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Reconciling Society and the Judiciary in Northern Kenya

Tanja Chopra

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JUSTICE
for the POOR



Legal Resources Foundation Trust

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Tanja Chopra

Research Report | December 2008

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Homestead in Longopito, Isiolo District

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Abbreviations

ALRMP	Arid Lands Resource Management Project
BNPP	Bank-Netherlands Partnership Program
CSO	Civil Society Organisation
GAP	Gender Action Plan
GJLOS	Governance, Justice, Law and Order Sector Reform Program
IDEG	The Institute for Democratic Governance
ITDG	Intermediate Technical Development Group
J4P	Justice for the Poor
LRF	Legal Resources Foundation Trust
NGO	Non-Governmental Organisation
NSC	National Steering Committee for Peacebuilding and Conflict Management
UNHCR	United Nations High Commissioner for Refugees
USAID	United States Agency for International Development

Acknowledgments

This report is based on qualitative research data that was 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 'Building Informal Justice in Northern Kenya', which focuses on the peace initiatives in the arid lands; and 'The Illusion of Inclusion. Women's Access to Rights in Northern Kenya', which focuses on the dynamics of intra-communal conflict, with particular focus on women and the role of the victim. 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.

The research team received generous help from staff of the Arid Lands Resource Management Project (ALRMP), and was funded by the Bank-Netherlands Partnership Program (BNPP) and the Gender



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





Lawyer speaking to community members during a legal aid day in Oldonyiro

Executive Summary

The pastoralist societies of the arid lands region in Kenya have long been subject to inter-communal and inter-ethnic conflicts. Disputes are triggered by the shortage of natural resources, political skirmishes and a general lack of development in the region. Arid lands populations have been existing on the periphery of government development assistance and service delivery. This includes a lack of service provision by justice sector institutions. Most intra-communal disputes are handled either by community elders or by chiefs and assistant chiefs on the basis of informal conflict resolution mechanisms.

The use of local conflict resolution mechanisms has proven challenging in inter-communal and inter-ethnic disputes, where more than one socio-cultural system is involved. Given the variety of ethnic groups in the arid lands, different concepts of usage of natural resources and different methods of solving disputes have jeopardized the application of informal mechanisms to pacify communities in conflict.

According to the Kenyan constitution, the judiciary is supposed to be the principal actor in resolving disputes, in particular those involving more serious crimes. However, there are serious shortcomings which hamper the impact of the judiciary in the region. Vast geographical distances to the nearest court, and high costs of travelling and filing cases have made it nearly impossible for citizens to seek redress through the courts. Internal systemic flaws, such as unavoidably long duration to process cases, non-conducive work environments for magistrates, poor physical conditions of court houses, the lack of public defence lawyers, the lack of official legal aid, and the lack of private lawyers, have rendered the role of the judiciary insignificant in the region.

One of the gravest challenges to the role of the judiciary in the arid lands, however, is the difference between concepts of justice underlying the formal system and the local perceptions of what constitutes misconduct and who is responsible for a crime. Most cases filed at court are of a criminal nature and are filed by the police. While most of the acts are defined as criminal under the formal law, they are not necessarily perceived as a crime among the local communities. Cases such as gambling, illegal possession of firearms, or the brewing of alcoholic beverages are not at the heart of what triggers serious conflict among communities. On the contrary, some of these charges are not perceived as ‘wrongdoing’ at all, and the pursuit of such cases through the formal legal system does not instill the population’s trust in official institutions.

In cases that seriously violate social order at the local level, such as disputes over natural resources, violent assaults or killings, and cattle rustling, communities usually have a strong interest in resolving them outside the judiciary. Only then do they feel that cases can be solved in accordance to what they perceive as just, and solutions can be negotiated that can truly re-establish peace among communities. Local conflict resolution often requires the payment of compensation to the party of the victim. Furthermore, the entire kin group is held responsible for the misconduct of one of its individuals. Conflict resolution, therefore, has to include the entire social group as opposed to only the perpetrator and the victim. For the victim’s family, the receipt of compensation may be more attractive than the conviction of the perpetrator by an official court.

Community leaders will therefore attempt to withdraw a case from court, or they will ensure that cases are never filed at court in the first place. However, they often seek the involvement of the police in order to retrieve stolen cattle, or of the formal executive authorities in order to help broker informal settlements. In formal cases, therefore, the



judiciary and the police often face a complete lack of cooperation from the communities in securing witness statements or in identification of a perpetrator. As a result, the magistrates or prosecutors are often confronted with having to close cases prematurely, including in serious criminal offences.

The only instances where communities express the wish to receive support from the judiciary is in grievances against government authorities. In such situations, informal conflict resolution methods fail to be effective, and communities will seek assistance from the state.

Given the fact that the formal system does not have the capacity to respond to the socio-cultural contexts of the pastoralists and therefore fails to successfully resolve tensions between communities, people had to resort to innovative mechanisms in order to stop the massive outbreak of conflict in the 1990s. Local organizations fostered the establishment of 'peace and development committees', which became involved in inter-communal or inter-ethnic conflicts by supporting conflict negotiations between different socio-cultural systems. Based on local concepts of justice, hybrid systems were developed out of common denominators between different cultural systems. They led to successful interventions in conflicts at that level.

As a next step, different ethnic communities of one area met and negotiated common terms of how to solve frequently occurring types of conflicts. The results became known as 'declarations' or 'agreements'. They spelled out commonly-agreed penalties for misconduct, such as stock theft, assaults or killings. The declarations were embraced by the Office of the President, and their implementation involved executive authorities at the local, district and provincial levels in the arid lands.



What emerged is a quasi-legal regime that is parallel to the official legal system. While the official law is the basis for law and order in the whole country, the declarations can guarantee peace in a specific region. The moment both have to co-exist, the logic of the two as a single system becomes incompatible. The development of the parallel regime is a consequence of the formal system contradicting local realities and concepts. It should sound an alarm for the formal judiciary of the failure of its main mission: the establishment of peace in society through law and order.

Strengthening the role of the judiciary in the arid lands of Kenya can be initiated in a twofold way. On the one hand, understanding of official legal norms needs to be increased among local populations. On the other hand, the judiciary needs to adopt measures which allow it to be more responsive to the different societies' socio-cultural systems. The latter will help to establish more trust in the judiciary from the side of the local populations, but also to deliver judgments which resonate better with societies. There are a variety of practices which have been piloted in Kenya or have been adopted in other countries that can inform a judicial reform process in this regard.

Introduction

Kenya's judiciary has served only modestly well to pacify the conflict-ridden pastoralist societies in the north and northeast of the country. One of the prevalent reasons is that official laws and judicial processes – many of which are inherited from British colonial administration – largely fail to respond to socio-economic and political realities of local communities. More significantly, state laws and procedures often contradict local concepts of justice.¹ In some areas these tensions hinder people from accessing the official justice system, while in others the local realities altogether engulf the judiciary and other justice sector institutions. The pressing question for Kenya's judiciary, therefore, is how to address local realities so as to strengthen the role of official laws and institutions in dispensing justice and establishing peace in the arid lands.

Technically, Kenya's judiciary should be the primary state organ that contains and resolves disputes across the country. Through the application of official laws, it should provide a means for individuals to redress their grievances. The trial of criminal cases in the public interest should be a deterrent for criminal action, as well as retaliation and self-help, and aid in establishing peace within and between communities. However, according to a household survey conducted by the Governance, Justice, Law and Order Sector (GJLOS) reform program², the judiciary is not the main addressee for conflicting parties seeking the assistance of a third party. In the rural areas of Kenya only 3% of the population file their cases at court, and only 7% report them to the police. Instead 48% resort, as prominent alternatives, to the chiefs or assistant chiefs (who are part of the Provincial Administration and therefore the executive arm of

1. M. Adan and R. Pkalya, 'Conflict Management in Kenya. Towards Policy and Strategy Formulation,' Practical Action, July 2006, p.6.
2. GJLOS is a sector wide program embracing 32 Ministries, Departments and Agencies.

the government) and 25% to the ‘traditional’ elders, while the rest make use of other available institutions.³

In the arid lands of Kenya, which mainly cover the north and northeast of the country, the number of cases filed at court is arguably⁴ lower than in the rest of the country. The arid lands exist on the periphery of the state’s development interventions and government services. In regards to judicial services, the number of courts is low while distances are vast, and the costs for filing a case are relatively high for a poverty-stricken population. However, the main cause for the insignificant number of cases in court appears to be that the official laws and judicial processes do not resonate with the concepts of the resident pastoralist societies. Local understanding of what constitutes a crime or misconduct, how it should be treated, and who has the authority to address the misdemeanour or solve a conflict differ significantly from the norms and rules on which the formal law is based.

