

ACCESSING JUSTICE AND PROTECTING THE RIGHTS OF THE VULNERABLE THROUGH CULTURAL STRUCTURES:

A Tool On Working With Elders in Communities

**Prepared for Kenya Legal and Ethical Issues Network on HIV & AIDS
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LIST OF ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
CBO	Community Based Organisation
CSOs	Civil Society Organizations
FBOs	Faith Based Organizations
HIV	Human Immunodeficiency Virus
HPI	Health Policy Initiative
JOOF	Jaramogi Oginga Odinga Foundation
KELIN	Kenya Legal & Ethical Issues Network on HIV and AIDS
KNCHR	Kenya National Commission on Human Rights
LAHI	Law and Health Initiative
LCE	Luo Council of Elders
MARPs	Most At Risk People
MHBC	Muhoroni Home Based Care
NACC	National AIDS Control Council
NGO	Non-Governmental Organisation
NOWA	Nyando Orphans And Widows Association
NOWA	National Organisation of Womens' Associations
OSIEA	Open Society Institute East African
OVC	Orphans and Vulnerable Children
POLICY PROJECT	The Original name of HPI
PLWHAs	People Living with HIV and AIDS
UNICEF	United Nations Children Fund
WOFAK	Women Fighting AIDS In Kenya

“Widow in heritage was about the social-economic protection of a widow and her children by the community. It was not about sex. In the wake of HIV, alternative rites can be performed to signify wife inheritance.

The first is the symbolic dressing by the widow in the coat of the man to take care of the widow and the children (“the inheritor”). This is enough and no sexual act is required.

The second is the symbolic patching of the roof by the inheritor by removing a section of it and replacing it. In both cases the widow can seek consultations with this person without having sex with them.”

Asenath Bole Odaga

“Since the formal government structures are not very close to the people, cultural structures are very significant to the protection of the rights of the vulnerable in communities. I wish the government would recognize their role and value and invested in strengthening them to deliver rights for women and children.”

Hon. Phoebe Muga Asiyio

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ACKNOWLEDGEMENT

This tool is based on the work of the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) in Nyakach, Nyando and Muhoroni districts in Nyanza province in Kenya. It has also drawn from the experiences of the Kenya National Commission on Human Rights (KNCHR) and the Health Policy Initiative (HPI) who collaboratively begun the work with the Luo Council of Elders in other parts of Nyanza, and with the Njuri Ncheke elders of the Meru community in Eastern Province, in 2004.

I would like to begin with appreciation of the role of Ms. Angeline Siparo, with whom we first discussed the experiences of women in the context of cultural power. We then developed the initial concept paper that led to the adaptation of the idea by the POLICY Project, which was later renamed the Health Policy Initiative (HPI). Angeline's willingness to take on the idea and persuade her donors to raise the necessary funding, planted the seed that began the project. I would also like to thank my former colleagues and fellow commissioners at the Kenya National Commission on Human Rights (KNHCR), and especially the former chairman Mr. Maina Kiai ('Chief') who supported my proposal that the KNCHR collaborate with the POLICY project on this project. The support facilitated the commission and POLICY Project together with the Jaramogi Oginga Odinga Foundation (JOOF) to launch the project in Nyanza. The fire picked up so fast and so successfully that other communities started, and continue asking for, similar projects.

Planning for the Nyanza and Meru programmes involved a number of people whose contribution by way of advice and participation in various activities helped with the success of the project. These include the late Professor Hastings W.O. Okoth-Ogendo, Hon. Phoebe M. Asiyi, Mrs. Asenath Bole Odaga, Mrs. Millicent Obaso, Mrs. Mary Okumu, Dr. Dan Wendo, Mrs Esther Gatua, Mr. Maina Mutuaruhiu and Mrs. Dorothy Awino, among others.

Together with the collaborating organisations, I would also like to thank the widows and orphans, their various support groups and the community based women's organisations (NOWA, St. Monica, Orongo Widows and the individual village based support groups, among others) that have been collaborating with KELIN, KNCHR and HPI to give this approach a chance to work.

Without the support and buy-in of the elders, the project would never have taken off. In this regard I would like to thank the Luo Council of Elders, particularly its chairman, Ker Riaga Ogalo, and his team, and the elders from the districts where we worked. This includes the Nyando, Muhoroni and Nyakach elders. I would also like to thank the Njuri Ncheke elders in Meru, who have contributed with their work in Meru.

Great appreciation to the staff of KELIN, particularly Ms. Nancy Ondeng, the project officer on the ground in Nyanza, who has walked the various steps with the widows, orphans, the elders and the community. Her experience has assisted in the continuous evaluation of the project, ensuring that the lessons learnt were incorporated, and enabling improvement on every successive activity. Mr Allan Maleche, the coordinator of KELIN, has also provided useful comments to the various drafts of the tool. Ms. Veronica Omunga and Ms. Joy Obuya, also helped in administrative support, and in the video and photo documentation of the project activities in Nyando, Muhoroni and Nyakach. Thanks also go to Mr George Mogaka, who assisted in the collation of the materials, as well as in the layout and illustration of the tool.

