Peace Versus Justice in Northern Kenya

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Preliminary Draft, Subject to Revision
Prepared for World Justice Forum,
Vienna, July 2-5, 2008

I. Introduction

Establishing a rule of law in post-conflict environments often faces a dilemma when prosecution of serious crimes is at odds with calming passions after fighting has stopped.
This problem has been frequently debated in the field of transitional justice.\textsuperscript{3} It reflects a similar, less obvious, challenge in the context of developing countries, where the formal justice system can be at odds with conflict management initiatives. 

Often, due to inaccessibility or incompatibility with local socio-cultural values, official justice institutions in developing countries do not fully pervade society. The notion of ‘justice’ in the courts is at variance with what local communities consider as ‘just’. The formal system therefore often proves incapable of re-establishing peaceful relations in communities following conflict. In response, practitioners and policy makers increasingly turn to the conflict management and peace building fields, which can be more flexible and responsive to local values and realities, and consequentially have a higher rate of success in settling disputes and establishing lasting peace. Though both have the potential to be mutually informative, in practice, conflict management initiatives are often severed from justice sector work. Policy makers and practitioners are confronted with a choice between applying official justice, which may be inefficient 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. Given the frequently occurring droughts, disputes over pasture and water, or cattle rustling activities are common in this area that is inhabited by pastoralist communities. Official justice institutions have proven too weak or ill-suited to preventing or resolving conflicts. To address prevailing conflicts, local ad hoc peace initiatives developed that include local stakeholders and that are based on the value systems of the local communities. These initiatives have proven successful in preventing incessant conflicts and safeguarding communal property, such as grazing land and water.

Some state agents have increasingly acknowledged that the official notion of justice is a subset of peace and not vice versa. They have supported the further establishment of quasi formal peace committees at the district level and below, which have the ability to rapidly respond to conflicts and to mediate across district and ethnic boundaries. Different peace initiatives were eventually harmonized under the umbrella of the National Steering Committee for Conflict Management and Peace building (NSC), located in the Office of the President. The NSC is currently taking the initiatives a step further by drafting a policy framework on conflict resolution and peace building for Kenya, which is in part based on the experience of the peace initiatives in the arid lands.

The fact that peace committees have gained credence with the Office of the President and won support of donor agencies is a groundbreaking phenomenon in bottom-up law-making. It is 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 of applying official justice versus perpetuating peace. It may draw on the legitimacy of the value systems of local communities for the establishment of peace, but it can face challenges when those are at odds with the official laws of Kenya. Policy makers and practitioners may have to decide between the establishment of peace and the application of formal justice.

\textsuperscript{3} For example the early fate of the Yugoslav Tribunal, El Salvador and the Truth Commission instead of prosecutions. See also, for example: Centre for Conflict Resolution, ‘Peace versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa,’ Seminar Report, South Africa, 2007.
II. 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. This has placed local communities among the poorest of the country.4

As the state has generally little impact on the area, many of the intra-communal conflicts and grievances among the arid lands populations are handled within the community. 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.5 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 his location.6

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 re-establishment of peaceful relations among 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 their world in the present. They are an integral part of the socio-political reality, and more importantly they are fluid and can readily adjust to social changes. As such, they have a high potential to efficiently resolve conflicts.

A greater threat to stability in the arid lands is inter-communal or inter-ethnic conflicts. Droughts and the resulting scarcity of resources are the cause of a considerable number of conflicts and crimes.7 Scarcity of natural resources poses major difficulties for the different groups who have to co-exist in the same area. Each ethnic group has its own systems of organizing usage of pasture and water sources. Given the considerable number of different ethnic groups in the area, such as the Somalis, Borana, Samburu, Turkana, Pokot, Markwet and others, differences in the usage patterns can lead to confrontations at boreholes or over pasture. In addition, significant confusion over land ownership exists. Different groups claim land as their customary pasture. There are no individual land titles in most of the arid lands and most land is held in trust for the benefit of the communities.

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 activities as communities wish to regain lost assets. On the other, cultural concepts and values of some of

6 Laws of Kenya, Cap 128 Chiefs’ Authority, Sec. 6.
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 and increase the social status of a man, and to allow a young man to find a wife. It is seen as an important activity in a person’s life cycle and communities are therefore not willing to simply abort the practice.