The formal system is an unattractive means of recourse for redress. Where criminal cases are filed at court by the police, communities have a tendency to apply for their withdrawal in order to negotiate a solution out of court. As local realities in the arid lands tend to be stronger than the influence of state institutions, communities often enforce their will upon the official system. In such instances, there is little a judge or magistrate can do but stand by and watch how local communities negotiate disputes involving serious offences under the criminal law, such as stock theft or even murder.

With an increase in conflicts and disorder in the arid lands, and in the absence of formal responses, peace initiatives began to develop in the

3. Such as the District Officer, an extended family member, or another local authority. See: Governance, Justice, Law and Order Sector (GJLOS) Reform Program, ‘National Integrated Household Baseline Survey Report,’ September 2006, p.33.

4. There are no surveys available that assessed the arid lands districts in particular.

early 1990s. In contrast to the official justice system, these responded to local concepts of justice and integrated local stakeholders in the determination of solutions. The initiatives have proven efficient in ending conflicts and in providing stability in the region and have been taken up by the executive authority of the country. The result is the emergence of parallel legal regimes in the arid lands: conflict management activities that follow the logic of local value systems, and the official justice system that is based on a modern legal paradigm. Their co-existence is a challenge to the idea of a unified national legal system.

While the existence of different concepts of justice is a challenge in other areas of Kenya, the arid lands are an interesting case, since informal systems have been absorbed by formal authorities. The case of the arid lands helps to show hurdles and best practices in the integration of informal structures into a formal system.



Children fetching water in Oldonyiro, Isiolo District

Conflicts in the Arid Lands

Kenya's arid lands have long been subject to neglect by official institutions. Its pastoralist populations have subsisted on the periphery of governance and development assistance for many years.⁵ In addition, the dry lands are frequently hit by severe droughts. One such drought can erase a community's livestock, and with that its entire livelihood. It can take several years for families to establish new stock. Consequently, the region suffers from extreme poverty. The harsh environment and barely existent infrastructure pose challenges for the development of alternative livelihoods.

As the state generally has little impact in the arid lands, informal institutions address most of the grievances and conflicts within and between local communities. Intra-communal grievances, for example, are usually managed internally. Property and domestic disputes, or small stock thefts, are dealt with by the family elders. If more than one family is involved, respected community elders, the assistant chief or the chief will assume responsibility.⁶ The chiefs and assistant chiefs are civil servants, employed by the Provincial Administration, but they originate from the communities they serve. The Chiefs' Authority Act mandates chiefs to maintain law and order in their respective locations.⁷ Chiefs typically work hand-in-hand with community elders and apply local means of conflict resolution in order to maintain stability and peace.⁸

Members of a community basically share common ideas that define transgression of the rules and that prescribe how peaceful relations

5. See, for example OXFAM, 'Delivering the Agenda. Addressing chronic under-development in Kenya's Arid Lands,' Oxfam Briefing Papers, 88, 2006.
6. R. Ocharo and B.M. Mutotso, 'Report on Community Justice Systems Study in Kenya: Case Studies of Communities in Wajir, Isiolo, Laikipia, Meru North, Turkana Districts and Nairobi (Mukuru and Kibera Slums). Final Report,' The Kenya Section International Commission of Jurists, Nairobi, 2003.
7. Laws of Kenya, Cap 128 Chiefs' Authority, Sec. 6.
8. See for more detail, B. Ayuko and T. Chopra, 'The Illusion of Inclusion. Women's Access to Rights in Northern Kenya,' Justice for the Poor and Legal Resources Foundation Trust, Research Paper, Nairobi, 2008.

can be restored. These local systems are not immemorial relics of the past (and therefore they are not necessarily ‘traditional’)⁹, but reflect the way a community perceives and orders the world at present. Such systems are fluid and adjust to social changes. Consequently, they have great potential for helping to efficiently resolve conflicts.

In contrast, inter-communal and inter-ethnic conflicts pose a more serious challenge to the maintenance of peaceful relations in the arid lands – as different socio-cultural systems may be involved. Droughts and the ensuing scarcity of resources, as well as political skirmishes are the causes for a considerable number of conflicts and crimes. The competition over natural resources poses major challenges for communities who have to co-exist in the same area. Communities have their own systems that regulate the usage of pasture and water sources; but these may differ between groups. Given the considerable number of ethnic groups in the arid lands, such as the Somalis, Borana, Samburu, Turkana, Pokot, Marakwet and others,



Lake Bogoria

9. The current literature in Kenya on the subject often seems to indicate this.

disagreements over usage of natural resources are not uncommon. These can lead to violent clashes at water points or to a series of revenge killings after an initial murder has taken place. In addition, significant uncertainty exists over land ownership. There are no individual land titles in many parts of the arid lands (in contrast to the rest of Kenya), as most land is held in trust for the benefit of the communities. Trust holders are the respective county councils. As a consequence, communities apply customary land claims, which are based on land usage concepts that may vary from group to group.

Loss of livestock after a drought can lead to wide-ranging cattle rustling as communities endeavour to recover lost assets. Additionally, cattle rustling is an inherent feature in the local socio-cultural systems of some societies.¹⁰ Taking the cattle of another group serves to prove manhood, increases the social status of a man, and enables a young man to find a wife. It is prescribed as an important activity in a person's life cycle and therefore plays a crucial role in the maintenance of social order.

Conflicts and cattle rustling in the arid lands have escalated with easy access to firearms,¹¹ which are traded across the adjacent borders of war-torn neighbouring countries. The ready availability of firearms has permitted cattle rustling to be conducted on a larger scale¹² and fostered the increase of highway banditry. The use of firearms is also responsible for the high number of fatal outcomes in violent disputes over water and pasture. Growing insecurity and lack of adequate responses by official security sector institutions are said to account for the increasing demand for firearms.

10. I. Masinde, M. Adan, R. Pkalya, 'Indigenous Democracy. Traditional Conflict Resolution Mechanisms,' Intermediate Technology Development Group (ITDG) – East Africa, 2004.

11. According to the national assessment on the small arms situation in Kenya, there appears to be a higher number of small arms in the North Eastern Province. See Office of the President (Provincial Administration and Internal Security), *Kenya National Action Plan For Arms Control and Management*, Nairobi, 2006, p. 17.

12. Ditto, p. 30.

Shortcomings of the Judiciary

According to the Kenyan Constitution, the judiciary is the principal institution for dispensing justice and the maintenance of law and order in the conflict-ridden arid lands. However, judicial institutions and personnel in the region face significant constraints. The number of courts in the vast area is considerably small. There are no High Courts (which have jurisdiction over capital offences and hear appeals) located directly in arid lands districts. Only Magistrate Courts operate in different district capitals. Although Magistrate Courts constitute the lowest level of the judiciary, countrywide statistics indicate that they cover about 90% of the cases before the judiciary.¹³

The geographical distribution of the Magistrate Courts throughout the arid lands does not correspond with people's socio-economic and physical situations. Only very few roads have tarmac surfaces and most are only accessible by trucks or four wheel drive vehicles. Many pasture areas where pastoralists graze their livestock are not even accessible by road. Individual car ownership is very rare, and most people rely on a daily truck or a less frequent vehicle passing by to reach the next larger town. A journey to a district capital may require a day or two on the back of a truck. Someone from Isiolo's remote towns of Modogashe or Sericho, for example, would need to travel 250 km in order to reach the nearest court in Isiolo Town. For witnesses or complainants in a criminal case, there are few incentives to take on the burden of such a journey.

