



# Justice Versus Peace in Northern Kenya

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## Abstract

The conflicting relationship between peace and justice is frequently debated in the field of transitional justice. The obligation to prosecute serious crimes can contradict the measures necessary to reestablish peace among society. The predicament gives rise to a similar, though less obvious, challenge in many developing countries, where the formal justice system can be at odds with conflict management initiatives. Often, due to their inaccessibility or incompatibility with local socio-cultural norms, official justice institutions in developing countries do not fully penetrate the whole of society. In response, conflict management and peacebuilding initiatives have proven to be more flexible and responsive to socio-political realities. While such initiatives may be more efficient in reestablishing the peace between communities in conflict, they may contradict the official law.

Current policy efforts and practices in the arid lands of Kenya illustrate this dilemma. Official justice institutions have proven too weak or ill-suited to prevent or resolve conflicts between local communities. To address the prevailing tensions, local *ad hoc* peace initiatives have developed, which operate on the basis of local norms and include local stakeholders. Given their relative success, some high level state agents have embraced the initiatives. The Office of the President is currently drafting a national policy framework on conflict management and peacebuilding, which is in part based on the experiences in the arid lands. Such a policy framework will ultimately have to deal with a similar dilemma known from the field of transitional justice: a decision between the establishment of peace and the application of formal justice may be required.

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# **Justice Versus Peace in Northern Kenya**

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The author was the program coordinator of the World Bank's Justice for the Poor Program in Kenya. This paper draws on qualitative research data that was collected during field research between July and November 2007 in three districts of Northern Kenya, namely Isiolo, Baringo/East Pokot, and Garissa. Research was implemented in partnership between the World Bank's Justice for the Poor Program and The Legal Resource Foundation Trust (LRF) of Kenya, with support from staff of the Arid Lands Resource Management Project (ALRMP), and was funded by the Bank-Netherlands Partnership Program (BNPP). The research data was initially presented in two research reports on "Building Informal Law in Northern Kenya" and "Reconciling Society and Judiciary in Northern Kenya." A version of this combined working paper was presented to the "Group on Access to Justice" at the American Bar Association in Washington DC, in March 2008, and subsequently to the "World Justice Forum" in Vienna, in July 2008. A version of this paper will appear as a chapter in Yash Ghai and Jill Cottrell (eds), *Marginalized Communities and Access to Justice* (Routledge-Cavendish), forthcoming in November 2009.

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## INTRODUCTION

Establishing the rule of law in postconflict environments often presents a dilemma when the obligation to prosecute serious crimes conflicts with the need to calm passions after the fighting has ended. This problem has been frequently debated in the field of transitional justice.<sup>1</sup> The predicament gives rise to a similar, though less obvious, challenge in many developing countries, where the formal justice system can be at odds with conflict management initiatives.

Often, due to their inaccessibility or incompatibility with local sociocultural values, official justice institutions in developing countries do not fully penetrate the whole of society. The notion of “justice” in the courts can be at variance with what local communities consider “just.” The formal system therefore often proves incapable of reestablishing peaceful relations within and between communities following a conflict. In response, practitioners and policy makers increasingly turn to the conflict management and peacebuilding fields, which can be more flexible and responsive to local values and realities, and as a result, have a higher success rate in settling disputes and establishing a lasting peace. Although both have the potential to be mutually informative, in practice, conflict management initiatives are often disconnected from justice sector work. Policy makers and practitioners are thus confronted with a choice between applying official justice, which may be inadequate in settling disputes, or resorting to conflict management techniques, which can run counter to the official law.

Current policy efforts and practices in the arid lands of Kenya illustrate this dilemma. Because of the frequently occurring droughts, disputes over pasture and water or cattle rustling activities are common in this area of pastoralist communities. Official justice institutions have proven too weak or ill-suited to prevent or resolve such conflicts. To address the prevailing tensions, local *ad hoc* peace initiatives have developed, which include local stakeholders and are based on the value systems of the local communities. These initiatives appear to have been successful in preventing recurrent conflicts and safeguarding communal property, such as grazing land and water.

Some state agents have increasingly acknowledged that the official notion of justice is dependent on peace, rather than the other way around. They have supported new peace initiatives through the establishment of quasi-formal peace committees at the district level and below, which have the ability to respond rapidly to conflicts and to mediate across district and ethnic boundaries. Different peace initiatives were eventually coordinated under the umbrella of the National Steering Committee for Peacebuilding and Conflict Management (NSC), located in the Office of the President of the Republic of Kenya. The NSC is currently taking the initiatives a step further by drafting a policy framework on conflict resolution and peacebuilding for Kenya, which is in part based on the experience of the peace initiatives in the arid lands.

The fact that the peace initiatives have gained credence with the Office of the President and won the support of donor agencies is a groundbreaking phenomenon in bottom-up lawmaking. The initiatives represent an effort to create institutions of justice that resonate with the people.

The drafting of a national policy framework, however, will ultimately have to deal with the dilemma between applying official justice and promoting peace. Such a national framework may draw on the legitimacy of local communities' value systems in the advancement of peace, but it will face challenges when those value systems diverge from the official laws of Kenya. In the end, policy makers and practitioners may have to decide between the establishment of peace and the application of formal justice.

## **CONFLICTS IN THE ARID LANDS**

Dry lands and frequent droughts are characteristic of the arid lands of Kenya. One drought can erase entire herds and destroy the livelihood of many communities. A harsh environment and barely existing infrastructure have made the development of alternative livelihoods a difficult undertaking. In addition, the pastoralist populations of the arid lands have been subsisting on the periphery of Kenya's governance and development assistance for many years, leaving them among the poorest in the country (see, for example, Oxfam International 2006).

