A Commentary on Trends, Actors and Initiatives that Impact Women’s Inheritance Rights in Eastern, Nyanza and Coast Provinces
Traditional Dispute Resolution Mechanisms on women’s property rights

ABSTRACT

This report contains a commentary and analysis from the desk review of reports and documents on trends, actors and initiatives that impact women’s inheritance rights in the former Nyanza and Coast provinces. It also contains the analysis of the actors, structure, substance and process of the traditional justice systems, and the factors affecting the effectiveness of these structures as gauged against the interaction of these systems with the formal justice system. This analysis is based on the findings of a social inquiry undertaken in July 2013, of these traditional justice systems. The respondents were elders, chiefs and community members from Kwale, Kilifi and Malindi at the Coast, Kuria, Nyando, Kisumu, Nyakach, Rachuonyo and Seme in the former Nyanza province. It draws conclusions on the positive aspects of the traditional justice systems as currently formulated and makes recommendations for the strengthening of these systems in line with Article 159(2) (c) of the Constitution of Kenya 2010.
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>AIDS</td>
<td>Acquired Immuno Deficiency Syndrome</td>
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<tr>
<td>CSP</td>
<td>Cultural Structures Project</td>
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<tr>
<td>CUC</td>
<td>Court Users Committee</td>
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<tr>
<td>DC</td>
<td>District Commissioner</td>
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<td>DLB</td>
<td>District Lands Board</td>
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<tr>
<td>DO</td>
<td>District Officer</td>
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<tr>
<td>FGD</td>
<td>Focus Group Discussion</td>
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<td>FGM</td>
<td>Female Genital Mutilation</td>
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<td>FIDA K</td>
<td>Federation of Women Lawyers Kenya</td>
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<td>FWRK</td>
<td>Foundation of Women’s Rights in Kenya</td>
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<tr>
<td>HIV</td>
<td>Human Immuno deficiency Virus</td>
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<td>JOOF</td>
<td>Jaramogi Oginga Odinga Foundation</td>
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<tr>
<td>JTF</td>
<td>Judiciary Transformation Framework</td>
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<td>JTI</td>
<td>Judiciary Training Institute</td>
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<tr>
<td>KELIN</td>
<td>Kenya Legal and Ethical Issues Network on HIV and AIDS</td>
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<tr>
<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<tr>
<td>LRF</td>
<td>Legal Resources Foundation</td>
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<tr>
<td>NCAJ</td>
<td>National Council on the Administration of Justice</td>
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<td>OCPD</td>
<td>Officer Commanding Police Division</td>
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<td>OSIEA</td>
<td>Open Society Initiative for Eastern Africa</td>
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<td>TJS</td>
<td>Traditional Justice System</td>
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<td>UN</td>
<td>United Nations</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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EXECUTIVE SUMMARY

This research was commissioned by the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN) to determine the extent to which cultural structures support women’s property rights in access, use and inheritance in accordance with Article 159 (2) (c) and (3) of the Constitution of Kenya 2010, and to map out issues, actors and strategies for KELIN’s Women’s Inheritance Rights Project.

In choosing the research area, KELIN took into consideration the possibility of strengthening its ongoing initiatives in Kisumu and Homa Bay Counties while exploring the prospects of expanding the project to other areas in which it has not previously worked, namely the Coastal region and among the Kuria community in Migori County. The research was undertaken using focus group discussions that were moderated on the basis of a series of questions on the substance, process, actors and challenges in using traditional justice mechanisms. An overview of the legal framework for land and property rights in ownership, marriage and succession in Kenya is given to provide the basis for comparison with women’s property and inheritance rights in the traditional justice system. The gap between the two systems is seen as an opportunity for advocacy as noted in the recommendations at the end of the report. An analysis of the extent to which organizations and individuals have engaged with traditional justice systems in addressing the property and inheritance was also done by way of desk review.

The research findings are from the interviews conducted in Mombasa, Kisumu and Kehancha in July 2013, with elders as the supply side, and community members from the demand side of the traditional justice mechanisms. These findings are analyzed from the perspective of the actors in, substance, structure and processes of traditional justice systems; factors affecting the work of the traditional justice systems; and the interaction between the traditional and formal justice system on the one hand and the traditional justice systems and the law on the other. Seven elders from the Digo, Giriama and Chonyi communities in the former Coast province, seven from the Luo and four from the Kuria communities in the former Nyanza Province were interviewed in the research. The elders from the Kuria community were accompanied by their secretaries who are young men working under the tutelage of elders for purposes of ensuring continuity of the cultural structures. On the demand side, seven community members were interviewed from several communities in Mombasa, seven from the Kuria and seven from the Luo communities. From the analysis it is clear that these traditional justice mechanisms are underpinned by foundations of organization and were well intended to protect the rights of women. In all three communities interviewed, it was noted that the traditional justice mechanisms were more efficient than the formal justice systems. However, all the systems faced challenges especially around the logistical arrangements on documentation, recording of proceedings, remuneration of the elders and transportation where they were required to move from one place to another.
EXECUTIVE SUMMARY

The report concludes with recommendations on strengthening of the traditional justice systems through awareness, research, training and documentation, and effectively makes the case for the full integration of the processes of traditional justice systems into the formal justice systems as envisaged in Article 159 (2) (c) and (3) of the Constitution of Kenya 2010. It however notes that the even though the substance of the traditional justice systems must invariably be aligned to the Constitution and be documented as a process of dispute resolution, it should, to the extent possible be allowed to evolve in a way that allows the various cultures to retain their diversity and uniqueness. This will call for a careful navigation of the rigors of strict control that legislation shall invariably bring to these traditional justice systems.
Traditional Dispute Resolution Mechanisms on women's property rights
INTRODUCTION

Chapter One

1.1 Background to the Study

KELIN’s mission is to promote and protect HIV related rights. KELIN works to address the needs of widows and their children in Kisumu and Homa Bay counties, disinherit and left homeless due to the denial of their lawful rights to inherit and own property. These widows count among the majority of Kenyans in rural areas who are not able to access the formal justice system and for this reason KELIN has been working with traditional cultural structures such as Councils of Elders, to increase access to justice for widows, predominantly through mediation. In 2011-2012, KELIN scaled up the existing cultural structures project (CSP), to increase the number of widows benefitting from the project and to also carry out further training for the elders and beneficiaries, in order to increase their knowledge on human rights, including property rights. KELIN also opened an office in Kisumu, thereby bringing services closer to the project’s beneficiaries in that region. A tool on working with cultural structures to facilitate access to justice for women was translated into Kiswahili and Dholuo languages. This in turn enhanced the levels to which the beneficiaries and other stakeholders would appreciate the use of cultural structures as a method for alternative dispute resolution.

After three successful years of the CSP, KELIN’s goals for its Women’s Inheritance Rights Project are now threefold: i) to get a clear understanding of the extent to which cultural structures throughout Kenya are supporting women’s inheritance rights; ii) to engage widows, elders, other NGOs and international donors in a national dialogue regarding cultural structures and how they can be used to advance women’s inheritance rights; and iii) to maintain the existing CSP in Kisumu and ensure that the elders are up to date on their training.

In view of the above, the research was undertaken to establish the extent to which cultural structures in the country facilitate access to justice, and to gauge their impact on women’s inheritance and other related rights. The research was initially developed to cover three counties; however, it eventually included respondents from at least six counties in the former Coast and Nyanza provinces. These were Kisumu, Homa Bay, Migori, Kilifi, Kwale, Mombasa and Malindi. It involved field visits to Mombasa, Kehancha and Kisumu, which were preceded by a desk review of existing documentation on the role of cultural structures across the country.
1.2 Geographical coverage

The research was conducted in the former Coast and Nyanza provinces and targeted communities from the Mijikenda, Luo and Kuria tribes. At the Coast, the research team met with the respondents in Mombasa whereas in Nyanza the meetings were held in Kehancha and Kisumu respectively. The respondents from the Mijikenda communities were diverse in terms of language, underlying cultures and practices whereas the Luo and Kuria were more homogenous in their character.

1.3 Methodology

As a social inquiry, the research was more qualitative than quantitative. To get the qualitative data analyzed below, the research team held focus group discussions (FGDs) in the form of short stories with the three community groups targeted in the study. The researchers integrated all the questions contained in Annex 2 of this report into the methodology.

In applying this methodology, the research team sought to understand the culture of the target groups as a basis for understanding the underlying principles and processes that inform the decisions of the various traditional justice systems. The premise upon which the research team settled on this method was that each actor in the traditional justice systems is guided and affected by one or more of several factors, including their gender, position at birth, station in birth or education opportunities. Further, that each actor uses these fairly universal variables to their advantage, depending on, or hampered by, the rules of their respective community cultural structures.

Several writings on culture begin with, or include, the story of the creation or origin of the tribe or community. It is from an interrogation and analysis of these accounts of origin or creation that the values of the respective communities can be gleaned. It is hardly disputable that the laws of each community are grounded on these values; indeed the laws of the community are set to protect these values, which like all values in any other context, are held in the highest esteem.

Once the values and their underpinnings are established in the creation stories, it is then possible to determine the structures and processes for the protection of these values. All through the narrative, the details of the actors, their positions and their roles either emerge or are intertwined into the story through the prompting of the research team members.
Using this method, the research team was able to establish for example that among the Kuria, there were two levels of leadership - the cultural leaders and the elders. The cultural leaders have little regard for the elders whose positions are closely linked to chiefs and the local administration. According to the cultural leaders, the connection with the local administration effectively brought in an element of outside influence by the government to what should be an exclusively Kuria affair. Additionally, the team was able to establish the gender relations in the various communities and interrogate how the elders came to hold their positions, the tenure of their offices and how men and women owned property in life and in death.