Many are also limited by their economic situation as they cannot afford the costs of transport, lodging and food in town, which are necessary in order to attend court (frequent adjournment of cases makes this even more expensive). Additionally, complainants filing

13. International Commission of Jurists, 'Kenya. Judicial Independence, Corruption and Reform,' April, Nairobi, 2005, p. 35.

a case at court will need to pay fees. Filing a case costs around Ksh 700 (about 12 USD). These costs make it particularly difficult for poorer social groups to make use of the court. Women may, for example, already face difficulties in leaving their homestead to travel to a court. Additionally, challenges in finding the funds to pay for the costs related to filing a case may prevent them from ever seeking official justice. As one interviewee explains, ‘often women with children cannot file a case against their husbands, because they do not have the funds’.¹⁴

Some of the *Kadhis’ courts* have managed to address issues of distance and cost. *Kadhis’ courts* are usually co-located with magistrates in areas with Muslim populations; they have jurisdiction over civil cases, and they rule on the basis of *Sharia* law.¹⁵ Relying on a religious network, some courts have appointed local Imams, or other Muslim scholars in the remote areas, as first point of contact for complainants. They are not part of the official structure, but they report to the *Kadhi* and can refer cases to him. They play a vibrant role in their community and establish important links between the populations of remote areas and the *Kadhis’ courts*.

The use of mobile courts to overcome the problem of distances is still rare, but has been taken up as a reform initiative by the judiciary. In one of the western areas of the arid lands, the research team met with a magistrate who implements mobile courts. He realized that he was not able to dispense justice to many communities in his district, and therefore decided to travel to selected communities on a regular basis to hold his court. ‘We started the mobile courts because we felt there were cases that should be dealt with by us.’¹⁶ He regularly travels to the communities with his translator and the prosecutor, where he mostly deals with cases that are reported by the police.

14. Interview with staff of NGO, arid lands, September 2007.

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

16. Interview with Magistrate, arid lands, November 2007.

The magistrate feels that his mobile courts have a positive effect in bringing official institutions closer to the people. ‘We try to show them that we don’t just arrest people.’¹⁷ In his opinion, the mobile courts contribute to public outreach by the judiciary and help increase public understanding of the law. He described how community members passing by his court sessions come and sit down to listen.

Mobile courts further support the chiefs in directing people towards the official law. In the past, it was nearly impossible for the chief to direct complainants to distant courts. In most cases reported to them, the chiefs applied local means of conflict resolution instead. The mobile courts give them the opportunity to send cases to the official system. They also counter abuse by the chiefs. Chiefs can act as gatekeepers, deciding whether cases remained with community elders or went to court. Some abuse this power where they – or their peers – have advantages through the application of a specific system.¹⁸ The availability of a court at the local level allows for an additional avenue for community members to choose from to solve their conflict, while this selection would otherwise be a privilege of the community leadership.

In other areas mobile courts address specific needs. The magistrate in Garissa, for example, had been requested by UNHCR to hold mobile courts in the Somali refugee camp of Dadaab. There are a significant number of conflicts inside the camp among the refugees and between refugees and the population living adjacent to the camp. For legal reasons, the refugees cannot travel to Garissa Town to seek help at the court. The magistrate received higher-level permission to travel to the camp, with the costs of the travel being covered by UNHCR, which also provided the space for the court hearings.¹⁹

17. Ditto.

18. Interview with Magistrate, arid lands, October 2007.

19. Interview with Magistrate, arid lands, November 2007.

Apart from the physical barriers to access, another issue that inhibits complainants from turning to the official system is the long duration of cases. Although the magistrates interviewed in the arid lands districts did not report a major backlog of cases, the time it takes to receive a judgment is still too long for the parties in conflict. Even waiting times of a few weeks may already encourage the preparation of revenge actions, as the situation seems unresolved in the eyes of the parties. Ceasefires can be arranged between the different parties in order to create space for informal negotiations, but it is unlikely that parties would adhere to such arrangements in order to wait for a court decision. Furthermore, long waiting times are a concern for complainants and witnesses: ‘the court takes long even for simple things. You have to come back after three weeks, again and again. The courts are a bother, because we have other things to do.’²⁰

The work environment of the magistrate is also not conducive to efficiency. Magistrates originate from different areas of Kenya. They are usually re-deployed to different regions every four years or at even shorter intervals. Each time they are moved to a new area, they have to re-adjust to a different social context in order to provide equitable access to justice.

The space and conditions of some court buildings in the arid lands are not conducive for the magistrates to perform their duty. Some court buildings do not provide sufficient office space for the judicial personnel. Some do not allow for the space for a library (nor are there sufficient books available). Though a positive development, the posting of Kenya’s law reports online does not help those magistrates in the arid lands when they require access to judgments, as almost none of them are connected to the Internet nor do they have adequate electricity supply to start with.²¹

20. Interview with Sheik, arid lands, September 2007.

21. See http://www.kenyalaw.org/kenyalaw/klr_app/frames.ph

Other shortcomings in the justice sector hinder the dispensation of justice. Defence lawyers, for example, are only provided – free of charge – for capital charges, and then usually only for murder but not robbery with violence (for which the Penal Code also allows capital punishment). The population has little understanding of formal laws and procedures, most cannot afford a defence lawyer, and there is barely any legal aid provided. Charged with criminal cases, the alleged perpetrator usually has to defend himself. In addition to the lack of defence lawyers, there are a limited number of public prosecutors. To bridge this gap, police inspectors have received a short period of training to enable them to act as public prosecutors. Offenders who can afford a lawyer are often acquitted because a police-run prosecution is ill-equipped to win the case. Seeing criminals go free does not foster the population’s trust in the official justice system.

The number of practicing lawyers in the region is small due to lack of demand. In Isiolo Town, for example, only one lawyer maintains an office, but does not even reside there. The Pokot communities in East Pokot/Baringo claimed that there was not a single lawyer among them.²² Without legal advice, it is nearly impossible for a citizen to file a case at court.

The work of the judiciary is also hindered by the challenges the police face in the arid lands. In contrast to the courts, police presence is more widespread. Even the lower administrative sections, such as the divisions, have a police station manned with officers of the Kenya Police, while locations have a presence of officers of the Administrative Police.²³ However, these outposts are often equipped with one or no vehicle, and can therefore not respond rapidly to crimes or violent conflicts. In addition, the police have difficulty in arresting perpetrators and filing their cases at court because they

22. Interview with ALRMP staff, arid lands, October 2007.

23. The Administration Police was established in order to support the officers of the Provincial Administration (see Cap 85 Administration Police).

receive little cooperation from the local population. Most police officers interviewed claimed that the detention of offenders and the collection of witness statements are a prime challenge. It is difficult for them to convince the local communities of the rationale of witness statements, that the court will actually solve their disputes, and that the perpetrator will be punished. The police are at the frontline in enforcing official laws, but they are often simply overwhelmed by social realities. This trend is somewhat confirmed through the dissatisfaction with the police expressed by respondents in the GJLOS baseline survey, where 58% of those who had reported a crime in the Eastern Province (which is part of the arid lands), said they were not satisfied with the response of the police, 21% were partly satisfied and 21% were satisfied.²⁴

In addition, general accusations of widespread bribery in the courts do not encourage people's trust in the court system. In the Kenya Bribery Index of 2006, the judiciary is listed with 21.3% of bribery instances and features prominently on rank 12 among national institutions, with the Kenya Police on rank 1.²⁵ A common perception about the court is that bribery plays a key role, and that one cannot expect justice if one does not have the necessary funding. As a result, many people do not even consider addressing the court with their grievances.²⁶

24. Governance, Justice, Law and Order Sector (GJLOS) Reform Program, 2006, p.50.

25. Transparency International Kenya, 'The Kenya Bribery Index 2007,' Nairobi, p.12.

26. Interview with NGO staff, arid lands, July 2007.

Different Cultures of Justice

The shortcomings of the judiciary constitute serious constraints for magistrates in the performance of their duties and for peoples' access to justice. However, there is one additional factor that appears to undermine the impact of the judiciary in creating peace in the arid lands: the concepts of justice that inform the official system differ significantly from local concepts. This paradigmatic difference provides few incentives for the local population to seek redress from the official courts. Consequently, most cases that appear before the arid lands courts are filed by the police and not by individual citizens, and they only reflect official notions of justice.

