

ACCESS TO JUSTICE IN KENYA

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ABSTRACT

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The purpose of this study was to analyze the contextual factors limiting marginalized persons to access justice in Kenya, with a view to recommend policy strategies which can be used to improve the implementation of the Bill of Rights, particularly the right to administrative action. The following questions are answered in this study: 1) What is the socio-cultural, economic, and political context of implementation? 2) How was the implementation process conducted? 3) What are the contextual factors limiting marginalized persons to access justice? 4) What policy strategies can better improve the implementation of the Bill of rights?

This was a qualitative study. Documentary research, Key Informant Interviews and observation methods of data collection were used. Participants in the study were individuals with firsthand experience of the implementation process. Their lived experiences while participating in the process of seeking justice served as the lens through which the reforms to provide access to justice were examined.

The results of the study show that implementation success was realized in the following areas: 1) Taking the courts closer to the people; 2) Realizing equality in justice delivery; 3) Creating a quicker way to solve disputes; and 4) Making it easy to file a case in court. However, implementation failed in other areas which exposed factors hindering indigenous women to access justice for instance: inadequate staff; delay in legislative process; inadequate resources; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in implementation process; inability to enforce court rulings; lack of legal aid; impunity;

and failure to provide basic amenities suggests that access to justice is still a goal too far to reach.

Based on this study, I recommend the following: 1) Gains that have been made so far as a result of implementing the constitutional reforms should be maintained to avoid fall back for instance, protecting the doctrine of separation of powers in principle and practice, the financial and administrative autonomy of the Judiciary, transitioning from a centralized government to a devolved government system, and strengthening the county governments and the senate. 2) Government should continue to devolve police services and the services of the office of the Director of Public Prosecution to marginalized areas to strengthen the justice system 3) Both national and county governments should invest more in physical infrastructure that is necessary to make services of the justice system easier to run and access. 4) The Judiciary should expand its programs for instance free legal aid programs; education and awareness programs; judiciary public engagement programs; and the devolution of justice services to more effective local tribunals.

Furthermore, the following need based policy recommendations can help address the problem: 1) The judiciary should work with communities to create a more inclusive community oriented paralegal programs that can help provide support services to the justice system. 2) The Judiciary and non-governmental organization should invest more in educating Kenyans so that they can adopt rights based civic culture 3) More resources should be invested in de-ethnicizing nationhood so that externalities created because of ethnic politics and ethnic based exclusion in public police and public service can be minimized. 4) Creation of alternative to mainstream justice systems to supplement the mainstream justice system. 5) Political reforms aimed at value change and building nationhood. 6) Creation of collaborative framework that will enable government agencies, civil society and international actors to work together on reforms especially in areas that are often left behind for instance gender and justice, minority issues and ethnic politics. 7) Civil society groups should work with donors to analyze, propose and support reforms in the justice system especially areas where marginalized groups are unable to access justice.

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CHAPTER 1

INTRODUCTION

The purpose of this study is to analyze the contextual factors limiting marginalized persons to access justice in Kenya, with a view to recommend policy strategies which can be used to improve the implementation of the Bill of Rights, particularly the right to administrative action. This first chapter is the introduction to the study.

1.1 Background

The Bill of Rights is a set of laws providing a legal framework within which the rights and fundamental freedoms of an individual in a given country are defined and implemented. Usually, the Bill of Rights is included in a country's constitution. In general terms, the constitution is a set of rules and customs, written or unwritten, legally established or extra-legal, by which government conducts its affairs. The constitution can also be defined as a written document outlining the structure of a political system. The constitution defines the roles and powers of government institutions, and shows the limits of government power, by outlining the rules that provide a balance between the interests of the minority and majority in a country. In most cases, only what the country considers the core legal principles are included in the constitution (Roskin, Cord, Robert, Medeiros, & Walter, 2006, p. 55).

Although the discourse on the Bill of Rights dates back to the 18th century's US Declaration of Independence and the French Revolution's Declaration of the Rights of Man, it was until after Second World War when the UN made it a global agenda. The concept of the Bill of rights has evolved over time, and varies from country to country. It is based on the idea of democracy. Initially, it emerged from the idea that all human beings are equal and deserve to be treated equally and with dignity. Later the concept developed and took into account freedom of expression,

right not to be tortured, and freedom from slavery. Socio economic rights were also included for instance right to shelter, health, and pension. Other components of the Bill of rights include right to marriage and right to privacy. The importance of the Bill of Rights is to remind a country that it has people with fundamental freedoms which need to be protected and it has democratic values that go beyond mere majority rule (Jowell, 2007, p. 3).

However, countries have been relatively slow to adopt the Bill of Rights into their constitutions.

In most cases, countries that have adopted the Bill of Rights did so out of the internal political circumstances or as a result of ratifying international laws (Jowell, 2007, p. 2). In the US, it was until 1964, when Congress enacted the Civil Rights Act of 1964. In a nutshell, the law provided measures for enhancing equality by combating racial discrimination. Later, Civil Rights Act of 1968 prohibited refusal to rent or sell a dwelling to any person on the basis of his race, color, religion, or national origin. The law also banned advertising the sale or rental of a dwelling indicating preference or discrimination on the basis of color, race, religion, or national origin.

The 1964 legislation occurred in response to the needs that had been realized during the civil rights movements' activities. The 1968 legislation was enacted as a result of recognizing that discrimination was a critical issue, particularly in the area of housing. The law was also passed by Congress as a tribute to the assassination of Martin Luther King Junior (Dye, 2011, pp. 242-243). Besides the US, Canada introduced the Charter of Rights and Freedoms in 1982, while Britain adopted the European Convention on Human Rights in 2000. Formerly, British Rights and Freedoms were not clear (Roskin et al., 2006, p. 55).

The Bill of Rights changes when citizens in a given country develop new needs and in response the government changes the law in order to provide measures to address the newly realized needs. As a result, some countries have included legal measures protecting the rights of people with disabilities, minority groups, the elderly, and environment (Jowell, 2007, p. 3).

South Africa holds a global recognition in the history of constitution making. After the end of the apartheid regime, South Africa did not have a constitution that

would guide the newly realized future. As a result, South Africa developed a constitutional model that aimed at addressing among other things, the distinctive socio-economic, environmental, and political realities in the country (Jowell, 2007, p. 3).

The United Nations recognized South Africa's constitution as one of the most transformative constitutions in the world (Slarks, 2010, pp. 164-165). Over the recent years, the European Union and individual countries like Kenya and the British Virgin Islands, have adopted various aspects of the South African constitution, especially the use of the Bill of Rights in addressing inequalities (Jowell, 2007, p. 1-3). The South African reform experience is also seen as one of the current global models of integrating the rights based approach in public administration.

One of the distinctive features of the South African constitution is Article 33 1) and 2) which reads: "Just administrative action: - 1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair. 2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons" (Republic of South Africa). This right requires all public officials to exercise their powers in a manner that is fair and just. It gives citizens the right to access information and administrative justice. While such a right may not suit other countries, it was necessary for a country like South Africa that was emerging from an Apartheid regime and felt that no one should be mistreated by a government official, the way it was during the apartheid regime. The right also aimed at expanding the scope of public policy by including groups that were formerly disadvantaged and excluded from public policy benefits, for instance women and the minority groups. Some key aspects of South Africa's constitution have been adopted worldwide. The European Union has adopted the right to administrative action from South Africa's constitution. The British Virgin Islands has also adopted the clause on environment from the South African constitution (Jowell, 2007, p. 2-3).

In 2010, Kenya changed its constitution. One of the issues Kenya sought to address was inequalities which manifest in many ways for instance in the distribution of resources and opportunities which include public service delivery. To address these problems, there was need to find a country with experiences similar to Kenya. Such a country would serve as a model for Kenya, particularly in providing policy or practical lessons on how to address historical inequalities using a constitutional

framework. South Africa had experiences similar to Kenya, particularly inequalities and historical injustices that had an ethnic, racial, and gender base. It had used the constitutional framework to address this problem since 1996.

Before the 1994 plural democratic elections, South Africa had gone through decades of apartheid, an experience that resulted to mass inequalities that had racial, gender, and ethnic bases. Although Kenya had not had an apartheid experience, it had undergone colonialism and aftermath decades of historical injustices, enhanced by former government regimes and legacies, particularly the 1960s, 80s and 1990s repression period. The Bill of Rights in the constitution of South Africa, and the way South Africa had conducted the reconciliation process after the apartheid regime, demonstrated a more practical example Kenya would look up to, in her path to addressing historical injustices and inequalities. Therefore, the Committee of Experts who designed the Kenyan constitution chose the South African model of addressing inequalities and injustices using the constitutional framework, particularly the Bill of Rights.

It is also important to note that policy formulators take into account the possibilities of the political acceptability of the policy they formulate. Therefore, besides the legality and technical content of the policy, policy formulators also take into account the projected rejection or acceptance of the policy, based on the politics, value systems, and the general logic the policy is likely to make, when the policy proposal is given to the public or policy makers for scrutiny (Bardach, 2009, pp. 33-34). The logic of policy advocacy also requires that the advocate shows where else the policy proposal advocated for has ever worked successfully. This means that in policy advocacy, practical examples people can realize and identify with, work well than abstract ideas that have never been applied anywhere before. Therefore, South Africa stood as an outstanding model for Kenya to emulate.