Conflicts in the arid lands were generally accelerated by easy access to firearms, 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 and has contributed to the increase of 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 lack of adequate responses of security sector institutions has led to a higher demand for firearms among herders.

III. Responses of the Official Justice Sector

III. 1. Applying Official Law

Magistrate courts are the main judicial institution in the arid lands of Kenya, while most High Courts are located in the semi-arid or other regions of the country. In the judicial structure Magistrate courts represent the lowest level, but they deal with the majority the case load of the country. They are thus at the forefront in dispensing official justice. Considering the geographical distances of the north/northeastern region of Kenya, the number of official Magistrate courts is low. Most of them are located in the district capitals, each having jurisdiction over vast and remote areas. This geographical spread of the courts does not correspond with peoples’ realities. Very few roads are tarmac, most are dirt roads, only accessible 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 capitals may require a day or two on the back of a truck. Peoples’ socio-economic 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 of overnight accommodation and food have to be taken into account. In addition to fees the court charges for the filing of a case this creates little incentives for people to access the court.

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 parties to the conflict. Even waiting times of a few weeks may encourage them to prepare for revenge actions, as the conflict remains

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

9 Dito, p.30.

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.’

Magistrate courts are staffed with at least one magistrate. Those are usually well educated and originate from different areas of Kenya. They are moved to several locations throughout their career. Each time they have to re-adjust to differing local realities, which may be in stark contrast from their own socio-cultural background. The infrastructure of their courts in some cases is not adequate for them to do their work. Some court buildings do not provide sufficient office space for judicial personnel. Some buildings lack adequate electricity and magistrates may therefore have no computers or internet access. The fact that Kenya’s law reports have recently been posted online does not 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 the lack of public defenders and prosecutors. Charged with a criminal case, the accused usually have to defend themselves. Defense lawyers are only provided for capital charges, while there are barely any lawyers in the area for an accused person to turn. For example, in Isiolo town, it was said that only one lawyer maintains an office in town, but 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 they are 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 challenges faced by the police force in the arid lands. Police stations are more wide-spread than courts, locations (which are after the sub-location at the lowest administrative level) usually have a number of officers from the Administration Police and divisions have a police station of the Kenya Police. However, police outposts tend to be equipped with one or no vehicle and may be unable to respond rapidly to crimes or violent conflicts. Furthermore, they receive little cooperation from local communities, which often accuse the police of harassing them. This often makes it impossible for police officers to track down an alleged perpetrator or to record witness statements. Since the police do not manage to file a case or produce a witness, the judiciary is unable to proceed with the pursuit of criminal justice.

The types of cases that actually do come to court provide an interesting perspective on the relation between the official justice system and the local populations. The majority of cases brought before the magistrates comes from the respective towns in which the court is located, and not from the rural areas. Cases filed at court include women charged with ‘living of the earnings of prostitution’ or ‘loitering with an immoral purpose’; men charged with ‘drunk or disorderly’ behavior, traffic accidents, ownership or boundary issues in town, cases of rental disagreements, gambling, child custody and succession, brewing of illicit brews, sodomy, indecent assault, defilement, stock theft, robbery with violence (some during cattle

11 Interview with a community member in Isiolo, September 2007.
12 See www.kenyalawreports.org
13 Kenya combines two police forces, the Kenya Police, and the Administration Police. The latter was established under the Administration Police Act CAP 85, Laws of Kenya. It is mandated to provide assistance to government officials in maintaining law and order. See for further information, Administration Police, Administration Police Strategic Plan 2004-2009, Nairobi, 2004, p. 13.
14 Interview with police officer, ASAL district, July 2007.
raids), and illegal immigration (particularly in the areas bordering Somalia). In the areas with a high Muslim population (for example in Garissa), a higher number of family cases, such as divorce or child maintenance, are filed. This is because Islamic law allows for divorce, while among other groups, such as the Pokot in Baringo/East Pokot, local value systems do not allow for divorce.