According to the magistrates interviewed, most cases handled at court involve the urban population and only to a lesser extent that of the more remote areas. All magistrates confirmed that the majority of cases are filed by the police and that civil cases are less common. While there is no aggregated data for the cases filed at arid lands courts, this confirms the countrywide trend of a large majority of criminal cases filed at courts. At the Isiolo and Kabarnet Magistrate Courts, for example, nearly all cases are said to be criminal.²⁷ The Court in Garissa, a district mostly populated by Muslims, receives a few civil cases, but most of those go to the *Kadhis* court.²⁸ The magistrates explained that they received significantly more civil cases when sitting in other areas of Kenya, where the populace addressed the courts more frequently. One magistrate confirms that in her work in central Kenya, the general understanding about the court was much higher. As a result, people come and express their individual concerns and are willing to wait all day outside the court building to

27. Interview with Magistrate, arid lands district, October 2007.

28. Succession and child maintenance cases go through the *Kadhi* in areas with Muslim populations, but the judgments are certified by the magistrate.

be heard. In comparison, the magistrates explain that the arid lands population considers the courts as something much more ‘casual’.²⁹

The types of cases filed with the courts seem to differ slightly from area to area, depending on socio-economic features of the local societies. In Isiolo Town, for example, the magistrate receives a significant number of cases concerning girls charged with ‘loitering with an immoral purpose’ (prostitution) or individuals charged with ‘drunk or disorderly behaviour’. Here, the court serves the police, in their attempt to establish order in town.³⁰ Other typical ‘town’ cases are traffic accidents, ownership or boundary issues, and cases of rental disagreements.

In the Magistrate Court in Kabarnet, the capital of Baringo/East Pokot, most cases filed relate to gambling, child custody, and a few charges of robbery with violence.³¹ In both Isiolo and Kabarnet, the police commonly file cases of illegal arms possession, and women charged with ‘brewing of illicit brews’.³² The magistrate in Garissa sees charges for assault, sodomy, indecent assaults, defilement, some stock thefts, robbery with violence (usually connected to cattle raids) and, most significantly, cases concerning illegal refugees from Somalia.³³ In the Muslim areas there are cases of child maintenance, as Islamic law allows for divorce, and people therefore divorce more easily.³⁴

The prison in Garissa is filled with inmates convicted for illegal immigration. Detainees have usually tried to cross the border from

29. Interview with Magistrate, arid lands, July 2007.

30. Interview with Magistrate, arid lands, July 2007.

31. Interview with Magistrate, arid lands, October 2007.

32. Interview with Magistrate, arid lands, October 2007.

33. Garissa district has to deal with Somali refugees crossing the border from Somalia into Kenya. A lot of the police and court’s work therefore concerns refugee issues. As there is also a big refugee camp in Garissa, Dadaab, many conflicts concern the interaction between refugees and local inhabitants.

34. This is in contrast to the pastoralist groups that do not adhere to Islam. Among the Pokot, for example, respondents explained that divorce is nearly impossible. Interview with government officer, arid lands district, November 2007.

Somalia into Kenya or have left the UNHCR supervised refugee camps. Most other prisons visited were filled with inmates convicted for illegal arms possession or robbery with violence. Murder cases are usually taken to more central high security prisons, such as Kamiti near Nairobi. The prisons for women appeared relatively empty, with a few cases of illegal immigration or the ‘brewing of illicit brews’.

Logically, most of the criminal offences listed here are based on the official legal definition of a ‘crime’, but they do not necessarily comply with local understandings of what constitutes punishable behaviour. Brewing of alcohol, gambling, illegal arms possession³⁵, and drunk or disorderly behaviour do not necessarily constitute offences in pastoralist socio-cultural systems. ‘Somalis are usually brought before the court due to illegal possession of firearms, but they don’t understand since they think they have the right to possess arms.’³⁶ The community often simply does not share the official definition of an offence. Consequently, by applying the formal law, magistrates run the risk of alienating communities and of jeopardizing the reputation of the courts as being ‘just’.

Some sexual offences, for example, are not considered ‘serious’ in some local societies. For most magistrates, on the other hand, sexual offences are a red line, and they may give harsh sentences for the law to have a deterrent effect on society. Such sentences may come as a surprise for the community. One magistrate, for example, gave lifelong imprisonment to a perpetrator who was found guilty of the defilement of an under-aged girl. However, the local society involved perceives such defilement cases very differently. The most threatening consequence for the family of the girl is that she may suffer from a social stigma and nobody will want to marry her. Defilement cases

35. The fact that illegal arms possession is one of the main types of cases dealt with by the magistrates poses a more general concern. Where the state fails to protect the community and their property, and people try to protect themselves – which requires arms if the enemies are armed too – it is questionable whether people should then be detained for arms possession.

36. Interview with Magistrate, arid lands, July 2007

are therefore treated very secretly in the first place, and are resolved through payment of compensation to the girl's family. The latter then presses the perpetrator to marry the girl. The magistrate defended his sentence, which was contradictory to the way local society would deal with the offence: 'people were astonished: I wanted to make a point and show that this is illegal'.³⁷ The punishment in this case may have served as a deterrent or reduced the willingness of the community to address the judiciary. In future, people may simply refrain from seeking help from the official system if they perceive the sentences as unfair.

As a result of the different definitions of a 'crime' in the formal versus the local systems, people's perceptions of the courts are often negative. Some are suspicious about the courts and do not believe that they can help redress their grievances. They are afraid of the official laws, as they do not understand official procedures.³⁸ Some respondents claimed that they feared the court so much that they did not want to get involved, even as witnesses.³⁹ They made statements like: 'If you don't understand the court system, you will receive injustice'⁴⁰; or, 'When you go to court it is the victim that gets punished.'⁴¹

37. Interview with Magistrate, arid lands, October 2007.

38. Interview with NGO staff, arid lands, September 2007.

39. Interview with ALRMP staff, arid lands, October 2007.

40. Interview with Sheik, arid lands, September 2007.

41. Interview with Sheik, arid lands, September 2007.

Justice Outside the Courts

Many of the cases handled by the courts do not relate to the conflicts that cause serious disorder among the arid lands communities. This is not surprising, since most pastoralist communities would not turn to a court for an issue that seriously jeopardizes their social stability, such as conflicts over natural resources or cattle rustling. One magistrate confirms: ‘Sometimes I read about big cases in the newspaper: there is a big shootout, cattle rustling, the police is involved, the District Commissioner gets involved, but none of that ends here in court.’⁴² Given that the official law is based on a different understanding of justice, it is rarely effective in creating stability. Societies are therefore more interested in solving conflicts through informal means - although they may ask the police to trace their cattle and the District Commissioner to help in negotiating peace. What the court would be able to deliver in the case of cattle rustling – the detention of the perpetrator – is not an incentive to address the official system. Even in capital crimes, communities may simply insist on implementing their own solutions that are in accordance with their own concepts of justice.

There is a general perception among the population that conflicts between community members or communities should not be pursued by the official system. Parties to a conflict may not accept a court judgment as it may contradict their understanding of how a case should be solved. Local leaders feel responsible for dealing with the conflicts of their communities and they are convinced that they have better solutions than the state can provide. Some feel harassed if the police or the court insists on its involvement, and they have little faith that the court is actually able to bring peace to their communities.

