermore, it is important to use local concepts in order to counter such practices, and/or offer symbolic replacements.
- ▶ Education plays an important role in the empowerment of women. Educated women are at the forefront of challenging the social structure which denies them access to various entitlements which are claimed by their male counterparts, such as inheritance rights. Education of the girl-child, particularly in pastoralist communities, should therefore be encouraged and campaigns towards this end should be given higher priority.

- ▶ Support the creation of more women-specific committees. Donor requirements that provide for a ‘women-quota’ in various committees are insufficient to empower women alone. Though the intention is good the measures taken are insufficient. Men include women in these committees simply to satisfy the donor requirements and to ensure they receive funding. There is however only little evidence that this process actually empowers women. The creation of more women-specific committees, working in the realm where women are acknowledged to have powers (for example, water or food) can further strengthen their general position in society.

### Proposed further research

- ▶ The practical implications of applying the Sexual Offences Act/Laws of Succession. The contradiction between some laws and social realities is epitomized in the Sexual Offences Act of 2006. The Act is one of the most progressive and captures a high standard of equity. However, field data has shown that the Act is not in line with reality, and that it can even have a deterrent effect on citizens that prevents them from approaching the official justice system. A study should be undertaken that investigates the application of the Sexual Offences Act in the courts and the impacts of judgments on society, and one that captures the contradictions between the Act and concepts and values of local societies. This is in no way meant to criticize the Act, but to clarify how its implementation can be better realized. The same holds true for the Laws of Succession, which in some areas, such as the arid lands, paradigmatically oppose local social systems.
- ▶ The police and socio-cultural challenges to their work. Assess the challenges for the police in implementing rule of law in the arid lands region with particular regard to challenges in relation

to local cultures. In aiming to fulfil their mandate, the police face a number of challenges, when for instance witnesses or complainants do not see the necessity to appear at court, or to give statements to the police. Assessing these types of challenges can help to design a strategy to make the police more responsive in gender-related cases.

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