As the state has generally little impact on the region, many of the intracommunal conflicts and grievances among the arid lands populations are handled within the community. For example, property and domestic disputes or livestock thefts are usually taken to the family elders, or, if they concern more than one family, to respected community elders or the assistant chief (Ocharo and Mutsotso 2003). The chiefs and assistant chiefs in Kenya are civil servants, employed by the Provincial Administration, but they originate from the communities in which they serve. The Chiefs' Authority Act mandates the chiefs to maintain law and order in their locations.<sup>2</sup>

In practice, the chiefs often work closely with community elders and apply local means of conflict resolution in order to maintain stability in their respective locations. Community members share common values that define "wrongdoing" and provide for adequate punishment to allow for the reestablishment of peaceful relations within society. These local value systems are not relics from the past (and therefore not necessarily "traditional"), but reflect the way a community perceives and orders its world. They are an integral part of the sociopolitical reality, and more importantly, they are fluid and can readily adjust to social changes. As such, they have a high potential to resolve conflicts efficiently.

Intercommunal or interethnic conflicts are a greater threat to stability in the arid lands. Droughts and the resulting shortage of resources, as well as political skirmishes, are the cause of numerous conflicts and crimes. The scarcity of natural resources poses major difficulties for the different groups that have to coexist in the same area. Moreover, each ethnic group has its own systems of organizing the usage of pasture and water sources. Given the considerable number of different ethnic groups in the area, including the Somalis, Borana, Samburu, Turkana, Pokot, Markwet, and others, differences in usage patterns can lead to confrontations at boreholes or over pasture lands.

Cattle rustling activities are another major threat to peace in the arid lands. On the one hand, loss of livestock after a drought can lead to extensive cattle rustling, as communities wish to regain lost assets. On the other, the cultural concepts and values of some of the pastoralist societies prescribe cattle rustling as a core activity in the maintenance of their social order. Taking the cattle of another group is a means to prove manhood, increasing a man's social status and enabling him to find a wife. It is seen as an important activity in a person's life cycle and communities are therefore not willing simply to halt the practice.

Conflicts in the arid lands were generally accelerated by easy access to firearms (Office of the President 2006, 17), which are traded across the adjacent borders from neighboring war-torn countries. Possession of firearms has enabled cattle rustlers to operate on a larger scale (Office of the President 2006, 30) and has contributed to an increase in cases of highway banditry. The use of firearms is also responsible for the high number of fatal outcomes in violent disputes over water and pasture or during cattle raids. Growing insecurity and the lack of adequate responses from security sector institutions have led to a higher demand for firearms among herders.

## **RESPONSES OF THE OFFICIAL JUSTICE SECTOR**

### **Applying Official Law**

Magistrate courts are the main judicial institution in the arid lands of Kenya, since most high courts are located in the semiarid or other regions of the country. Although magistrate courts represent the lowest level in the judicial structure, they deal with the majority of the case load in the country and are thus at the forefront in dispensing official justice (International Commission of Jurists 2005, 35).<sup>3</sup> Considering the geographical distances within the north/northeastern region of Kenya, the number of official magistrate courts is low, and most are located in the district capitals, each having jurisdiction over vast and remote areas. This geographical spread does not correspond to peoples' needs and the reality of their everyday lives. Very few roads are paved, and are thus accessible only by trucks or four-wheel-drive vehicles. Individual car ownership is rare, and most people rely on a daily truck or a less frequent vehicle passing through their settlement to travel to the next larger town. A trip to the district capital may require a day or two on the back of a truck. Moreover, peoples' socioeconomic situations rarely allow them to take on the burden of a journey to a district capital in order to file a case at court or to attend court as a complainant or witness; costs for transport are high, and additional costs for overnight accommodation and food have to be taken into account. Together with the fees the courts charge for filing a case, these logistical costs create little incentive for people to access the courts.

The time a case takes to be processed at court is another hurdle. Although there does not appear to be a major backlog of cases in the arid lands' magistrate courts, the time it takes to obtain a judgment may be too long for the conflicting parties. Even waiting times of a few weeks may encourage them to prepare for revenge actions, as the conflict remains unresolved in their eyes. The time issue is also a general concern, as one herdsman expresses: "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.”<sup>4</sup>

Magistrate courts are staffed with at least one magistrate. These magistrates are usually well-educated, originate from different areas of Kenya, and are moved to several locations throughout their career. Each time they move, they must readjust to differing local realities that may be in stark contrast to their own sociocultural background. Furthermore, in some areas, the infrastructure of their courts is not adequate; for example, some court buildings do not provide sufficient office space for judicial personnel, while others are in need of electricity, leaving magistrates unable to use computers or access the Internet. The fact that Kenya’s law reports have recently been posted online<sup>5</sup> does not necessarily help those magistrates in the arid lands when they need to access judgments.

Apart from difficult physical working conditions, the work of magistrates may suffer from other weaknesses in the system, such as a lack of public defenders and prosecutors. Charged with a criminal case, the accused usually have to defend themselves. Defense lawyers are provided only for capital charges and there are few lawyers in the region to whom an accused person can turn. For example, in Isiolo town, the capital of a vast district, only one lawyer maintains an office in town, and even he resides in the distant town of Meru. Furthermore, there is only a limited number of state councils, and in most cases, police investigators act as public prosecutors in court. Due to weak prosecution, an accused party who can afford a lawyer may go free even if he or she is guilty. This does not set reliable precedents to foster the population’s trust in the official justice system.

The work of the judiciary is further hindered by the challenges faced by the police force in the arid lands. Police stations are more widespread than courts; locations (an administrative unit at the local level) usually have a number of officers from the Administration Police, and divisions have a police station manned by the Kenya Police.<sup>6</sup> However, police outposts tend to be equipped with only one or even no vehicle and may be unable to respond rapidly to crimes or violent conflicts. Furthermore, they receive little cooperation from local communities, frequently making it impossible for police officers to track down an alleged perpetrator or record witness statements. Since the police do not usually manage to file a case or produce a witness, the judiciary is often unable to proceed with the pursuit of criminal justice.<sup>7</sup>

The types of cases that actually do come to court provide an interesting perspective on the relationship between the official justice system and the local populations. The majority of cases brought before the magistrates come from the respective towns in which the court is located, and not from the rural areas. Cases filed at court include charges involving “living off the earnings of prostitution” or “loitering with an immoral purpose” (for women), “drunk or disorderly” behavior (for men), traffic accidents, ownership or boundary issues, rental disagreements, gambling, child custody and succession, the “brewing of illicit brews,” sodomy, indecent assault, defilement, stock theft, robbery with violence (some during cattle raids), and illegal immigration (particularly in the areas bordering Somalia).<sup>8</sup> In the localities

with a high Muslim population (for example, in Garissa), a greater number of family cases, such as divorce or child maintenance, are filed, because Islamic law allows for divorce.<sup>9</sup>