42. Interview Magistrate, arid lands, July 2007.

In instances where the police file a case with the court that is also perceived as a 'crime' by the local community, leaders will attempt to remove the case from the official system and handle it according to local concepts. If the police and the official system try to interfere, local populations mobilize and enforce their will upon the official system. This is not difficult, as local realities in the arid lands have proven stronger than the power of official institutions. Elders or community leaders will appear at court requesting the withdrawal of a case. To withdraw a case, elders usually argue that it is part of their responsibilities; that out-of-court solutions have already been agreed on; or they simply declare that the case does not constitute a transgression of the rules. 'We write an agreement, and go to the police and the magistrate and withdraw the case.'⁴³ If elders achieve the withdrawal of grave criminal cases, the courts are in danger of undermining their credibility as impartial, independent and law abiding institutions.⁴⁴

One fundamental conceptual difference between formal and informal systems lies in the understanding about who is the perpetrator and who should be held responsible for the crime. In pastoralist societies it is the entire kin group that is held responsible for the acts of any single individual. The kin act as social safeguards, as they have to ensure that all their members comply with local rules. If an incident takes place it is due to their failure. Since the kin is held liable, they also have to pay the compensation which is negotiated between the two parties in conflict. The elders as the main authorities of a kin group lead such negotiations. The payment of compensation for losses or damages is a common means of ending conflicts. The payment is not made to the victim, who will only receive a small portion, if anything at all. Most of the compensation will go to the members

43. Interview with peace committee members, arid lands, November 2007.

44. The magistrate in Isiolo indicated that there is an attempt to withdraw most cases that reach the court. The magistrate made an interesting observation based on five years in another area of Kenya. During that time, conflict parties attempted to withdraw only two cases. This is in stark contrast to the experience of the magistrate in the arid lands. Interview with Magistrate, arid lands, July 2007.

of the aggrieved kin group. Such transactions constitute important occasions that define the boundaries of a kin group and strengthen its internal relations. Payment of compensation is important for the re-establishment of peace between two groups, but it is also essential for the maintenance of internal relations in the kin group.⁴⁵

This system of payment of compensation, which is an expression and reinforcement of a social contract, contradicts the very notion of the responsibility of the individual perpetrator. Since the judiciary will only pursue the guilt of an individual, it will have little impact on solving the conflict that is perceived to be between groups. In fact, it may instead have a disruptive influence on the negotiations, as the parties have to factor into the compensation terms that the perpetrator may be additionally punished by the state. Following the logic of the official law, the payment of compensation equates with the individual perpetrator ‘getting away’ without being punished.

The request for withdrawal of such cases – following payment of compensation - can pose a serious challenge for the magistrates. Most of them are well aware of the tension between the legal framework and the reality they are operating in, but they are given little guidance on how to respond. The trial and sentencing of the offender may simply lead to renewed violence among the families and clans involved, but the magistrates are obliged to implement the law. Consequently, they have developed their own ways of dealing with these contradictions. One magistrate, for example, explains how she encourages local reconciliation mechanisms: ‘There is no need to push someone in jail if they can reconcile.’⁴⁶ Most magistrates seem to make a distinction between cases where they can accept out-of-court solutions and cases that seriously violate the law: ‘We encourage out- of-court solutions

45. This can take place at different social levels. Depending on who the conflict parties are, it can comprise clans from different ethnic groups (in which scenario the clans may get support from other clans of their own ethnic group), or it may entail members of different lineages within one clan.

46. Interview with Magistrate, arid lands, July 2007.

in small matters, such as assaults, but in sexual offences we refuse'.⁴⁷ Asked how they deal with the prospect of ongoing violence after a judgment, one states: 'We usually try the perpetrator, and leave the remaining conflict for the police to deal with.'⁴⁸

Magistrates who refuse withdrawal of cases face significant challenges. The magistrate in Garissa, for example, complains that the parties involved will simply not appear at court as witnesses or complainants. This can make it impossible for the court and the police to proceed with the case. Once informal negotiations have successfully taken place, there is a common understanding among the parties that the court should not interfere any further. In such cases, police officers complained that they will attempt to collect a witness for a hearing, but may find that he or she is hiding and not willing to cooperate anymore.⁴⁹ Given the harsh environment and the lack of infrastructure, that makes it extremely difficult for the police to operate; there may be no choice for the police and the court other than to close a case. The magistrate in Garissa, for example, recounts an incident in which he had refused the withdrawal of a case where the parties involved had agreed to reconcile. As a result, the witness just never appeared at court and there was very little the magistrate could do. 'They do not want us to interfere in their way of life.'⁵⁰ 'They never threaten the court, but they tell you what they want you to do'.⁵¹

The police face these challenges even more dramatically, as they have to operate amidst communities to collect witnesses or catch offenders. In many cases of theft, cattle rustling or murders the victim group knows the identity and the whereabouts of the perpetrators, but may not be willing to reveal this information to the police or the

47. Interview with Magistrate, arid lands, November 2007.

48. Interview with Magistrate, arid lands, October 2007.

49. Interview with Magistrate, arid lands, November 2007.

50. Interview with Magistrate, arid lands, November 2007.

51. Interview with Magistrate, arid lands, November 2007.

magistrate. Sometimes in the heat of the moment they may call the police to arrest the suspect. The same group may soon ask for his release – as negotiations could have started and it would be difficult to proceed while the perpetrator is detained. The victim’s family is likely to have an interest in receiving compensation rather than in the criminal trial of the individual perpetrator, which may leave them with no tangible benefit.

Communities also use the detention and trial of the perpetrator as leverage in negotiations or in the realization of compensation payments. After parties to a conflict have reached a settlement on the amount of compensation to be paid, the victim party is concerned about actual payment of the agreed sum. They will therefore reserve the option of submitting the perpetrator to the official system. Hence, while society relies on local ways of conflict resolution, it uses the official system as a back-up to ensure the implementation of informal agreements.

Closing a case poses legal challenges and opens space for abuses. The police and magistrates often have to rely on the law that allows a complainant to withdraw a case before a final order is passed, if he can satisfy the court that there are sufficient grounds for permitting withdrawal.⁵² Magistrates can also dismiss a case if the complainant does not appear at court. The prosecutor can withdraw a case pending further investigation. If the prosecution asks for the case to be withdrawn, the magistrate has the discretion to agree or refuse. In this case, the victim party, which usually does not have a lawyer, would not know how to argue to prevent the prosecutor from withdrawing the case. A problem with cases ‘pending further investigation’ is that the police may return to the community to arrest the offender again after some time. The community, usually having reconciled by then, may not understand such action and simply feels

52. Criminal Procedure Code (Chapter 75 of the Laws of Kenya). Withdrawal of Complaint, Section 204.

harassed by the police. Only the Attorney-General has the power to enter *nolle prosequi*, an application not to pursue charges. However, this does not bar the person from subsequent proceedings against him on account of the same facts.⁵³

53. Criminal Procedure Code (Chapter 75 of the Laws of Kenya), Right of Attorney general to Enter *Nolle Prosequi*, Section 82.

Grievance against Government Authorities

Unlike most disputes, there is one type of conflict in which arid lands communities demonstrate particular interest in addressing the formal legal system: grievances against official authorities. This interest became apparent during legal aid days, which were organized in several arid lands settlements and towns. The legal aid days served to gain more insights into the kind of grievances communities wish to discuss with a lawyer, and which types of cases had remained unresolved by the community.⁵⁴

Given the limited role that the official justice system plays in the arid lands, people surprisingly turned out in large numbers. What was strikingly different from other Kenyan communities was their desire to discuss legal concerns of the community openly instead of holding individual counselling sessions. Community leaders explained that they had issues concerning the entire community, and they wanted everyone to hear the legal responses. While in other areas of Kenya individuals approached lawyers at such occasions to make their case against another individual, in the arid lands, communities expressed concerns about their relations to official institutions.