Special appreciation goes to commissioner Wambui Kimathi of the KNCHR and Ms Angeline Siparo who provided very useful inputs to the tool.

On behalf of KELIN, I would finally want to appreciate the generous support received from the Open Society Institute's East African Office (OSIEA) and its Law and Health Initiative (LAHI) in New York towards this project, and the development of this tool in particular. Without this support KELIN would not have managed to share this important information.

Catherine Muyeka Mumma
December 2010

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This booklet is available from the Kenya Legal and Ethical Network on HIV and AIDS (KELIN)

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THE POWER OF CULTURE

Sopiato is an executive director of a grant making organization that supports more than 20 organizations to advocate for policy change in the health and HIV sector. She manages an organization of over 15 members of staff. She holds a post graduate qualification in business administration. She is one of the leading gender experts in the country and she is one of the role models for girls in her Maasai community.

Sopiato is now a widow with 2 children. Before the death of her husband, they lived together in a happy marriage where she was treated with respect. She was lucky to have a husband that celebrated her strength and encouraged her to excel in her career. They both invested in family property where some were registered in her name and others in his name and yet others in their joint names.

After the unfortunate death of her husband, Sopiato was firmly informed by her in-laws that she had no claim to her late husband's land, including the agricultural crops that she and her husband had planted; that the cattle would be given to her brother-in-law, and that his vehicle and the tractor would go to her mother-in-law. Her attempts to resist this arrangement and stand for her rights were met with hostility. She decided to seek legal advice, and was ready to go to court and claim her rights when her own mother and two aunts came to advise her not to take her children's relatives to court as this would be taken negatively in society and might embarrass them.

While taking the counsel of her mother and aunts, she still felt that she needed to further assert her position and demanded a meeting with the family members and the community leaders to discuss the issue. She was advised that a meeting of elders would be held but which she could not attend as this would be contrary to some cultural tradition. As a woman she had to let the elders discuss the matter on their own and communicate the verdict to her. Culture dictated that she gets a male member of the community to listen to her case and present her views to the meeting in her absence. She did so. Surprisingly, when the verdict came, it was fair. Sopiato was awarded a number of the properties in dispute and a few were given to the mother-in-law who was said to have been dependent on Sopiato's late husband. The brothers-in-law were not awarded anything.

"For the first time in my life I realized the power of culture," Sopiato says. "It does not matter what the laws say: neither is it significant that I am educated, understand my rights and can argue my case. My contribution to the acquisition of some of the property was not significant after all, it's men that acquire property, not women. My ability to hire the best lawyer in town and pursue the matter in the formal legal system was not a welcome avenue even to my own family".

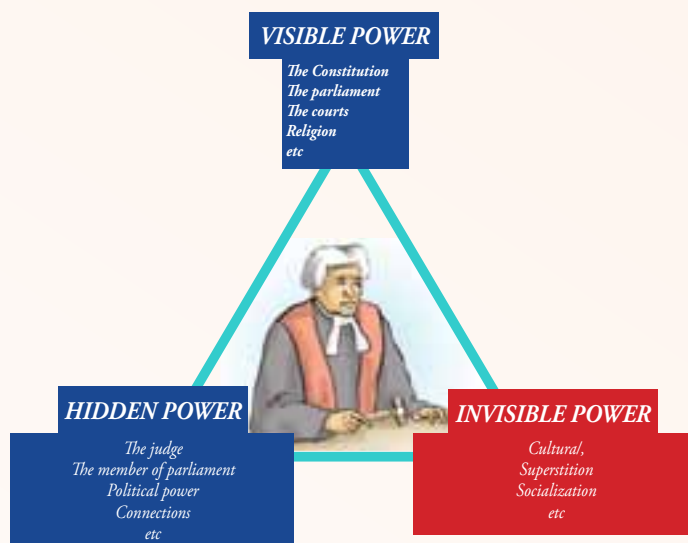


Atieno lost her husband in 2004. Three months after his burial she was approached by her brother-in-law who wanted to inherit her. She told him that she was still mourning her husband and was not interested in being inherited by anybody. One month later the brother in law came with some of his cousins to talk to her. She was told that she was going to bring a bad omen in the family if she refused to be inherited. Mary stood her ground and told them to leave. The following year turned out to be a nightmare for Mary and her 4 daughters. No one welcomed her and her children in the village; they were asked to keep off people's homes and her children were not allowed to play with other children. Her sisters-in-law (the wives to her 2 brothers-in-law) told her off for causing problems in the home. They felt that they would not have a good harvest that year. Early in 2006, the roof of Mary's house started leaking and her house needed repairs. Mary could not get anyone in the village to assist her carry out the repairs. Her brother-in-law told her to prepare to leave the family land with her daughters since she had refused to follow the traditions of the community. She informed her mother-in-law, hoping to get some protection from her, but her mother-in-law also rebuked her and asked her to find somewhere else to go to since she had caused the family a lot of stress. During the long rains, Mary's house became uninhabitable, and she was forced to move out to the market place and rent a room there for herself and her daughters. Soon after this move to the market, her brothers-in-law ploughed her land and she was not allowed anymore to go back to her home.