Except for the cases of family law, most of the cases listed above are based on what the official law defines as a crime, and enforcement agencies in that official system are bound to bring them forward. Indeed, the majority of cases are filed by the police, as few civil cases are brought by citizens seeking the help of the judiciary. Magistrates generally feel that in other areas of Kenya, people more frequently seek redress in the courts. One magistrate stated that during her former posting in Nyeri, for example, the local population generally had a better understanding of the very concept of the courts; consequently, they would bring forward their individual concerns and were ready to wait all day outside the courthouse in order to be heard. By comparison, communities in the arid lands have a more casual perception of the court: “the Samburu and Turkana do not understand the significance of the courts.”<sup>10</sup> One of the reasons for this attitude is that offenses under the law may not conform to local understandings of what constitutes a crime. Brewing illicit brews, gambling, illegal arms possession,<sup>11</sup> and drunk or disorderly behavior are not considered crimes in pastoralist value systems. One magistrate explains, “Somalis are usually brought before the court due to illegal possession of firearms, but they don’t understand and think they have the right to possess arms.”<sup>12</sup>

In cases where local communities do not perceive charges against them to be legitimately criminal, a magistrate may apply the formal law, but subsequently incur the opposition of the entire community and jeopardize the legal system’s reputation of being “just.” For example, communities would try to informally negotiate solutions to sexual offenses between the families involved. As a means of delivering a threat against an opposing party, a family might report a case to the police without actually intending the perpetrator to be tried under official law. The police, however, are obliged to file the case at court because it is considered a crime under the official legal statutes.

In one example, as a lesson about the seriousness of the defilement of a young girl, one magistrate sentenced the accused to life imprisonment. The local Tugen society, which wanted to negotiate compensation for the girl’s family and marry the girl off to the perpetrator, was shocked at the sentence. The magistrate defended his judgment: “I gave life imprisonment. People were astonished, I wanted to make a point and show that this is illegal...You punish them in an area where they think it is not a big deal.”<sup>13</sup> This example raises the question of whether a punishment of this nature serves as a deterrent against the crime, or rather, prevents the community from ever again resorting to the judicial system to settle its disputes.

### **Enforcing Local Ways**

Not many of the “crimes” that are filed at court play a significant role in the violent conflicts that plague the arid lands. Most communities would not consider approaching the court to address their disputes over natural resources or if they have been victimized in a cattle raid. They would even prefer to deal with murder cases or serious assaults, which often accompany cattle rustling or can be the result of a conflict over natural resources, outside the judiciary,



though they do often turn to the police for enforcement of their status quo.<sup>14</sup> It is not surprising, therefore, that the court is not involved in the resolution of most of their conflicts or the punishment of perpetrators, even though they are a serious threat to peace. 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.”<sup>15</sup> The police report only few cattle rustling cases, when they are conducted with arms; the perpetrators are usually charged with “armed robbery” under the law.

If the police file a case at court that the community itself categorizes as a “wrongdoing,” the local population tries to take the case out of the hands of the official system and handle it according to their own concepts of justice. In many other parts of Kenya, communities are subject to parallel institutions, the formal and the informal justice systems. This often leads to double trials, where individuals are tried by the official justice system and either punished or acquitted, and then judged and sanctioned by the community. In the arid lands, however, the trend is for communities to impose their own ways on the official system, since they believe that cases threatening or undermining their way of life should be dealt with outside the judiciary.<sup>16</sup> If the police and other officials interfere with the community’s informal conflict resolution practices, the local people may try simply to supplant the system with their own processes.

In most cases, community members will try to withdraw the case from the official judiciary. This is true both for criminal cases that have been filed by the police and the few civil cases reported by individuals. One magistrate gave an interesting example: In her five-year posting in another area of Kenya, only twice did conflicting parties ask to withdraw a case from the court. In her time in the arid lands district, parties have requested the majority of cases to be withdrawn.<sup>17</sup>

Usually the community elders approach the court and request the withdrawal of a case. They argue that solving a particular case is their responsibility, that out-of-court settlements have already been agreed to by the parties in conflict, or that they simply do not agree that a particular case is an offense. They fear that if cases are tried by the court and not handled according to local concepts of justice, the conflict will persist and restoring good relations will be impossible. They are also afraid that parties to a conflict may not accept court judgments because those judgments contradict their understanding of how a situation should be resolved. The popular viewpoint simply does not acknowledge the role—or the usefulness—of the court in settling disputes and serving justice.

The withdrawal of criminal cases poses legal challenges for the magistrates. Most magistrates are aware of the tension between the official legal framework and the local reality in which they operate; however, they receive little guidance on dealing with these challenges and have thus developed individual approaches to them. One magistrate claims that he sometimes refers litigants back to their communities to sort out a case, because he agrees that court sanctions have no peremptory force in certain scenarios, noting that “there is no need to push someone in jail if they can reconcile.”<sup>18</sup> Most seem to distinguish between cases in which out-of-court

solutions are acceptable and those where this would be a serious violation of the law.<sup>19</sup> One magistrate differentiated between offenses this way: “We encourage out-of-court solutions in small matters, such as assaults, but in sexual offenses we refuse.”<sup>20</sup>

When social reality proves more powerful than government and judicial forces, communities are able to impose their will on official institutions, as magistrates or prosecutors no longer have the power to decide whether or not to allow the withdrawal of a case. One magistrate, for example, complained that if he refuses to allow a case to be withdrawn, the parties involved will simply not attend court as witnesses or complainants, making it impossible for the court and the police to proceed with the case. Once local negotiations to resolve a conflict have been successfully concluded, there appears to be a common understanding amongst the parties that the court should not intervene. “They do not want us to interfere in their way of life,” says one magistrate.<sup>21</sup> If the police then arrive at the community to pick up a witness, people will respond, “oh, he is not here, he is grazing the cattle far away in the lands of Wajir.”<sup>22</sup> Magistrates complain that oftentimes, the accused is caught and brought to court, but the witness or complainant never shows up. “They never threaten the court, but they tell you what they want you to do.”<sup>23</sup>