Conflicts with, or grievances against state authorities turned out to be the gravest circumstances under which communities clearly wished the involvement of the judiciary, or other external actors. This is not surprising as such conflicts cannot be solved by informal means and informal authorities alone. To a certain extent, communities seemed to respond to what they perceive as failures of state authorities through the lens of their own value system. In one case, for example, a community perceived the *Kadhi* as unfair and misbehaving. Community leaders proposed that the *Kadhi* be beaten. ‘We have

54. For further information on legal aid days, see B. Ayuko and T. Chopra, ‘Legal Aid Days as a Research Tool. Experiences from Northern Kenya,’ Justice for the Poor/The World Bank, Briefing Notes, September 2008, Vol. 1.4.

even attempted to have the *Kadhi* beaten as he caused a rift between a couple; he made them fight each other.⁵⁵ This is a punishment in full compliance with the local concepts of justice.

However, it becomes difficult if communities have to engage in formal legal relations to secure their rights against formal authorities. Communities are constrained by a lack of understanding of their rights vis-à-vis the authorities. Furthermore, district authorities or courts are located a great distance away, there are few lawyers available, and the costs of filing a case are high. The chief, as the only formal authority in the community, is thus often the sole addressee for such conflicts or grievances. He may or may not report them to the district authorities, where the chief's power and influence challenge the power of the institution against which the complaint is lodged. Even



Participants at legal aid day in Bula Pesa, Isiolo District

55. Interview with sheik, arid lands, September 2007.

if he does report a case to a higher level, conflicts hardly ever reach the formal legal system.

One legal aid day, for example, was used by a community to express their dissatisfaction with the head of the police in their sub-district. He was allegedly beating people and taking bribes. The community wanted to know from the lawyers how they could remove the officer from their location. The chief had not managed to lobby for his removal with the district authorities. The community assumed that he failed due to the fact that the head of the police had a close relative in the provincial level police. The presence of a lawyer in their remote town was a welcome opportunity to address this issue and seek advice. However, what the lawyers had to offer was difficult for the community to pursue, given the unavailability of the courts.

The complaint about the *Kadhi* was launched in the hope that the lawyers could advise on how to have him removed. ‘We have not taken any action against him, as we don’t know what avenue to use.’⁵⁶ Some had written a letter of complaint to the Chief *Kadhi*, but had not had any response.⁵⁷ The lawyers present at the legal aid day advised the community to draft a petition to the Chief *Kadhi*. Yet, it was clear that to draft a petition they needed the advice of a lawyer, which required the community to be organized and to have funds available. The chances of that were slim.

Some cases against authorities have in fact been taken up at a formal level. Each of these was backed by well-educated individuals who reside in the district capital, or Nairobi, and who return for visits to their home towns. Such individuals understand the formal system and legal avenues to pursue, and are able to support their home communities in accessing justice.

56. Interview with community member, arid lands, September 2007.

57. Interview with chief, arid lands, September 2007.

Emerging Parallel Systems

As illustrated above, the impact of community elders, chiefs and assistant chiefs is limited in instances of inter-communal conflicts or grievances against formal authorities. In both cases, the local systems that inform conflict resolution mechanisms of a particular community are not sufficient to resolve a conflict involving different concepts of justice. While grievances against formal authorities could be addressed by increasing access to the formal justice system for communities, this may not necessarily help in inter-communal conflicts.

In such cases, careful negotiations are required between different cultural systems in order for both conflicting parties to agree on a solution. The formal judiciary has not been able to play an important role in this as it adds to the mix another set of concepts of justice. A study by Practical Action concludes: ‘The formal justice institutions have proved to be inadequate in responding not only to outbreaks of violence but in addressing the underlying causes and facilitating peace building and reconciliation of communities.’⁵⁸ In fact, some think that the courts have more of a negative impact on such cases: ‘We never take cases to court, because it causes animosities and may result in revenge.’⁵⁹

The dire need for solutions to the many persisting inter-communal and inter-ethnic conflicts in the arid lands has led to the development of ad hoc initiatives for conflict management.⁶⁰ One of the first was the ‘Wajir Peace and Development Committee’. It was established in the early 1990s, during years of intense conflict in Wajir District, when a group of women started discussing their possible

58. Adan and Pkalya, 2006, p.7

59. Interview with peace committee member, arid lands, November 2007.

60. For more detailed information, please see T., ‘Building Informal Justice in Northern Kenya,’ Research Paper, Justice for the Poor and Legal Resources Foundation Trust, Nairobi, 2008.

contribution to peace.⁶¹ They approached elders, and developed innovative peacebuilding and mediation strategies, which included a broad spectrum of society, such as youths, sheiks, business leaders, civil servants, and the District Commissioner.⁶² Their recipe for success was that they worked with locally legitimate ideas, and that they integrated local level stakeholders into the process. Many organizations have since followed the example.⁶³

After several initiatives had been implemented successfully in the arid lands,⁶⁴ the Office of the President tasked the ‘National Steering Committee for Peacebuilding and Conflict Management’ (NSC) to oversee and coordinate the various programs. The peacebuilding efforts were taken to the next step, when representatives of different groups in Isiolo and Garissa met to negotiate a general agreement on how to deal with offences that frequently occurred in the area and that posed a threat to peace. As a result they drafted a document, which defines offences and regulates their punishment. Substantially, the ‘declaration’ merges elements of different ‘traditional’ conflict resolution mechanisms that the parties could agree upon. In the case of cattle rustling, for example, ‘any livestock stolen and not recovered should be compensated for by five. In case of the death of a man, his family should be compensated with 100 camels/cows, whereas the death of a woman is to be compensated with 50 camels/cows’.⁶⁵ The declaration was signed by the representatives from all levels of society including formal authorities. The agreement was

61. S. Krätli and J. Swift, ‘Understanding and managing pastoral conflict in Kenya: A literature review,’ Institute of Development Studies, University of Sussex, UK, 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, paper accessed at http://payson.tulane.edu/conflict/Cs%20St/case_studies.htm

62. Krätli and Swift 1999, Ibrahim and Jenner 2006

63. M. Buchanan-Smith and J. Lind, ‘Armed violence and poverty in Northern Kenya: A case study for the Armed Violence and Poverty Initiative,’ Centre for International Cooperation and Security. University of Bradford, United Kingdom, 2005.

64. See, for example Ibrahim and Jenner, 1996; J. Jenner and D. Ibrahim, ‘Voices of Local Peace Initiatives – Kenya Peace and Development Network, Wajir Peace and Development Committee, National Council of Churches of Kenya, and Amani’s People’s Theatre,’ Collaborative for Development Action, October 2000, accessed at <http://www.cdainc.com/publications/rpp/casestudies/rppCase07Kenya.pdf>

65. See Office of the President/National Steering Committee on Peace Building and Conflict Management, ‘The Modogashe-Garissa Declarations,’ Nairobi, 2005. p.14.

later published, including a revised version, as the ‘Modogashe-Garissa Declarations’.⁶⁶

The NSC has further overseen the establishment of ‘peace and development committees’ in many of the arid lands districts. The communities were asked to appoint or elect representatives to a committee at the lowest level of the formal administration, the location. From there, members were delegated to serve on committees at the division and the district levels.⁶⁷ These committees have since become active in inter-community and inter-ethnic disputes, in which they mediate on the basis of the declarations.

More recently, the NSC has begun drafting a policy framework on peace building and conflict management.⁶⁸ The draft is based on experience from the arid lands and recognizes that the ‘legal framework treats all acts of violence as crimes against the state, and by doing so gives minimal attention to the needs and conceptions of justice that the victim or victims may have.’⁶⁹ For that reason, one of the principles of the policy framework is that conflict management and peacebuilding must be sensitive to local cultures and must build on existing traditional conflict resolution mechanisms.⁷⁰

The official justice system has not been able to respond to conflicts among the pastoralist communities, and it has been substituted by a parallel system to make up for its deficiencies. The peace and development committees and the declarations have essentially delivered what the justice sector has not been able to. They have taken local approaches, worked with locally legitimate authorities

66. Office of the President / National Steering Committee, 2005.

67. Interview with the peace committee, arid lands, 2006.

68. See Office of the President, ‘National Policy on Peacebuilding and Conflict Management. First Draft,’ July 2006, Nairobi, unpublished document. For a discussion of the policy, see Adan and Pkalya 2006. Please note that the document is currently re-drafted in order to address the recent post-electoral crisis. A new draft was released in August 2008.