In its reforms, Kenya heavily borrowed from the South African experience and systems, particularly the Bill of Rights. For Instance, chapter 2 (Bill of Rights) Article 33 1) and 2) of the Constitution of the Republic of South Africa states: “Just administrative action: - 1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair. 2) Everyone whose rights have been adversely affected by administrative action has; the right to be given written reasons”.

Similarly Chapter 4 (Bill of Rights) Article 47 1) and 2) of the Constitution of the Republic of Kenya states 1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”. This raises an interest in examining the implementation experience in South Africa with a view to draw policy implementation lessons for instance Kenya.

The theory behind changing the constitutions in these countries was that the new constitutions would provide a framework for addressing inequalities. The Bill of rights is intended to provide measures for enabling public agencies to formulate policy mechanisms for rights based approach to public policy, since public policy has become a right. It is also intended to provide the legal basis for citizens to demand better services from government irrespective of their status and background. The Bill of Rights is also intended to protect the disadvantaged groups for instance women, minority groups, and the youth, by giving them an equal legal opportunity to seek, compete for, demand, and access public services. The projected outcome is that if implemented, the Bill of Rights will enable citizens to gain more benefits from public policy than before.

In order to comply with the constitutional requirements, Kenya’s Judiciary conducted a wide range of reforms. One of the main areas of the reforms was providing access to justice. Priority was given to areas that were historically or geographically marginalized. Under these reforms, the judiciary created a mobile court as a mechanism through which the right to administrative action would be achieved. The mobile court is where the judiciary facilitates magistrates and judges to go where people are and solve their disputes. The mobile court is part of the wider national reform initiatives to establish courts in all areas where citizens can easily access justice.

1.2 Problem Statement

Although bringing services closer to the people will help achieve the right to administrative action, Kenya is a country that has immense levels of inequality which

has an ethnic, regional, and gender base. Studies in other countries for example in the US have shown that the universal application of the constitution to address public problems does not always solve all contextual problems (Lejano, 2012, pp. 17-31). Therefore, there is need to seek policy mechanisms to supplement the universal application of the constitution, when dealing with contextual inequalities.

To address inequalities in public service delivery from rights based approach means to protect the rights of the disadvantaged groups for instance, women, people from ethnic minorities and people with disabilities, who need public services, in a way that is unique or different from the rest of the population. Despite of implementing the reforms aiming at improving access justice, little is known about the issues limiting marginalized persons to access to justice. Therefore, this study seeks to analyze contextual factors limiting marginalized persons to access justice in Kenya, with a view to recommend policy strategies to improve the implementation of the Bill of Rights.

1.3 Significance of the Study

1.3.1 Policy Interest

Over time, Kenya's socio-economic and political inequalities particularly with regard to the disadvantaged groups have grown immensely. These inequalities have assumed ethnic, regional, and gender dimensions and are strongly entrenched in the public administration and political system. In 2004, Kenya was among the 10 most unequal countries in the world (Society for International Development, 2004). In the wider scope, Sub-Saharan Africa is one of the areas in the world, where high levels of marginalization have been realized (Harttgen & Klasen, 2009, pp. 1-82). Women and the minority groups are among the most affected population. For the first time in Kenyan history, women, youth, minority groups, and people with disabilities had many legal gains from the new constitution. Therefore, information from this study will provide insights and recommendations that will be helpful in developing need based policies and development programs that will enable effective implementation of the right to administrative action, and the Bill of rights at large.

1.3.2 Political Interest

The quest for a wide range of rights has been at the center of Kenya's politics since the pre-independence period. In fact the reason Kenyans fought for independence from the colonial rule was to get freedom to live freely, develop, and equally benefit from resources and opportunities in the country. Kenyans wanted a government that would serve them efficiently and with dignity. Independence meant freedom to access good quality public services for everyone.

It is for this purpose that the country adopted the South African approach, particularly the Bill of Rights, including the right to administration of justice. The issue of rights is an important political issue for Kenya because Kenya's reforms were as a response to the colonial legacies, as well as the 1960s, 1980s and 1990s repression. As a result, there is a general national ethic inspiring public fear of repression and an authoritarian government. This makes rights issues one of Kenya's critical policy agendas. Therefore, a research that can provide lessons that can contribute to successful implementation of the Bill of Rights is helpful.

Since the quest for better services has been at the center of Kenya's political agenda, the quest for Multi-party democracy in 1980s and its realization in 1991 was politically seen as the first step to realizing the vision for a rights-driven country. This dream reached its peak at the promulgation of the new constitution of the Republic of Kenya of 2010. Now it is time to implement the constitution in a way that is sustainable. Therefore, it is a time of learning and reflection, and action. In the modern world, fair administrative action is becoming one of the critical issues in public administration. It is critical because it involves diversity and equality issues in society. The way an organization shows commitment to equality and diversity is through its policy (Kumra & Manfredi, 2012, p. 87). This is why such a study is helpful in drawing insights that can be helpful to other countries as well.

1.3.3 Theoretical Interest

The context of policy implementation is important because analyzing a given policy in light of the context within which policy failure or success was realized, will help us understand what approaches are most appropriate, when planning intervention strategies in a similar situation. The philosophical foundation of the constitution is

that the constitution regulates public behavior by providing the broad measures to be applied to all people at all times. This is what (Lejano, 2012, pp. 17-31) describes as regulations based on the text (rule of law). The philosophical principle here is that the law is sacred, supreme, and adequate enough to protect people. If such universal principles are applied to all people at all times, then change will be realized.

However, there are many experiences showing that there are contextual issues which are not addressed, when the law as a universal principle is applied. Therefore, there is need for intervention strategies that can supplement the realized shortcomings. Such strategies are based on the context but can provide lessons for other contexts as well. Therefore, studying the use of the constitution in addressing problems that are unique to disadvantaged groups like women, and minorities from a contextual perspective is considerably important.

Implementation studies have evolved over time. At the beginning, implementation studies focused on goals. The second generation scholars of implementation studies focused on the actions of the street level bureaucrats and how such actions influence implementation. The third generation focused on the power relationship among the stakeholders in the implementation process. Finally, the fourth generation scholars focus on responsive evaluation (Colebatch, 2007, p. 87). The basic tenets of responsive evaluation are: 1) Direct contact with the people involved in the subject of study. 2) Capturing the concerns and experiences of those the program affects or those involved in the program.

Therefore, this study falls under the fourth generation studies on implementation but also incorporates other elements of the previous generation of scholars which are necessary for this study. Some of the elements are goals which was the focus of the first generation, street level bureaucrats which was the focus of the second generation, and the relationship between stakeholders which was the focus of the third generation of scholars. This study seeks to contribute to implementation literature by shedding light on underprivileged people's evaluation and response to policy implementation as a success or failure, based on their experiences with the public policy. The study demonstrates success or failure by describing the experiences that show limitations in access to justice.

The field of public services is still an under researched area in Public administration (Pollit, 2012, pp. 1-13). Studies in this area largely focus on opinion

surveys which do not provide detailed particulars worth comprehensive understanding of public policy process issues. Opinion surveys do not provide much information about what people go through when seeking fair administrative justice. There are also limited comparative case studies in this area. Therefore, this study will highlight the gap between policy and implementation as well as areas in public services that need policy related intervention both at state and society level. Lessons drawn from this study can also be used to design intervention mechanisms that can improve effectiveness in the provision of fair or just administrative action.

1.4 Research Questions

- 1) What is the socio-cultural, economic, and political context of implementation of the Bill of Rights?
- 2) How was the implementation process conducted?
- 3) What are the contextual factors limiting marginalized persons to access justice?
- 4) What policy strategies can better improve the implementation of the Bill of rights?

1.5 Scope and Limitations

The study emphasizes the perspective marginalized groups. The researcher focuses on the experiences of individuals who have been directly or indirectly involved in the process of seeking justice, either as individuals seeking justice on their own behalf, or on behalf of their relative, friend, or client. In this case, they witnessed or had an experience of the process. The study also takes into account the experts' opinion on the consumers' experiences, and additional evidences from state agencies and National Independent Commissions' reports.

The study also focuses on the experiences of the disadvantaged groups. In this study, the disadvantaged groups refer to women from marginalized communities, groups or individuals from low and middle income families. This is because while women and marginalized communities are part of the specific groups the Bill of

Rights seeks to protect, because they belong to the minority groups; cases studied here shows that the police in Kenya alike are marginalized and excluded in practical sense, even though they belong to the disciplined forces. Women and marginalized groups enjoy same protection status because women are most hit by the socio-economic and political inequalities. Their status affects them in particular ways for instance, they are largely discriminated against, they are vulnerable to violence, and they have limited access to income and power. Therefore, the constitution identifies them as the target beneficiaries in particular ways, although everyone in the country is entitled to equality in public service delivery.

This is a policy implementation study with a focus on improving access to justice. Therefore it is not a legal study. Because of the problem of accessing participants and data, the study examined two of the 14 indigenous communities in the country. The study also examined 8 cases of individuals seeking justice across social economic, and regional geopolitical contexts. Therefore, the findings cannot be generalized to the entire country. However, the findings provide a slice of the wider perspective into factors that hinder access to justice.