Except for cases of family law, most of the cases listed above are based on what the official law defines as a crime. Therefore, enforcement agencies of the official justice system are bound to bring them forward. Indeed, the majority of cases are filed by the police; and not many civil cases are brought by citizens seeking the help of the judiciary. Magistrates generally feel that in other areas of Kenya people more frequently sought recourse to the courts. One magistrate expressed that during her former posting in Nyeri, 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 perceive the court as something much more casual: ‘the Samburu and Turkana do not understand the significance of the courts’. One of the reasons for this attitude is that offenses that come to court often do not comply with local understandings of what constitutes a crime. Brewing of illicit brews, gambling, illegal arms possession, and drunk or disorderly behavior seldom constitute crimes in pastoralist value systems. One magistrate recounts: ‘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.’

In such cases, where local communities do not perceive charges against them as legitimately criminal, a magistrate may apply the formal law, but incur the opposition of the entire community and jeopardize the reputation of the law and the courts as being ‘just’. For example, community would usually try to negotiate 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 intending the perpetrator to be tried under official law. The police, however, are obliged to file the case at court because of its criminality under the official law.

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, instead wanted to negotiate compensation for the girl’s family, and maybe marry the girl off to the perpetrator. The magistrate defended his judgment: ‘I gave life imprisonment. People were astonished, I wanted to make a point and show that this is illegal.’ This example raises the question whether the

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16 Interview with magistrate, ASAL district, November 2007. Muslims can choose between the magistrate and the khadis court to bring cases of child maintenance. The khadis court is a parallel institution, which exists at the magistrate level; it 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 (Chapter 11 of the Laws of Kenya).
17 Interview with ALRMP officer, ASAL district, November 2007.
18 Interview with Magistrate, ASAL district, August 2007.
19 The fact that illegal arms possession is one of the main types of offenses dealt with by the magistrates indicates a dilemma. The state fails to protect the community and their property, and people therefore resort to arms for self-protection because their enemies are armed.
20 Interview with Magistrate, ASAL district, August 2007.
21 Interview with Magistrate, ASAL district, November 2007.
22 Interview with Magistrate, ASAL district, November 2007.
punishment has served as a deterrent against repetition of the crime, or whether it prevents the community from ever again resorting to the judiciary.

III. 2. 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. The causes of these conflicts appear not to be taken to the judiciary. Most communities would not consider approaching the court in their disputes over natural resources or if they have been victimized in a cattle raid. They would even prefer to deal with murder cases – which often accompany cattle rustling or which can be the result of a conflict over natural resources - outside the judiciary.23 However, they often seem to turn to the police for enforcement of their status quo. It is not surprising, therefore, that the court is not involved in the resolution of most of these conflicts or the punishment of perpetrators, although 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.’24 The police report only few cattle rustling cases, when conducted with arms, charged with ‘armed robbery’ under the law.

If the police file a case at court that the community itself categorizes as ‘wrongdoing’, then the local population tries to take the case out of the hands of the official system and handle it according to their own concepts and values. 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 have been tried by the official justice system and either punished or acquitted, and then the community passes its own judgments and sanctions. In the arid lands, however, the trend is to enforce the local ways on the official system. The perception of communities is that cases threatening or undermining their peace should be dealt with outside the judiciary.25 If the police and the official system interfere, the local population may try to enforce their values on the official system.

In most cases, community members will try to withdraw the case from the official judiciary. This is true for both criminal cases that have been filed by the police, as well as 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 parties to a conflict 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.26

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 by the parties in conflict; or 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 the local way, then the conflict will persist and restoration of peace will be

23 Interview with Magistrate, ASAL district, November 2007
24 Interview with Magistrate, ASAL district, July 2007.
25 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 would wish to make use of the formal system.
26 Interview with Magistrate, ASAL district, July 2007.
impossible. They are afraid that parties to a conflict may not accept court judgments, because they contradict their understanding of how a case should be resolved. The popular perception simply does not acknowledge the role of the court in settling disputes and serving justice.