The family structures are also defined in these stories and with them the details of property ownership and how it passed on from the originators of the tribe down the generation lines over the years. It also allowed for distinctions to be made in land and property ownership between men and women, during their lifetimes and in succession.

This then formed the basis for cases on inheritance and property rights of widows in all communities, which were adjudicated upon grounded on the values of the various communities.
“Constitution protects the rights of women”
Chapter Two

Overview of the Legal Framework on Land Property Ownership for Women in Marriage and Succession in Kenya

Prior to the promulgation of the Constitution of Kenya 2010, discriminatory laws and policies, patriarchal customs, traditions and social attitudes contributed significantly to hinder women’s access to land, property and other natural resources. The Constitution protects the rights of women to hold property and specifically protects these rights from discrimination. Article 40 of the Constitution protects the right of every citizen to acquire and own property in any part of the country. This Article, read together with Article 27 (4), further protects the rights to property from discrimination on any basis whatsoever including culture. Article 60(1) (f) on its part provides for the elimination of gender discrimination in law, customs and practices related to land and property in land.

The Land Registration Act 2012 in Section 93 presupposes co-ownership of property acquired in marriage and requires mandatory spousal consent for disposal of all such property. This therefore presupposes equality in the event of death of either of the spouses. Unfortunately, when the man predeceases the woman the practice of disinhermitance of the widows of their property acquired in marriage has been very common.

The Law of Succession Act Chapter 160 of the Laws of Kenya envisages a situation where a surviving spouse inherits the entire estate of the deceased spouse in intestacy. However, it makes the distinction in Article 35 (5) (b) where it provides that where the surviving spouse is a woman, the interest shall devolve upon the surviving child or children if the woman remarries.

Despite these progressive provisions in the Constitution and the requisite Land Registration Act, it must be recognized that culture, even though dynamic in nature, is not easy to change. In recognition of this, Article 60(1) (g) provides for the encouragement of communities to settle land disputes through recognized local community initiatives that are consistent with the Constitution.

The work of the various traditional justice mechanisms targeted in this research use the positive aspects of the respective cultures to afford women a level of justice that the procedural and administrative processes deny them for reasons of cost and lack of accessibility. It is instructive that the restrictive provisions in the Law of Succession Act were informed by the very retrogressive practices that the traditional justice mechanisms are now working at reversing. It is also to be seen how the Land Registration Act will be implemented for widows to enjoy the level of equality that is envisaged by this law.
Land Property Ownership for Women
Chapter Three

Trends, Actors and Initiatives that Impact Women’s Inheritance Rights in Meru, Nyanza and Coast Provinces.

Prior to the arrival of colonialists, land tenure systems across the country were primarily communal. Although every African had an ancestral land base which was considered important for the continuity of the family, clan or tribe, absolute ownership of such land was rare, even by the head of a household or family. The level of rights and use of the land was set by customary norms and regulations. Any disputes over rights of access, use or control over land were settled by elders’ tribunals. After independence, land remains the main element of production in Kenya.

Women account for 52% of the Kenyan population with 80% living in the rural areas. The rural women, and by extension the majority of women in Kenya, largely depend on land for basic survival. The woman wakes up in the morning to go and till the land to which she has at best, access. From this she gets food to feed her family and sells whatever remains to supplement her income. In other instances, she also works as a laborer in large farms. Women form the majority of the work force on land providing 80-90% of labor in subsistence production and over 70% in cash crop production. Women therefore play a crucial role in agriculture as producers and providers of food. The dependence of rural women on land as a basic survival tool cannot therefore be gainsaid.

In spite of all this, women rarely have any land in their names, making them very vulnerable in the case of divorce or widowhood. In the likelihood that they are disinherited, they are left with no means of production and sustenance. The treatment of women as users and not owners of family property has increased their vulnerability through the instances of denial of their customary rights to be joint beneficiaries of family property. In many communities their access to, use and control of land is largely determined by their marital status and in the case of widowhood, to their relationship with male members of the immediate family of their deceased husband.

Many studies have been done across the country to determine the cultural practices on land ownership, inheritance and property rights. These studies continue to provide insights into how women become vulnerable and lose access, control of and at times ownership of family land upon the death of their husbands. The excerpt in Table 1 below is an apt illustration of this. While it may just be one case in point, many other cases have been documented across the country. Most depict how women bear the brunt of negative cultural practices that continue to support male inheritance of family land to the detriment of the women’s rights. Women are regarded as belonging neither to the homes into which they were born, nor to those into which they are married. This leaves them out of the inheritance cycle both ways. Underlying this is the very absence of women in the traditional justice mechanism to wit, as witnesses or judges in this system.
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 returned with 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. Atieno stood her ground and told them to leave.

The following year turned out to be a nightmare for Atieno and her four daughters. She and her children were no longer welcome in the village; they were asked to keep off peoples’ homes and her children were not allowed to play with other children. Her sisters-in-law (the wives of her two brothers-in-law) told her off for causing problems in the home. They felt that they would not have a good harvest. In 2006, the roof of Atieno’s house started leaking and her house needed repairs. She could not get anyone in the village to assist her undertake 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: instead, her mother-in-law 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 and rent a room at the market place for herself and her daughters. Soon after this move to the market, her brother-in-law ploughed her land: she was not allowed to go back to her home.
CHAPTER THREE

3.1 Cultural impediments to women’s rights

3.1.1 Land ownership and property rights of women are at the center of the challenges that women can face in accessing their human rights. Some of the key issues with regards to land rights for be summarized as follows:

- Inheritance is predominantly patrilineal. It is a widespread and commonly accepted practice for fathers to bequeath land to their sons with the expectation that their daughters will be taken care of by their husbands upon marriage.
- It is the expectation of communities therefore that the women will get married and provision in inheritance is therefore rarely made for unmarried women.
- In inheritance, women are disadvantaged at two levels as they are neither deemed to belong to the homes of their birth or their homes of marriage.
- Women’s rights were limited to land use that was further limited to their association with, or relationship to a man, as mothers, wives, sisters or daughters.
- Outside of the cultural context, few women hold land in their own names and this is ironically still primarily underpinned on the cultural determinants of land tenure.
- Even in urbanized non-traditional settings, there are instances where women acquire land either individually or jointly with their husbands, but still register the land solely in the names of their husbands. This then serves to disinherit the daughters born of such marriages since the husbands ultimately bequeath the land to their sons.

3.1.2 Discriminatory traditional and cultural practices such as early and forced marriages, female genital mutilation (FGM), wife inheritance and ritual cleansing all affect land ownership and access for women.

- The status of women in the society is in many instances determined by the socio-cultural determinants of the communities to which they belong. Among the Luo for example the practice of widow inheritance was premised on the need to retain the widow of a deceased clan member within the clan and to avoid her remarriage to an “outsider”. Her capacity to “inherit” land was pegged on whether or not she was inherited. It must be clarified here that even where the woman was considered as belonging to the clan of her husband through widow inheritance, she only got user rights over the land and not absolute ownership. In other words she only got access to the land. On the other hand, where she acquiesced to the demands to be inherited, her male children were then assured of inheriting the land of their deceased father, a right that would be denied to them if their mother was not inherited.
Among the Marakwet, a woman’s status was determined by whether or not she had undergone FGM. This status defined her position in the family across all aspects including her position with regards to property ownership and inheritance.

In the Bukusu tradition, a widow was assigned a custodian, appointed by the clan, to take care of her and her children. The custodian was usually the husband’s brother. This served to protect the property from being sold off by the widow and by extension preserved it for the children.

3.1.3 Limited participation of women in traditional community decision making is as a result of negative attitudes towards the role of women as leaders. Women are expected to be just simple recipients and implementers of decisions that emanate from the interactions of men.

These decision making processes that include women, touch on all issues affecting the society including the ownership, usage and succession of land.

In some instances women’s views are not sought in any way during the decision making processes while in others, the men are deemed to represent the interests of women.

In most communities, issues such as land boundaries that would benefit from the input of women are decided upon without consultation with or input of women. Yet these are important in deciding land ownership of women especially in widowhood. In communities such as Kisii, old widowed women are termed witches and burnt in an effort to stop them from giving evidence in land related issues. In such instances these women are the custodians of the communities’ memory but are prevented from giving evidence even where the main beneficiaries of the land transactions in question may not have been women.
3.1.4 Traditional and religious practices often dominated by men are manipulated or misinterpreted to deny women access to property, assets and inheritance.

- Traditional African religion often conflates with culture at several instances and it is difficult to draw the line between the two in issues of personal law. Regarding land and inheritance, in communities where tradition is strong, the church turns a blind eye to the violations of the rights of women in inheritance especially with regards to land, as the custodians of religion are often male members of the communities that subscribe to these cultures. For example among the Luo, the Catholic Church has in several instances turned a blind eye to widow inheritance and its attendant consequences on the proprietary rights of women, even where they could have played a more significant and decisive role in the mediation of disputes touching on widow inheritance and property rights of women.
- The Marakwet and the Pokot have a long history of conflict over access to and use of natural resource, including land. These conflicts are resolved through negotiation using traditional methods. Women are involved in the conflicts as active and passive participants alike. They also suffer the brunt of these conflicts and in the event that their husbands are killed in the conflicts, they are subjected to a traditional adjudication system of their rights in inheritance, to which their contribution is either negligible or totally absent. On the other hand, men in similar positions are given a fair hearing and allowed to fully express themselves.
- The Masla system in northern Kenya is a mixture of tradition and religion. It propagates several issues that neither respect religion nor conform to human rights standards, but which are recognized as part of the cultures of the communities in the north.