1.6 Definitions Key Terms

1) Constitution

The constitution is a set of rules and customs, written or unwritten, legally established or extralegal, by which government conducts its affairs. The constitution can also be defined as a written document outlining the structure of a political system. The constitution defines the roles and powers of government institutions, and shows the limits of government power, by outlining the rules that provide a balance between the interests of the minority and majority in a country (Roskin, et al. 2006, p. 55).

2) The Bill of Rights

The Bill of Rights is a section in the constitution that provides for the rights and fundamental freedoms citizens are entitled to in a given country. It includes things like right to: health care; security; well-being; dignity; public service; education and natural resources.

3) Community

The term community in this research means a group of people, living in a particular place as an organization and interacting, in order to meet the needs of the individual and community at large. Examining a community as an organization takes into account examining the leadership models and generic influence tactics exhibited by members of the community in pursuit of the interests of the community (Kreitner & Kinicki, 2001, pp. 519-564). A community includes the diversity and the homogeneity of the people, the environment, and all that is in it. A community as a social system is an organization within which interests and goals are pursued (Ghimire, 2011, p. 3). A community includes social capital. Social capital refers to material substances as well as intangible substances like sympathy, good will, fellowship, and relationships, existing within a given social unit that makes or represents a community (Nishide, 2009, pp. 2-3). Social capital is the glue that holds people together or the repellant that keep people apart (Cuesta, 2009, p. 38). Social capital is used as a means to achieve intended goals (Gilbert, 2009, p. 57). Intended goals can be civic, political, religious, workplace, welfare, volunteer, and information sharing engagements (Kazemipur, 2009, p. 14). Such engagements are built on social ties like relationships, contacts or activities (Koput, 2010, pp. 3-4). Social ties are influenced by the structural forces in the environment. Therefore, choice of social relations is not by random selection (Son, 2013, p. 1).

Understanding the community involves understanding: what individuals in the community think about the subject (DiNitto, 2003, p. 177); leadership capacity to respond to problems and influence policy (Austin, Brody, & Packard, 2009, p. 8); how people and organizations in the community contribute to the welfare of the community (Segal, 2007, p. 12); development actors and issues in the community (Appleby et al., 2007, p. 13); diverse social experiences (Guranatnam, 2003, p. 41); hidden rules or the unspoken issues, and scenarios that exhibit information about the subject (Payne, 2005, pp. 9-10); what motivates members of the community to act or not act (Adams, Domineli, & Payne, 2011, p. 126); and culture (Lohmann & Lohmann, 2005, pp. 9-11). Understanding the community will also take into account the realization of significant people or entities seen to have played significant roles in the progress of the community, for example opinion leaders or people who are seen

by the community as change agents; as well as those who are seen to hinder progress (Smale, Tuson, & Statham, 2000, p. 119). The use of the word community is context bound when referring to a particular community like the Turkana or Samburu. It is not context bound when referring to both communities as a set of indigenous community in Kenya.

4) Access to Justice

Access to public services an individual is entitled to as required by the constitution for example services provided by the court such as filing cases, hearing of cases, or any other relevant institution tasked with the responsibility to provide public services. With specific reference to this study, access to justice refers to the condition where the following issues are realized in the process of seeking justice. 1) The courts are closer to the people; 2) Court procedures are simplified making it easy for all people to pursue a case. 3) People are educated to know their rights and other legal procedures or matters regarding their case. 4) People can easily access court information. 5) Authorities ensure that state agencies are treating everyone equally. 6) It is easy for everyone to access courts and get services from them. 7) There is physical infrastructure to facilitate the process. 8) There is a conducive socio-cultural environment within which the justice system can function well. 9) Court cases are processed efficiently. 10) Court orders or rulings are enforced effectively.

5) Indigenous Women

Women from communities that have adopted less or no western value systems and as a result strongly hold on their traditional culture. In this case the Turkana and the Samburu. Women in these communities are largely marginalized in public policy and development.

1.7 Organization of the Dissertation

This study constitutes five chapters. In chapter one, I present the introduction to the study. This includes, background, problem statement, significance of the study, research questions, scope and limitations, and the definition of key terms. In chapter two, I will present literature review. This includes the literature search process, a discussion of theoretical issues in public policy and implementation, and women and

justice issues in Kenya and South Africa. In chapter three, I will discuss research design and methodology. In Chapter four, I will present the findings of the study. This includes: the context within which the policy was implemented, how the implementation process was conducted, and factors that limit indigenous women to access justice. In chapter five, I will provide conclusions and recommendations.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

In this section, the process used to obtain literature is highlighted. The relationship between public administration, implementation, evaluation, and the Bill of Rights is discussed. The background to public policy implementation and evaluation, the contexts of Kenya and South Africa, and the research on women seeking justice in these countries is also examined. The main features which this chapter covers areas: the process of conducting literature review; the relationship between public policy and policy implementation; key issues concerning women and justice in Kenya; key issues concerning women and justice in South Africa; the use of qualitative research methods in policy evaluation; the summary of the literature review; and how it relates to this study.

2.2 The Search Process

Literature review design was based on Denicolo and Becker (2012, pp. 43-51) and Randy and Joyner (2007, pp. 85-95). The identification, evaluation, and selection of the relevant sources of literature for this study, was based on Graybosch, Gregory, Scott, and Stephen (2003, pp. 80-81). Issues considered were: 1) document screening seeking to determine the relevance and reliability of the material. 2). Taking notes from the relevant sources identified, and photocopying reliable material for further reading and analysis. 3) The thesis outline was drafted and revised, with guidance from the instructor. The search process was based on Gravetter and Forzano (2012, pp. 57-70). In this case: 1) I began with the general idea. 2) I used the recently published material to narrow the focus and search. 3) I used words and themes to locate relevant research in the local and international journal data bases. 4) I surveyed

journal abstracts in order to select only articles that were relevant. 5) Based on these resources, I reviewed the literature tracing new themes and issues relevant to the cases. 6) With no more new items realized, I completed the process.

2.3 Public Policy: Meaning and Philosophical Assumptions

2.3.1 Theories of Public Policy

The relationship between seeking justice and public policy theories is that seeking justice is basically seeking to benefit from public policy. Theories of public policy on the other hand explain what determines the nature, content, and outcome of public policy. Theories for instance explain how government decides what to do or not to do, as well as the process and behaviors of the politicians and bureaucracy that facilitate government action or inaction, which citizens seek to benefit from. Public policy includes both political processes and behavior (Dye, 2011, p. 14). At the heart of this discourse are the strategies and behaviors that are used to achieve the intended goals of public policy during implementation. According to the institutionalist theory, public policy is not yet public policy until it is adopted by government, and implemented through the respective government institutions.

This means the legislature has to make it into a law, or the executive by the powers vested in it can give executive orders. The Judiciary has to interpret the policy and give it the legal legitimacy or disapproval. The bureaucracy implements it. Therefore, the actualization of the policy from the text to real life experienced outcomes depends on government institutions (Dye, 2011, p 12). According to group theory, public policy is the result of the influence of the interest groups. This means that public policy changes when the influence of the interest groups decreases or increases. The assumption here is that there is need for constant effort from the interest groups to influence the policy from the beginning to the end. According to the elite theory, the elite who have power in society determine public policy because they shape the opinion of the masses, and influence the government's decision on the society's value system. Therefore, public policy will be incremental rather than revolutionary. On the other hand, public choice theory argues that political parties, individuals, and interest groups seek to maximize benefits in politics just like in the

market. Given that politics is about who gets what when and how, government enters into a social contract with citizens, and interest groups who agree to obey the law and support government, in exchange for the benefits they will get from government, for example protection, liberties, and resources. It is in this case that the constitution comes in as a binding sacred document that seeks to hold everyone accountable, for the benefits of all. The underlying assumption is that citizens are entitled to benefits on the basis of the contract. Government is therefore expected to honor its commitment and provide the services that people require (Dye, 2011, pp. 19-24).

Policy process theory believes that policy is the work of many actors both in government and outside government. Players in government have the power to determine policy and do it on the basis of government authority. Players outside government for example pressure groups seek to influence public policy by either luring or pressuring government to identify an issue as a public problem, put it on government agenda, transform it into a policy, and implement it as intended, so that the prospective beneficiaries can have their needs addressed (Anderson, 2003, pp. 71-113). Finally, game theory believes that government takes policy choices by calculating winning and losing chances. The game here is that players in policy making know what others fear. Therefore, they create mechanisms that instill fear in them, so that they can comply in a given way, since they fear the costs that may be incurred in case they lose the game. Game theory is the rationale behind policy advocacy strategies like coalitions, protests, and media detective journalism and exposure of scandals (Dye, 2011, p. 24).