The withdrawal of cases – in particular criminal cases – poses legal challenges for the magistrates. Most magistrates are aware of the tension between the legal framework and the reality in which they operate. Magistrates receive little guidance on dealing with these challenges and have developed individual approaches to them. One magistrate claims that he sometimes refers the litigants back to their communities to sort out a case, because he agrees that court sanctions have no peremptory force in certain scenarios: ‘there is no need to push someone in jail if they can reconcile’.27 Most seem to distinguish between cases in which out-of-court solutions are acceptable and cases where this would be a serious violation of the law.28 One magistrate differentiated between offenses: ‘we encourage out-of-court solutions in small matters, such as assaults, but in sexual offenses we refuse’.29

When social reality proves more powerful than the forces of the government and the judiciary, communities are able to impose their will on official institutions. It is simply no longer in the power of the magistrates or prosecutors 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. This makes it impossible for the court and the police to proceed with the case. Once local negotiations to resolve a conflict have 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.30 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.’31 Magistrates complain that it happens often that the accused is caught and brought to court, but the witness or complainant never show up. ‘They never threaten the court, but they tell you what they want you to do’.32

Attempts of 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. However, neither would 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 or her, 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. Detention would need to be taken into account in the negotiations and this would put the victim’s group in a less advantageous position regarding the amount of compensation they can request. The victim’s family has a particular interest in receiving compensation payments rather than watching the criminal trial of the individual perpetrator – which 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.

27 Interview with Magistrate, ASAL district, July 2007.
28 Interview with Magistrate, ASAL district, October 2007.
29 Interview with Magistrate, ASAL district, November 2007.
30 Interview with Magistrate, ASAL district, November 2007.
31 Interview with Magistrate, ASAL district, November 2007.
32 Interview with Magistrate, ASAL district, November 2007.
If the compensation payment following informal negotiations is delayed or a perpetrator’s group is no longer willing to compensate, the victim’s family may threaten to have the perpetrator detained by the police in order to enforce the outcome of the informal negotiations. This illustrates how – instead of accepting the formal system as a parallel process – communities utilize it more as a back-up to ensure the implementation of informal agreements.

Such incident also demonstrates the different definitions of who the perpetrator of a crime is, and who ought to be punished. The official system focuses on the individual involved in a criminal act and pursues their prosecution and punishment in order to provide a ‘deterrent’ effect or to simply remove the perpetrator and protect society. In most pastoralist societies the kin group is held responsible if one of its peers 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.\(^\text{33}\)

This is also the reason why the kin group is responsible for the payment of compensation for a crime. Compensation for lost or damaged values are a common way to end conflicts, and important for the re-establishment of peace between the two groups. For example, ‘blood money’ has to be paid for a killing, or animals paid as compensation for theft of livestock. As the kin group is held responsible for the actions of the perpetrator, they also have to come up with the payment. On the side of the victim, the compensation is received by the entire kin group. It does not go exclusively to the victim, in fact, the victim only receives a small portion, if anything at all. Most of the compensation will go to the members of the kin group (who would also be the ones paying in case that someone in their group becomes a perpetrator). 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 can be essential events for the perpetuation of social relations.

These are all strong reasons for communities to attempt the withdrawal of cases from court. Given the harsh environment familiar to pastoralists and the lack of infrastructure, which makes it difficult for the police to track anyone, 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 when it comes to sentencing, but they cannot pass sentence below the minimum prescribed. If communities make it impossible for them to pursue a criminal trial, they have to find 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.\(^\text{34}\) Legally, magistrates can dismiss a case if the complainant has not appeared 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 not.\(^\text{35}\) A problem with cases ‘pending further investigation’ is that the police may return to the community to arrest the perpetrator again after some time. The community, which has usually solved their conflict by then, often does not understand such action and simply feels harassed by the police. Only the Attorney General has the power to withdraw a case \textit{nolle}

\(^{33}\) Depending on the ethnic group, the kin group can entail different categories of people. It can be the lineage, the patri-lineage and individuals from the matrilineal side of an individual, or it can be the whole clan.

\(^{34}\) Criminal Procedure Code (Chapter 75 of the Laws of Kenya). Withdrawal of Complaint, Section 204.

\(^{35}\) 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.
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prosequi, however this does not bar the person from subsequent proceedings against him on account of the same facts.  