3.1.5 Traditional justice systems stand the risk of being rendered irrelevant due to the non-integration of acceptable aspects from the administrative and formal justice systems. However these traditional methods still play a key role in the adjudication of disputes, especially in the rural settings. There may be need to define what the traditional methods are and a distinction made between the actors using these methods which include the community leaders and elders on the one hand, and religious and is often interference from the administrative setups especially in the context of the ongoing devolution processes. There are instances where chiefs are appointed on the basis of their academic qualifications only. Where these chiefs are part of the traditional justice system at whatever level, there are challenges especially with the acceptance of the judgments of younger chiefs since the custodians of culture are often seen as the older members of the society.
• According to Kipkorir, many non-governmental organizations have tried to incorporate the traditional justice mechanisms into their work with the local administrative processes but the authority of the elders and the confidence in the traditional system have been compromised in most instances.

• Clement observes that the underlying principles of alternate dispute resolution (ADR) mechanisms can be used with the traditional justice systems so that the custodians of the traditional justice system add on to the role of the formal justice and mediation systems. He noted that in the west there is a renewed energy around safeguarding the traditional mechanisms of dispute resolution. He noted that the pilot ADR projects are working well where they are based on the values of the traditional communities such as is the case in New Zealand, and that perhaps it is time to seek methods of including the traditional and cultural methods into the formal justice systems. He also cited the example of Canada, which continues to successfully use what are termed as family circles, which can be equated to the traditional systems in Africa.

• Clement also avers that traditional methods are unlikely to be militant if integrated in the formal justice systems.

• Whereas the Constitution has directly provided for the use of the traditional justice structures, there does not seem to be a clear strategy on the use of these structures and they are not included in the Judiciary Transformation Framework (JTF). According to the National Commission on the Administration of Justice (NCAJ), the traditional justice mechanisms will be useful in addressing the case backlog that presents a key challenge in the judiciary. The Judiciary Training Institute (JTI) is keen to work with the traditional justice systems in the context of ADR. There is however no clear strategy or plan on how this is to be effected. It remains to be seen the extent to which the JTI will include it in its training strategy.
3.2 Civil society engagement in using the law to protect the rights of women to property and inheritance

The Constitution of Kenya 2010 recognizes women as equal stakeholders in the use and ownership of land, and guarantees women various rights and freedoms through Article 10 on the National Principles and Values, Chapters 4 on the Bill of Rights and 5 on Land and the Environment.

Despite these progressive provisions, it is often difficult to change a people’s culture as the communities that form any nation are composed of diverse populations defined by equally diverse cultural practices, customs and traditions. Indeed, these are further broken down into the peculiarities of the smaller units that form these larger communities. This diversity is reflected in the myriad efforts by organizations and individuals to give life to the constitutional provision that upholds women’s rights to property and inheritance. Several of these organizations have partnered with cultural structures across the country to educate the public on the importance of the constitutional provisions, and made efforts to bridge the gap between these traditional methods that are for the most part undocumented, and the statutory law on property, land and inheritance, which finds meaning in the Constitution.

In its publication “Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya” FIDA Kenya refers to all those people-based and local approaches that communities innovate and utilize in resolving localized disputes to attain safety and access to justice by all. The study further shows different communities and the names of the traditional justice systems, as indicated in Table 2 below: Table 1

<table>
<thead>
<tr>
<th>DISTRICT</th>
<th>NAME OF COMMUNITY</th>
<th>NAME OF TRADITIONAL JUSTICE SYSTEM</th>
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<tr>
<td>Mombasa</td>
<td>Multi-ethnic</td>
<td>• Council of Imams and Preachers of Kenya CIPK</td>
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<td></td>
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<td>• Wazee wa Mtaa</td>
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<td>Kilifi</td>
<td>Giriama</td>
<td>• Wazee wa Magogo</td>
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<td>Kwale</td>
<td>Digo</td>
<td>Kaya</td>
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<td>Kinangop</td>
<td>Taita and Duruma</td>
<td>Wazee wa kijiji</td>
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<tr>
<td>Tana River</td>
<td>Orma</td>
<td>• Matadetha</td>
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<td>• Had Gasa</td>
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<td>Pokomo</td>
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The illustration goes to show the extent to which people rely on traditional set ups for dispute resolution. Other known traditional set ups include the Njuri Ncheke of Meru, The Luo Council of Elders, The Athuri Aitora of the Kikuyu and the Kokwet of the Kipsigis.

It is said that Traditional Justice Systems resolve 80-90% of disputes in developing countries.

Below is a brief on the initiatives of some of the organizations:

3.2.1 KELIN

KELIN in its publication Accessing Justice & Protecting the Rights of the Vulnerable Through Cultural Structures justifies the use of existing cultural structures on the following grounds:

- The physical location of courts and lawyers is beyond the reach of most Kenyans living in rural areas.
- Judicial costs and processes are prohibitive.
- Most legal aid programs are situated in urban areas.
- Aggrieved women would rather keep off the court processes for fear of being ostracized by the community.

According to KELIN, the use of cultural structures was favored as a more effective means in an effort to overcome these challenges. It notes that these structures have been tested over time for the arbitration of land disputes and other community related issues. The use of the traditional justice systems would however be more effective if they were non-partisan in their approach and, if they took cognizance of the fact that any culture that is inconsistent with the Constitution is unlawful.

3.2.2 Mama na Dada

Mama na Dada is a non-governmental organization working in Karachuonyo, Bondo, Rarieda and Makueni. Over a two year program it has worked with the councils of elders, chief’s barazas and women’s groups in the four areas to mitigate the violations of women’s land rights in inheritance. It has used the local administration mainly the chiefs, district officers (DO) and district commissioners (DC) to mobilize the community to attend sensitization sessions on land and property rights at the chiefs’ barazas. These sessions are based on the provisions of the Constitution of Kenya 2010. Those trained are taught how to disseminate the information to a broader audience. The organization is convinced that the women reached were empowered as a result of the sensitization. Communities are more receptive to peer training from their members who have already been trained. Mama na Dada is encouraging their constituencies to use local justice mechanisms in line with the Constitution.
3.2.3 Caucus for Women’s Leadership

The Caucus for Women’s Leadership has also engaged in projects to assist women access justice through cultural set ups. It has worked in the former Bungoma and Kisumu Districts. The prevalent cultural challenges with regards to women’s property and inheritance rights faced by these communities include patrilineal ownership of land and wife inheritance. Their research shows that when the head of the home dies, the widow cannot inherit land and property and have the property registered in her name. In fact, the original Luo culture was to have the widow inherited by the husbands’ brother or a close male relative. The sole purpose of this was to ensure that the widow and her children were protected and would not be disinherited, and that the deceased’s family would continue living in the ancestral home. Sexual relations were never the purpose behind wife inheritance. This culture was however abused and misinterpreted hence the current scenario where women are forced into sexual liaisons: when they refuse to cooperate, are ejected from the matrimonial home.

The Caucus partnered with UN Women over a six month program in 2011 – 2012 to assist women access justice where they stood the risk of being disinherited. All stakeholders were considered and incorporated to make sure the program was a success. These included the women who would be the primary beneficiaries, the Councils of Elders and the local administration. The Councils of Elders are considered the first and most effective line in the administration of informal justice systems. The Luo Council of Elders is deemed to be fairly advanced in its structure and operations. The approach that was used was as follows:

- With the assistance of the village heads, mobilize male and female stakeholders, including the local administration (chiefs, DO’s and DC’s) to convene a baraza.
- Inform the Council of Elders of the intention to hold a baraza.
- On the day of the baraza, the focus would be on raising awareness on the legal framework of the property and inheritance rights of women as enshrined in Article 159 of the Constitution, and the National Lands Policy and Sessional Paper No.3 of 2009. Besides the legal framework, there is also the cultural framework on adjudication of land which, although not written, has had its principles passed on through the generations.
- The special training would be given to women, the police and local administration, a few selected elders and the local land team. These are the people who would be tasked and empowered to bring justice in the case of a complaint by a widow.
- A local lands team would also be formed as this was the interface between the community, elders and the District Lands Board (DLB). This would ensure that cultural solutions were also in line with the constitutional provisions.
- Once the communities are sensitized, more barazas would be held and thereafter the women encouraged to share their challenges. Following this, solutions would be sought using both the cultural and statutory legal framework.
- Rarely is legal aid used to solve these problems due to the inherent costs, time taken and the challenges of accessing the courts system.
The Caucus notes from its interventions that the alternative, or informal justice system, has proven to be very effective in helping women access justice. The Caucus therefore established committees to monitor violations of women’s rights, especially in cases where the women were unable to report the same. In these instances, it is these committees that would forward the complaints to the councils of elders.

The Caucus sees its success in the case of Kisumu where it reports that a number of disinherited women were settled back into their matrimonial homes. With the help of other organizations it assisted these women to reconstruct their houses that had been destroyed in the process of their disinheriance. Going forward, the Caucus wants to get more involved, not just in rehabilitating disenfranchised women but to also begin to address issues such as women living with HIV and economic empowerment.

3.2.4 Kenya National Commission on Human Rights (KNCHR)

Between 2005 and 2012 KNCHR had a program to assist disenfranchised women, funded by the Health Policy Initiative of the United States Agency for International Development (USAID). The program addressed issues that touched on culture and was initially meant to respond to the high prevalence of HIV in Luo Nyanza. A root-cause analysis revealed that widow inheritance was a major contributor to these high prevalence rates. KNCHR therefore changed the focus from the prevalence of HIV to culture as one of the root causes of the high prevalence rates of disinheriance.