2.3.2 Public Service as Public Policy and Administration Issue

Public policy is defined as what governments choose to do or not to do, why they do it and the difference it makes. Public policy may be government action or inaction to regulate behavior, extract taxes, organize bureaucracies, or distribute resources and benefits to citizens. Public policies go beyond what is reflected in government records functions, and expenditures (Dye, 2011, pp. 1-2). Public policy involves government activity showing structural commitment of allocating important resources (Colebatch, 2007, p. 99), and the authoritative allocation of values to the whole society (Easton, 1953, p. 129). Public policies involve private and public goods

and how they are related to the public. Policies can be material which means they involve tangible goods for example health care and education, or can be symbolic, which means they seek to provide non-tangible benefits to the citizens for instance, social justice, peace and patriotism. Policies can also be substantive meaning they show what government is going to do, procedural meaning they show how something is done and who is going to take action, distributive meaning allocating services and benefits to a particular section of the society, and regulatory meaning they impose sanction on the behavior of the individual or group (Anderson, 2003, pp. 2-12). The key focus in this study is the government action but examined in the context of public service delivery.

2.3.3 Public Policy as an Implementation Issue

Policy is about government choices, action and inaction. Government makes choices throughout the policy process. Implementation is about the choices government makes in order to accomplish particular intended goals. Policy is based on a cause effect relationship. In every policy, policy makers want to achieve particular objectives. Therefore, they choose means through which the intended objectives are met. If the objectives are not met, then implementation was not done, or not done properly. Implementation means that the policy goals government articulates should be realized on the ground soon after action is taken. If they are not realized, then action was not taken as intended (Colebatch, 2007, p. 52).

The institutionalist model provides the key features in the policy implementation process. First, political activities which in this case facilitate policy implementation process center around government institutions for instance the presidency, the courts, municipal authorities, and the bureaucracy. Second, public policy is authoritatively determined, adopted, implemented, and enforced by government institutions. Third, only government has the legitimacy, universal power, and coercion to extend public policy to all people (Dye, 2011, pp. 12-13). Therefore the role and centrality of government institutions is very fundamental in the policy implementation process.

Another important model in the implementation of public policy is the policy process model. The policy process model views policy as an activity going through

various stages from the beginning to the end. The first stage is policy problem identification. At this stage, a policy problem is identified by government through the demands of individuals and groups. Government acknowledges that it is a problem worth action. The second stage is agenda setting. At this stage, interest groups, media, and public officials work to influence government decision. The third stage is policy Legitimation stage. At this stage, government selects and enacts policy through the legislature, the judiciary, and the executive. The fourth stage is policy implementation stage. At this stage, policy is implemented through bureaucracies, public expenditures, regulations, and other activities of the executive agencies. The fifth stage is the evaluation stage. At this stage, government agencies, media, and external entities evaluate the policy (Dye, 2011, pp. 14-15).

2.3.4 Philosophy of Public Policy

The philosophy of public policy is the search for basic principles underlying public policy, the search for the ultimate outcomes, and the critical examination of the policy implications. While dictatorship as the core principle of policy making is not as effective as democracy is in improving performance, it sometimes helps to reduce disorder (Whitford & Lee, 2012, pp. 5-31). Socrates believed that truth could be attained through reason. His emphasis was on education. The best government was the one led by an individual with best abilities, knowledge and virtue (College of Agriculture and Life Sciences, 2012). In light of public policy, the basic principle is to educate society to a level that it can make rational decisions and contributions to public policy, and to ensure that the country has the right leaders with worthwhile knowledge values and commitment, in order to implement policies as intended.

It is also important to create a critical mass that can effectively contribute to public policy making and implementation. Concerning Justice, Plato argued that the leaders needed to be highly competent, with perfect knowledge and virtue. The expert, the wise, the most intelligent and the virtues person at the top was the one capable of delivering change in government. The implication here is that highly knowledgeable, ethical and competent leaders know better what the community needs and so they can deliver better outcomes (OSWEGO, 2012, p. 1).

On the other hand, Aristotle emphasized the rule of law and infrastructure development. Aristotle believed that since human nature is imperfect, there is need for

an overall regulation that can bind government and the people to take responsibility and be accountable for their actions. From this philosophy, the idea of the constitution and constitutionalism as a sacred contract binding the government and the people under prescribed responsibilities developed (Frank, 2007, pp. 37-50). Thomas, Aquinas's impeachment policy which is the foundation of the Washington Consensus is based on the belief that the purpose of the state is to improve the well-being of the people. Therefore, the state must put in place welfare policies that safe guard the country and the citizens. In modern constitutions for instance that of the US; this principle forms the basis of seeking judicial or legislative action against government's policy. Such actions may aim at seeking a court's ruling to overturn public policy, or impeaching the executive (Ellsworth & Harris, 1960, pp. 1-56). This principle seeks to regulate government policy so that it can only serve the best interests of the people.

2.4 Public Policy and Rights Issues: A Global Perspective

2.4.1 Origin of the Bill of Rights

In the previous section, we focused on the theoretical understanding of public policy. We examined the meaning of public policy, the philosophical assumptions underlying public policy, and how they are related to justice. The study examined the basic tenets of the theories of public policy, understanding public policy as a public administration issue, as well as the basic tenets of the philosophy of public policy. The reason for doing this was to understand the foundation of public policy implementation. By doing so, we ground the study within the theoretical frameworks of public policy. Therefore, the previous section is the mother section providing insights into understanding public policy implementation from a broader political, theoretical, and philosophical perspective. Therefore, the previous section provides a frame of reference for interpreting phenomena within the context of public policy and implementation studies, as well as grounding the study within the discourse of public policy and implementation.

Rights issues are relatively a new notion in the world, especially when we consider the fact that it was out of the World War II experience that the issue of rights became a global agenda under the influence of the UN. Given the suffering and

crimes committed during the World War II, the UN sought to facilitate the international community to adopt a rights based conscience and domesticate the UN conventions on rights, based on which individual countries will develop rights based policies (Shiman, 1993, pp. 6-7).

The Second World War provided experiences that raised international consciousness of the rights of individuals and groups. The Nazi attacks on Jews and the Japanese attacks on Chinese populations led to the UN 1948 General Assembly to adopt the Universal Declarations on Human Rights which nations fear to violate openly. Over time other acts of violence against individuals and groups for instance Saddam Hussein who ordered the use of poison gas to kill Iraqis opposing his regime, and the massacres emerging from conflict in Congo and Sudan, have increased the UN efforts on engaging individual countries to integrate rights in public policy. As a result, the need for the Bill of rights has grown to include human, civil, economic, and constructed rights (Roskin et al., 2006, p. 62).

Even though before World War II, different society's and nations had systems of propriety and justice, in which individuals under those systems acquired rights, the World War II experience propelled the UN to mobilize countries to recognize the International Human Rights Law and to improve their justice systems and policies, in order to protect the lives of vulnerable individuals and groups living in these countries. The World War II also exposed other human rights issues like denial of shelter, food, nationality and freedom of religion. The essence of the UN conventions was to set international standards that would enable governments not to abuse power and to promote public accountability (Shiman, 1993, pp. 6-7).

While the efforts to realize rights in many countries was informed by the UN convention, the French revolution and the US Declaration of Independence were strong sources of understanding the need for the Bill of Rights in the US and in France (Jowel, 2007, p. 1). Over time, the scope of rights began to grow as new areas which required rights based interventions were realized.

2.4.2 Definition and Categories of the Bill of Rights

The Bill of Rights is a section in the constitution that provides for the rights and fundamental freedoms citizens are entitled to in a given country. It includes things

like health care, security, well-being, dignity, and so on. There are four categories of rights. The first category is human rights. Human rights mean freedom from government mistreatment such as arrest, torture, jail, and death without due process. The second category is civil rights. Civil rights mean the ability to participate in politics and society, such as voting and free speech. Civil rights are higher than human rights. The third category is the economic rights. Economic rights mean guarantees of adequate material standards of living. The fourth category is the constructed rights. Constructed rights mean something widely believed as old and revered but in the real sense it is new (Roskin et al., 2006, p. 63).

The Bill of Rights affirms the basic and civil rights that government may not arbitrarily take away, for instance right to life, freedom of assembly, freedom of expression, freedom of movement, freedom of religion and political participation. Other rights include the rights to work, marry, raise family, provide for that family, and live according to one's culture. Another key right is that which seeks to protect the minorities (Roskin et al., 2006, p. 64).

The power of the Bill of Rights is its content and location within the constitution. Written constitutions provide the framework for government policy, limits the scope of government, and balances the interests of the majority and minority groups in the country. Constitutions state national ideals. However, the values and interpretation of the ideals require some decisions. The constitution is also a blue print that is realized through legislations and practices. Constitutions are always modified by laws and traditions in order to provide the suitable legal application. Some flexibility is required in order to allow for adaptability, which takes a long time, for instance the right to own fire arms in the US (Roskin et al., 2006, pp. 59-61). Since the Bill of Rights is part of the constitution, then it is part of the supreme law that has to be implemented through various policy measures.

2.4.3 The Theory of Human Rights

Human rights theory is one of the main theories underlying rights policy. The theory of human rights holds that freedom is the goal of human rights. However, freedom depends on others and other cultures. Therefore, understanding freedom takes into account understanding the relationship between the individual and the

environment. Achieving the condition of freedom is the ultimate moral obligation of every person. Based on Mensch (2010, p. 1), the following are basic tenets of the theory of Human Rights.