69. Office of the President, June 2006, p.11.

70. Office of the President, June 2006.

and amalgamated locally accepted conflict resolution processes and punishments. The declarations resemble a law with a penal code, which the conflicting parties have drafted themselves, and which was officially legitimated by the executive arm of the national government.⁷¹

What is emerging then are in effect parallel legal regimes: one is the official law, which is legislated and enforced based on a separation of powers; and the other is the declarations, which are supported by the national executive. Both make sense in their own sphere. One is the basis for law and order in the whole country, while the other one guarantees peace in a specific region. The moment they have to coexist, however, the logic of the two as a single system becomes flawed. Implementing the declarations may create peace, but may contradict the official laws at the same time. Implementing only the law will not achieve an end to conflict. If the very purpose of the law is peaceful coexistence it needs to be reviewed and adjusted to better cater for specific social contexts. Interestingly, the recent post-electoral violence in Kenya has sparked a similar debate: what of justice can be sacrificed for peace?

71. This solution may be unconstitutional, as the monopoly of adjudication of criminal offences lies with the judiciary. Hence, for declarations to become legal, they may need to be provided for in the constitution and subsequently in the respective legislation.

Bridging Society and the Judiciary

The example of the role of the judiciary in the arid lands of Kenya shows how access to the formal justice system is not only a matter of short distances to courts, low costs or short duration of cases. While these are all crucial concerns, there is an additional aspect that needs to be addressed to improve access to the formal system, namely the fact that official legal procedures and laws do not always abide by society's concepts of justice. Lacking is the necessary reciprocity between the concepts reflected in the current policies and law on the one hand, and the citizens' perception, experiences and needs on the other hand.

Contradicting local systems – in the extreme case – can simply render the formal system irrelevant. In the case of the arid lands a radical response has developed: the emergence of a parallel legal system, which out of necessity has been embraced by formal government agents and institutions. This sounds an alarm for the formal justice sector of the failure of its main mission – the establishment of peace in society through law and order.

This research was exploratory and further research on this issue is desirable to be able to develop more specific recommendations. However, some general observations and recommendations can be made. Next to a general increase in government engagement and improvement of services in the arid lands (for which the establishment of the new Ministry of Development of Northern Kenya & other Arid Lands is an important step), a twofold approach should be considered to strengthen the role and impact of the judiciary in the establishment of peace and stability in the arid lands. On the one hand, understanding of official legal norms needs to be increased among local populations. On the other hand, the judiciary needs to



adopt measures which allow it to be more responsive to the different societies' socio-cultural systems.

Societies have to be sensitized in the underlying norms of official laws and legal procedures. As everyone is part of a national body politic, awareness and understanding of the formal state system is important for several reasons. Informed citizens can make their own choice whether to seek redress from the formal system or not. This can not only grant the individual access to the formal system, but also help towards a more unified legal order within the nation. Increased government services can also foster peoples' confidence, and make them more inclined to adhere to common principles.

Increased awareness can be achieved through different means, such as mobile courts. As described above, convening mobile courts has proven to be an effective instrument in bringing the law closer to the people. Besides the fact that they allow for the trial of cases in remote communities, they have the added effect that people can observe hearings and legal procedures. Communities can observe how cases they report to the police are followed up on. Other tools for 'civic education' are available and have been piloted in Kenya and elsewhere.

On the other hand, the judiciary needs to become more sensitive to local value systems so it does not deter people who wish to address the formal courts. Only then can it have a greater impact on peace and stability in the volatile region. It is important for the judiciary to acknowledge that the paradigmatic differences between local and official justice systems have a negative impact on people's willingness to seek redress from the courts. Possible ways to tackle this include training and preparing magistrates better for their postings in distinct socio-cultural environments in which they are likely to be confronted with different systems. Only then the magistrate can take



social context into account and attempt to provide equitable access to justice. Magistrates are on the frontline of the judiciary, and they play a crucial role in people's perception of the judicial system. Their actions, particularly sentences, will define whether people develop trust in or come to reject the judiciary, and whether they perceive it as fair or not.

Further research can clarify how much discretion a magistrate or judge has in the laws and uses to take local systems into account in his or her judgments. This may be important in order to avoid double jeopardy for the perpetrator and to promote a perception of 'fairness' in sentencing among the community. For example, if informal negotiations following a case of manslaughter have led to the payment of compensation to the aggrieved party, can a judge take this into account when sentencing the offender? However, a note of caution is important: while discretion may be good, as it will allow peace and reconciliation in the communities without double jeopardy for the perpetrator, the need for too much discretion may indicate that the laws indeed are at fundamental variance with society, and it may jeopardize the viability and integrity of a unified legal system. It may further expose the judiciary to allegations of impartiality and corruption.

It is also fundamental to create a link between communities and justice sector institutions, including the police. Both the police and the judiciary are guardians of the official laws, which often contradict local ideas of justice. It is important to include the police in reform activities, given that the judiciary depends on the investigative and preparatory work of the police. The police are at the frontline and have to face communities who have very different ideas about the law. This is a big hurdle for their work, and they need particular support in order to overcome this. Community-based policing programs can help to bridge the gap between local understandings and the official

system. Such programs should establish a framework that allows for judicial and security sectors to communicate with each other and with communities.⁷²

The activities suggested here are just examples of a longer list of possible approaches, which should accompany a more traditional and comprehensive technical approach to judicial reform and a more frank political debate about legal judicial vestiges. However, while these are first steps that should be taken to ensure that society gains improved understanding of the official legal system, and to allow the judiciary to comply better with local value systems, most important is to understand the reconciliation of society and the judiciary as a long-term process. Only this will allow, over time, an official system to respond to society's needs with the ability to deliver peace.

72. Court User Committees have provided a framework for this where they have been tested. They allow a variety of stakeholders to meet and discuss needs. They allow greater coordination See, for example Kenya Magistrate and Judges Association/Gesellschaft für Technische Zusammenarbeit (GTZ), 'Judiciary, Accountability and Transparency Mechanism. Appraisal Report,' November 2007, p.8.

Operational Considerations

To promote reconciliation between judiciary and local communities in northern Kenya, the following steps can be considered:

a. Increase Society's Understanding of the Law

- ▶ *Increase legal awareness through use of local concepts.* It is important to not just train community leaders in modern laws, but to make them 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. It facilitated community debates, in which local concepts, such as the belief that 'Luo culture protects women' were challenged.⁷³ Such activities should be scaled up and tested in other regions and new tools developed. In the conflicts of the arid lands, legal awareness activities need to address the men who are involved in conflict negotiations.
- ▶ *Implement legal aid days in remote communities.* As research data has shown, communities are keen to receive legal advice in matters that include claims against formal authorities. Legal aid days, at which pro-bono lawyers can advise communities about their grievances, could be an important tool to start familiarizing communities with legal concepts in general. Providing communities with help where they do wish to receive help provides an entry point into a community. If they have experience

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

as beneficiaries of the justice system, their trust towards the judiciary will grow. At the same time, they will become more familiar with the modern legal paradigm.