Attempts by the police to arrest an accused person often fail. In many cases of theft, cattle rustling, or murder the parties know the identity and whereabouts of the perpetrators but will not reveal them to the police or the magistrate. Sometimes in the early phase of a conflict, the victim’s family may call the police and reveal the name of the accused person. The police will detain him, but will soon face community members—including the victim’s group—at the police station demanding his release. This usually indicates that informal negotiations between the parties have started and cannot continue while the perpetrator is detained, as detention would become a factor in the negotiations and thus put the victim’s group in a less advantageous position regarding the amount of compensation that can be requested. The victim’s family has a particular interest in receiving compensation rather than pursuing the criminal trial of the individual perpetrator, as the latter will leave them with nothing. These are strong reasons to avoid appearing as complainants at court. The victim can theoretically file a civil case for damages, but usually lacks funding, knowledge of the official laws, and access to lawyers.

If the payment following informal negotiations is delayed or a perpetrator’s group is no longer willing to pay compensation, the victim’s family may threaten to have the perpetrator detained by the police in order to enforce the arrangement. This illustrates the way in which, instead of accepting the formal system as a parallel process, communities utilize it more as a backup to ensure the implementation of informal agreements.

Such incidents also demonstrate the different definitions of who is a perpetrator of a crime and who ought to be punished. The official system focuses on the individual involved in a criminal act and pursues his or her prosecution and punishment in order to provide a “deterrent” effect, or to simply remove the perpetrator to protect society. In most pastoralist societies, the kin group is held responsible if one of its members commits an offense; it is the

kin who assume control of social safeguards in order to prevent crimes, and they are therefore held responsible if they fail to do so.

This is also why the kin group is responsible for the payment of compensation for a crime. Compensation for lost or damaged values is a common way to end conflicts, and important for the reestablishment of harmony between the two groups. For example, “blood money” has to be paid for a killing, or animals paid as compensation for the theft of livestock. As the kin group is held responsible for the perpetrator’s actions, its members also have to deliver the payment. In turn, the compensation does not go exclusively to the victim but to his or her entire kin group; in fact, the victim receives only a small portion, if anything at all. It is the members of the kin group, after all, who would have to pay if someone from their group were to commit an offense. Such compensation payments are therefore important institutions in the victim’s as well as the perpetrator’s kin groups. They constantly redefine the boundaries of the kin group, and internal kin relations are strengthened. These are essential elements in the maintenance of the local social structure, and they also provide a strong incentive for communities to attempt to withdraw their cases from court.

Given the harsh pastoralist environment and its lack of infrastructure, which make it difficult for the police to pursue a potential perpetrator, there is often no choice for the police and the court but to close a case. Magistrates are bound by law; they have some discretion in sentencing, but they cannot pass sentence below the minimum prescribed. If communities make it impossible for the magistrates to pursue a criminal trial, they must employ legal channels to close a case. Magistrates often use the law that allows a complainant to withdraw a case before a final order is passed if he satisfies the court that there are sufficient grounds for permitting withdrawal.<sup>24</sup> Legally, magistrates can dismiss a case if the complainant has not appeared in court. The prosecutor can withdraw a case pending further investigation, a decision with which the magistrate has the discretion to agree or disagree.<sup>25</sup> Only the Attorney General has the power to withdraw a case *nolle prosequi*; however, even this does not bar the person from subsequent proceedings against him on account of the same facts.<sup>26</sup> In cases left “pending further investigation,” the police may return to the community to arrest the perpetrator again after some time has passed. The community, which has usually solved its conflict by this point, often does not understand such action and simply feels harassed by the police.

Although the judiciary should be the principal means of addressing the many conflicts in the arid lands region, its role appears minimal. The main reason is that local concepts of justice are more legitimate in the eyes of the population. Furthermore, local authorities have an in-depth understanding of local concepts and power dynamics, placing them at the forefront in the maintenance of peace among communities. Both the judiciary and the local systems are competing realities on the ground, and the fact that they are each based on different paradigms seems to render them incompatible.

## **ALTERNATIVE RESPONSES**

### **From Peace Initiatives to Declarations**

Given the incompatibility of local systems with official justice institutions, communities in the arid lands have had to develop their own ways and means to stop and prevent conflicts. In some areas, after long periods of incessant conflicts and insecurity, ad hoc peace initiatives were initiated to resolve the ongoing disputes. One well-known initiative is the Wajir Peace and Development Committee. During a time of intense conflict in the Wajir District in the early 1990s, a small group of Somali women began to meet with local market women to discuss conflict prevention. They later merged into the Wajir Peace Group (Krätli and Swift 1999; Ibrahim and Jenner 1996). This group first approached the elders in conflict-ridden communities, gradually expanding their peacebuilding and mediation efforts to youths, sheiks, business leaders, civil servants, and the District Commissioner (Krätli and Swift 1999). The Wajir Peace Group was formalized in 1995 and became integrated as a subcommittee of the District Development Committee, a multisector government committee at the district level.

Other organizations have followed this example (Buchanan-Smith and Lind 2005) and the model of the “Peace and Development Committees” (henceforth referred to as peace committees) has been applied in other districts across the arid lands. Committees have been established through bottom-up selection processes at the location, division, and district levels, and they consist of a broad range of members, all with the purpose of contributing to the maintenance of peace in their area. Though some of the committees consist of representatives from multiple ethnic groups, they have shown considerable success in preventing conflicts and safeguarding property (Adan and Pkalya 2006b, vii). These peace initiatives have since received significant support from government, local, and international nongovernmental agencies (NGOs), as well as donor agencies.