Although the judiciary should be the principal means of addressing the many conflicts in the ASAL region, its role appears minimal. The main reason is that local concepts of justice are much better tailored to serve the needs and understandings of the communities. Furthermore, local authorities have in-depth understanding of local social and power structures, which places them at the forefront in the maintenance of peace. Both, the judiciary and the local systems are competing realities on the ground. The fact that they are each based on different paradigms renders them seemingly incompatible.

IV. Alternative Responses

IV. 1. From Peace Initiatives to Declarations

Given the incompatibility of local systems with official justice institutions, communities had to develop their own ways and means to stop and prevent conflicts. In some areas, after a long period of incessant conflicts and insecurity, ad hoc peace initiatives started to resolve ongoing conflict in the arid lands. One well-known initiative is the Wajir Peace and Development Committee (WPDC). During years of intense conflict in 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. This group first approached elders in conflict communities, gradually expanding their peace building and mediation efforts to youths, sheiks, business leaders, civil servants, and the District Commissioner.

The Wajir Peace Group was formalized in 1995 as the WPDC became integrated as a subcommittee of the District Development Committee, a multi-sectoral government committee at the district level.

Other organizations have followed this example and the model of the ‘Peace and Development Committees’ has been applied in other districts across the arid lands. Committees were established through bottom-up selection processes at the location, division and district level. They consist of a broad range of members all with the intention to contribute to the maintenance of peace in their area. With some of the committees consisting of representatives from multiple ethnic groups, they have shown considerable success in preventing conflicts and safeguarding property. These peace initiatives have since received significant support from government, local and international NGOs, as well as donor agencies.

36 Criminal Procedure Code (Chapter 75 of the Laws of Kenya), Right of Attorney general to Enter Nolle Prosequi Section 82.
38 Krätli and Swift 1999.
The challenges in cases where the conflict parties originate from different ethnic groups adhering to different local value systems were overcome through the facilitation of meetings, in which the disputants could carefully negotiate common ground rules that complied with each of their own systems. A good example of this is the ‘Modogashe-Declaration’. 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.40 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.41 Together they discussed and outlined the modes of a peace agreement, which resulted in a document called the ‘Modogashe Declaration’ in April 2001.42

‘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?’43

The declaration outlines the general challenges faced by communities in the area, such as cattle rustling, disputed use of pasture and water sources, and trafficking of illegal firearms. Its provisions spell out ground rules in order to tackle these problems. 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; that they are not allowed to enter strange grazing areas with their firearms; and that they have to 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 re-introduction 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 which 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 aim of stopping the practice of cattle rustling, one provision calls upon peace committees and elders to work with the authorities to recover stolen cattle. Complainants have to give correct information about the number of cattle stolen or they should be prosecuted by the law; complainants should not track their own animals, but should let elders and security personnel pursue them; elders and security personnel should hand 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 case of

40 The district boundaries between Wajir/Garissa and Isiolo also constitute provincial boundaries, between the Northeastern Province (Isiolo) and the Eastern Province (Garissa and Wajir).
42 See Office of the President/National Steering Committee on Peace Building and Conflict Management, 2005.
43 Interview with peace committee member, ASAL district, November 2007.
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a killing, the death of a man should be compensated with 100 cows/camels, and that of a woman with 50 cows/camels. 44

With regards to highway banditry, the declaration emphasizes the need for increased cooperation between communities and governmental security services. It calls upon communities to assist in the identification of perpetrators; and peace committees should cooperate with the security personnel in order to identify and arrest them. The declaration further determines how to stop the spread of livestock diseases, how to encourage socio-economic 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.45

In May 2005, a review of this declaration was coordinated by the Office of the President, with financial assistance from donors, such as Oxfam, UNDP, and ITDG. The fact that the revised declaration was drafted under the auspices of the Office of the President, and bilateral and multilateral donors was a landmark in making law from bottom-up instead of top-down. The result was the new ‘Garissa Declaration’, which was signed between the districts of Isiolo, Garissa, Marsabit, Moyale, Samburu, Meru North, Tana River, Mandela, Wajir and Ijara. 46

The revised version adds specifics to some of the provisions of the first declaration. For example, it gives more details in regards to the process to be followed by visiting grazers; they are now requested to have a written agreement when grazing elsewhere; and visiting grazers should adhere to ‘traditional’ water and grazing rules of the local host community.47

