Traditional Justice Systems in Kenya:
A Study of Communities in Coast Province, Kenya

FIDA – KENYA
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<th>Description</th>
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<tr>
<td>TJS</td>
<td>Traditional Justice System</td>
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<tr>
<td>CJS</td>
<td>Community Justice System</td>
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<tr>
<td>CIPK</td>
<td>Council of Imams and Preachers of Kenya</td>
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<td>FGM</td>
<td>Female Genital Mutilation</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<tr>
<td>WPDC</td>
<td>Wajir Peace and Development Committee</td>
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<tr>
<td>IPRC</td>
<td>Isiolo Peace and Reconciliation Committee</td>
</tr>
<tr>
<td>PRSP</td>
<td>Poverty Reduction Strategy Paper</td>
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<td>PRI</td>
<td>Penal Reform International</td>
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Foreword

The Swahili have a saying ‘Fimbo ya mbali haiui nyoka’ which literally translated states; the stick that is far cannot kill a snake.

The justice system in Kenya faces a myriad of challenges including, high cost of litigation, delay in conclusion of matters, complicated court procedures which all contribute towards hindering access to justice especially for the indigent.

As revealed in the study many women especially in the rural areas resort to the informal community justice systems for redress of violations, these informal structures are therefore for many women the stick that is close at hand.

FIDA Kenya is constantly working to improve access to justice for her constituents. With this in mind FIDA Kenya commissioned this research to inquire into the opportunities for women to access justice through the informal justice systems.

We are optimistic that if the concerns raised in this study are addressed the traditional justice systems will go along way in complementing the formal justice system.

Violet Awori
Chairperson
FIDA Kenya.
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Patricia Nyaundi
Executive Director
Introduction

Objectives of the Research

The main objective of the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.

Working Definition of TJS

Since Traditional Justice Systems tend to be culturally specific, there is no universal or cross-cutting definition of Traditional Justice Systems. Hence concepts like Community Justice System (CJS), traditional, non-formal, informal, customary, indigenous and non state justice systems are used interchangeably in different contexts to refer to localized approaches by communities to attain justice. For purposes of this research, the following was adopted as a working definition of TJS: Traditional Justice Systems refer 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 Field Research

The field research was undertaken among various ethnic communities in the Coast Province as follows:

<table>
<thead>
<tr>
<th>District</th>
<th>Name of Community</th>
<th>Name of TJS</th>
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<tbody>
<tr>
<td>Mombasa</td>
<td>Multi-ethnic</td>
<td>Council of Imams and Preachers of Kenya (CIPK)</td>
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<tr>
<td></td>
<td></td>
<td>Wazee wa Mttaa</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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<tr>
<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></td>
<td></td>
<td>Had Gasa</td>
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<td></td>
<td>Pokomo</td>
<td>Gasa</td>
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<td></td>
<td></td>
<td>Kijo</td>
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Review of Literature on Traditional Justice Systems

Different terms have been used in relation to systems of justice that are outside the official structure of formal courts. Such terms include “informal justice”, “popular justice”, “community justice”, “non-formal justice” and “non-state justice systems”. The meaning of each of these terms varies depending on the perspective of its proponents, and none is free from controversy. According to (Merry 1993), the term “popular justice” has sometimes been used synonymously with informal justice to describe processes and rules which are informal in ritual, non-professionalized and local. The term is also used to describe justice that is community based or that is based on widespread public support (Feenan 2002). However, it has been pointed out that popular justice is not necessarily informal, and often reflects attempts to replicate or appeal to the symbols of the official legal system (Santos 1982). The terms “non-state justice systems” and “non-formal justice systems” have been generally used to label all ordering that occurs outside of the state’s immediate control, whether complementary to or in opposition to the state (Scharf 1998; Musembi 2003).