The challenges in cases where the conflicting parties originated from different ethnic groups adhering to distinctive local value systems were overcome through the facilitation of meetings. These provided a forum for the disputants to carefully negotiate common ground rules that complied with their own systems. A good example is the “Modogashe-Declaration.” Following an intense period of conflicts, a meeting was organized between the peace committees, district security committees, and other formal and informal stakeholders of the districts of Isiolo, Marsabit, Moyale, Wajir, and Garissa.<sup>27</sup> It included the respective provincial commissioners, district commissioners, police officers in charge of a division or district (OCPD), members of parliament, county councils, chiefs, and elders (Office of the President 2005, 17-20). Together they discussed and outlined the modes of a peace agreement, which resulted in a document called the “Modogashe Declaration” in April 2001 (Office of the President 2005).

Every community in Kenya had their own laws. The Brits came and imposed their laws on us. We then took them over. It would have been better to adopt every different law into the official law. There are so many conflicts now because of that. So we had to go back and revert back to the old laws. Those are the Modogashe declarations. We had to look back into our history, when we had no government. But we had traditional rules, which we had to follow. We had to ask ourselves, what were these?<sup>28</sup>

The declaration outlines the general challenges faced by communities in the area, such as cattle rustling, disputed use of pasture and water sources, and the trafficking of illegal firearms, and spells out ground rules aimed at tackling them. For example, it determines that all unauthorized grazers have to seek prior consent from elders and chiefs if they wish to migrate to a different area; it also stipulates that such grazers are not allowed to enter strange grazing areas with their firearms and they must return to their home district at the end of a drought. This provision responded to the frequent conflicts over pasture between the Borana communities in Isiolo and the Somali communities in Garissa and Wajir through the reintroduction of the “traditional” usage system (under which people needed to seek permission to migrate to an area claimed by a different group). The provision opposes modern law, which allows anyone to move freely within the country and does not recognize land claims based on customary usage. In most of the arid lands, only the county council—and not the local elders and community leaders—technically have the power to keep grazers away from land.

With the object of stopping the practice of cattle rustling, one provision calls upon peace committees and elders to work with the authorities to recover stolen cattle. Its specific language states that complainants must give correct information about the number of cattle stolen or they will be prosecuted by the law; accusers should not track their own animals, but should let elders and security personnel pursue them; elders and security personnel should hand cattle over to the authorities in the neighboring district if the tracks lead across a boundary; and most importantly, each head of livestock not recovered should be compensated by five. In the case of a killing, the death of a man should be compensated with 100 cows/camels, and that of a woman with 50 cows/camels (Office of the President 2005, 14).

With regard to highway banditry, the declaration emphasizes the need for increased cooperation between communities and government security services. It calls on communities to assist in the identification of perpetrators, and on peace committees to cooperate with security personnel in order to identify and arrest them. Moreover, the declaration suggests ways to stop the spread of livestock diseases and encourage socioeconomic development, and acknowledges the important role played by the peace committees, especially in uniting communities. It requests further strengthening of the peace committees through training in peace issues (Office of the President 2005, 16).

In May 2005, a review of this declaration was coordinated by the Office of the President, with financial assistance from donors, such as Oxfam, the UN Development Program, and Practical Action. The fact that the revised declaration was drafted under the auspices of the Office of the President and bilateral and multilateral donors made it a landmark event in the effort to craft law from the bottom-up rather than the top-down. The result was the new “Garissa Declaration,” which was signed by the districts of Isiolo, Garissa, Marsabit, Moyale, Samburu, Meru North, Tana River, Mandela, Wajir, and Ijara.<sup>29</sup>

The revised version adds specifics to some of the provisions of the first declaration. For example, it gives more details regarding the process to be followed by visiting grazers, who are now requested to have a written agreement when grazing elsewhere and to adhere to the “traditional” water and grazing rules of the local host community (Office of the President 2005, 2-3).

In other provisions, attempts were made to better integrate features of the official law. For example, possession of illegal firearms is against the law of Kenya, and as such, no grazer is permitted to carry arms. Chiefs are now made responsible for checking on the possession of illegal arms in their communities, and in cases of violations, to take appropriate legal action. Another provision calls for increased government action to implement the international agreements on disarmament<sup>30</sup> that the government of Kenya has signed. The role of peace committees in pursuing stolen cattle is more formalized: the penalties for stolen livestock have been lowered to two instead of five per animal, and alleged murderers now must be arrested in addition to compensation being paid. With regard to the peace committees, the new declaration requests that the process for selecting their members be more transparent and democratic. These members should be elected by the grassroots, without political or top-level interference; they should refrain from instigating or accelerating conflicts; and they should work in partnership with the police force (Office of the President 2005, 2-8). Interestingly, the declaration states that all offenses, including “modern” ones not provided for by the local systems, such as the illegal obtaining of an identification card, are to be punished by the official laws.

Getting local actors from different ethnic communities to agree to common ground rules that respond to the different local systems required careful negotiations. At the outset, these societies shared some basic principles, such as the payment of “blood money” for a killing or compensation for stolen livestock. Reaching agreement on other points, however, was challenging. Members of one district peace committee recall that the norms of the Samburu and Turkana communities differed significantly from those of the Borana or Somali communities. For example, the Samburu representative could not agree to the payment of compensation for the killing of a woman, because, as he stated, “we don’t kill women.”<sup>31</sup> The Samburu chairman had to return to his community in order to discuss with the other elders whether it was possible to agree to such a provision. On the other hand, some women complained about the fact that a difference was made in the amount of compensation for the killing of a man (100 camels/cows) and the killing of a woman (50 camels/cows).<sup>32</sup> Women felt that this indicated that they were “worth” less than a man. However, the women were overruled by their male counterparts, who referred back to “traditional” ways of life: “We always have followed our laws. So women should follow too. You have to follow community laws otherwise you cannot live in the community.”<sup>33</sup>

At the national level, the National Steering Committee for Peacebuilding and Conflict Management (NSC) was formed within the Office of the President to coordinate and harmonize the peace activities. In 2006, the NSC took the idea of the peace initiatives even further by drafting a national policy framework on peacebuilding and conflict management for Kenya (Office of the President 2006).<sup>34</sup> It aims to establish a countrywide policy on

peacebuilding and conflict resolution, utilizing experiences from the arid lands. One of the principles of the policy framework is to ensure that conflict management and peacebuilding be sensitive to cultural values and build on existing traditional conflict resolution methods (Office of the President 2006, 28). It recognizes that the official law may give minimal attention to the needs and conceptions of justice that the victim or victims may have (Office of the President 2006, 11). The drafting of such a policy framework is a noteworthy attempt to formalize local structures.