In other provisions, attempts were made to better integrate features of the official law. For example, possession of illegal firearms is stated to be against the law of Kenya, and as such no grazer is expected to carry arms. Chiefs are now made responsible for checking on illegal arms possessions in their communities, and in cases of violations, to take appropriate legal action. Another provision calls upon increased action by the government to implement the international agreements on disarmament which the Government of Kenya has signed. The role of peace committees in pursuing stolen cattle is more formalized; the penalties for stolen livestock are set down to two instead of five per animal; and alleged murderers now have to be arrested in addition to the payment of compensation. In regards to the peace committees, the new declaration requests the increase of transparent and democratic processes in the selection of the members of the peace committees. These 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

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45 Dito, p.12-16.
46 While the ‘Modogashe-Garissa Declarations’ are the most famous ones, other declarations were negotiated and signed in other areas, such as the Laikipia Declarations in 1999, Wamba Declarations in 2002, Kolowa Declarations in 2002, and the Peace Accords in Naivasha of 2006. Office of the President/National Steering Committee on Peace Building and Conflict Management, 2005, p. iii
47 Dito, p. 2-3.
48 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.
Interestingly, the declaration provides for all offenses, including ‘modern’ ones not provided for by the local systems, such as the illegal obtaining of an ID card is to be punished by the official laws.

The agreement of local actors from different ethnic communities on common ground rules that respond to the different local systems required careful negotiations. At the outset, 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 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 defines it: ‘we don’t kill women’. The Samburu chairman had to return to his community in order to discuss with the other elders whether it is possible for them 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) versus a woman (50 camels/cows). Women felt this indicated that they were ‘worth’ less. 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.’

At the national level, the National Steering Committee for Peace Building and Conflict Management (NSC) was formed within the Office of the President in order 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 peace building and conflict management for Kenya. It aims at establishing a countrywide policy on peace building and conflict resolution, building on experiences from the arid lands. One of the principles of the policy framework is that conflict management and peace building must be sensitive to cultural values and build on existing traditional conflict resolution methods. It recognizes that the official law gives minimal attention to the needs and conceptions of justice that the victim or victims may have. The drafting of such a policy framework is a captivating attempt to formalize local structures.

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50 Interview with peace committee member, ASAL district, July 2007.
51 Interview with peace committee member, ASAL district, July 2007.
52 Interview with peace committee member, ASAL district, July 2007.
54 Office of the President, June 2006, p. 28.
55 Office of the President, June 2006, p.11.
IV. 2. Implementing Peace in Practice

Generally, most respondents expressed that the declarations and the work of the peace committees have had a positive impact on solving persisting conflicts in their areas. In Isiolo, for example, most respondents agree that the number of conflicts since 2001 has decreased due to these agreements. The amount of cattle raids are said to have decreased, more cattle are returned and less killings occur.

Effective peace committees facilitate dialogue, raise conflict awareness, and coordinate peace initiatives at relatively low cost. They rely on local approaches, work with locally legitimate authorities and 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, the peace committees send rapid response teams, in case of cattle theft, that pursue the footprints of the cattle. 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 cattle is identified, they request the return of the cattle. In case the cattle is not returned, the peace committees from both sides get involved in mediation and negotiations over compensation to reimburse the victim group for their loss of livestock, on the basis of the declarations. The committees are perceived as less bureaucratic than governmental institutions. They have basically delivered what the justice sector has not been able to provide: acceptable resolutions to conflict and the pacifying of communities.

The peace committees also intervene in conflicts within a district. These conflicts can be inter-ethnic, as different ethnic groups may inhabit a single district. However, intra-district conflicts are easier to handle, because the district peace committees combine representatives of most of the ethnic groups of a district. Committee members have well-established working relationships and can easily turn into mediators between their groups. They make use of their various local conflict resolution methods, and try to establish what is generally perceived as ‘fair’. In this scenario the declarations may be less significant.

The involvement of peace committees in intra-ethnic 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). He 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 intra-ethnic conflicts. Somali social structure, in contrast, is sedentary rather than hierarchical; it provides less for overall leadership. Clans or sub-clans may compete in order to increase their status and power. Inter-clan fights are therefore not unusual among the Somali communities. Here, peace committees are said to play an important role in calming down intra-ethnic conflicts.