Anthropologists of the structuralist-functionalist school generally posit that patterns of social ordering determine the forms of dispute resolution in any given society. Thus their analysis has been mainly concerned with the form and structure of societies and with the arrangement of persons in social relations to one another, and their emphasis was on harmony and order in society. According to this school, in simple, pre-industrial societies where relations are multiplex (involving various interests which are continuing), parties will rely on negotiation or mediation in settlement attempts which generally lead to consensus and compromise. Conversely, in more complex industrialized societies where parties are mostly involved in simplex (single interest) relations, reliance is mainly on adjudication or arbitration in settlement attempts which lead to “win-or-lose” decisions (Gluckman 1955; Radcliffe-Brown 1952; Van Velsen 1964).
In Kenya, traditional justice systems as an area of social inquiry is fairly recent. However, there exist early ethnographic studies of individual ethnic communities in Kenya. These studies tended to focus more on the existence, organization and functionality of the traditional justice systems but not in relation to justice. Examples of such studies include; The Gada System, Legesse, (1973) and Hogg (1981); Kenyatta, (1971) in the study of the Kikuyu; Mwanzi, (1975) and Kirui, (2006) in the study of the Kokwet of the Kipsigis Mutsotso et al (1994) in the study of the Kokwo. However, these scholars of the 1930s to 1950s studied African societies as if they were closed and static, and they seem to have ignored the fact that these societies were experiencing colonial rule at that time, with concomitant fundamental socio-economic changes. The assumption was that current non-state justice systems in Africa are merely a continuation of traditional (customary) systems that existed in the pre-colonial era, albeit operating in altered socio-economic contexts. However, it should be noted that traditional forms of dispute settlement and normative ordering have evolved in response to current circumstances so that it is virtually impossible to find “pure” traditional systems.

Kimathi, (2005) indicates that at independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized TJS would naturally die, but this has not happened. According to Penal Reform International (PRI) (2000), informal or traditional modes of settling disputes have remained as widespread as ever.

Some of the reasons for the persistence of TJS in Africa despite the introduction of Western-based state law systems include the incomplete reach of the state’s legal structures, due to the weak nature of most African states. People face geographical and financial constraints in accessing the formal justice systems. Most courts are situated at the administrative headquarters and are therefore not easily accessible to individuals. The cost of traveling to court is prohibitive and especially when a litigant is required to make several visits to court as matters are rarely concluded at the first hearing. Legal fees that is money paid to court as filing fees and advocates fees contribute to raise financial cost of litigation. The long delays, cumbersome
procedures and technicality of legal proceedings, coupled with legal illiteracy exacerbate the alienation of the population from the court process (Scharf 1998; African Rights 1996). In addition, state systems have perpetuated the authoritarian colonial “law and order” orientation, which does not focus on meeting the needs of the people for substantive justice. State systems are viewed as individualistic and rule-oriented, and thus antithetical to the communalistic, process-oriented nature TJS, which emphasize restoration of harmony and cohesion in the community (Elechi 2006). Where the state fails to serve the needs of its citizens, the citizens tend to create their own structures and processes, which express their values, in order to meet their needs (Scharf 1998).

Studies relating to TJS, human rights and access to justice emerged from the early 2000’s. In 2003 the International Commission of Jurists, Kenya Chapter (ICJ-Kenya) commissioned a study on Community Justice Systems (CJS) (2003). The study covered several ethnic and multi-ethnic CJSs including: the Njuri Ncheke of the Meru Athuri Aitora of the Kikuyu; Kokwo of the Pokot; Ngaisikou Ekitoe of the Turkana; and Oo-olpaiyan of the Samburu. The study also detailed how multi-ethnic CJS function, for example the Wajir Peace and Development Committee (WPDC) and Isiolo Peace and Reconciliation Committee (IPRC). Both of them involve local approaches crafted by several ethnic communities on how to resolve different types of conflicts and how government is enmeshed in them. The ICJ study also details the existence of CJS in urban informal settlements of Nairobi especially Kibera and Mukuru slums. The study demonstrates that local communities, whether urban or rural, extensively utilize traditional or non-formal approaches in resolving disputes. Further, lack of access to justice is not only a rural women’s problem but is also experienced by poor urban women, many of whom inhabit informal settlements.

It is apparent that local people perceive of TJS as: incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred. However, the ICJ study also demonstrated that most TJS were male dominated and that women often faced the challenge of lack of access to fair
justice. As a consequence most women preferred accessing formal justice systems in spite of its many bottlenecks. Further, all TJS surveyed had little or no knowledge of the provisions of existing human rights instruments.

Osaghae (2000) reported that TJS remain localized and therefore unable to deal with the expansive nature of modern conflicts, hence they are limited in the extent to which traditional knowledge can be applied. However, examples from WPDC and IPRC show that inter-ethnic approaches effectively resolve large-scale disputes. Menkhaus (2000) showed that TJS are dynamic. They keep changing and adjusting to incorporate new realities in the social milieu. Kimathi (2005) indicates that TJS have weak linkages with the formal justice systems. However, the lack of access to justice by many does not lie in exclusively relying on either of the systems. Hence the solution is not in formalizing the informal systems, nor making the formal informal, but a hybrid of the two.