1) Proposition 1

Freedom is isolated self. This is John Locke's idea that freedom is an innate natural state one has before society (birth). The innate freedom is natural and is not socially acquired. As a state, Immanuel Kant argues that freedom is an abstract idea, until it is realized in human activity or society. These two concepts are based on the assumption that there is human existence before birth, and that the state of human existence before birth has to be realized in the life of the individual after birth. Therefore, human activity or society and the environment are seen to be forces that intervene in, or interfere with freedom in human life by providing either support or limitations to achieving absolute freedom.

2) Proposition 2

When individuals are born into the society, they need to learn how to survive in the world. Therefore, they learn the language and behavior through the process of interacting with others and the environment. As a result, they acquire the meaning of life from the language they are taught. They also learn to interact within the limits of choices they are given in that particular society. The basic assumption here is that of survival; where individuals have to rely on outside actors in order to receive what they need for success in life.

3) Proposition 3

Because individuals have to rely on external actors and the environment for them to succeed in life, they are vulnerable to these factors that determine their survival.

4) Proposition 4

Since human life is determined by external factors upon which it relies in order to survive, human freedom is limited to the choices, behavior, and perspective provided to the individual by these external factors. For example, human freedom is limited to socio-cultural, economic, and political circumstances that determine human life in a given society. Political factors such as speech, assembly, and political systems; social factors such as the ideology that informs behavior and

interactions, cultural factors such as a people's world view and value systems (which can be tolerant, strict, or repressive), and economic factors such as access to or power to own and use resources to meet the individual's needs can determine the content and degree of human freedom.

5) Conclusion

Therefore, freedom in society is socially constituted. It is limited to external forces that determine individual's worldview, behavior, practices, and choices. Therefore, to understand an individual's realized freedom takes into account the interaction between that particular individual and the environment. As a result, rights are legally and socially constructed, in order to meet the desired degree of freedom. Therefore, the Bill of Rights regulates or limits government activity so that individuals can have the desired freedom. The Bill of Rights also enables the citizens to access benefits from public policy for example the right to education or the right to health care.

2.5 Public Policy: Implementation Models

In the previous section, we focused on understanding the emergence of rights issues and the adoption of rights issues as a global policy agenda. We examined the circumstances under which rights were realized as a global policy problem, and factors that informed the inclusion of rights in national constitutions. We also examined the categories of the Bill of Rights and the theory of human rights.

In this section, we will focus on the policy implementation, particularly how policy success or failure is explained within the existing theoretical literature. The section comprises of key implementation models. We point out what factors or variables are believed to implement policy success or failure under general circumstances.

2.5.1 Contextual Model

The context of implementation bears factors that can positively or negatively influence policy outcomes. Policy stakeholders inside and outside government can propel policy success or failure, depending on the role they play in the policy

implementation, and the way they actually do it in a given context. Based on the evaluation of health care reforms in the US, Dye (2011, p. 105) observes that social economic conditions of the society, the meaning the society makes of public policy, and the way it is administered can lead to policy failure. For instance, the policy may be inadequate, the solutions provided may be immediate and unsustainable, social complexities may make it difficult to run the project effectively, society may not be able to handle policy requirements, and may see or find the welfare bureaucracy intimidating.

2.5.2 Political Model

Policy implementation can be positively or negatively influenced by the politics of the time. Drawing lessons from the Oakland Project, Jeffrey L. Pressman and Aaron Wildavsky (1973) show that what was began as a project with an aim to reduce urban violence, especially among African Americans, changed into something else from time to time. In the long run, the project became more expensive and complex. The money invested in the project was never used as intended. There were no clear goals from the beginning, outcomes were not projected and so were not met, compromises were made along the way so the project lost track, and financial arrangements were not adequately done. Other challenges were fear of ultimate failure, increased anxieties, withdrawals, unresolved conflicts, and high salvage costs.

Eugene Badarch (1980) takes the discourse further by exploring the challenges faced during policy implementation. Among the issues raised is the gap between the policy as conceptualized or intended and the policy as implemented. The original intention of the policy is twisted or short changed by the bureaucracy. Governments make good policies then declare that the problem is solved, even when they don't know how to implement it.

Therefore if you want to know whether a policy has been implemented or not, look for the results or outcome, and not the politics of program creation. This is because after the Bill becomes a law, implementation may be obstructed by some government agencies or bureaucrats with particular interests. Other problems may delay tactics, lack of or rigid rules, stakeholder conflicts, unclear or no communication, resources, and misdirection. To address these problems, there is need

for: Increased stakeholder participation, consensus building, transparency, better understanding of the policy, oversight implementation organs, and the bridge between policy and practice.

2.5.3 Management Model

According management model, the purpose of administration is to ensure that an organization is able to deliver services effectively (Denhardt, 2011, p. 75). Processes and structures in public organizations are designed on the basis of political rationale. Such processes and structures aim at organizing a system that provides a permanent problem solving routine. Processes include activities and behavior exhibited in areas like decision making, opinion forming, and implementing government policy. Structures are the frameworks that enable policy process. Structures set limits as to who can participate, what is acceptable, reasonable, appropriate, and valid perceptions of a situation (Christensen, Laegreid, Paul, & Rovik, 2007, p. 15).

2.5.4 Rational Model

According to the rational model, no policy should be adopted if its costs are more than the benefits. Therefore, policy alternatives are weighed on the basis of the greater benefits to the society in relation to the cost of adopting and implementing that particular policy. Policy makers must therefore know: what the society values and prefers, know policy alternatives available, know the consequences of each alternative, know the cost and benefits of each alternative, and select the most efficient alternative. In the context of justice, rational model would ensure that policies that deter crime ensure certainty, swiftness, and severity of punishment has been implemented (Dye, 2011, p. 15). Therefore the key determinants of policy success or failure are information, choices and resources.

2.6 Public Policy and Rights Issues: US Experience

In the previous section, we examined models of public policy implementation, with a view to determine factors that determine policy success or failure under normal

circumstances. We found out that socio-economic condition, political power, interest and will, management systems, and resources are among factors that can influence policy success or failure.

In this section, we will focus on the US experience. The aim of this focus is to obtain an understanding of the implementation of rights, from the constitution to policy. The US is a major global player and an international influencing agent in issues of rights and democracy, given the legitimacy it has earned out of centuries of democratic sustainability and a strong culture of constitutionalism. Therefore, the US policy implementation experience provides insights into policy implementation literature, particularly in matters of justice, rights, and democracy.

The US has a strong history in rights issues which provides an experience that is helpful in understanding the role of rights in policy and development. Women rights movements in the US began as early as 1840s. In 1848, the Seneca Falls, New York convention sought equality between men and women, particularly equality before the law, equality in education, and equality in employment. This was followed by the national women rights convention in 1950. All these conventions and rights movements were based on America's Declaration of Independence, which provided for fundamental rights and freedoms of the citizens (Imbornoni, 2010).

In 1869, National Woman Suffrage Association was formed with the aim of pursuing the voting rights of women, through a constitutional amendment. In the same year, the American Woman Suffrage Association was formed to pursue the voting rights of women at individual state level. The two associations later merged in 1890 in order to increase their influence. In 1896, National Association of Colored Women was formed and joined the efforts to pursue democratic rights for women. In 1903, National Women's Trade Union League was also formed to pursue the rights of women in the employment sector, particularly wage equality. It is important to note that the formation of these movements emerged from diverse contextual circumstances which had national significance had far reaching implications on the lives of women. It is also important to note that the growth in women rights movements responding to different needs of women build up a network of a strong force culminated in the realization of the rights of women, although it took relatively

longer to realize the achievements. Different states adopted the policy gradually (Imbornoni, 2010).

Based on a strong and consistent network of campaigns for women rights, the following laws were passed: the definition of sexual harassment as a form of illegal job discrimination (1986), and the Violence against Women Act (1994) which increased penalties for sexual offenders, provides for funding of services for victims of violence, and provides for special training for police officers. It is also important to note a considerable success of the women rights movements has been through cases taken to the court for ruling, for instance: in the Nevada Department of Human Resources v. Hibbs, where the Supreme court ruled that states can be sued in federal court if they violate the Family Leave and Medical Act, and the United States v. Virginia where the Supreme Court ruled that the all-male Virginia Military School has to admit women in the Military School in order to continue to receive public funding (Imbornoni, 2010).

Other important aspects rights movements addressed were violence directed against women, and ethnic minorities, as well as economic aspects for instance property rights, rights to own property, and rights to access economic opportunities. Human rights for instance seek to protect individuals from government driven violence for instance arrest, torture, jail, and death without following the due process. It is believed that life and liberty are natural and so government should not deprive people such rights without a legal justification (Roskin, et al, 2006, p. 63).

Initially, women rights in the US gave priority to civil rights, particularly when they focused constitutional amendments and other policies that sought to give women more political power in the society. Civil rights are higher than human rights and are derived from the ideology of democracy. Civil rights include the right to speak and vote, organize social gatherings, form political parties and the right to equal opportunity for every person. Civil rights are core to achieving human and economic rights, because of their political nature power content. Economic rights include freedom to live adequately, get a job and education, and access to information for instance prescriptions on commodities to enable consumers make informed decisions (Roskin, et al, 2006, p. 63).