- ▶ *Increase training of community paralegals.* Legal NGOs in Kenya have established a network of NGOs that train community 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, which have so far been under-served. Community paralegals can play an important role in inducing formal legal knowledge into informal processes. Trained in formal laws and procedures, they have the capacity to understand both systems – the community’s value systems and the official laws. They can therefore act as an important bridge between the two. They can either advise community members to address the formal system and how to do so, or they can contribute their legal knowledge in informal negotiations. In the long term, they can be important agents in inducing formal laws into communities.
- ▶ *Establish community resource centres.* Community resource centres need to be established within the local administration premises where all laws and policies that have been passed by parliament are disseminated to the community. This will keep them up-to-date with the legislations. This can be done in conjunction with the community-based policing project, which has been aiming at establishing community centres.
- ▶ *Increase number of mobile courts.* Mobile courts can be an important means to allow people wishing to address the formal system to overcome barriers of distance and costs. Mobile courts can also be useful for information dissemination and in countering legal illiteracy in remote locations. They enable community members to observe hearings by the mobile court and therefore contribute to their legal awareness. They can enhance people’s

trust in the justice system. People can actually observe how cases which they have reported to the police are processed. At present mobile courts are implemented sporadically. The mobile courts are either held in areas with a high population and which do not have a court building, or in areas where magistrates insist that the types of cases occurring should not be left to the informal systems. For the implementation of mobile courts, vehicles have to be provided, and the fuel allowances of the respective courts' budgets increased. Other actors such as the prosecutor and translators have to be willing to participate. An increase of mobile courts should be accompanied by an assessment and the development of a strategy laying out a roadmap for their future use.

b. Make the Judiciary more Responsive to Society

- ▶ *Develop new strategy for deployment of Magistrates.* Among the judicial personnel there is a sense that being posted to the arid lands is 'punishment' for a magistrate, as the arid lands provide harsh living conditions and are located a great distance from Nairobi. This is named as one of the reasons why magistrates fail to engage with local societies and their views. Postings in the arid lands should be made more attractive for magistrates, and those posted there should be carefully selected. It may help to post more magistrates who originate from pastoralist societies to the arid lands, as they bring excellent understanding of the pastoralist systems, as well as the state law. They would be more capable of sentencing in a way that is sensitive to social context. In order to make this possible, more pastoralists need to be given scholarships or should be encouraged to study law, as the number of law students from the arid lands is still very low.
- ▶ *Training of Magistrates, Kadhis and Judges in social context.* Providing training for judicial personnel posted to the arid lands

communities in 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. This may decrease the need for alternative systems, such as the peace initiatives and declarations. A few other countries have successfully introduced social context training in their general curriculum. Canada was among the first and 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.⁷⁴ In South Africa, the rationale for introducing social context training was to eradicate remaining discrimination that had developed 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.⁷⁵ 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 since been called for in other countries.⁷⁶ Canada has embedded judicial notice of social contexts in their

74. Justice D. Hackett, 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 (CJEI) Report, September 2007, pp. 13-17.

75. 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.

76. 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,' IDEG 2007, p.12.

legal systems.⁷⁷ Such a curriculum in Kenya would need to be modelled on the specific context, 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 that allow Magistrates or Judges to take social context into account. One of them is the ‘Victim Impact Statements’, in the Legal Notice no. 5/2003.⁷⁸ It focuses on the victim of the offence 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.
- ▶ *Strengthen probation offices.* In other regions of Kenya, probation officers play an important role informing judgments on a case’s social context. Quite often the Judge asks probation officers to provide that information. The probation officers then go into the communities to understand more about the background of a case, including features related to local value systems. By strengthening probation offices, Magistrates and Judges can be better informed about the social context of a case. This can play an important role in informing the decisions of Magistrates or Judges whether to allow the withdrawal of cases (usually requested by community elders), or in simply making their judgments comply more with local contexts. As mentioned above, such judgments will enhance the trust of the population in the judiciary.

77. 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 the recognition of social context and previous personal knowledge of issues gave a reasonable apprehension of bias; it did not.

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

c. Allow Legislation to be more Responsive to Society

- ▶ *Introducing restorative aspects of justice in criminal trials.*
Once a crime is reported to the police, the victim becomes the main prosecution witness. However, if the victim needs to be compensated personally, which many local value systems prescribe, he or she would have to file a case in the civil court. This process is considered tedious, expensive and full of procedures which are difficult to comprehend, and the result is that most complainants do not bother reporting the cases to the police or following up the issue in the civil courts. Allowing restorative aspects of justice in criminal cases could make the formal law more attractive to the user. This could be especially relevant for arid lands societies, for which the lack of restorative elements in a variety of crimes is an important factor that keeps them away from the courts – and even makes them try to withdraw cases once they have been filed at court. Canadian criminal law may provide a good example. Canadian judges are guided by a section of the *Criminal Code* containing overarching sentencing provisions. Part XXIII of the *Criminal Code* codifies the fundamental purposes and principles of sentencing and factors to be considered by a judge in determining a sentence.⁷⁹ Notably, Section 718.2(e) obliges sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders. Case law indicates this was done to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to specifically encourage sentencing judges to have recourse to a restorative approach to sentencing; there exists a judicial duty to give the provision's remedial purpose real force.⁸⁰ To this end, judges can request specific information regarding an offender and

79. The Canadian Criminal Code. R.S., C. 2005, C-45S.

80. See R. v. Gladue, 1999 CanLII 679 (S.C.C.), accessed at: <http://www.canlii.org/en/ca/scc/doc/1999/1999canlii679/1999canlii679.html>

their community to enable them to take ‘judicial notice’⁸¹ of the individual and community circumstances. Indeed, judges have the duty to consider information regarding the circumstances of an aboriginal offender. Depending on the crime (e.g. if it doesn’t have a minimum or fixed jail term or fine) options for sentencing are broad and can include fines, imprisonment, community-based restorative programs or plans – or a combination of these. Community-based restorative programs are seen as leading to increased acceptance in indigenous communities because of the restorative justice initiatives that resonate with their value systems. The *Criminal Code* also contains provisions for a ‘victim surcharge’ which must be paid in addition to any other punishment imposed on an offender.⁸² The court has the discretion to order an offender to pay a larger victim surcharge than that enumerated in the *Criminal Code* if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount – without undue hardship to themselves or their dependants. Lastly, the *Criminal Code* also enables judges to make restitution orders regarding property theft, damage or destruction and any pecuniary damages arising from bodily or psychological harm.⁸³ Specifically in the case of spousal abuse or threat thereof, the judge may order restitution for any expenses incurred by a spouse as a result of moving out of the offender’s household, namely for temporary housing, food, child care and transportation. Such restitution does not affect recourse to the civil system for claims on the same issue. Overall, if adopted in modified form in Kenya, these sentencing principles and orders could be combined to permit a fusion of informal and formal justice to be meted out in terms of sentencing for a given crime. An offender may be sentenced both in accordance with what the

81. Judges cannot divorce themselves from social context; bringing such context and experience into consideration can facilitate the formal application of the law and better reflecting society.

82. Criminal Code, s. 737.

83. Criminal Code, s. 738.

victim's community may consider just as well as in accordance with the norms underpinning sentencing in the formal system. Kenyan law already has elements which could be applied in this regard. Section 3(2) of The Judicature Act states that the High Court, Court of Appeal, and all subordinate courts "shall be guided by African customary law in civil cases in which one or more of the parties is subject to it, or affected by it, and in so far as it is not repugnant to justice and morality, or inconsistent with any written law."⁸⁴ If such guidance were extended to criminal cases as well, decisions may be better received due to the increased fit with a given social context. This option and example should be considered in greater detail.

d. Proposals for Further Assessments

- ▶ *Assessment of the police and socio-cultural context.* Similar to the judiciary, the work of the police can be subject to local socio-cultural impediments. The police are confronted with challenges posed by local understandings of justice, particularly when dealing with communities. Witnesses or complainants, for example, may not wish to cooperate with the police because they are more interested in informal negotiations. Communities can also have misconceived expectations about the role of the police. Community members, for example, expect the police to retrieve stolen cattle, but not to detain the perpetrators. The result is disappointment and lack of trust if the police do not fulfil local expectations. The challenges that the police face in their daily work in a particular environment, such as the arid lands, needs to be better understood to improve their efficiency. An assessment of these issues in the arid lands could help inform policing in the region, and could improve the delivery of formal justice for the population.

84. The Judicature Act, Cap. 8 (1983), revised ed. 1988.

- ▶ Assessment of 'social context' in Magistrate Courts. In order to add 'social context' training to the curriculum for Judges and Magistrates, legal assessments need to be undertaken that specify what laws exist, or what discretion exists under certain laws, to allow greater responsiveness to social context. Such a study can further include an assessment of sentencing in order to understand how laws are applied in practice. Such a study could result in guidelines on the laws and discretion under the laws. The results of such an assessment can be added to the training curriculum, but can also inform bench books for specific regions, such as the arid lands.

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