### **Implementing Peace in Practice**

The declarations and the work of the peace committees have for the most part had a positive impact on solving persistent conflicts in their areas (Adan and Pkalya 2006b). In Isiolo, for example, most respondents agree that due to these agreements, the number of conflicts since 2001 has decreased. The number of cattle raids are also said to have decreased; more cattle are returned and fewer killings occur.

Effective peace committees facilitate dialogue, raise conflict awareness, and coordinate peace initiatives at relatively low cost (Adan and Pkalya 2006, vii). They rely on local approaches and work with locally legitimate authorities, and they have defined locally accepted processes and punishments. The committees allow for peaceful interaction with representatives of different groups across ethnic and administrative boundaries. For example, in case of cattle theft, the peace committees send rapid response teams that pursue the footprints of the cattle.<sup>35</sup> If the cattle have already crossed the district border, they call the peace committee of the neighboring district for cooperation. Once the location of the livestock is identified, they request its return. If the cattle are not returned, the peace committees from both sides get involved in mediation and negotiations over compensation to reimburse the victim group for its loss of livestock, as the declarations stipulate.<sup>36</sup> The committees are thus perceived as less bureaucratic than governmental institutions, as they have basically delivered what the justice sector has not been able to provide: acceptable resolutions to conflict and the appeasement of communities.

The peace committees also intervene in conflicts within a district. These conflicts can be interethnic, as different ethnic groups may inhabit a single district. However, intradistrict conflicts are easier to manage, because the district peace committees combine representatives of most of the district's ethnic groups. Committee members have well-established working relationships and can easily turn into mediators among their groups. They make use of the various local conflict resolution methods, and try to establish an agreement that is generally perceived as fair. In this scenario, the declarations may be less significant.<sup>37</sup>

The involvement of peace committees in intraethnic conflicts differs from area to area. Some ethnic groups adhere to a more hierarchical social structure that provides for more general leadership. For example, Borana communities adhere to a joint leader, a "king" (*bagada*), who presides over a "parliament" (*gumigaiu*), which has the foremost task of handling conflicts among the Borana. This informal structure is set up to deal with intraethnic conflicts. Somali social structure, in contrast, is sedentary rather than hierarchical; it provides for less overall leadership, and clans or subclans may compete in order to increase their status and

power. Interclan fights are therefore not unusual among the Somali communities. Here, peace committees are said to play an important role in calming intraethnic conflicts.<sup>38</sup>

While peace committees have shown success, they suffer from some contradictions in the way they are constituted. Since they draw their strength from elements of “traditional” social structures, the peace committees frequently reveal a power asymmetry that is inherent to pastoralist societies. However, attempts by donors and government agents to promote the inclusion of other elements, such as women and youth, who are usually left out of peace processes, run counter to the idea of drawing on “traditions” (Chopra 2008).

The work of the peace committees and the implementation of the declarations depend significantly on the cooperation of official authorities. The involvement of the government in the peace initiatives is at present still defined by practice rather than official policies. Government officials, such as chiefs, county council members, district commissioners (DC), and the police have a general interest in the maintenance of peace in their areas; indeed, it is their duty to keep peace and provide security. In practice, many formal authorities thus get involved in peace initiatives in order to stop serious conflicts instead of pushing for formal avenues of conflict resolution.<sup>39</sup>

There are different ways and degrees to which this cooperation or support takes place, ranging from the provision of logistical support to the full involvement of government officials in peace meetings. The county council of Isiolo, for example, grants money for fuel to the peace committees to enable them to send out search parties, travel to sites of accidents, and take care of injured people, while the DC may even chair peace meetings.<sup>40</sup> As councilors and chiefs often originate from the local communities, they may represent their particular home locations and can become involved efficiently if a conflict breaks out in their hometown.<sup>41</sup>

The governmental division or district security committees also assume an important role in the peace initiatives. The district security committees consist of formal and informal authorities, such as the DC, the head of the district station of the Kenya Police (OCPD), and peace committee members. They cooperate if cattle have been raided or a killing has taken place. They are also the main institutions that meet if cross-district conflicts have occurred. In addition, the chiefs may call in administrative police officers to support the peace committees in their work, for example, by providing transport or sometimes even by enforcing peace agreements. In some areas, the cooperation between peace committees and the administrative police is said to have fostered better relationships between the community and the police.<sup>42</sup>

Despite the fact that the agreements maybe at odds with the formal duties of their government position, district government authorities have come to appreciate and acknowledge the peace initiatives. However, because of the involvement of officials and higher level authorities, some proposals have been hijacked by politicians or other individuals and used to their own interests. This has resulted in the distortion of some of the peace initiatives (Adan and Pkalya 2006b, vii; Chopra 2008).



## DILEMMAS

The declarations resemble a law with a penal code, which the parties in conflict have drafted themselves and which was officially legitimated by the executive arm of the national government. Two analogies can be drawn. The declarations are like a miniature peace treaty between different communities. It is as if the two communities are countries and the overarching Kenyan law is international law, which they may or may not utilize, depending on their interests. Second, the coming-together of different groups to negotiate basic legal principles is a process similar to what occurs at the time of early statehood, when different actors join together to define founding legal doctrines. Here, however, it takes place inside an existing state.

What is emerging then is the parallelism of legal regimes. One is the official law, which is created and implemented based on a separation of powers, and the other are the declarations, which were locally generated but have been supported by the executive of the country. Both systems make sense in their own sphere; the former is the basis for law and order in the whole country, while the latter guarantees peace in a specific region. When they are forced to exist together, however, the logic of the dual system falters. Implementing only the official law may mean that conflict prevails; applying the declarations may promote peace, but since they may also contradict the official laws, they may serve to undermine the rule of law.