Procedurally, KNCHR used the same format for sensitization and addressing justice as that of the Caucus described above. Indeed this seems to be the main mode of implementation preferred by most organizations that were sampled in this review. KNCHR however went a step further and involved local political leadership that included organizations such as the Jaramogi Oginga Odinga Foundation and notable and influential individuals, including Raila Odinga and Phoebe Asiyo.

Following their intervention, KNCHR reported that at least 40 women in Luo Nyanza had been resettled. To replicate the success it had recorded in Luo Nyanza, KNCHR convened a countrywide conference of elders to try and establish which tribe still had existing cultural set ups.

KNCHR engaged the Njuri Ncheke Council of Elders of the Meru to address the plight of widows and orphans on matters of property and inheritance rights. Sensitization workshops were held, and in 2009, nine cases of women who had been disinherited were documented. KNCHR sat with the Council of Elders for a week and addressed the nine cases to conclusion. The only condition was that the judgments of the Councils of Elders had to be in line with the Constitution. The aim of this session with the elders was to test the hypothesis that the Council of Elders could be used as an alternative arbitrator to the formal judicial system and still provide justice to the aggrieved women.
KNCHR has also engaged the Maslaha system of the Somali in North Eastern Kenya, and made some progress in working with the elders in Turkana and Isiolo.

The focus of the KNCHR has been to encourage traditional systems to adhere to basic human rights standards. The issue of FGM and early or child marriages have also been addressed in their programmes.

3.2.5 Federation of Women Lawyers Kenya (FIDA-K)

FIDA-K also makes a compelling case on the use of traditional justice systems. From its research on informal justice systems at the Coast, it established that these systems are perceived as incorruptible, accessible at all times, and affordable, with familiar proceedings and language while utilizing local resources and passing decisions based on consensus that seek to heal and unite disputing parties.

From the implementation of its Strategic Plan 2008 – 2013, FIDA-K established that there would be a lot of value added by incorporating the use of informal justice systems into their programs. It further established that it was not only more accessible to the large rural population, but that it also came at an affordable cost, unlike some of the legal aid programs. Community elders adjudicate on issues concerning family law matters, separation and divorce, land issues, inheritance, custody and maintenance. They could be used as an alternative justice system.

FIDA-K has engaged with several communities, including the Kamba, Maasai of Kajiado, the Nubian community in Kibera, the Luo, the Kaya of the Mijikenda and the Abagusii. The format of community engagement is not significantly different from that of other organizations. The issues faced by these communities are similar: they involve the disenfranchisement of women with regard to their property inheritance rights, and the subjecting of women to retrogressive cultural practices.

In a study done alongside Georgetown University Law Center it became clear that the rights of women were greatly abused in some communities. It goes to illustrate the plight of widows when it comes to inheritance, widow cleansing and eviction. Many widows are evicted by their in-laws, who take their household items, leaving the widow with nothing.

According to one of the respondents in the study:-

*My friend’s husband was critically ill. When she was called by the hospital and told that her husband had died, she went home with a lorry and removed everything before going to the hospital or calling any of her relatives. Indeed, when she was informed her son had died, her mother-in-law also came with a lorry to the house. This woman had been married for 12 years, and had four kids, yet that did not matter.*
FIDA-K is now in its third year of implementation of the program. It has developed and integrated a monitoring and evaluation mechanism into its overall systems. This enables it to seek feedback from the Councils of Elders and the affected women on a regular basis.

3.2.6 Legal Resources Foundation (LRF)

LRF is developing a framework on engaging the traditional justice mechanisms, while endeavoring to ensure that the informality of these systems is maintained. Its work with traditional justice mechanisms covers the former North Eastern Province, Lodwar, Trans Nzoia, Kapenguria, West Pokot, Uasin Gishu and Kericho.

3.2.7 Foundation for Women’s Rights in Kenya (FWRK)

FWRK is a non-profit making organization, and was registered as a trust in December 2006. Its main purpose is to promote women’s rights in governance and development processes. The rights provided for are: equality in marriage, elimination of discrimination in land ownership, protection of matrimonial property, and protection from negative cultural practices among others. It notes that without active advocacy, these rights will remain only on paper. FWRK is convinced of the need to increase women’s awareness on the constitution, and more importantly establish a strong enforcement mechanism that will ensure access to justice for women.

FWRK conducted a baseline survey on access to justice for women in Migori County in September 2011, with the objective of establishing the extent to which women access justice in Migori County. The survey sought to gauge the level of awareness of rights of women, women’s rights violations, available justice mechanisms and effectiveness of those mechanisms. The findings were that 79% of the women were not aware of their rights. Deprivation of land rights was a key concern for women and in all focus group discussions in Kuria District. Lack of title deeds was mentioned as a problem facing a majority of women. In most cases, men do not even leave titles or instructions on property before death, which leaves women vulnerable to disinheritance. Denial of the right to income from land was also mentioned as a key concern. Though women are the major contributors to labor in the farms, albeit unpaid, they do not have access to the revenues derived from the farms.

It is out of the findings of this baseline study that FWRK, with support from Open Society Initiative in East Africa (OSIEA), is currently implementing a project in Kuria and Migori Districts, aimed at enhancing access to justice for women in the new constitutional dispensation.
3.3 Gauging the possibilities for further engagement with the traditional justice mechanisms.

From the desk review the following are the issues that would require further interrogation.

3.3.1 Project based interventions
All the organizations sampled had not integrated their legal aid engagements with the traditional justice systems. Funding is not always available and these organizations have to rely on donors. Programs are therefore short term and once the funding stops; there is no close monitoring of the progress of their interventions.

3.3.2 Monitoring and evaluation
Most of the organizations do not have a clear strategy on monitoring and evaluation. It was therefore difficult to gauge the level of impact of these projects. Some organizations will only provide the total number of women assisted.

3.3.3 Lack of a clear government policy of engagement
From a government policy perspective, there is no a clear directive on engagement of informal justice systems. The National Land Policy provides that the government shall encourage and facilitate the use of ADR mechanisms as negotiation, mediation and arbitration to facilitate speedy and cost effective access to justice. Most organizations interviewed have however stated that they are keen to see how the judiciary works around this issue and probably how this will affect their decisions.

3.3.4 Concentration of the interventions
The organizations featured in this review have worked in the following areas: Nyakach, Rarieda, Karachuonyo, Bondo, Kisumu, Makueni, Bungoma, Uasin Gishu, Pokot, Trans Nzoia, Kapenguria, Isiolo, Meru and Lodwar. The organizations have also worked with the Kamba, Maasai, Luo, Mijikenda, Abagusii, Somali, Turkana, Meru, Pokot and the Nubian communities. Most of the interventions have been in Luo Nyanza with few interventions recorded among communities such as the Kikuyu. All organizations sampled have worked in Luo Nyanza. Some organizations indicate the areas of work but are not specific on the community with which they worked.

3.3.5 Culture and religion interface
Religion is a recurrent issue in the discussions on the engagement of cultural structures. However there is not much information on the extent to which religion supports or impedes the aimed at the formalization of traditional justice systems.
3.3.6 Interface of traditional and formal justice systems
Despite the constitutional provision on the role of the traditional justice mechanisms in the exercise of judicial authority, there is little evidence of the effort to include the traditional justice systems in the judicial reform agenda. Such inclusion could cover the training of the actors in the informal system as a means to ensure adherence to the Constitution. The Court Users Committees at all court stations in the country are addressing issues to improve access to justice to all levels, and this remains an important entry point for the traditional justice mechanisms.

3.3.7 Duplication of efforts and lack of coordination
If there is coordination between non-governmental organizations engaging with traditional justice mechanisms, this is not evident. This has led to what appears to be duplication especially in Luo Nyanza.
Traditional Dispute Resolution Mechanisms on women's property rights
Chapter Four

Using the traditional justice systems to promote and protect women’s inheritance rights in the former Coast and Nyanza regions

This chapter describes the actors, substance and processes of traditional justice systems within cultural structures in the former Coast and Nyanza provinces, and analyzes how these have been used to protect the inheritance rights of women in the various communities. With gender as an overarching theme, it also analyzes the factors affecting the effective operation of the traditional justice systems, and the interaction between formal and informal justice systems.

4.1 Actors and the traditional justice system
The actors can be categorized into i) custodians of knowledge of the substance and processes of the traditional justice system ii) service providers, iii) service seekers, iv) collaborators and v) resisters to the system.

4.1.1 Actors
The actors in the traditional justice system are spread across the demand and supply side and comprise the cultural elders, village elders, local administration and community members, both male and female. The structure of traditional justice systems varies from one community to another with the common factor of being anchored on the work of the elders in these communities. The various communities reached by the research define elders differently. Among the Kuria, there is a Council of Elders that is charged with safeguarding the cultural traditions of the community and is led by the chairmen of the four clans of Kuria namely: the Bwairege, Bukura, Bugumbi and Nyabasi. At a secondary level are the village elders: there is a disconnect between the two levels with regard to their respective mandates and operations. The respondents in Mombasa also made reference to the two tier structure in the traditional system, comprising the cultural elders and the village elders. Whereas there seems to be some coordination between the two levels of elders in Mombasa, this was not evident among the Kuria. The two groups of elders treat each other with suspicion. It was however clear from the discussions with community members that the village elders enjoyed greater support and acceptance by the community as opposed to their counterparts in the Council of Elders.

Among the Luo on the other hand, there is a Council of Elders that has been devolved down the community clan lines into units at the lower administrative levels. As opposed to the Kuria, the Luo Council of Elders works in close collaboration with its chapters in the various clans and the village elders under it, very much like the elders in Mombasa. The justice system is managed by the second tier of elders from these two communities (the coastal communities and the Luo) who draw inspiration from the Council of Elders.
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Among the Giriama, the elders are elected in accordance with the Chief’s Act, which provides for the choosing of an elder. They are also chosen by the people in barazas that are called for that purpose.