The existence of laws and a formal legal system in Kenya suggests that all citizens are governed by these written laws and any conflicts are resolved within this system. Customary law is recognized in Kenya in personal matters like marriage and divorce and in certain land matters; but the parameters of the operation of such customs and cultural practices are not defined. Consequently the details of the cultural aspects that come into play on any issue are unclear and vary from community to community. Even in a community they may vary from one family to another. More often than not, the power of the invisible little aspects of culture determines a woman's standing in her community. In both cases above, the two women's rights were not being determined on the basis of any written law. Even the right to seek redress in the formal system of adjudication was limited, albeit for different reasons. The power of culture was the determining factor at every stage for both of them.

Power analysis with respect to the violation of women's right to own and inherit property



INTRODUCTION

The Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) was formed in 1994 and registered as a Non Governmental Organization (NGO) in the year 2001. KELIN is a network of stakeholder organizations and individuals with an interest in addressing the legal, ethical and human rights concerns relating to health and HIV. KELIN's vision is to achieve ***"The full enjoyment of health and HIV related human rights for all Kenyans"*** while its mission is ***"To advocate for the promotion, respect and protection of health and HIV related human rights"***.

KELIN's areas of focus and strategic result areas are:

1.	Enhanced protection against health and HIV related human rights violations;
2.	Increased demand by communities and vulnerable populations for respect and protection of their health and HIV related human rights;
3.	Improved sectoral service delivery systems that protect and promote health and HIV related human rights that are accessible to all, including MARPS and other vulnerable populations.

KELIN's programmes include:

- Facilitating access to justice in communities through the provision of legal services in the form of legal aid and working with cultural structures for community based alternative dispute resolution in matters relating to HIV and health;
- Building capacity on legal, ethical and human rights issues relating to health and HIV and;
- Popularizing the rights based approach to programming in HIV and advocating for rights based policies in health and HIV programming nationally, regionally and globally.

KELIN collaborates with various stakeholder organizations at all levels, including the community (CBOs and support groups of various vulnerable populations), civil society organisations (nationally, regionally and globally), and relevant government departments.

WHY THE CULTURAL STRUCTURES

The choice to work with cultural structures to facilitate alternative dispute resolution and access to justice for widows was informed by a number of difficulties experienced by women in accessing justice. These include the fact that the physical location of courts and lawyers is beyond the reach of most Kenyans who are situated in rural areas. To utilize the formal legal system, one needs financial resources to pay court fees and legal fees where they are represented. Most widows and orphans cannot afford this. The legal AID services have largely been an initiative of civil society organisations who have managed to represent many poor people but have only reached very few of those that need this assistance. Most legal aid programmes are situated in urban areas and are therefore not accessible to many people in rural areas. For those that have been lucky enough to access legal aid, the lengthy court processes that can run to 6 or more years are discouraging and have led to many poor litigants giving up on their rights since the justice is so delayed as to be functionally useless to them. Women whose property is illegally appropriated will often have migrated from the area in question to some informal settlement in big towns and cities by the time the case is finalized. The adversarial nature of the litigation process also makes many women give up their rights since the enforcement of court decisions is sometimes frustrated by relatives who consider the act of “taking relatives to court” as an act of war. Those who pursue their family rights in courts are considered to be enemies. The women are likely to be ostracized and exposed to violence. Many women will therefore not consider the option of filing suits against those that violate their rights.

The design of the project considered the fact that there formerly existed dispute resolution mechanisms in every community at all levels. The project therefore sought to reconstruct the community based ‘courts’ or arbitration barazas. The only conditionality set was to ensure that this process respected the human rights of the parties that came before them.

The Constitution of Kenya now protects the rights of all people and has done away with any form of discrimination, including discrimination based on culture. It has entrenched the principles of human dignity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of

the marginalized.¹ The Constitution limits the application of customs and laws that violate the principles laid out in the Constitution.

“Any law, **including customary law**, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid”.²

The Constitution has also entrenched equal rights among men and women in matters relating to property rights and land ownership. It has obligated parliament to put in place legislation to protect the rights of spouses including protection of the matrimonial home and the rights of spouses to inherit family property³.

In matters relating to the right to access justice, the new Constitution has included the principle that “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted- so long as the traditional dispute resolution mechanisms are not used to contravene the bill of rights or to contradict the Constitution⁴.”

KELIN initiated the program on working with cultural structures **‘to facilitate access to justice by women and children in relation to their right to inherit and own property’** in 2009. Since then, KELIN has been working with the elders in Nyakach, Nyando and Muhoroni Districts in Nyanza province in Kenya, to resolve disputes involving widows, orphans and the families over their right to inherit property.