Practitioners seemed to have been aware of this problem when the Modogashe Declaration was revised in 2005, as the new version aims to better integrate features of the official law. For example, to the rule that murder should be compensated with 100 (for a man) or 50 (for a woman) cows or camels, it was added that the perpetrator must be detained and pursued by the official law. This addition was to ensure that a perpetrator in the arid lands would not get away with murder through compensation paid by his family, while a murderer elsewhere in Kenya may be sentenced to death.<sup>43</sup>

Yet, the new addition—that a killer should be arrested in combination with compensation payments—is still at odds with the formal law. Although on paper, the two systems seem reconciled, in reality, the same problem that existed at the outset of all the peace initiatives remains: the communities have no interest in the detention and trial of the perpetrator. As soon as the declarations depart from the interest of the communities, they no longer want to apply them. Second, if both are pursued—informal negotiations and the criminal trial of the perpetrator—a legal problem may occur, for if the perpetrator is detained and tried while this informal trial is taking place, the accused person faces the risk of double jeopardy.

The contradictions occurring in cases of livestock theft have also not been addressed. According to the declarations, theft of livestock is to be compensated with twice the amount stolen. However, official laws prescribe imprisonment not exceeding 14 years for the crime of robbery, including livestock theft, and any theft is to be punished with at least three years in prison.<sup>44</sup> The sentence for robbery with violence is death.<sup>45</sup>

Furthermore, the declarations are based on local concepts of communal responsibility for crimes, rather than individual responsibility. Under the paradigm of the official legal system, this means that individuals within a group are held liable for crimes they did not commit. While this communal responsibility is an important factor of internal social control, implementing it under the declarations is at odds with the norms of the official laws.

In the case of herders' migration to new pastures, the declarations set restrictions where the formal law does not place any boundaries. The declarations regulate the migration of herds and people across district boundaries in times of drought by requiring that herders obtain written approval from the elders of the other side. According to the official law, grazers can move freely, and technically only the county councils, which hold the land in trust, can stop them.

The declarations could therefore be challenged by requesting a constitutional interpretation, in which a judge could rule that the declarations are *ultra vires* the constitution and thus against the law. Government officials or other individuals implementing the declarations in contradiction of official laws run the risk of being taken to court, as occurred in a northern district, where a DC was taken to court for having applied the informal laws. Communities from the neighboring district had moved into his district in search of better pasture, and they had not requested permission from the elders, as agreed in the declarations. The DC followed the declarations and evicted the herders, and the communities have taken him to court for having denied them their official rights.<sup>46</sup>

These legal and normative discrepancies also pose a similar hazard for government officials. On the one hand, officials have a strong interest in keeping the peace in their respective districts; on the other hand, in so doing, they may be forced to act against the official law. Some are aware of these contradictions. For example, when asked about the legal situation, some county council members claim that they "do their peace work not in their official capacity." Not taking part in the peace initiatives, however, is not an option for them: "If we don't do that, there will be more bloodshed."<sup>47</sup>

The magistrates have the "easiest" role in this state of affairs, as they rely on the police to file cases at court. "If they [the offenders] are not brought in, there is nothing we can do."<sup>48</sup> However, the magistrates must nevertheless deal with the fact that the peace committee members appear at court to withdraw cases in order to pursue informal negotiations and the judges still lack guidance on how to deal with such situations. One magistrate, for example, has deliberately not looked at the declarations "because they are not real laws."<sup>49</sup> However, he is fully aware that the declarations are more effective than the official laws. "The compensation for them is more effective. With us, the victim gets nothing. The traditional system is more attractive."<sup>50</sup>

The police are in the most difficult position, as they are caught in the middle. They have to respond to local expectations in order to pacify conflicts, but they also have to act as guardians of the law and file criminal cases at court. Out of necessity, they are cooperating significantly with the peace committees and the declarations, or they would not be able to

control the security situation in their respective areas of deployment. For example, the police are often asked to help retrieve cattle stolen during rustling raids. According to the law, they should subsequently arrest the perpetrators for stealing or handling stolen property, but if they do so, renewed conflict between the communities may break out.

The most prevalent challenge for the peace committees and all other actors taking part in the peace initiatives is the enforcement of the declarations, which do not have binding powers and depend only on the goodwill of the communities.<sup>51</sup> Some communities do not abide by the provisions of the declarations, especially those that feel they were not part of the negotiation process. If a party decides not to adhere to the declarations and refuses to pay compensation, the other party cannot appeal to government security forces to enforce the agreement, as the declarations are not official legislation. One county council, for example, recounts the implications of these constraints: if, after arduous negotiations, the perpetrator's family refuses to pay compensation, there is no law to enforce the payment. The council would like to submit the declarations to parliament to legislate them into official law and enable their enforcement by official agencies. At the moment, however, all they can do is try to convince the parties to pay, using the threat of calling the police.

## **CONCLUSIONS**

The declarations agreed to in the arid lands of Kenya are an intriguing illustration of bottom-up law making. They are also an encouraging development, as they point to the need for legal regimes to respond more adequately to local values and social realities. The need for more responsiveness from the justice sector became obvious in light of the January 2008 postelectoral violence in Kenya, when the political parties concerned did not rely on the judiciary to address their grievances over the electoral results. Nor did people at the grassroots turn to the formal legal system; instead, they resorted to violence as a means of expressing their dissatisfaction. Those events were a wake-up call for Kenya's justice sector to become more responsive to society's needs.

In the long run, justice sector institutions and laws must begin to reflect peoples' actual perceptions and everyday realities. The official justice sector may need to better tailor its interactions with communities to provide judgments that truly do foster peace in communities, and that people believe to be "fair." To this end, magistrates should not be left without guidance on dealing with the considerable challenges that the communities of the arid lands pose to the acceptance of the country's official laws. As a first step, magistrates could receive social context training in order to better understand—and be more effectively prepared for—the different societies in which they are posted. Furthermore, benchbooks could be developed for the specific regions of Kenya, aimed especially at guiding magistrates on ways to respond to the particular sociocultural challenges they face.

Though they stem from the particular problems confronting the different communities in Kenya's arid lands region, the peace initiatives of northern Kenya may be able to serve as a model to address some of the social tension that still prevails in the country more generally in

the aftermath of the January 2008 violence. They may be especially useful in cases where tension between ethnic groups still exists. In fact, soon after the election violence ended, the model of the peace committees was introduced in Nairobi and in other volatile regions in the country, such as Mt. Elgon (see PeaceNet and Saferworld 2008). In order to expand the implementation of peace committees, however, some crucial contradictions will need to be addressed.