Muli (2003) studied the experiences of female survivors of domestic violence in informal dispute resolution processes in both urban and rural settings in Kenya. She found that women who experience domestic violence prefer informal forums for resolving disputes, such as clan elders and chiefs, as they find these more private and less intimidating, and provide the woman the opportunity to “tell her story” unhampered by legalistic rules of evidence. At the same time, however, informal forums reflect patriarchal attitudes which sometimes operate to the detriment of the woman, for instance the elders’ exhortation to women to persevere and return to the matrimonial home despite physical abuse.

In a study of non-formal dispute resolution processes in a slum area in Nairobi, Kamau (2007) observed that these processes operate in a wider socio-economic context and are integrated into the social and economic fabric of life. Thus, for instance, the mandate of the village committees extend beyond hearing disputes to other important aspects of community life such as security, environmental management, health and civic education. Further, the outcomes of the dispute resolution process tend to reflect unequal socio-economic relations, for example in disputes between landlords and tenants, or husbands and wives. However, the participatory and problem-solving approach of non-formal forums has potential for democratizing dispute resolution.
Kamau also found that there is a high level of interaction between non-formal and formal dispute resolution processes, which to a large extent blurs the boundary between the official and unofficial. This is especially seen in the ambivalent position of chiefs and village committee elders, who are agents of the provincial administration but at the same time have a large measure of legitimacy as community leaders. Despite the interaction between formal and non-formal systems, policy making and resource allocation has focused only on the formal system. She argues that there is need for reform of the justice system in Kenya in a way that captures “the best of both worlds”, that is, that incorporates the informality, flexibility and diversity of non-formal systems while maintaining minimum standards of fairness and non-discrimination found in formal systems.

Musembi (2003) reviewed the experience of non-formal justice systems in the three East African countries – Kenya, Uganda and Tanzania - in which she reported that governments' engagement with TJS justice systems has been sporadic and at the level of rhetoric only. The momentum to improve non-formal justice should be pursued alongside efforts to decentralize and streamline formal justice structures to enable people to choose the system they prefer to access justice. The high utilization of TJS in rural and urban informal settlements areas does not necessarily imply that it is preferred, but that it could be the only option.

Musembi noted that support to institutional linkages with the judiciary is necessary in order to open up avenues for the application of human rights principles to the operation of non-formal justice systems. Hence people’s access to higher courts that are vested with power to uphold constitutional rights should not be blocked. Reform efforts could start by undoing legal arrangements that amount to such restriction. An example is section 82(4) of the Constitution of Kenya, which exempts personal laws (customary and religious family laws) from application of anti-discrimination provisions. However, proposals for reform will need to take into account the concerns of different interest groups, such as the Muslim and traditionalist groups.
Research Methodology

The research adopted a multidisciplinary approach and, in addition to law, drew from the insights of gender studies and sociology. The field research was undertaken by three consultants from each of the three disciplines of law, gender studies and sociology. Each research had specific terms of reference. While the researchers had regard to the overall objectives of the research, each one focused on a specific topic in order to reflect their disciplinary competencies. This approach was adopted in order to arrive at a more nuanced picture of the research field. Each researcher was mandated to document a case study of a dispute in one of the selected communities. The final reports of the researchers would contain recommendations for reform.

Fieldwork tools from sociology and anthropology were used in the study, including focus group discussions, gathering information from key informants, and participant observation. Meetings were also held with women’s groups and councils of elders in each of the ethnic groups visited. The fieldwork was undertaken over two weeks. The field researchers wrote daily reports on their main research findings, which were subsequently discussed among the team members, thereby ensuring a multidisciplinary/interdisciplinary approach of the research findings. All preliminary key findings and key recommendations were discussed and a set of joint recommendations was agreed upon.
4.1 Structure, Composition and Jurisdiction of TJS

Structure: TJS vary from community to community and have various names given to them. In most of the communities surveyed, there is a hierarchy of TJS from village, locational, divisional and district levels. TJS members are predominantly elders drawn from the community, except for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of Imams and religious leaders. TJS members are mostly elected by community members, but in some cases they are appointed by the chiefs.¹

Composition: In most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority. Two exceptional cases are the Had Gasa of the Orma community and the Kijo of the Pokomo community, which are TJS made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male TJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.

Jurisdiction: At the village and locational levels, TJS mostly deal with family and neighbourhood disputes, such as marital conflicts, parental misconduct, juvenile misconduct, abusive behaviour and boundary disputes. They also hear petty criminal offences such as theft and assaults. At the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Some TJS mediate in serious conflicts to prevent family feuds and cleanse the community. Women-only TJS deal with matters related to women’s sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM. The spiritual Kaya among the Digo is concerned only with spiritual matters and is not involved in resolution of disputes.