4.1.2 Gender considerations
The gender considerations are similar in the composition of the traditional structures in Kuria, Kisumu and Mombasa. The traditional structures start off from the point of male domination and therefore see gender training as key to enabling them promote and protect the work of women in their deliberations. The Kuria Council of Elders has no female members, which means that there are no women clan elders since the only criterion for membership to the Council of Elders is that one must be the clan elder. It was not clear whether the cultural structures in the coastal communities have female members. The Luo on the other hand has one woman member of the Council of Elders. All the three tribes targeted in the study have women chiefs or sub chiefs in the local administration. The Luo and the coastal tribes also have elders at the second tier of the traditional structure while the Kuria did not have women at this secondary level.

4.1.3 Role of actors
In terms of participation in the processes, all the communities had space and processes that allowed for the participation of women in the traditional justice processes. However, among the Kuria and Luo, the women from the supply end noted that their views were not taken seriously in the processes owing mainly to the fact that they were not seen as fully belonging to their marital homes. Instead, they are viewed as outsiders, while in their homes of birth; they were seen as being in transit to their marital homes and by extension strangers incapable of taking decisions or participating in important issues for their clans and families such as land and inheritance. Their views were therefore seen as being inferior even to the views of young boys in the home or community. In Mombasa, two of the elders noted that whereas their communities had women elders, it was difficult to sustain their participation as the women were not as readily available as the men, owing mainly to the fact that they had too many chores to perform and therefore faced challenges in attendance and follow up of the trainings that would facilitate their participation in these processes. Once women were chosen to belong to these decision making bodies, their views were seen as important and women were considered to be a good reference point for the elders in their work. In these communities, the women were chosen on the basis of their past engagements in the community and “a demonstrable capacity to exercise wisdom in decision making”.

4.1.4 Role of women
In terms of the role of women as custodians of knowledge in inheritance cases, the respondents from Mombasa noted that any training of elders and communities on the Constitution of Kenya 2010 should include women as a matter of course since women are the main subjects of inheritance cases. They underscored the importance of women in disseminating information as women were known to have broad networks that would enable them do this across a broad spectrum. Following the gender training by FIDA Kenya, the elders in one community in Mombasa included women and noted that they add value in the gender considerations of the issues that the elders adjudicate upon.
4.1.5 Role of Civil Society Organizations
Several organizations are working with traditional justice mechanisms mainly through awareness and sensitization on human rights, gender and the law. FIDA Kenya, in addition to training the various elders and communities on human rights and the law, also continually tries to address the challenges faced by elders in carrying out their work. It has also trained the elders on how to write and submit regular reports on their work so as to capture emerging issues that can inform and enhance their work. Similarly, the elders disseminate information to communities on the trainings and awareness from FIDA Kenya, including through peer training. According to the respondents from Mombasa such capacity building initiatives have improved the quality of their deliberations and also enabled them to efficiently take on more cases. This has increased the number of cases resolved at the community level. Before this, they would preside over cases in a manner that was not satisfactory and this resulted in cases being referred to court where it would take much longer to resolve them. They were advised to take minutes of each of the cases they handle.

The respondents noted that other organizations engaging the traditional justice systems in the communities include Plan International who have conducted paralegal training and awareness on sexual and reproductive health and rights; Action Aid which works with young mothers in the community; and Red Cross on girl child empowerment and capacity building on economic investment. Based on who undertook the training, the elders report to the various programs on how their work impacts the community.

4.2 Substance of the traditional justice systems
The nature and number of cases addressed by the traditional structures are identified alongside the substance of the traditional law applied in the adjudication of cases. Examples of the cases are provided.

4.2.1 Number of cases
One respondent in Mombasa noted that at times he handles two or more cases per week, including some that come as matters of urgency. The number of cases handled at any given time depend on the nature of the cases as they take different lengths of time to resolve. The number of cases presented also depends on the levels of awareness of the parties concerned. An increase in the number of cases presented is often noted following awareness sessions by organizations such as FIDA Kenya. An elder from Kwale noted that on average he takes up about four cases per month. Having been trained by FIDA Kenya, he makes monthly reports on the progress of these cases to FIDA Kenya.

4.2.2 Nature of cases
Matrimonial cases top the list of cases presented to the traditional justice systems. In one case that an elder from Mombasa handled, the couple had accused each other of infidelity. At the time the case was brought to the elder, the man was suicidal. It was therefore important to try and ascertain the truth of the issue in a bid to save the man. The elder spoke separately to the woman and found that there was no evidence to support her accusations of the man’s wrongdoing. The elder therefore instigated a mediation process and the couple was reconciled. He made a follow up on the case and found that the man had died in the course of the year in which the case was presented.
Another elder noted that several cases are on drunkenness and these are mainly reported to them in the night. In such cases, he advises the parties to mull over the issues overnight and return in the morning. Most do not return, in which case he does not make any follow up. Yet another elder noted that the other common f cases are on inheritance, which normally take a long time to resolve. He added that the cases of domestic violence are normally resolved very fast. This was reiterated by elders in Kisumu and Kuria, who were of the view that there was no need to get involved in cases of domestic violence as these were almost always self-resolving. In such cases, he recommended the use of mediation for resolution.

A woman chief from Kilifi, gave the example of a case that she had handled where the parents of a child had denied her the right to education. The case was reported to her by a female member of the community. She visited the home and explained to the parents the importance of taking the girl to school. She used the examples of girls in the community who are good role models and compared them to other girls who had not completed their education. The father of the girl cited the Giriama culture where girls are not meant to be educated because it is assumed that they will get married to rich men who have gone to school. Another example was a case in which a six-year-old girl was raped by an 18 year old boy, who thereafter gave her some money to buy sweets. The man attempted to rape the child again, and threatened her with dire consequences if she told anyone about the incident. On the second day she told the parents who brought her to the elder and they followed up on the case. The parents of the boy also threatened the parents of the girl. The elder reported the case to the police who issued a P3 Form. The case took a long time to resolve and the boy tried several means to get away from the case. He was eventually placed on probation.

4.2.3 Jurisdiction
The jurisdiction of the elders is limited to the villages and does not cover entire counties. They therefore resolve the issues that arise in their villages.

4.2.4 Substance of the law
Under the Giriama culture, the girl child would in the past receive an eighth of the inheritance according to Islam. But the girl child has now been empowered. The elders adopt a rights based approach but also use religion to decide on the cases. Among the Muslims there is no issue with regards to inheritance and the woman is guaranteed an inheritance under Islamic law. When the inheritance has not been addressed sufficiently, then the money is taken to the public trustee until the children reach the age of 18. Several examples were also given from the Luo and Kuria customs.
4.2.5 Inheritance
Mohamed, an elder from the coastal area noted that in cases of inheritance, the nature of the case is taken into account and this also determines role of the child in the proceedings, because the welfare of the child is paramount. Where the child is very young, the woman is considered as the best placed custodian. In certain instances, the cases are referred to the Child Welfare Department who then adjudicate the cases. One elder noted that children have a right to inherit the property of their fathers, adding that initially the girl child was discriminated against in inheritance. This has however now changed: all the children have a right to inherit the property of their parents. This is the principle that the elders apply in their decisions. Another elder noted that previously they would use traditions in addressing their issues but this proved to be problematic. For instance, a woman would find trouble getting maintenance from a man. Now they use human rights principles to protect the best interests of the child, even if the parents were not married.

The elders do not handle criminal cases, especially rape: instead, they refer them to the gender desks or offices for follow up and prosecute. Cases of neglect are also referred to the child welfare department.

4.3 Structure and Process of Traditional Justice Systems
The processes of the traditional justice systems are analyzed to indicate the methodology used to obtain and prosecute the cases and how the outcomes are monitored.

4.3.1 Structure
Elders are appointed by chiefs and effectively come under the jurisdiction of the provincial administration. The elders serve as the first point of contact with the community. In inheritance, the chief provides the all-important letter that serves as certification of the next of kin of the deceased. The chiefs, in consultation with the elders, also address the issues that arise in the community. In the adjudication of cases, the role of the chief, albeit important, is not always clear. What is clear is that elders take on cases and are also able to constitute the adjudication panel based on the rules of the communities, which vary from one community to the other. The elders rely on the chiefs for advise in the cases that they take on, and are still involved in the cases referred to the chief for adjudication.

4.3.2 Process
Once a complaint is lodged with the elders, they inform the accused directly either through summoning him, or going to his home. The summonses are copied to the assistant chiefs and the chiefs. In cases of violence where the accused does not want to report to the police for any reason, the summonses are copied to the police in the area. Once the accused person responds they seek out the families to resolve the issues amicably. In inheritance cases where widows are being ejected, they seek out the families of the husbands and try to settle the matters amicably through family meetings. Aggrieved parties and the accused have a chance to produce witnesses in the proceedings.
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Where the meetings fall through, they refer the matters to the chief who can then decide to take the cases forward to the formal justice system to ensure that there is respect for the law. Such cases end up in court, and the proceedings with the elders and the chief form part of the evidence. In choosing the process to use, the elders from the coast noted that they always seek the best interest of the woman and try to ensure that she gets the best protection from both the law and the traditions. Where the elders decide that the case should be decided on the basis of the formal system, they refer the cases to various entities including FIDA Kenya or even the gender offices or children’s department. The cases referred contain the judgments and minutes of the proceedings from the elders and the chief. The elders also seek advice from those working with the formal justice systems, and from those they consider are better versed on the workings of the traditional structures than they are. They also seek the counsel of religious leaders as religion plays a key role in the management of the communities in the case of conflicts.