For peace initiatives to function fully, they require careful harmonization with official laws. This step is vital to protect those who put any new declarations into practice from being pursued legally, to defend perpetrators from double jeopardy, and to create enforcement mechanisms for the local agreements. It is particularly important for all these issues to be taken into account within the policy framework on peacebuilding and conflict resolution that is currently being drafted by the NSC. Close cooperation and communication among the institutions of the justice sector, such as the Ministry of Justice, the police, and the NSC in the Office of the President, are essential.

Only if efforts are launched from both sides—that is, if peace initiatives are supported and made to conform better with the formal laws, and if judicial institutions start to respond more adequately to social realities and local values—can the dilemma of having to choose between the application of official justice or the advancement of peace be overcome.

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<sup>1</sup> This is evident, for example, in the early fate of the Yugoslav Tribunal, the creation of a Truth Commission instead of prosecutions in El Salvador, or, most recently in the debates regarding the indictment of Sudan's President Al-Bashir by the International Criminal Court (see LeBor 2008).

<sup>2</sup> Laws of Kenya, Chap. 128, Chiefs' Authority, sec. 6.

<sup>3</sup> For the jurisdiction of the magistrates' courts, see *Magistrates Court Act*, (Laws of Kenya, chap. 10).

<sup>4</sup> Interview with a community member, arid lands, September 2007.

<sup>5</sup> See <http://www.kenyalawreports.org>.

<sup>6</sup> Kenya combines two police forces, the Kenya Police and the Administration Police. The latter was established under the *Administration Police Act* Chap. 85, Laws of Kenya. It is mandated to provide assistance to government officials in maintaining law and order. For further information, see Administration Police 2004, 13.

<sup>7</sup> Interview with police officer, arid lands, July 2007

<sup>8</sup> Interviews with magistrates in a selection of arid lands districts, 2007.

<sup>9</sup> Interview with magistrate, arid lands, November 2007. Muslims can choose between the magistrate and the khadis court to bring cases regarding child maintenance. The khadis court is a parallel institution that exists at the magistrate level and has jurisdiction over family law only. The magistrate needs to approve judgments by the khadi, and appeals go to the High Court. See *Khadis Courts Act* (Laws of Kenya, chap. 11).

<sup>10</sup> Interview with magistrate, arid lands, August 2007.

<sup>11</sup> The fact that illegal arms possession is one of the main types of offenses dealt with by the magistrates reveals a dilemma: the state fails to protect the community and its property, and people therefore resort to arms for self-protection because their enemies are armed.

<sup>12</sup> Interview with magistrate, arid lands, August 2007.

<sup>13</sup> *Ibid.*, November 2007

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, July 2007.

<sup>16</sup> The one exception seems to be cases in which individuals or entire communities have a grievance against government authorities. In these cases, people often do not know their rights and how to access the formal system, although they wish to make use of the latter.

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- <sup>17</sup> Interview with magistrate, arid lands, July 2007.
- <sup>18</sup> Ibid.
- <sup>19</sup> Ibid., October 2007.
- <sup>20</sup> Ibid., November 2007.
- <sup>21</sup> Ibid.
- <sup>22</sup> Ibid.
- <sup>23</sup> Ibid.
- <sup>24</sup> Criminal Procedure Code (Laws of Kenya, chap. 75), Withdrawal of Complaint, sec. 204.
- <sup>25</sup> The victim party, which usually does not have a lawyer, would not know how to argue in such a case to prevent the prosecutor from withdrawing the case.
- <sup>26</sup> Criminal Procedure Code (Laws of Kenya, chap. 75), Right of Attorney General to Enter Nolle Prosequi, sec. 82.
- <sup>27</sup> The district boundaries between Wajir/Garissa and Isiolo also constitute the provincial boundaries between the Northeastern Province (Isiolo) and the Eastern Province (Garissa and Wajir).
- <sup>28</sup> Interview with peace committee member, arid lands, November 2007.
- <sup>29</sup> While the Modogashe-Garissa Declarations are the most famous, other declarations were negotiated and signed in other areas, such as the Laikipia Declarations in 1999, Wamba Declarations in 2002, Kolowa Decalarations in 2002, and the Peace Accords in Naivasha of 2006 (Office of the President 2005, iii).
- <sup>30</sup> The government of Kenya signed the “Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa” in March 2000, and the “Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa” in May 2006, among other declarations.
- <sup>31</sup> Interview with peace committee member, arid lands, July 2007.
- <sup>32</sup> Ibid.
- <sup>33</sup> Ibid.
- <sup>34</sup> The draft policy is currently being revised in order to suit the postelection crisis situation in Kenya. For a discussion of the policy see Adan and Pkalya 2006.
- <sup>35</sup> Interview with ALRMP officer, arid lands, July 2007.
- <sup>36</sup> Interview with peace committee members, arid lands, September 2007.
- <sup>37</sup> Interview with peace committee member, arid lands, September 2007.
- <sup>38</sup> Interview with NGO staff, arid lands, November 2007.
- <sup>39</sup> Interviews with local authorities, arid lands, July 2007.
- <sup>40</sup> Interview with police officer, arid lands, September 2007.
- <sup>41</sup> Interview with local authorities, arid lands, July 2007.
- <sup>42</sup> Focus group discussion with peace committee members, arid lands, September 2007.
- <sup>43</sup> The death penalty has not been implemented in Kenya for some years.
- <sup>44</sup> Penal Code (Laws of Kenya, chap. 63), General Punishment for Theft, sec. 275 and 278.
- <sup>45</sup> Ibid., Definition of Robbery, sec. 296.
- <sup>46</sup> Interview with conflict management specialist, arid lands, July 2007.
- <sup>47</sup> Interview with local authorities, arid lands, July 2007.
- <sup>48</sup> Interview with magistrate, arid lands, November 2007.
- <sup>49</sup> Ibid.
- <sup>50</sup> Ibid.
- <sup>51</sup> Interview with peace committee members, arid lands, September 2007.

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