As indicated elsewhere, this project was built upon the work initiated by the Health Policy Initiative (HPI, formerly, the POLICY project) together with the Kenya National Commission on Human Rights (KNCHR) in 2004. The Luo council of elders, in collaboration with KNCHR and HPI has been working in other areas in Luo Nyanza since December 2004. Over the subsequent 5 years, they have resettled more than 150 families of widows and orphans from the different districts. The KNCHR also works with another cultural structure within the Meru in Eastern Kenya. They are working with the Njuri Ncheke, the council of elders in this community, on protecting the rights of women.

¹ *Article 10 of the Constitution*

² *Article 2(4) of the Constitution*

³ *Article 68 of the Constitution*

⁴ *Article 159 of the Constitution*



The success of the project in delivering justice to the vulnerable who cannot access the formal legal system for protection, as experienced by the KNCHR, HPI and KELIN, has inspired the development of a tool for use by anyone wishing to replicate this project, or to work with cultural structures on other human rights issues. Although the KELIN, KNCHR, and HPI projects specifically addressed the right to inherit and own property by women and children, the model of working with cultural structures can be adopted to intervene in other human rights violations requiring arbitration, including peace-keeping among communities, land transactions and other family disputes. The authority of elders can also influence and provide protection in other matters, including sexual and gender based violence, elimination of harmful practices like child marriages and female circumcision, child labour and the trafficking of women and children. They can also be used to address the elimination of HIV related stigmatization and discrimination, among other issues.

NOTE:

It is becoming increasingly clear that community based mechanisms cannot be wished away in an environment where formal structures of economic, social and cultural development are located elsewhere. The provision for the formation of a Cohesion Commission in Agenda 4 negotiations, and thereafter the activities with national elders from the different communities attests to this. It is informative that a law establishing the elders' structure has been proposed and may very well be a reality for Kenya soon.

Article 27(4) of The Constitution: "The State Shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth"

The project is influenced by the rights based approach where the human rights of those involved drive every step. The methodology emphasizes participatory and people centred approaches where the vulnerable are empowered to know their rights and demand or negotiate for

protection against violations. The community is facilitated to take charge in the protection of the rights of its members. The different stakeholders in the community (men, women, youth and their support groups, administrative leaders, and religious leaders) are involved to ensure their support where necessary, and accountability for their expected roles. The activities relating to actual cases are largely owned and driven by the community members and the project supporting organisations come in only where they may be required to reinforce the intervention.

HOW TO ENGAGE CULTURAL INSTITUTIONS AND ACTORS

The tool breaks down the steps taken into two phases:

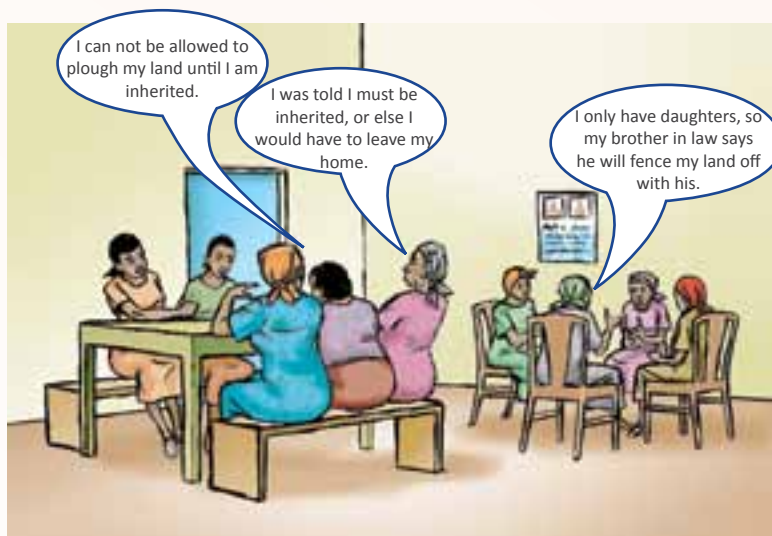
Phase One: This covers the initial stages, from research leading to understanding the culture and the community, analysis of the problem at hand, the identification and mobilization of crucial community stakeholders. It is also the stage where the building of the rights-based skills that are necessary to carry out the tasks at hand takes place.

Phase Two: This is the stage after the training and the system has been set in place, and the process is entrenched in the community as a self-sustaining mechanism that requires little or no outsider participation.

STEP BY STEP BRIEF: PHASE 1

STEP 1

Identify the specific problem or the human rights violation that affects the vulnerable population with whom you are working in a given community.



This is some causal analysis that will help to visualize the forces driving a violation and find the root causes for the violation in that community.

This may be through generally available or common information about the community in question and/or a particular cultural practice; for example, the predominance of female circumcision in a particular community.

The information may also come from secondary information through some organization/s working in the community, or as a result of a specific baseline study. In the case of the KELIN project, the fact that widows were being disinherited in the Luo community with the onset of HIV was often cited by organisations working in this community at various regional, national and international forums.