Chiefs also refer cases to the DOs who may call in the chiefs and elders as witnesses. The DOs adjudicate the cases or refer them to the formal justice system.

Where the cases involve Muslims, the elders refer the parties to the Kadhi Courts which ensure that the rights of women to inheritance are addressed as intended under Islamic laws.

Apart from witnesses, the parties in the cases may bring persons to assist them in the cases. These persons are given a chance to speak by the chiefs and elders. The names of the persons are recorded. The first person to speak is the complainant and the elders give direction on the process such as the use of good non abusive language. The accused is then given a chance to address the issues and respond to the allegations, after which the witnesses may speak. The complainant is allowed to say if he or she has an issue with any person in the court and if this is the case then the person is removed from the place of hearing. When the complainants are not happy with any elder then the elder is asked to excuse him-or-herself.

4.3.3 Follow up
The lack of recorded proceedings has been a challenge in follow up of the cases to ensure that the decisions of the elders are adhered to. The elders now record the proceedings and have the parties sign on to the agreements or decisions. The elders also ensure that the proceedings are typed and these have been used in inheritance cases that have proceeded to the formal justice systems.
4.4 Factors affecting the traditional justice systems

A description of the factors affecting the traditional justice mechanisms, including administration, religion and cost.

4.4.1 Local administration
There are tension points that could potentially affect the work of the traditional justice systems and should therefore be addressed. The elders serve on a voluntary basis while the local administration is paid for their work. The elders find this unfair since they are of the view that they support the work of the local administration and in fact make it easier.

4.4.2 Religion
At the coast, it was evident that religion plays a key role in the adjudication of cases in the traditional justice mechanisms. Christianity and Islam are used among the various communities. The elders’ committees are made up of Christians and Muslims who work together. The elders note that most people respect religion and this serves the purposes of justice well as the parties then respect the decisions reached with reference to religious principles.

4.4.3 Costs
Whereas the cost of litigation in the formal court system is out of reach for most of those who engage the traditional justice systems, this does not mean the pursuit of justice in the traditional justice systems does not attract costs. The elders normally have to seek the opinions of lawyers, religious leaders, human rights organizations, and at times the police, as they adjudicate upon cases of inheritance. This involves communication and transportation which they have to meet from their own resources. In certain instances they get the assistance of the parties especially the complainant but these are few and far between. When the elders do not have the resources, this may result in delays that might in the long run compromise the cases of the complainants.
4.5 Interaction between the traditional and formal justice systems and the law

Currently there are no direct lines of cooperation between the traditional and the formal justice system. Most of the structures have however established linkages with several agencies that oil the wheels of the formal justice system.

4.5.1. Police
The elders cooperate with the police especially when there is a threat to the woman’s life, or in instances where the woman has been hurt. In such cases they assist the complainants to make reports to the police and follow up to ensure that the cases are heard to completion. The cooperation with the police is also important as it ensures the protection of accused persons from irate mobs where there has been violence related to the inheritance cases. An elder from Malindi noted that the Officer in Charge of Police Division (OCPD) Malindi has been very helpful and cooperates with the public generally, and the elders in particular, for the uptake and follow up of cases.

4.5.2 Government agencies in the judicial systems
The elders work well with the children’s and gender departments, and the prisons. There are instances where a civil case has been taken up as a criminal case and the accused person locked up. The elders at the coast provided examples of how they have, through their follow up mechanisms, ensured that the cases were removed from the criminal jurisdiction into the civil courts.

4.5.3 Evidence
As already noted, the elders are often called upon to give evidence in cases of inheritance. They are the main linkage to the foundation of these cases as they know the parties and all those involved in the subject of the inheritance cases.

4.5.4 Law
Most of the elders are not trained in any form of law or justice. They rely on the goodwill of the organizations that train them such as FIDA Kenya. All the elders who responded to the study noted that they were not well versed with the laws in relation to succession and had very superficial knowledge of the Constitution and the Bill of Rights.
“Solidarity for people with HIV & AIDS”

~ KELIN ~
Chapter Five

Recommendations

As noted from the interviews with the elders in the former Coast and Nyanza provinces, the work of the elders has enabled several women to access justice: women who would not otherwise have been able to do so. Whereas, the traditional justice systems draw their inspiration from well-defined cultural structures of various communities, the underlying frameworks and principles of the traditional justice systems are similarly well defined. Since the traditional systems are operational within the context of a broader formal justice system to which it is not well aligned, this has given rise to gaps that reflect in effectiveness and impact of these traditional justice systems. The recommendations below are drawn from the analysis in Chapter 4 of the gaps on the one hand and the effectiveness of the traditional systems so far, despite the gaps. The recommendations are also informed by the outcome of an Advocacy Forum held on 26-27 August 2013 convened by KELIN and held at Silver Springs Hotel in Nairobi to discuss the findings of this research.

5.1 Actors, Structure and process

5.1.1 Since the traditional structures almost invariably all start off from the point of male domination, it is important for the promotion and protection of the rights of women in the processes and judgments of the traditional justice systems.

5.1.2 To effectively incorporate the principles of equality and non-discrimination in the actualization of Article 159 (2) (c) and (3) of the Constitution of Kenya 2010, the structure of the traditional justice systems must embrace the 2/3 principle to ensure that men and women are represented. As it were, some structures such as the Kuria have no female members.

5.1.3 The elders working in the traditional justice systems do not have a specific time for their work: they are on call 24 hours a day as they provide support to the chiefs and assistant chiefs. Additionally, the elders have no support staff. To ease the strain caused by this method of work, the structures would need to be strengthened through the appointment of a secretary in the model of the Kuria Cultural Leaders (Council of Elders).

5.1.4 Previously, the lack of recorded proceedings has been a challenge in follow up of the cases to ensure that the decisions of the elders are adhered to. The elders now record the proceedings and have the parties sign the agreements or decisions. The elders also ensure that the proceedings are typed and these have been used in inheritance cases that have proceeded to the formal justice system. The typing is however happening around localized arrangements that are not sustainable. The traditional justice systems would benefit from financial support for recruitment of support staff to facilitate their work.
5.1.5 The elders are currently not paid and are working with non–governmental organizations in the traditional justice system who are funded to do the work. This would also minimize the instances of actors engaging in corruption to ensure that their cases are heard and determined favorably. This is particularly important if the traditional justice systems are to be incorporated into the formal justice system since the latter operates on the basis of a well-defined and financed structure. This would facilitate the provisions of administrative support for the traditional justice systems.

5.1.6 Elders working in the traditional justice systems under Article 159 (2) (c) and (3) of the Constitution should be registered and gazetted.

5.2 Substance/Interaction with the traditional justice system

5.2.1 To better align the work of the traditional justice systems with the Constitution, there is need for more training on the Constitution especially on the Bill of Rights and how it relates with the work that they do. The elders would also benefit from training on all the other aspects of the Constitution, including Chapter 5 on land, for a greater understanding of this fundamental document on which their work must be invariably be based to bring into effect Article 159 (2) (c) and (3) of the Constitution.

5.2.2 Similarly, the judicial staff would need to be trained and sensitized on the traditional justice mechanisms so that their interaction is based on knowledge and information. This would also enable the judiciary to guide the elders from a point of law as they make decisions on the various issues.

5.2.3 Ultimately, the traditional justice systems would need to be integrated into the Judiciary Transformation Framework (JTF) through operational guidelines and the development of a regulatory framework for the work of the traditional justice mechanisms. Such integration would also include a re-definition of the appellate process between the traditional justice mechanisms and the formal justice system. Additionally this would provide for clear guidelines on the enforcement of the decisions of the traditional justice systems.

5.2.4 There would also be need for legal training to enable the elders align their work with the civil and criminal procedures if they are to be integrated into the formal justice mechanisms. This would enable them take on the evidence necessary to ensure the protection of the rights of women to inheritance.

5.2.5 In formalizing the traditional justice systems, there would be need to standardize the processes including communication. The fact that elders come from various spaces even within the same communities makes the communication difficult.

5.2.6 Monitoring the work of the traditional justice mechanisms and the extent to which they coordinate with one another is also not clear and not standardized. Even though there are some organizations facilitating the monitoring of the work of the traditional justice systems.
5.2.7 The monitoring and standardization of the work of the traditional justice systems would benefit from joint trainings of elders and judicial staff, exchange visits among elders and comparative studies with organizations and countries that have used traditional justice mechanisms.

5.3.8 There is need to coordinate the activities between the actors so that they are not spending too much time replicating reports to the various partners.
## ANNEX 1.

**List of respondents**

<table>
<thead>
<tr>
<th>NO.</th>
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<td>Susan Nchagwa</td>
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<td>38.</td>
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## ANNEX 1.

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<td>42</td>
<td>Jenipher Kaingi</td>
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List of questions

These are the broad issues that would give rise to more specific questions to be canvassed in the research. They are divided into substance of the traditional justice mechanisms (S), the process (P) and the actors (A).