¹ Chiefs are administrative officials at the locational levels who are appointed under the Office of the President.
4.2 Procedures in the TJS

Procedure: Proceedings usually involve a complaint being brought to the lower level TJS, often after the family has been unable to resolve the problem. The respondent is summoned (by word of mouth or sometimes in writing) and a date is set for hearing of the matter. In some TJS a file is opened for the matter. At the hearing the complainant is given a chance to give his/her side of the matter and also to call witnesses in support. The respondent thereafter gives evidence and also calls witnesses. The TJS members deliberate and then reach a decision, which is delivered either on the same day or communicated at a later time. If a party is dissatisfied with the decision he/she may refer the matter to a higher level TJS, for example at the divisional or district level. If still not satisfied, a party may appeal to the chief. In the case of dissatisfaction with an Imam’s decision, the matter may be referred to the Kadhi’s court.2 Where a TJS’s decision is not complied with, the matter may also be referred to the chief.

Cost: A payment (usually between Kshs. 200-300) is usually paid prior to the hearing, although in some TJS (for example the CIPK) there is no payment. In some TJS an additional fee of about Kshs. 200 is payable before the decision of the TJS can be released. In some TJS a non-monetary fee applies, for example a goat. In others there is no set fee but the disputing parties are expected to give token after completion of the case in appreciation of the work of the TJS.

Enforcement: Remedies range from apology, fines and physical punishment depending on the type of conflict. In most cases enforcement of decision by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only Had Gasa punishment may be meted out in the form of beating. The chief is usually notified of such

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2 Kadhi’s courts are established by statute to deal with disputes between Muslims involving personal law matters such as marriage, divorce and inheritance.
punishment. Compliance with TJS decisions varies. In some TJS, enforcement is weak and decisions are not always adhered to, while in others, particularly where there are spiritual sanctions, the compliance rate is very high.

4.3 Women’s Participation in TJS

Participation as Members: In most TJS membership is open to men only, and women are therefore excluded. In a few cases there are women members, but their function is mostly restricted to issues involving women’s sexuality and social issues such as HIV/AIDS, FGM etc. In Mombasa there seems to be more involvement by women; for instance one TJS (Bamburi) is chaired by a woman, and in Jomvu Kuu there are six women to two men in the TJS. However, in a number of TJS with female members, they do not attend TJS sessions for fear of the male members, largely due to cultural beliefs that restrict women’s interaction with men.

There are two exceptional TJS which are composed of women only, namely the Had Gasa of the Orma and the Kijo of the Pokomo.

It should be noted that the Had Gasa in particular is very powerful and can deal with both men and women. They can impose severe punishment, for instance beating, and are feared by everyone, particularly because of the spiritual sanctions such as curses that they are known to impose. The compliance rate of the Had Gasa’s decisions is therefore very high. In one case for instance the chief had to apologise to women in his community for his offensive conduct due to fear of being cursed by the Had Gasa. The Kijo have also been influential in initiating peace talks between the Pokomo and the Orma which have resulted in the resolution of conflict between the two communities.

The Orma are a pastoralist ethnic group with close ties and traditions with Boran of northern Kenya and Southern Ethiopia. They practice female genital mutilation (FGM). They also practice Islamic faith. Orma women are strong proponents of FGM.
In 2006, the Council of Imams and Preachers of Kenya (CIPK) held a rally in Garsen town attended by men, women and youth to sensitize the people against the dangers of FGM. The Imams spoke in Swahili while the area chief interpreted into local Orma language. The Imams appealed to the people and women in particular to stop the practice. The Imams enumerated the complications women who have undergone the practice faced especially during child birth. However, Chief kept over-emphasizing, giving unnecessary details and adding his own personal comments about FGM such as:

- Women who are circumcised have no sexual urge
- FGM is responsible for many divorce cases because men find no pleasure in women who are circumcised
- Women who are circumcised have problems in pregnancy and child birth
- That women who are circumcised are too open to elicit man’s pleasure
- Circumcised women have to be cut twice in order to have sex
- FGM is a bad practice

The women felt undressed in public by their Chief given his over-emphasis and unwarranted details. These comments infuriated and embarrassed women in public since the rally was attended by their children, grand children and in-laws. In response, the women publicly protested against the Chief and staged a mass walk-out from the rally. Had Gasa was immediately convened at the gazeba and deliberated the conduct of the Chief. They summoned the Chief to appear before them but he declined. In response to his declined to heed their summon Had Gasa planned to retreat into seclusion on the forest to curse the Chief. Other elders appealed to the women not to punish and embarrass the Chief but this was ignored.