The early goal of civil rights movements in the US sought to prevent discrimination and segregation by governments, particularly states, municipalities, and school districts. With time, the scope of civil rights grew to other aspects of private and public life. This meant that governments should address acts of discrimination in government, private entities, and among individuals (Dye, 2011, p. 240).

One of the policy measures used in the implementation of rights is the Affirmative Action. Affirmative Action seeks to provide and protect the stake of the marginalized or minority groups in the country's share. As part of gender, ethnic or racial politics, Affirmative Action seeks to increase income, jobs, housing, health, education, and other conditions of life. In affirmative action, opportunities are seen from the perspective of inequalities, where minority and majority groups are compared on a continuous basis, particularly with regard to their chances to access or gain a given opportunity, as well as the actual possession of those particular opportunities. In Affirmative Action discourse the equality of opportunity is not the same as equality of results. That is why the Affirmative Action goes beyond opportunities (Dye, 2011, p. 243).

Equality of opportunity means ability to make oneself what one can. It refers to ability to develop skills and talents and to be rewarded for one's achievement. This means that everyone begins with equal chances of success. In this case the differences among the competitors are as a result of differences in talents, skills, or good luck. Equality of results means equal sharing of income, jobs, contracts, and material rewards, regardless of one's condition in life. Equality of result does not prioritize abilities, talents, or initiative. Everyone begins and ends the race together. Over time, the goal of civil rights movements has shifted from equality of opportunity to Affirmative Action. This means that goals and time tables are established determining when to archive what results. Affirmative Action programs in the US were developed by the federal bureaucracy, in compliance with the Civil Rights Act of 1964, which required federal bureaucracies to develop rules and regulations to ensure there is no discrimination in public programs funded by public funds (Dye, 2011, pp. 244-245).

Another way in which Affirmative Action has been implemented in the US has been through the ruling of the Supreme Court, particularly when aggrieved parties

feel that they are deprived off their constitutional rights when government agencies put in place programs that exclude them from opportunities they qualify for, particularly on the basis of equal opportunity. While the court's ruling creates policies and sets precedence for future policy action, the judiciary has reserved the Affirmative Action policy on grounds of addressing historical injustices. Over the years, Affirmative Action has expanded its scope to include gender and immigrant issues, and has addressed a wide range of issues for instance low income labor laws, and gender issues in the higher education and socio-economic sector. Other issues that have been included in the policy are the protection of people with disability and protection against gender based violence (Dye, 2011, pp. 245-250).

2.7 Public Policy and Rights Issues: The South African Experience

In the previous section, we focused on the US experience. We examined the implementation of rights policies from the constitution to policy outcomes. We found out that it takes quite a long time to realize public policy. Particularly state agencies are very reluctant and resistant to rights policies. Some states for instance realized rights policies earlier than others. This implies the variations in political conditions driving the states, as well as public administration cultures which states want to hold on. We also realized the significance of the central role the Judiciary has played in the implementation of rights policies, particularly in providing policy implementation measures and implementation orders and sanctions.

The US experience also shows a strong network of resilient women rights movements continuously working at all levels to mobilize support and push for the implementation of rights policies, adoption of new policies and passage of new legislations. The role of the elite both at the political, Judiciary, and society level is also very crucial in the implementation of rights policies. Finally, it is important to note that there was considerable effort made to address the conscience of decision makers in government, as well as major players at the society level.

In this section, we examine South Africa's experience. We will focus on South African women's struggle for justice during and after the apartheid regime. We want to understand the issues around the struggle for justice in South Africa. The

importance of this section is that it provides the foundation for understanding policy achievements South Africa has made in promoting justice for women, as well as major players, and factors in the success. This section also provides the basis for understanding challenges in implementing rights based policies in a post-colonial and post-apartheid context characterized by immense structural inequalities. This section is also important for this study because the South African experience provides policy implementation lessons for Kenya, given that Kenya adopted the South African model of addressing inequalities using the constitutional framework.

2.7.1 Introduction to South Africa

South Africa is a multi-cultural country located in the Southern parts of Africa. Africans are the majority race in the country. However, the Afrikaners (Dutch), the British, and Indians constitute part of the major races in the country. South Africa, like other African countries was exposed to white settlements, due the increased demand for slaves in America as a labor force required in running European industrialization. After the ban on slave trade, European countries required an alternative economic enterprise in Africa to replace the gains obtained from slave trade. As a result, colonialism was introduced; in order to replace slave trade in Africa. It is also important to note that colonialism was a gradual process which affected African countries at different periods of history. As a strategy, colonialism varied in nature across African countries and even within the countries.

South Africa was colonized by the English and Dutch in the seventeenth century. After the Dutch colonization, South Africa was colonized by England. After independence from England in 1910, the Dutch and the Afrikaner groups in South Africa formulated a power-sharing deal based on which they led the country until the 1940's, when the Afrikaner National Party was able to gain a strong majority. The Party then created the apartheid system, as a means to sustain their control over the economic and social system. The objective of the apartheid regime was to maintain white domination and extend racial separation. Racial laws enacted in 1948 controlled every aspect of life. All the Blacks who were the majority were denationalized. Laws determined 'White only' jobs, racially classified citizens based on descent and appearance, and socio-economically located them within the prescribed areas of

public life. The essence of the apartheid policy was to give the Whites preferential opportunities, power, and resources, and at the same time limit the capabilities of the Blacks to develop. Police repression and computer technology were used to enforce and sustain the regime (Chokshi, et al., 1995, pp. 1-2). Apartheid regime continued until in 1994, when South Africa first held its plural democratic elections, which saw Nelson Mandela become President.

In 1996, South Africa changed its constitution and emerged on the reconstruction of the governance and justice system. Currently, South Africa's constitution is among the most progressive constitutions in the world. The UN points at South Africa as one of the leading examples that demonstrate best practices. The South African Judicial system has set an outstanding progress in transforming the justice systems and enforcing the culture of constitutionalism (Slarks, 2010, pp. 164-165). In the following section, we will examine the experiences of South African women in the struggle for justice during and after the apartheid regimes.

2.7.2 Women and Justice in South Africa: A Historical Overview

Understanding women's struggle for justice in South Africa is multi-dimensional. First, it is about dealing with the apartheid legacies and inequalities. Apartheid was a legal regime that deliberately enacted and enforced racial laws with the political intention to marginalize the black South Africans in all aspects of life. The second dimension is the gender dimension, which is about the inequalities between men and women. These inequalities are rooted in the inherent socio-cultural, economic, and political structures which determine daily life.

According to African National Congress (1980), women movements began in the 1920s, especially in the laundry, clothing, mattress, furniture and baking industries. These were small movements which evolved over time and were shaped and challenged with various government forces. Although several black national federations were formed and dissolved, the one that endured in spite of the new labour legislation of the 1920s was the Non-European Trade Union Federation, which was formed in 1928.

Women trade unionists opposed the growing Afrikaner nationalism and apartheid in the unions in 1930's. Their aim was to keep the trade union united by

combating forces of racism. They also strived for compulsory education for all races besides an end to job reservations on the basis race. Women also wanted government to provide training for all races. As the economy developed in the 1930s and 1940s, the growth in capital accumulation and the increase in demand for labor, gave women an opportunity to respond to this needs. At this time, women movements largely comprised of black industrial workers (African National Congress, 1980).

The government enacted racial laws in the 1940s and 50s. These laws sought to constrain the development of Black Africans. The National Party`s labor legislation, particularly the Industrial Legislation Commission of 1950 enforced apartheid in the trade unions. Under the Suppression of Communism Act, 56 trade union activists were banned by 1955; the Industrial Legislation Bill of 1956 made job reservations for the Whites only the law. In response, women led protests and strikes in efforts to combat the laws. Historically, the trade union movement helped to inspire women in many other areas, but the main impact was that the unions provided a training ground for women political leaders. Because of these experiences, women workers in factories learned new methods of organizing and were exposed to the principles of non-racial worker solidarity (African National Congress, 1980).

Since the founding of the African National Congress (ANC) Bantu Women`s League in 1913, women have been active in other organizations, especially those based in urban areas. Women for instance played an active role in the Campaign of Defiance against Unjust Laws during which, in 1952, many were arrested. They also helped to organize the Congress of Democrats, a white organization in alliance with the ANC and the Colored People`s Congress. However, the lack of a broad-based women`s organization made the participation of women sporadic. These activities largely took place in urban areas. There was little or no contact with women in the reserves (African National Congress, 1980).

1) The Federation of South African Women

Studies by the African National Congress (1980) also show that the Federation of South African Women (FSAW) was formed in 1954, in response to among other things, the effects of apartheid. Its membership was about 230,000 women from the Congress Alliance, but especially from the ANC`s Women`s League. FSAW had two primary aims: to work for majority rule and end the policy of

apartheid; and to build a multiracial women's organization that would also work for the rights of and freedoms for women. The creation of the FSAW marked the start of a period of expansion of the political involvement of women, especially black women. In December 1954, the FSAW campaigned for a boycott of schools controlled by the Government. The women organized on a house-to-house basis, but when the State announced that all children out of school on a certain date would be expelled, the boycott collapsed (African National Congress, 1980).