1. Nature and number of cases that have been addressed by the traditional structures in each area including the findings on the issues and any follow up thereto. (S)
2. How the traditional justice mechanisms obtain the cases, the prosecution of cases and the outcomes (P)
3. The guiding principles of law on which the traditional justice mechanisms rely to make their decisions (S)
4. How the traditional justice mechanisms ensure that their decisions are adhered to (P)
5. What happens where an aggrieved party is not satisfied (S, P)
6. Land ownership and land tenure structures and whether there are distinctions between the rights accruing to men and women (S)
7. Women’s proprietary rights to land and inheritance in the different communities (S)
8. Comparison with the statutory laws (S)
9. Traditional/ cultural practices that are unique to women and how these affect the rights to inheritance (S)
10. Level of integration into the formal justice mechanisms (S, P)
11. Extent to which the administration plays a role in the traditional justice mechanisms (P)
12. Place of the customary/traditional justice processes in the judicial transformation framework (S, P)
13. Place of children vis a vis their mothers in inheritance (S, A)
14. Role of women in the traditional justice pipeline (P)
15. Role and place of women as custodians of knowledge in cases of inheritance (P)
16. Place of religion in the respective cultural structures (S)
17. Place of legal aid in the traditional justice mechanisms (S)
18. Extent of interest of organizations to engage the traditional justice mechanisms (A)
19. How organizations are monitoring their work with the traditional justice mechanisms and the extent to which they coordinate with one another (A)
20. Extent to which the traditional justice mechanisms are aware of the Constitution and other relevant human rights standards (S, A)
21. What are the other needs of these mechanisms in order for them to be effective (P, A)
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Summary Of The Advocacy Forum To Disseminate The Findings Of A Research On The Role Of Traditional Justice Systems In Light Of Article 159(2) (C) & (3) Of The Constitution

Date: 26th & 27th August, 2013

Venue: Silver Springs Hotel, Nairobi

Organised By The Kenya Legal And Ethical Issues Network On HIV And AIDS (KELIN)
The Kenya Legal and Ethical Network on HIV and AIDS (KELIN) successfully undertook a two day advocacy forum to disseminate the findings of a research on the extent to which cultural structures are supporting women’s property rights in inheritance with reference to Article 159 (2) (c) and (3) of the Constitution of Kenya 2010: Mapping issues, actors, and strategies for KELIN’s Women’s Inheritance Rights Project.

The forum brought together stakeholders in the justice sector including the National Council for the Administration of Justice (NCAJ) and the Judiciary Training Institute (JTI), organizations working on HIV/AIDS, civil society organizations, and representatives of the research target group including elders and widows.

The two and a half day advocacy forum presented findings of the research, which were then discussed by the participants. They then identified gaps and made recommendations for the full actualization of Article 159 (2) (c) and (3) of the Constitution.

Recommendations from the participants touched on the future role of the local administration in relation to the work of the elders. They addressed the issue of training of the elders so that they work in tandem with the developments that are ongoing in the judicial reform processes. They also addressed the integration of the work of the elders in the plans and programs of the Judiciary Training Institute (JTI). A recurrent theme was the payment of the elders with the participants grappling with whether or not elders should be paid, and how this would then impact the organic role of the elders. A concern was expressed over placing the elders within the ambit of the judiciary, thereby having them working for the money as opposed to the current situation where the elders are seen as safeguarding the interests of the communities to which they belong. Indeed many elders work on a voluntary basis. Despite these concerns, it was also noted that the work of the elders was costly and therefore needed to come under some form of financial regulation.

**Day One**
KELIN’s Litigation & Legal Services Officer Belice Odamna took the forum through the preliminaries that included the introductions by all the participants who included village elders, chiefs and other stakeholders from the civil society. She asked the participants to share their expectations. Thereafter, the Executive Director Mr. Allan Maleche welcomed the participants on behalf of KELIN and thanked them for honoring the invitation to the forum whose objectives were:

To share KELINs experience on working with cultural structures in Kisumu and Homabay counties;
To disseminate the findings of the research on the extent to which cultural structures support women’s property rights; and
To make recommendations on how the traditional justice systems can be effectively integrated into the formal justice system.

He also gave a background to the KELIN Cultural Structures project noting that the project idea was
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conceptualized by Commissioner Catherine Mumma, based on her previous experience of working with women and the power of culture. She in particular drew from her experiences in the Kenya National Commission on Human Rights (KNCHR) where she had worked with Luo and Meru elders. The project was also based on the Health Policy initiative (HPI) of 2004 and on KELINs work from 2009 focusing on HIV, women’s land and property rights in Kisumu and Homabay counties.

Why work with cultural structures?
Mr. Maleche noted that the physical locations of the courts are inaccessible to a large population in the rural areas. The cost of litigation in the formal court systems also places the courts out of the reach of widows and orphans, a majority of whom are poor. This creates a great need for legal aid despite ongoing work by various legal aid organizations as the demand is higher than the capacity of these organizations. Additionally, the court processes are generally very lengthy, adding on the already prohibitive costs, effectively discouraging the poor, widows or orphans from following up on cases. The court process is adversarial in nature: it may be considered confrontational against the other party, which in turn hinders the reconciliation process as those who pursue their rights in court are considered enemies.

Since 2009, a total of 236 cases have been reported and taken up by the elders. Of these, 172 have been successfully mediated, and 17 semi permanent houses have been constructed for the most vulnerable widows. From the work with the cultural structures, KELIN noted the following as lessons learnt:

• It is faster to use the alternative dispute resolution methods (ADRM) and indeed these have facilitated the enjoyment of rights to property and access to justice by widows and orphans.
• The ADRM are less expensive and more efficient.

Challenges in implementing the project
There is reluctance of some donors to support the project as elders are seen as ‘custodians’ of traditions that are generally viewed as oppressive and discriminatory towards women.
• The elders work on a voluntary basis and this is a challenge, for instance where the elders are required to move around and have to incur transport costs from their own means. This has tended to discourage the work of the elders.
• There are high expectations of KELIN from the beneficiaries due to the high levels of poverty and the high number of cases.
• The widows move from one place to another and this makes it difficult to finalize the mediation process.
• In most cases, the land in dispute is ancestral, making its registration in the name of the widow almost impossible.
Mr. Maleche was of the view that Article 159 (2) (c) and (3) of the Constitution of Kenya 2010 provides a good backing to the work of the cultural structures project (CSP) and that the advocacy forum would help identify strategies to strengthen the KELIN project and also formalize the cultural structures project generally.

In an interactive session moderated by Nancy Ondeng’, Project Coordinator-CSP KELIN, the participants posed questions and made comments in reaction to Mr. Maleche’s presentation, touching on land, inheritance and succession in customary settings.

In the next session the consultant, Carole Ageng’o presented research findings on the Trends, Actors and Initiatives that Impact Women’s Inheritance Rights. She noted in her preliminary remarks, that the subject of the research was broad and the issues diverse. The research therefore was not representative of the 42 official tribes in Kenya as it did not even cut through the deep diversities of the three groups of tribes that were sampled. Following her presentation, the following is a summary of the comments the participants gave in an interactive session:

**Comments**

Elders are doing good work but the lack of payment has had a negative impact on the effectiveness of traditional justice systems. The chiefs and village elders are paid by the government as part of the local administration of which they are part. The cultural elders support the work of the local administration but do not get paid. There is need for some form of remuneration for the elders.

- Elders know everyone who owns land in the village and those who don’t but the formal system can be corrupted to turn the tables
- There are two ways to elect the village elders:-
  - The chief can choose the elder based on various criteria.
  - The chief asks the villagers to choose an elder and they are under the provincial administration and on a voluntary basis.
- A participant said that the selection of elders has become difficult due to the fact that politicians will try and influence this process to ensure that they have elders who will do as they say.
- Another participant spoke about the selection of elders in his area noting that:
  - The elders go to the community and consult the members on whom they want to be their leader.
  - They have resisted political influence.
  - The chiefs and assistants have their miji kumi (ten households) elders who they elect.
  - The elders become chairmen of clans and it is the work of the community to elect their leaders.
- Another participant suggested that in the selection of elders, consideration should be made of the past development and leadership capacities of the prospective elders, to include retirees and teachers, who are leaders in their professions. These should be able to take on leadership as elders in the community.
- Some leaders were chosen due to their lineage. For example one would become a chief or elder if their father was a chief, and this is because it was assumed that by virtue of this fact, they have leadership qualities.
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- Chiefs are now reformed and are doing the right thing. They appoint the elders after performing background checks. They arbitrate and where this fails they forward the matters/cases to court where these elders can be mediate.
- A participant commended KELIN on the great work they are doing in building the capacity of elders and said that this would enable them to effectively carry out their duties.
- There are some churches that make false prophesies to intimidate vulnerable women and violate their rights, while some actually violate the rights of women. Religion is therefore not always supportive of women’s rights.
- Most project interventions do not have an inbuilt monitoring and evaluation (M&E) system and do not therefore go back to the project to gauge its effectiveness. Most implement the projects and leave. A different perspective to this is that several interventions are not sustainable beyond the lifetime of the project for financial reasons.
- Nobody has dispossessed the Kenyan people more than the provincial administration and the formal structure is the biggest hindrance to access to justice.
- Efforts should be made to study traditional law because it exists and is currently in use. Research will lead to codification and documentation and in that way spread its applicability.

The participants also asked the following questions:-

Question: Due to the change in the constitution, does the government have plans to deal with the backlog of cases in court and move them to the traditional justice systems?

Answer: The judiciary has put in place several mechanisms to address the backlog of cases, including the establishment of Court Users Committees (CUCs) that are one way of integrating the traditional justice systems. The implementation of Article 159 (2) (c) and (3) is still in its formative stages and there is scope to further engage the judiciary, with a view to ensuring full integration of the traditional justice mechanisms as a way to addressing case backlog.

Question: During the FGDs in the research, what age part of the considerations?

Answer: As a social inquiry (as opposed to a scientific sampling method due to limited time) the age, education and religion of the respondents was not considered. The general representation was membership to a cultural structure on the one hand, and being on the demand side of the cultural or traditional justice mechanism on the other.

Question: Does a woman’s HIV status affect the manner in which cases are handled?