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56 Adan and Pkalya 2006.
57 Interview with ALRMP officer, ASAL district, July 2007.
58 Interview with peace committee members, ASAL district, September 2007.
59 Interview with peace committee member, ASAL district, September 2007.
60 For a good description of conflicts and their resolution in Garissa, see Ibrahim H. Muhamed, ‘Traditional Conflict Resolution and Peacebuilding in Garissa District,’ Pastoralist Peace and Development Initiative (PPDI) and Arid Lands Resource Management Project (ALRMP).
61 Interview with NGO staff, Garissa, November 2007.
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, or it is even 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.\(^62\)

There are different ways and degrees to which this cooperation or support takes place. These range from the provision of logistical support to 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, to travel to sites of accidents, and to take care of injured people. The DC may even chair peace meetings with the different parties in conflict.\(^63\) As councilors and chiefs 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.\(^64\)

The governmental division or district security committees 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. They may support the peace initiatives either by providing transport or sometimes even by enforcing peace agreements. In some areas, the cooperation between peace committees and administrative police is said to have fostered better relationships between the community and the police.\(^65\)

Generally, district government authorities have come to appreciate and acknowledge the peace initiatives. This trend, however, has developed despite the fact that the peace initiatives maybe at odds with the formal duties of their government position.

V. 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 like international law, which they may or may not use depending upon their interests. Second, the meeting of different groups and the negotiation over the definition of basic legal principles is similar to early statehood, where different actors would

\(^{62}\) Interviews with local authorities, ASAL district, July 2007.

\(^{63}\) Interview with police officer, ASAL district, September 2007.

\(^{64}\) Interview with local authorities, ASAL district, July 2007.

\(^{65}\) Focus group discussion with peace committee members, ASAL district, September 2007.
come together to define basic legal principles. Only that here 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 have been supported by the executive of the country. Both of them 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 exist together, however, the logic of the system becomes flawed. Implementing the declarations may create peace, but can contradict the official laws at the same time. Implementing only the law may mean that conflict prevails.

Practitioners seemed to have been aware of this problem when the Modogashe Declaration was revised in 2005. The new version aims to better integrate features of the official law. For example, to the rule that killing of a person needs to be compensated with 100/50 cows or camels it was added that the perpetrator has to be detained and pursued by the official law for each citizen. This addition was to ensure that a perpetrator in the arid lands would not get away with a killing through compensation paid by his family, while a murderer elsewhere in Kenya may be sentenced to death. The new addition – that a killer should be arrested in combination with compensation payments - is still at odds with the formal law. While on paper, it seems to reconcile with the formal law, in reality the same problem occurs that was at the outset of all peace initiatives: 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, a lack of willingness at the local level occurs to implement them. Second, if both are pursued – informal negotiations and the criminal trial of the perpetrator – a legal problem may occur. If the perpetrator is detained and tried, while this informal trial is taking place, then the processes pose the risk of double jeopardy for the accused person.

The contradictions occurring in cases of livestock theft have not been addressed either. 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 livestock theft, and any theft is to be punished with three years in prison. Under official law, even simple robbery is punished by imprisonment of 14 years, and robbery with violence by the death sentence.

Furthermore, the declarations are based on local concepts of communal responsibility for crimes rather than individual responsibility. Under the paradigm of the official law, that means that individuals within a group are held liable for crimes that 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 pasture, the declarations set restriction where the formal law does not set any boundaries. The declarations regulate the migration of herds and people across district boundaries in times of drought by providing that herders require written approval from the elders of the other side. According to the official law, grazers can move freely, and only the county councils, who hold the land in trust, can technically stop them.