In 1957, women led public protests against government policy which had increased bus fare. The Public Utility Transportation Company, which transported some 25,000 Africans each day from the townships of Alexandra, Sophia town and Lady Shelburne had increased bus fare by one penny. As a result, Africans began a bus boycott by walking up to nine miles each way, some leaving at 3:00 a.m. Within three weeks, the 25,000 Africans from those towns had been joined in sympathy by 20,000 other Africans. The boycott was organized mainly by women and was led by a woman. The State responded with mass raids in which 6,606 Africans were arrested and another 7,860 subpoenaed. A rally of 5,000 people in Lady Shelburne was attacked by two police batons. An incident that left 17 Africans hospitalized. The Government announced legislation that would result in a permanent end to bus services to the African towns. But the Africans continued to resist, and after five months the Native Transportation Amendment Act No. 52 of 1957 rolled back the fare increase (African National Congress, 1980).

Studies also show that in 1959, Cato Manor, an area near Durban, became the site of large-scale protests against the "Bantu authorities" when the municipality attempted to end all illegal liquor stills. Beer brewing was the main source of income for African women. Under the law, African men had to drink in municipal beer halls. In June 1959, 2,000 women marched to express their grievances. Others entered a beer hall and destroyed the beer. They organized a beer boycott which led to wide-scale uprisings all over Natal. During 1959, an estimated 20,000 women in Natal protested and more than 1,000 were convicted in the courts (African National Congress, 1980).

2) The Anti-Pass Campaign

South African women also refused to accept the restrictive passes, a policy that required Black South Africans to obtain and carry pass ports when

traveling to regions designated as 'White only States' in South Africa. The Government attempted to get women to carry passes as early as 1913 but was met with such severe resistance that it did not make the attempt again until the National Party came to power in 1948. By the time the Native Abolition of Passes and Co-ordination of Documents Act was enacted in 1952, a large number of women had moved to the urban areas to seek employment and keep their families together. For the National Party, this represented a permanent urban labour force and, therefore, a serious threat to the apartheid structures they were designing. The 1952 Act was intended to permit only the necessary labour for industrial and domestic work into urban areas. Passes were to be extended to women. However, as a result of the earlier campaigns, the Government did not announce until October 1955 that passes would be issued to women beginning in January 1956. In response women organized a demonstration. The women in Black Sash staged an all-white protest; in Pretoria, 2,000 African women rallied (African National Congress, 1980).

Women burned the first Passes issued in March 1956 in the Orange Free State, even though it was illegal to do so. They then organized a protest on 9th of August 1956, an event that saw the attendance of more than 20,000 women organized by FSAW. Their attempts to see the Prime Minister failed. However, they placed petitions with more than 100,000 signatures in his office. In another case, when government officials arrived in Lichtenburg in the western Transvaal, in November 1956, to register women, more than 1,000 women met them to protest. The police made a baton charge, and the women threw stones in retaliation. The police opened fire and two Africans were killed (African National Congress, 1980).

When government changed the pass policy to identification permits, women in Johannesburg organized an anti-permit meeting in Sophia town on 12th of May 1957, where 2,000 Africans attended the meeting. On the 16th of May, 1957, about 20,000 people met to send a seven person panel to the Mayor seeking to abolish the policy. The panel was escorted by about 6,000 people. The mayor agreed to suspend police action and issue exemption certificates for women. However, the Pass policy was later enforced in 1963 by the Proclamation 268 and Government Notice 1722 of 26 October 1962 which made it obligatory for African women to carry passes as of 1 February 1963. However, the involvement of women in anti-apartheid

movements was a central pillar to South Africa's democratic victory (African National Congress, 1980).

3) The Black Consciousness Movement

The Black Consciousness Movement begun during the 1960's repression period. At this time, African National Congress and the Pan African Congress were banned, following the 1960 Sharpeville Massacre. On the morning of 21 March 1960, thousands of Africans gathered in locations around the country in protest of the apartheid regime. In Sharpeville, up to 20,000 came to the police station: the atmosphere was tense. Police opened fire; 67 Africans were killed and 186 wounded, including 40 women and 8 children. More than 80 per cent were shot in the back while fleeing (African National Congress, 1980).

Black consciousness was an intellectual initiative to bring blacks back to self-actualization. The initiative aimed at creating awareness among Africans, encouraging them to accept that they are Africans, hold on their values, and shun away from the white man's way of life. It was the ultimate search for black solidarity and power. Today, black consciousness is a call for an African centered perspective on socio-economic and political life of South Africa. It means that whatever that it is done, it has to be done by Africans and for Africans. During this period, African women formed the African Self Help Association in 1964. These association established day care centers and feeding programs for children (African National Congress, 1980).

In 1975, Black Women Federation (BWF) was formed with an aim to promote blacks to leadership and oppose anti-black legislations. BWF worked in both urban and rural areas, which its predecessor did not do. It attempted to teach women to realize their own potential and to increase their awareness and level of education. It began literacy, nutrition and health classes. It was starting to establish small cottage industries and was preparing to work in the areas of housing, trade unions, rural development, and the legal disabilities of black women. But the Government acted swiftly to crush BWF. Within a year, seven leaders had been detained. The entire organization was banned in October 1977. However, the movement was successful in mobilizing resistance and international pressure against the 1977 Crossroads Initiative. The Crossroads Initiative was an event when women mobilized resistance

against forceful relocation of blacks from Cape Town. Despite the fact that thousands of women were arrested, and attacked by Police, the campaign bore fruit in 1978, when the international community overwhelmed the government with pressure to withdraw the policy (African National Congress, 1980).

In a summary, we can observe that the Apartheid regime deliberately intended to exclude African women from the benefits of public policy, using the legal framework. As a result, women organized resistance movements that opposed the legislations. Their movements were a political struggle organized to influence protection of rights, through a political process. The success made in this struggle was the realization of plural democracy and later the comprehensive constitutional reforms. Factors behind the success can be attributed to the strong women networks and resilience demonstrated by the participants. Unlike the American experience, which largely succeeded through the judicial process, the South African women experience largely succeeded through a political process. Since there were few South African women political leaders at the time, rights movements were largely organized by trade unions since this was the arena where more elite women were dominant. Unlike the American movements that focused on addressing the consciousness of the elite, the South African movements largely focused on addressing the consciousness of the masses.

2.7.3 Women, Justice, and the South African Constitution

The Bill of rights which provides for non-sexism and non-racism is entrenched in Constitution. It recognizes primarily, that human rights are inalienable; they apply to all human beings. South Africans understand that the enjoyment of human rights is the most basic requirement and standard for the enjoyment of all human life. To this end South Africa has enacted legislation and ratified international and regional instruments aimed at the protection and promotion of women's rights as human rights. These rights fall into two broad categories: socio-economic rights as well as political and civil rights. Socio-economic rights are rights dealing with basic necessities such as housing, health, water and food. Political and civil rights refer to the rights of individuals to citizenship, language, culture, religion and basic freedom of movement and expression (Republic of South Africa, 2000).

Although the South African constitution (1996) does not provide for quotas as a mechanism for increasing women representation (Electoral Institute for the Sustainability of Democracy in Africa, 2009, p. 1), it provides for non-sexism and equality (Article 1). The Bill of Rights binds all state organs and applies to all laws (article 8). Other provisions in the Bill of Rights are: Equality of all before the law (Article 9); right to human dignity (Article 10); right to life (Article 11); right to freedom and security (Article 12); right to a safe environment (Article 24); right to own property (Article 25); housing (Article 26); health care, food, and social security (Article 27); education (Article 29); language and culture (Article 30); access to information (Article 32); and Just administrative action (Article 33), Republic of South Africa (1996).

The benefits of the Bill of rights in South Africa is that inequalities based on gender, and deepened by other characteristics such as disability, age, geographic location and religion, are particularly relevant to South Africans because of her history. Therefore, the Bill of Rights ensures that majority of South Africans, will no longer be subject to racist laws, and continue to encounter racist attitudes particular attitudes and practices emanating from the apartheid legacies (Republic of South Africa, 2000, p. 19).

2.7.4 Women, Justice and the South African Society

1) Gender and Politics

While women are denied access to employment opportunities as well as opportunities to advance their goals in education, the previous national commissions on employment did not take into account domestic work, yet the domestic sector is the largest employment sector for women (Nolde, 1991, pp. 203-223).

The political debate on the role and place of men in gender related initiatives in South Africa is of dual dimension. One school of thought is that which divides the gender issues between men and women. The assumption behind this school of thought is that the presence of men in gender initiatives only enhances the patriarchal structures and male domination. On the contrary, the second school of thought is based on the argument the goal to achieve gender equity in essence, means giving an equal opportunity for both men and women to contribute to change. This

view is based on the assumption that not all men are the same, and not all men share the oppressive power, privileges, will and interests. Therefore, there are men who share in the oppressed experiences just like women do, and so ally with feminist, anti-racist and anti-classist groupings to pursue the goal of social justice, including the dismantling of patriarchal privilege (Morrell, 2007, pp. 15-35).