Take time to research the practice in that particular community through reading of any relevant literature. Where there is no literature, interview scholars, elderly people and others from the community to get an understanding of the various aspects of that cultural practice, if there is one. Research the culture in question from the perspective of human rights violation. Determine the meaning of such practice in terms of:

•	Significance
•	Value
•	Beliefs relating to the practice
•	Myths about the practice
•	Variations of the practice

For specific local information, one can organize meetings with community-based organisations (CBOs) working with populations affected by this problem, or by their support groups. These will be able to recount their actual experiences with respect to the problem and will assist in further clarifying the intervention.

Clearly determine what human rights and what law, if any, have been violated. Is it the right to education? The right to health? Is it a violation of the equality principle? Does the violation extend to a breach of a specific law - maybe the Children's Act, the Succession Act, the Sexual Offences Act, The HIV & AIDS Prevention and Control Act of 2006, etc?



In determining the extent of the problem, ensure that you use a participatory approach in discussing the issues with various stakeholders from the community in question. This ensures that the process has buy-in to (but more important that it is owned by) the community.

Identify the link that this issue has with the local culture.

In researching and discussing the problem, take time to find its connection with culture. Is it a cultural practice? If it is a cultural practice, what role did/ does the practice play in that society? What are the beliefs and myths about it? What are the gender issues relating to the practice? Why is the practice common? Who are the powers behind the practice? Has the practice changed over the years? Is the practice legal or illegal? Is it criminal? If it is illegal or criminal and it is still predominant – why is this the case? In what ways does the practice undermine various rights? Who is most affected by this cultural practice?

These questions are important in achieving the following:

1.	Setting the stage for an objective discourse on the pros and cons of the practice in the community concerned
2.	Identifying the various stakeholders with connection to the practice
3.	Identifying the different duty bearers with respect to the practice
4.	Identifying the rights holders whose human rights are being infringed by the cultural practice
5.	Identifying the available solutions/ redress mechanisms/ structures within the community in question
6.	Identifying the different strategies that may need to be employed in working with different stakeholders and duty bearers in reversing the identified problem.

Is it a clear violation of human rights but disguised as culture? This is an important question since it helps in clarifying what the true culture is and may be the entry point for protection by the cultural structures. For example, in the project involving culture and property rights among the Luo, it was made clear that sending a widow and orphans away from their family land is not an accepted Luo cultural practice, and that it is also a violation of the rights of a widow under Luo customary law.



Where one is conducting consultations with stakeholders from the community, be flexible and ensure that the forum discussions are conducted in a language that facilitates easy expression of the issues by all participants, including the illiterate. In this regard it may be strategic to select facilitators that are from the same community. This will also give confidence to participants, while eliminating any perception of intrusion by "outsiders".

NOTE:

An 'outsider' can also facilitate the process but it is important that they take time to learn about the practice so that their cultural references are relevant. They must be non-judgmental and non-condescending while finding a way to highlight the rights violations in the practice. For example, negative effects to health, education, access to property, etc.

STEP 2

Establish A Project Committee

Identify community champions from all the levels that you can work with on the issue. These may be scholars, elders, women, youth, community administrators, health care providers, political leaders and cultural leaders.

Form a small project committee of scholars and civil society leaders and leaders of community based support groups to initially work within Phase One.

The role of this committee is to facilitate participatory planning and coordination of the project activities. It also ensures that the causal analysis for determining the root causes of the problem at hand is carried out by members of the community themselves. After this, the committee should be expanded in Phase Two to include other stakeholders, once there is wider buy-in into the project by other community structures.

The committee/s should develop its/their terms of reference and rules of procedure. It should also design ways of consulting on various issues including ways of resolving disputes among members.

It should agree on the important community activities to be undertaken to achieve the objective and the methodologies to use in the collection of evidence on the problem at hand or prevalence of the practice in question.

It should develop guidelines for members on issues like the basic human rights principles to be respected in the conduct of their tasks. For example, confidentiality, right to privacy, respect for gender equality and equity, protocols relating to social status etc.

NOTE:

One of the conditions that KELIN, the KNCHR and the HPI entrenched was not to justify or excuse any cultural practice that violated human rights to please those that might want to justify it. One such practice is the denial of the right to inheritance of ancestral land by daughters.

**TIP**

If the protocols and code of respect on greetings in that community indicate that young women may not shake hands with an elderly man, then make sure, if you are a young lady on the programme, to respect this culture. It does not substantively contradict the human rights principles or harm you. On the other hand, if the community believes that a child or person with a disability is a bad omen, engage them to educate them to realize that this is a violation of the human rights of the child or the disabled person in question.

The idea is to use culturally sensitive approaches while promoting human rights so as not to disrupt the cultural setup of the community. It is to work with the community to enhance their positive aspects, and work towards negotiating away, eliminating or phasing out the negative aspects.

Respect the cultural order of the community within which you are working.