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66 The death penalty has not been implemented in Kenya for some years.
67 Penal Code (Chapter 63 of the Laws of Kenya), General Punishment for Theft, section 275 and 278.
68 Penal Code (Chapter 63 of the Laws of Kenya), Definition of Robbery, section 296.
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 therefore are against the law. Government officials or other individuals implementing the declarations in contradiction of official laws run the risk of being taken to court. One such case occurred in a northern district, where a DC was taken to court for having implemented the declaration. Communities from the neighboring district had moved into his district in search of better pasture. They had not requested permission from the elders, as agreed in the declarations. The DC had followed the declarations and had helped to evict the herders. Subsequently, the communities have taken him to court for having denied them their official rights.⁶⁹

These legal and normative discrepancies pose a danger zone for government officials. On the one hand, officials have a strong interest in keeping the peace in their respective districts, but on the other hand they may act against the official law. Some are aware of these contradictions. When asked about the legal situation, some county council members, for example 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. People know each other. Government and police are not there. I don’t see doing wrong in this.’⁷⁰

The magistrates have the ‘easiest’ role in this, as they rely on the police to file cases at court. ‘If they are not brought in, there is nothing we can do.’⁷¹ They only have to deal with the fact that the peace committee members often appear at court to withdraw cases, in order to pursue informal negotiations. The magistrates still lack guidance on how to deal with such cases. One magistrate, for example, has deliberately not looked at declarations, ‘because they are not real laws’.⁷² However, he is fully aware of that fact 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.’⁷³

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 on the other hand they have to act as guardians of the law and they have to file criminal cases at court. Out of necessity, they are cooperating significantly with the peace committees and the declarations, as otherwise 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. 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. They do not have binding powers and only depend on the goodwill of the communities.⁷⁴ Some communities do not abide by the provisions of the declarations, especially the ones who feel that they were not part of the process of their development. If a party decides not to adhere to the declarations and denies the payment of compensation, the other party cannot appeal to government

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⁶⁹ Interview with conflict management specialist, Isiolo, July 2007.
⁷⁰ Interview with local authorities, ASAL district, July 2007.
⁷¹ Interview with Magistrate, ASAL district, November 2007.
⁷² Interview with Magistrate, ASAL district, November 2007.
⁷³ Interview with Magistrate, ASAL district, November 2007.
⁷⁴ Interview with peace committee members, ASAL district, September 2007.
security forces to enforce the agreement, as the declarations are not official legislation. One county council, for example, reports about the implications of those constraints. If, after arduous negotiations, the perpetrator’s family refuses to pay compensation, then 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 to enable their enforcement by official agencies. At the moment, all they can do is to convince the parties to pay, using the threat of calling the police.

VI. Conclusions

The declarations and other peace initiatives in Kenya’s arid lands are encouraging developments, as they demonstrate the need for legal regimes to respond better to local values and social realities. They also indicate that there are willing local and governmental actors and donors to support such innovative actions. The declarations are therefore an intriguing phenomenon of bottom-up law making.

However, for them to fully function, they require careful harmonization with official laws. This is not only required to protect the implementers of the declarations from being pursued legally, but also to protect perpetrators from double jeopardy and to create enforcement mechanisms for local peace agreements. It is particularly important for these issues to be taken into account in the policy framework on conflict resolution and peace building that is currently being drafted by the NSC.

Close cooperation and communication between the institutions of the justice sector, such as the Ministry of Justice, the Police and the NSC in the Office of the President is essential. Donors for their part need to be careful not to fund contradictory initiatives – such as the strengthening of the official system under the Ministry of Justice, and the development of a parallel legal regime under the Office of the President, and they may want to support the means of synthesizing the two.

Next to supporting the peace initiatives, law makers would need to be involved to make the necessary constitutional amendments that allow the declarations to play a formal role. In the long run, government institutions and laws have to become increasingly responsive to society, reflecting peoples’ understandings and realities. The official justice sector may need to aim at tailoring their interactions with communities better in terms of providing judgments that actually do bring peace to communities, and that people do understand as ‘fair’. Judicial institutions can play an important role in better responsiveness to local social realities and values. Magistrates should not be left without guidance in the considerable challenges communities of the arid lands pose to the official laws. As a first step, magistrates could receive social context training in order to better understand and be better prepared for the different societies in which they are posted. Furthermore, bench books could be developed for the specific regions of Kenya, particularly aiming at guiding magistrates how to respond to the particular socio-cultural challenges they face.

Only if efforts are launched from both sides – if peace initiatives are supported and made more compliably with the formal laws and if the formal justice sector institutions start to respond better to social realities and local values – can the dilemma of having to choose between the application of official justice or the establishment of peace be overcome.