For fear of the imminent dreaded curse, and on realizing the seriousness of the women, the Chief quickly dispatched his mother and uncle to intervene and appeal to the women to spare him and accept his apology for offending them. The apology was accepted but the Chief was fined a cow which he paid to the women. This cow was slaughtered in his home to appease the women. The food was shared between the women and Chief’s family and the Chief was subsequently cleansed by women for wrong doing.

Some men-only TJS, for example in Mombasa stated that they were open to having women members provided that they learnt Islamic law. These TJS also indicated openness to having youth members.
Participation as Litigants: Women participate in TJS mostly as litigants. In general, access to TJS is open equally to men and women. However, there are some factors that affect women’s ability to access TJS as well as the quality of outcomes for them. Lack of self-confidence and fear may cause some women not to use TJS. There is also a perception by women of bias against them on the part of male TJS members which discourages women from pursuing claims. Traditional beliefs are also used by TJS to deny women certain entitlements, for example inheritance to land.

4.4 Interaction between TJS and the Formal Justice System

There is a high level of interaction between TJS and the formal justice system. Such interaction includes:

**Appeals:** Where a party is dissatisfied with the decision of a TJS, the matter may be appealed to the chief or the Kadhi as appropriate. At the hearing of the appeal, the chief will sit with one of the elders who had previously heard the matter at the TJS.

**Referrals:** The TJS may refer matters to the chief or police, for instance serious criminal cases such as homicides or robberies. In cases of a party’s non-compliance with the decision of a TJS, the matter may also be referred to the chief. Likewise, the chief, police, Kadhi’s court or formal court may refer matters to TJS. In cases of appeals or referrals, the file opened for a case at the TJS will be used by the chief, Kadhi or formal court.

**Appointment:** Village elders in some TJS are appointed by the chief.

**Community mediation:** Some TJS, for instance the Kaya get involved in the adjudication of serious cases, such as homicide or rape, in order to restore social cohesion and to prevent family feuds. Sometimes the TJS will mete out punishment, for example a fine in addition to the sanctions imposed by the formal system.

Relations between TJS and the formal system are largely harmonious, and there is mutual recognition of each other’s sphere. However, there are sometimes tensions between the two systems, mostly owing to suspicions arising from lack of a clear understanding of the other’s functions.
A woman in Kilifi had difficulties with her husband and was chased away from her matrimonial home. She left with a suckling baby leaving behind other children with her co-wife. The step-mother mistreated these children who finally ran away to their mother. The husband reported this matter to the wazee wa magogo demanding custody of his children. The wazee decided that the father should have the custody of the children as a woman has no child. To them, a woman goes empty handed in her matrimonial home and must leave so. It happened that as the hearing went on an old woman who had come to see the chief on her personal issues sat as an observer. When the matter was finalised, she sought audience with the chief. The chief was happy to see her and said she would have been of great help if she had participated in adjudicating the conflict. The chief sought for her opinion. The woman replied that the matter was too sensitive for the wazee and the chief to decide. She advised the chief to refer the woman to a children’s officer. The chief gave the woman a letter to take to the children’s officer. The woman was eventually granted custody of the children.

4.5 Women and Men’s Perceptions of TJS

Men’s perceptions: Men on the whole perceive TJS to be fair and accessible. They find TJS impartial, accessible, available and affordable. They also appreciate the fact that TJS handle matters in an amicable way, for instance even in serious crimes such as homicides, the TJS mediates in a bid to prevent feuding between families and restore cohesion to the community. TJS are also perceived as a source of ethnic and cultural identity.

Women’s perceptions: In general, women consider TJS accessible in terms of availability, proximity, affordability and timeliness compared to the formal justice system. The formal justice system is viewed as intimidating, expensive and subject to long delays. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased.
Many women also feel left out of decision-making and would wish for women to be members of the male-only TJS.

against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operate to deny women’s claims, for example to land. TJS are also vulnerable to vested interests of the community. Women’s lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows. The fact that some elders are appointed by chiefs also creates room for cronyism. Many women also feel left out of decision-making and would wish for women to be members of the male-only TJS.