STEP 3

Reasonable understanding of the identified problem, its link to culture, and the community context underlying it is vital. It prepares one to move into the community and empower those affected by engendering an understanding of the human rights issues relating to this problem. They will recognize violations, and know the duty bearing structures, including cultural structures, and demand protection from such violations.

Organize capacity building forum/ on human rights and rights approaches for the vulnerable/ violated emphasizing the key principles of social justice, equality including:

• Gender equality;
• Inclusion;
• Accountability and
• Transparency

As part of the rights approach training, provide an opportunity for the participants to undertake a causal analysis of the problem in question in their community where:

• The immediate, underlying and hidden causes to the problems will be analysed;
• The different duty bearers within the community are identified and the role of culture and its face/ structure in the community is visualized.

Facilitate the undertaking of the power analysis around the practice to visualize the link between the practice and cultural

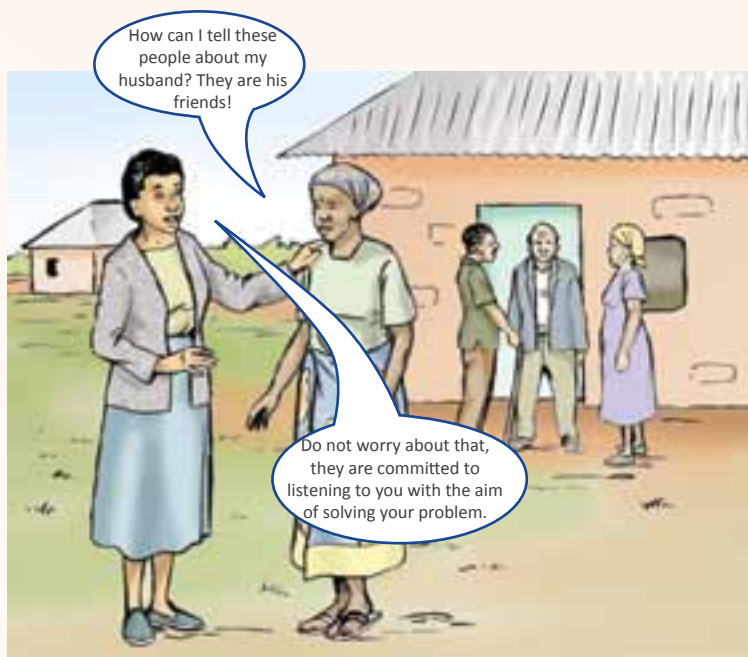
beliefs and myths.

Have a module to discuss the specific human rights, and laws relating to the issue at hand, or the practice in question where applicable.

Use training methodologies that will as far as possible provide opportunity for participants to speak about their personal experiences and that will work with the community situations. Provide opportunity for confidential hearing of cases for those who may wish to discuss their matters confidentially. For example, in determining who goes into what group for group work, you may wish to take into account the fact that teenagers may not present their cases fully in the presence of those they consider as parents, or that in some cultures and on some issues, women might not speak in the presence of men.

Identify individual cases of violation that require intervention from the participants. Give guidance to the participants to share the information learnt in their support groups and also assist in identifying other cases. Participants must pursue the following rules:

i/	To give correct information regarding the circumstances relating to the violation of their rights.
ii/	To retain their freedom to elect how their problem should be resolved, including the right to reject the authority of the cultural structure in their particular case.
iii/	To retain the right to stop any community based intervention and go for the formal one where they feel that is a better option for them.
iv/	Where the violation include criminal acts to facilitate information that will enable an intervention by the authorities.



TIP

Have individual meetings with those with cases to present; work with them to give them the confidence to present the case before the elders or the community arbitration structure. Affirm their rights with respect to the issue at hand; assist them to shed off any self-blame for the violation. Discuss strategies of countering any fears of retaliation that could be taken by the violator.

STEP 4

With the help of the technical committee and some of the community champions, identify the structure that you will work with in the community to arbitrate in the cases identified. Take note that while some communities in Kenya have visible structures of elders (such as the Luo, Meru, Somali, Borana, Miji-kenda), many do not have organized cultural structures; nevertheless they all have elders and opinion leaders that can be organized to give guidance on cultural and other community matters. In the latter case, let the committee work with the community to put together a team of these 'elders' for purposes of the project. Organise preliminary planning meetings with this structure to get the elders buy-in before proceeding to the next step.

Organise consultative and capacity building meetings for the identified elders. Facilitate discussions on the problem or cultural practice in question and allow various perspectives on the issue to be discussed.

Facilitate discussion of the key human rights principles of social justice, equality including gender equality, inclusion, accountability and transparency. Draw from the community beliefs, proverbs, etc.

Discuss the key principles relating to dispute resolution including fairness and justice. Stress the

importance of giving a fair hearing to both parties and the need to arrive at the verdict based on the facts of the case rather than other factors. Discuss the kind of intervention that is possible within their structure, for example, the fact that they cannot adjudicate over criminal matters. In such matters the intervention may be to assist victims to get to the justice system, and discourage local or private family negotiations rather than reporting to the law enforcement authorities.