Answer: The work of KELIN is grounded on HIV, thus this does not affect the manner in which the cases are handled.
Question: What was the focus of the study and the justification of using the elders? Did you find cases where culture has supported women’s rights? Did you also find out how to integrate the traditional system to the formal justice system?

Answer: The focus was to establish the underlying issues in the traditional justice systems. The political position and the anointing of elders by politicians did not come out in the research. The reasons for the research, as mentioned in the objectives, was to establish the extent to which traditional justice mechanisms are helping improve access to justice for women on their land rights. It covered the substance and process of the systems and the actors in the traditional justice systems.

Question: How does KELIN intend to work with CIC?

Answer: When reviewing legislation, there is a lot of participation from different parties including the elders in order to capture their input and this is a good way of marrying traditional and formal laws. It is important to make clear the basis or reason to engage the cultural structures. Currently there are efforts to integrate the two systems. The formal system has caused more abuses to women’s rights than the traditional system as they were meant to ensure that the black man conforms to the colonizers. KELIN will work with the CIC and give comments when the bill to actualize Article 159 (2) (c) and (3) of the Constitution.

Question: How can we make sure the traditional mechanisms are part of the law?

Answer: FIDA worked with elders from Tharaka where there are high numbers of defilement cases but the different clans have treaties amongst them and cannot take each other to court. They have paralegal systems whereby the elders are trained paralegals.

Instances where culture has supported women

A participant spoke about the work that Women Fighting Aids in Kenya (WOFAK) has done through the ‘Stop it Now’ program. Under this program, WOFAK has worked with traditional elders to ensure that women’s land rights are protected. If a woman is widowed and has land she has been tilling for 5 years and is faced with a situation where a brother-in-law wants to dispossess her of this land, the elders step in and follow the lineage to ensure that the widow keeps her land.
Day Two

The participants were divided into three groups to analyze the actors, identify the ongoing initiatives, identify the gaps in the system and make recommendations for strengthening these systems. The groups were tasked to:

1. Propose the structural entry points to Article 159 (2) (c) and (3).
2. Propose 3 key process issues that would facilitate the implementation of Article 159 (2) (c) and (3)
3. Identify 3 issues (in line with KELINs research) that each of the organizations could address moving forward, to enhance women’s land and property rights

Stakeholders

- The community; council of elders; different government agencies including the JTI, KLRC and the AG; the local administration and the civil society.

Ongoing initiatives

- Kenya Land Alliance is working on property ownership for women and acquainting them with the land laws. It has worked with four Councils of Elders namely the Luo, Meru, Kalenjin and the Kaya.
- Shelter Forum has worked with Council of Elders generally even though the group was not too sure of the project that this organization undertakes.
- Institute of Surveyors of Kenya
- ADRA Kenya is working with Kuria Council of Elders on issues of FGM
- LANDESA is working with the Maasai Council of Elders on Land
- JTI has conducted a pilot project on the role of the Council of Elders in promoting access to justice in Isiolo County.
- KELIN undertakes capacity building for elders on land and property rights, documentation of cases resolved through the Cultural Structures Project.

Challenges

- Councils of Elders and village elders seem to have parallel roles that are not well defined.
- Appointment of elders is taking place at two levels that appear to be conflicted between the political appointees and those appointed by tribal communities. A clearer definition of the roles would help resolve this.
- There is a general lack of political will among the elders to change status quo, for example in Samburu where there has been no challenge against some of the cultural practices that ultimately affect the rights of women, such as abortion and FGM.
- Work with the elders is not always consistent. While it is hard to work with various elders eg. Njuri Ncheke, some are easier to work with such as the Luo Council of Elders because of the statistics of high HIV prevalence.
Some of the elders have failed to live up to their original mandate due to negative attitudes of the communities towards them. In these instances, they end up being used in political campaigns.

Gaps in the formal and informal justice systems

- There is a near complete absence of documentation making it impossible to make reference to the findings of the elders
- There is a need to codify culture so that everyone can have an understanding of its main intention.
- There is need for literacy training for the elders to enable them know how to capture the cases, the use of legal language and the format that should be used to store information.
- The informal justice system is least understood hence condemned unnecessarily.
- There needs to be an assurance of equity and protection of human rights, to the members of the community, in a male dominated cultural system.
- There should be a clear separation between religious and cultural practices.
- There needs to be a regulatory framework on the procedures to be followed in the informal justice system.
- The formal justice system is largely inaccessible to the rural population due to a number of factors such as the;
  - Language used
  - Physical location of the courts
  - Cost implication is too high for majority of the rural population
  - Cases may take a long time before they are resolved
  - Attitude of judges and magistrates is not welcoming
  - Adversarial nature of the court process

Opportunities for engagement

- Targeting elders specifically in law making processes within the already existing structures.
- Undertake a comparative study with other countries such as Rwanda, which has used the Gacaca courts, and see how this can be modeled to suit the Kenyan situation.
- Organize exchange visits between elders of different communities to serve as learning experiences. These can also be intra-community so that for example, the Maasai elders from Narok visit those from Kajiado etc.
- Demonstrable willingness of various stakeholders to engage the traditional justice systems
- Article 159 (2) (c) and (3) of the Constitution provides an avenue for engaging the traditional justice system as a form of alternate dispute resolution mechanism.
- Culture is dynamic and often adapts to the realities of the day. This can be used to ensure that the rights of women are protected across the board
- JTI proposes to hold a forum in December 2013 to explore the opportunities for engaging the traditional justice mechanisms in the context of the judiciary transformation framework
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- The Judiciary would be the best entry point through practice rules and regulations. If the elders are registered at the county level, this would make enforcement easier.
- Recognize Traditional Justice Systems generally and at the pre trial conference in all cases in the formal justice systems as a means to ensure that all other methods are exhausted within the meaning of Article 159 (2) (c) and (3)
- Appeals would be made easier if the elders are registered and the cases well documented
- The courts should cover the costs of the elders
- The Traditional Justice Systems should only deal with misdemeanors as opposed to felonies.
- All CSOs and stakeholders should participate in harmonizing the training curriculum
- Organizations should work on the basis of smaller working groups to address the issues affecting the work of the traditional justice systems.
- The efficiency of the judiciary will inform the efficiency of the traditional justice systems and will make it easier to incorporate into the formal system.

Strengthening Roles

- There is opportunity to redefine the role of the council of elders and in so doing also understand the common issues that cut across the different communities.
- Engage the elders and let them discuss their issues as opposed to external parties discussing these issues and hoping there will be reform in the work of the elders.
- KELIN should coordinate the different organizations that are working with the cultural structures.
- Where culture is the issue of contention, the counsel of the elders should be sought before the case is taken to the formal justice system.
- The traditional justice system should be incorporated into the formal justice system so as to facilitate the referral of cases between magistrates and the elders.
- There is need for financial support for the work of the elders and a balance created to ensure that the elders receive financial support without killing the spirit of volunteerism.
- The elders should be trained to enable them undertake their work more effectively, and this should include training on the Constitution.
- The traditional justice mechanisms should be supported financially and administratively.
- The work of the elders should be standardized even as the integration into the formal justice system continues. Such standardization should include the jurisdiction and the substance of the various communities that use the traditional justice mechanisms.
- The criteria for choosing or election of elders should be clarified and this should be informed by the existing literature on the traditional justice mechanisms.
- Engage the Court Users Committees as a means to establishing the role of, and extent to which, the work of the elders is affecting access to justice.
- Engage the Committee of Experts to understand the thinking behind Article 159 (2) (c) and (3)
- Have elders listening to cases at different levels in the family, the sub clan, clan and tribe:
- The decisions made at the family level should be kept there. However, copies should be given to the chief.
Elders should be provided with some form of identification. Using the clan system but basing the choices on acceptability, both formal and cultural norms, knowledge, literacy. This will lead to elders commanding respect at the different tiers.

The progressive cultural practices should be documented.

**Entry points for engagement**

- The judiciary would be the best entry point. The council of elders is already working in dispute resolution but there is need for a regulatory framework for the elders.
- Documentation and record keeping should be done clearly and the same should be availed to the disputing parties.
- Encourage solutions from the disputing parties that would lead to a lasting impact.
- The parties should sign consent forms where an agreement is reached.
- Timelines and efficiency should be standardized so that the elders are able to undertake their work without delay.
- Appellate process is not clear and parties are therefore not able engage in any appellate process should they wish to.
- Provide clarity on whether the traditional justice systems should also handle criminal matters such as rape, murder and assault.
- Train Judges and Magistrates on land and inheritance issues as relates to the different cultures.
- Address Traditional Justice System matters with the Alternative Dispute Resolution Committee.
- CLE calendar for the coming year- sensitize lawyers and strengthen the Court Users Committees.
- Development of guidelines that can steer the Traditional Justice Systems and would be discussed by tribes and these would not be homogenous due to the fact that the tribes vary.
- The issues that would be covered in the guidelines would include:
  - Filing of cases and the types of cases to be filed.
  - Venues and times for the hearing of cases.
  - Selection and identification of elders, et cetera

- Community sensitization can be done by all stakeholders.
- KELIN to take the lead for the CSOs and collaborate on the guidelines put forth.

**Conclusion**

The meeting was closed by the Executive Director, Mr. Allan Maleche, who thanked the consultant for the work done from the research and during the forum. He acknowledged and thanked the stakeholders for what in his view had been a very rich and fruitful conversation through group and plenary discussions. Noting that such forums were essentially platforms for sharing knowledge, he expressed confidence that all present had learned something. Ongoing work needs to ensure that everyone is able to access justice especially on land and property rights. He thanked everybody for coming and participating actively, and urged them to turn the discussions into action.