A woman in Kongowea town of Mombasa district bought a plot and built on it. The remaining part of the plot was not enough to put up another house. A wealthy man came and wanted to buy this remaining part of the plot. He went to the village elder and only reappeared only to ask the lady to show him where the beacons of her plot ended. Meanwhile, he had found out that the lady is a widow with six children.

In February 2007, the village elder demarcated the woman’s land to the man, where upon the man built a house on the plot without leaving any space for drainage. The woman complained to village elder but he ignored her declaring that she had no brains. The woman went to the chief and was given a letter to stop the construction, but the man dismissed it. She went to the District Officer (DO) and was given another letter to take to the chief, but the chief did not respond. The DO, on the other hand, would not act until he gets a referral letter from the chief. The woman believes that she has lost her plot to the wealthy man because she is a woman, widow and poor.

However, it should be noted that women-only TJS are perceived as fair and non-discriminative. Further, women generally have confidence in some men-only TJS, particularly where its members are elected (for instance Wazee wa mtaa in Mombasa).
4.6 Compatibility of TJS with International Human Rights Principles

The procedures of TJS are generally compatible with international human rights principles as evidenced by the following indicators:

- justice is accessed within the shortest time;
- evidence is the key factor considered before reaching a decision;
- both parties and their witnesses, if any, are given a chance to be heard;
- parties are afforded the right to have witnesses against them examined;
- a respondent is informed as soon as practicable the wrong she/he is accused of;
- hearings are mainly public; private hearings are held when the interests of the private lives of the parties so require;
- hearing is conducted in the local language of the parties and therefore parties can ably express themselves;
- the chair of the TJS disqualifies himself from presiding over a hearing if one of the parties is a relative;
- a party dissatisfied with the decision of the TJS has a right of appeal to a higher level of the TJS or to seek justice in the formal system.

However, TJS suffer from some deficiencies vis-a-vis international human rights principles which include:

- Bias against women and the indigent in decision-making
- Inadequate powers of enforcement
- Inadequate knowledge of human rights principles
- Cruel and degrading punishment in some cases.
Conclusion

TJS play an important role in the delivery of justice to local communities. TJS have many advantages as they are readily available, accessible, affordable and timely in their decision-making. This is significant bearing in mind the formidable barriers faced by local communities in accessing the formal justice system. The procedures followed by TJS allow opportunity for parties to be heard and to appeal to higher levels if dissatisfied with the decision of a TJS. Moreover, TJS serve the function of maintaining cohesion and harmony in the community, and are also involved in social issues in the community, such as HIV/AIDS, FGM, environmental management, boundary demarcations, etc. and in some cases spiritual matters. This provides a more holistic approach to conflict management than that of the formal courts.

However, women are restricted in their participation in TJS, both as decision-makers and as litigants. Membership in most TJS is open to men only, and even where women are allowed to be members, their role is limited to matters relating to women’s sexuality and social issues, such as HIV/AIDS, FGM and rape. Gender bias and use of certain cultural norms often operate to the detriment of women’s claims, particularly poor women.

It should, however, be noted that women do exercise some power, albeit in limited fields. For instance women members of TJS play an important role, in as much as social issues and issues of women’s sexuality affect the community at large. Decisions of women-only TJS are generally complied with. Openness of some men-only TJS to incorporate women, provided they learn Islamic principles, opens up space for more women’s participation in TJS decision-making. There is therefore need to strengthen women’s role in TJS, both as decision-makers and as litigants. This would entail mainstreaming gender in TJS, strengthening women’s capabilities as well sensitizing TJS about gender issues.
Further, despite the large degree of interaction between TJS and the formal legal system, there is no clear linkage system between the two systems. There is a need for clear institutional linkages that would, for instance, enable decisions of TJS to be enforceable in a similar manner as court decisions. Further, such linkages would enable review of TJS to ensure compatibility of their procedures and decisions with international human rights principles and to safeguard against bias.
Recommendations

Based on the research findings, the field researchers came up with the following joint recommendations:

- Sensitize women and men on women’s rights
- Sensitize women on leadership and build their leadership skills.
- Raise awareness on customary and religious laws and how they impact on women’s rights
- Advocate for increased participation of women in decision making roles in the TJS
- Undertake gender sensitization in TJS
- Enquire through further studies the organisational capacity and potential of women to mainstream gender into the TJS
- Sensitize and build capacity of TJS, chiefs and women on existing national and international human rights instruments
- Formalize integration between the formal and informal justice systems by for example, making decisions arrived at by TJS enforceable by relevant state law enforcement organs
- Enhance Paralegalism in order to sensitize more women on where and how to access justice.
References


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