Inform them about the relevant applicable laws and policies on the issue in question. If the problem is sexual violence, for instance, you will need to educate them on the laws relating to sexual violence including the Sexual Offences Act and the Penal Code. You will also need to educate them on the procedures relating to health interventions for victims of sexual violence and discuss the question of availability of such services etc.

Provide skills on the key principles of mediation namely:

1. *Identity:*

It is best when the mediator or elder is known to both parties. However, it is the integrity of the mediator that will determine whether the parties agree to have the person arbitrate or mediate in their dispute. The title 'elder' in the African context has an inherent respectful connotation and this is the material reality that this project takes advantage of. (The elders and mediators we have worked with are largely respected and accepted opinion leaders in their communities, and not necessarily elderly).



2. *Voluntariness:*

That neither party should be forced to participate in the process; their participation should be with their informed consent in respect of their right to autonomy. A party may not have the required confidence in the process for various

reasons and the mediator must respect their right to elect not to be subjected to the process. For example, at the start of the project in Nyando district, one of the violated widows did not believe that the elders in her husband's community would be fair and just in her case. She declined the offer for help from the elders. One year later, she has seen what these elders have done for other widows and she has now requested the elders to intervene in her case.

3. *Confidentiality:*

That the information obtained during the course of the mediation shall be kept confidential; the mediator should reassure both parties that the information acquired during mediation shall not be used for personal gain or advantage by himself or either party.

4. *Impartiality:*

The mediator must strive to be fair and neutral throughout the whole mediation process and must declare any conflict of interest before commencing the mediation.

5. *Parties' involvement:*

Each party must be given opportunity and time to state their case or narrate their story without interruption. Every party must be given a chance to express their views in manner that is acceptable to all.

6. *Identification of issues:*

From what has been said the elder/mediator after listening carefully to both parties, should identify the problematic issues among the parties and single them out for further specific discussion.

7. *Solution searching:*

With the identified issues, the elder/s/mediator/s can then proceed to guide the parties to seek a solution. The solution may draw from the formal or customary law, but should be amicable. The agreement reached should be acceptable to both parties and the parties must have a clear understanding as to how the decision has been arrived at and show commitment to its implementation. It should be a win win situation that leaves both parties at peace.

NOTE:

The adversarial nature of the formal legal system tends to leave a winner and a loser with serious consequences that may, in a family setting result in further violence. The less rigid structure of the elder-led process should always enable a solution that does not alienate either party, leading to a lasting solution based on natural justice applied in a case-by-case manner by people who understand both the disputing parties and what is at stake.

If the issue requires the elders to sit in arbitration as in the case of property rights, conduct a few mock court sessions as part of the group work. It will give them the opportunity to arbitrate hypothetical cases constructed from factual information relating to some of the cases collected from the meeting with support groups. This will enable them to discuss some of the key concerns as a group, which will later assist as they intervene in actual cases.



Analyse the practice and be able to holistically discuss it from both positive and negative perspectives.

NOTE:

Note that the elders' task is expected to be voluntary as it emphasizes protective leadership in society. Nevertheless there is need to support the elders with administrative costs for facilitating the organization of their planning and review meetings and on capacity building on things like human rights and the statutory provisions on the matters at hand.

NOTE:

It is important to highlight the violations that amount to criminal acts and be careful not to suggest solutions that tolerate such acts. Indicate the limitations of elders in their methodology in addressing such cases. For example in cases of rape or defilement, elders must not be encouraged to enter into local settlements with violators. Instead, encourage interventions that will send the message of community disapproval to such acts; their actions should be geared towards ensuring that perpetrators are punished for their crimes.

TIP

The methodology used in training elders should take into account their age. The sessions should be more interactive and more interesting. Take opportunity to deliberately and strategically introduce the controversial cultural issues so they can get to candidly discuss them and perhaps come to a consensus on how to handle certain matters on the project. Getting senior, respected experts (university lecturers, judges, advocates, etc) in some of the matters as facilitators can be useful in encouraging positive dialogue with elders on the issues.

At the end of the meeting, the elders should be encouraged to come up with a set of rules that they should adopt for use by its members in arbitrating cases brought to them by victims of the violations in question.

STEP 5

Organize a public forum in which the different interest groups will be represented. The elders and representatives of the vulnerable groups will form the majority of participants but other interest groups from the community (local administrators, religious leaders, women etc) should be invited to attend the meeting.

The key objectives of the meeting should be:

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| 1. | To visualize the fact that there is a problem in that community as far as the issue at hand is concerned, the cultural practice or the violation. |
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| 2. | To initiate discussions on the cultural practice in question and enable the elders to publicly speak about the negative aspects of the practice and advocate change. |
| 3. | To get commitment of the elders to intervene in individual cases involving those whose rights have been violated. |

Expected output results from the public forum:

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|------|---|
| i/ | Individual cases of human rights violation presented to elders by those affected. |
| ii/ | Public condemnation of negative practice/culture by elders. |
| iii/ | Different elders assigned cases involving the vulnerable to commence arbitration/ interventions. |
| iv/ | Expanded project committee including elders' representatives with clear terms of reference and a work plan on when to meet and review any progress. |

TIP

It is important to organize the project committee meetings to give all the stakeholders an opportunity to discuss the successes, challenges, and emerging issues on the project.

STEP BY STEP BRIEF: PHASE 2**STEP 6****Community based interventions in individual cases of violation.**

This is the final step where the elders receive cases of violation from individuals and arbitrate in these matters. As the cases are identified, they are reported to the leaders of the community based organisations or support groups who then refer them to the leadership of the elders. The elders then assign the cases according to location and allow the assigned elder to undertake the mediation and arbitration.

The finalization of each case may take any time from a couple of days or weeks to a few months. This is determined by the complexity of the matter. In some cases the parties may agree to resolve early while in others the community may need to convene a number of sessions before the matter is resolved.

NOTE:

1. *It is only after the arbitration that the full facts may be known.*
2. *It is possible that you may find that the facts given in a case by an affected person may not be entirely correct in all instances . In such a case the organization may wish to revisit the matter to ensure that the elder is right in his/her assessment.*
3. *The human temptation for an elder to occasionally take sides in a matter should be guarded against by empowering the victims to raise the matter as soon as they detect such a tendency. Discussion on this danger should be part of the project review items and possibly incorporated in the rules guiding operations for the elders.*

Not all the cases will result in a positive verdict for the victim; it is possible that the matter may require to proceed to the formal legal system. Determine what to do in such instances; for example, a link with a legal aid organization or provision of the pro bono legal services as required.

STEP 7

- A: A follow-up community dialogue forum that involves all the stakeholders (widows, elders, youths, administrative officers, implementing organisations and local leaders) should be undertaken for purposes of lesson-sharing from what happened during the mediation process. This forum should serve as an avenue for community members and stakeholders to raise issues related to the steps undertaken to solve the disputes.
- B: The supporting organization records the details of the cases forwarded by the CBOs and the support groups and captures a record of those resolved as a success. However, it would be prudent to develop a system where the elders record the cases they arbitrate and indicate the reasons for arriving at their verdicts. This will however depend on whether a grant is available to support a more structured way of operation by the elders. They would need some basic equipment for such recordings and storage of the records.

CHALLENGES

It is possible that some challenges may be experienced during any stage of the project. These may be of a cultural, social or structural nature. They may be directly or indirectly linked to the

issue in question. The challenges will vary from project to project. Once identified, in a participatory manner, determine what can be done to militate against this challenge. Depending on the nature of the challenge (cultural, economic, short-term, long term or systemic etc), determine solutions. A quick causal analysis on the new challenge will assist in determining the action for mitigation. This may be advocacy for change in policy or an additional specific activity. It may also mean identifying a partner that works on the issue identified to take up the matter. Below are examples of the challenges that were identified in the project on property rights:

- a) The successful resolution of the cases of widows did not necessarily mean that all the widows were able to move back to their properties. Some of the most vulnerable widows who had lost their houses were too poor to afford the cost of construction of houses on their property. KELIN and KNCHR realized that they needed further support to put up some basic structures.

The Kenya National Commission on Human rights negotiated a grant to support some widows with some building materials while KELIN built into the grant some small provision to facilitate the construction of simple houses for the very poor widows. The construction activity was done in a cost sharing manner where KELIN supplied the building materials while the community (women's groups, young men and elders) provided the labour free of charge. The impact was of this activity turned out to be a good community based advocacy activity that brought together different groups in the communities to discuss the need to protect widows from being sent away.

- b) Another identified problem was the registration of the land that the widows had recovered after the arbitrations. The long term interest of the widows would be to have their recovered land registered in their names and those of their children. However most of the family land in the rural areas is still registered under the name/s of the widows father in laws or even grandfather in laws. This coupled with the fact that majority of Kenyans die intestate (without having written wills) creates another problem for those left behind. The procedures relating to succession in Kenya are long, complicated and inaccessible for poor people. The solution for this systemic problem is more long term and requires empowerment of communities on these procedures and advocacy with national governments to ease procedures and make the services

within the justice system accessible to all.

NOTE:

Human rights are inter-related and inter-dependent. The dignity of human beings lies in the basic respect and the full enjoyment of all rights. By facilitating access to housing for the very poor widows KELIN facilitated the full enjoyment by the widows of their right to property. This in turn created the stability required for the widows to till their land and plant some crops and enjoy their right to food. Having their own home also mitigated against the possible violation of other rights, including the right to education protection from violence and exploitation for the children.

CONCLUSION

The universality of human rights demands that we endeavour to ensure that all human beings are able to enjoy the full range of human rights wherever they are. The project on working with cultural structures widens the options on protective action for enhancing the rights of the vulnerable populations in society. The need for government to invest in accessible community-based justice systems is quite clear. It is our hope that projects like this one will facilitate such investment.