Since 1994, the African National Congress has largely contributed to the promotion of women in political leadership through its political commitment. This initiative is embedded in the constitutional requirement to ensure equality and non-discrimination. Other factors leading to the increase of women in political leadership are: first, the work of the women in the African National Congress (ANC), who have been actively involved for decades in the struggle for national liberation and social emancipation; and second, it is the result of the policies and affirmative action mechanisms adopted by the ANC. Of the 119 women elected to Parliament in 1999, 96 (80 per cent) were from the ANC. President Nelson Mandela set a socio-political ethic of equality which the African National Congress has continued (My a k a y a k a – Manzini, 2002, pp. 1-4).

Until 2007, the African National Congress Constitution required "a quota of at least one-third (1/3) in all its structures to enable such effective participation". At the 52nd National Congress held in Polekwane in 2007, this policy was amended to increase the quota to parity. As a result, 50% of the people elected to the National Executive Committee at the Congress were women (Electoral Institute for the Sustainability of Democracy in Africa, 2009, p. 1).

2) Public Administration and Governance

South Africa has made a significant improvement in providing opportunities for women in leadership. Women's access to political power and decision-making has improved since the 1994 general elections. In 2000, women constituted 8 of 27 Ministers and 8 out of 13 Deputy Ministers in the national government, 30% of the Members of Parliament and 24% of Members of Provincial Legislatures. Women are less well represented at local government level, where 19.4% of Councilors and 14.4% of Executive Committee positions are women. In public service, women representation was below 30% by the year 2000. The proportion of women holding senior positions in trade unions is also still low.

Although a significant number of women have reached higher positions in government, the dominance of the male culture hinders women to effectively influence policy (Republic of South Africa, 2000, p. 18).

3) Economy and Work Place

When compared to men, women, especially black women, have low access to paid employment. When they do find paid work, black women typically have lower incomes and less security than all men. Most black women are found in poorly paid domestic labor and micro-enterprises which do not offer job security and benefits or much by way of legislative protection. Although gender discrimination has been removed from labor laws, this has not been sufficient to achieve equality in women's participation in the paid labour force. Macro-economic policy does not effectively deal with women's empowerment and gender equality (Republic of South Africa, 2000, p. 18).

Most women are in the informal employment sector. These women spend large amount of their time on unpaid activities because they are unable to access paid employment and therefore have time at their disposal. Therefore, they are unable to spend more time in paid and income generating work because of the heavy burden that they bear in social reproduction (Valodia & Devey, 2005, pp. 1-12). While theoretically, women currently have access to a broader scope of position in the labor market, these new opportunities are accessible to a narrow pool of women who have had access to skills development, education and training. In large measure, women's employment remains either within the traditional female occupations or within the domestic and farming sectors all too often as casual workers. They are concentrated within positions which are low paying and which have high rates of turnover. The implementation of the reforms aiming at providing women with access to land is challenged by some entrenched cultural practices such as patriarchy (Republic of South Africa, 2000, pp. 1-11).

4) Education and Training

Science and technology is fundamental components of development, seeking to transform patterns of production, contributing to the creation of jobs and new ways of working, and promoting the establishment of a knowledge-based society. However, given the large number of women in the workforce, South Africa must

devise mechanisms for engaging women with science and technology in order to enhance their productivity and thus increase the quality of national production is still a challenge. This is because women are not actively involved in the definition, design, development, implementation and gender-impact evaluation of policies related to the economic and social changes undertaken in national development. Although both girls and boys have equal access to basic education, unplanned pregnancies affect girls more negatively than unplanned paternity affects boys.

In rural areas, girls are often absent from school because of the domestic responsibilities assigned them. Girls are also likely to be the victims of sexual harassment, rape and other forms of violence. These challenges reduce the number of girls attending school in the long run. Although South Africa advances in the education sector, gender stereotypes and women's subordination continue to pose a challenge for curriculum development. High levels of illiteracy among women in rural areas and non-formal education undermine the ability of women to improve their well-being. At the higher education level, in 1999 women comprised 55% of all university students' students. However, more women are in areas such as health, education and social sciences than in science and engineering, where rewards and career prospects are generally better. Although women constituted about 38% of the higher education staff by the year 2000, there were few women above the higher ranks (Republic of South Africa, 2000, pp. 11-12)

In some cases, the distribution and access to communication technologies still contribute towards the negative or degrading portrayal of women. Poverty, lack of access to opportunities, illiteracy, language barriers and other factors prevent women from positively and optimally utilizing ICT as a development tool (Republic of South Africa, 2000: 19).

5) Environment and Environmental Health

Statistical data on women's health is scarce. However, majority of women also live in informal settlements, where they lack housing, security, sanitation, and a safe environment to begin and run micro-enterprises. The major causes of female deaths in South Africa are: high blood pressure; pregnancy related complications; prolonged labor and obstetric hemorrhage; septic abortions; HIV/AIDS related diseases; cancer of the cervix; tuberculosis; malaria; and other opportunistic diseases.

Health issues reflect Apartheid related inequalities. For instance, the 1998 Demographic and Health Survey found that 58% of sexually active African women, 68% of Colored women, 80% of Indian women and 75% of white women were using modern methods of contraception. Despite relatively easy access to contraceptives, many women still have limited control over their sexuality and reproductive lives. According to the 1999 Annual Antenatal HIV Survey, women under the age of 30 are prone to HIV/AIDS, while an average of 22% of all pregnant women attending antenatal clinics, and 17% of teenage mothers tested HIV positive. Health care community workers largely bear the burden of taking care of people living with HIV/AIDS, as well as people with disabilities (Republic of South Africa, 2000, pp. 12-14).

Free health care program for pregnant and lactating women, and for children under the age of six years at state clinics and hospitals begun in 1994, fell short of health workers in some areas. The program had inadequate health facilities, and lacked adequate transport for many rural women. As a result, this limited women's and their children's access to such programmes. Women constitute the majority of health personnel in state and private clinics and hospitals, since they largely serve as nurses. However, nurses are accorded low social status and material benefits. They are grossly under-represented in research, managerial and leadership positions in the health sector. Therefore, they play an even smaller role in shaping health policies, structures, services and products. Mental health is continuously neglected especially in rural areas. This has a greater impact on women in under-resourced circumstances, since they face poverty, ill health, unemployment and greater responsibilities. Expectations based on gender are usually very high for women particularly in terms of fertility. Childless women are often in pressured by the stigma attached to childlessness. Violence is also common in these circumstances (Republic of South Africa, 2000, pp. 13-14).

Since the large proportion of women live in rural areas, where people dependent on natural resources and are largely affected by poverty, access to these resources is a gender issue. In large measure, women struggle to get water, wood and fuel as well as access to mineral and other resource rights. Although the natural resource policy provides for 30% women representation in water management and

environmental planning boards; water schemes have tended to favor houses which are easy to connect to water supplies. This has disadvantaged poor rural women who live far away from water supplies. There are also few training and empowerment programmes to prepare women as managers and custodians of natural resources. Environmental impact assessments have not paid enough attention to the impact of policies and practices on all women. Few women are involved in making decisions aimed at the creation of a healthy and sustainable environment (Republic of South Africa, 2000, p. 17).

6) Culture and Gender Issues

Domestic violence, abuse and rape are not taken seriously among many cultures in South Africa. There are few support structures and facilities for victims of rape at police stations. These issues affect women most. In 2000, the South African Police Service initiated a women empowerment initiative seeking to address the problem of violence against women and children. The 1994 government policy to provide housing to all homeless and stateless South Africans experienced challenges such as gender based discrimination in the allocation of houses, since women were ignored. Women also lost their houses in cases of divorce. It is difficult for women to obtain the necessary security of tenure that is a precondition for accessing housing subsidies. In marriages under customary law women are denied rights to own property independently, to enter into contracts, to sue or be sued and to obtain credit. Women in marriages under customary law may not inherit property or land held in individual tenure. Women may, however, apply to be exempted from "Black Law and Custom". Procedural or structural laws limit the number of women who benefit from state welfare grants compared to men. The number of African women benefiting from the state grants is relatively lower than White and Asian women (Republic of South Africa, 2000, p. 15).

Women ownership of property for instance land largely depends on their social status, or the good will of their male partners or parents. Customary laws guiding inheritance favors sons and discriminates against daughters and as well as widows in some cases. Even when women own land, the control is in the hands of their male relatives. Traditional power systems also deny women the right to represent

themselves in the land dispute cases or land issues (Republic of South Africa, 2000, p. 16).

President Jacob Zuma married his sixth wife in April 2012. Zuma married Ms Bongki Ngema at a traditional ceremony known as umgcagco at his home in Nkandla, KwaZulu-Natal. The marriage process includes the ritual where the bride showers the groom's family with gifts. Polygamy is legal under liberal post-apartheid laws (The Telegraph, April 20, 2012). President Zuma's marriage is a representation of the traditional African culture. In most African cultures, leadership, wealth, and polygamy are closely tied together. This culture is passed on to the next generation and is enhanced by the involvement of powerful people in society who the masses emulate.

In a summary, we can observe that although South Africa has made considerable progress in some areas for instance securing 1/3 women representation in parliament and 50% women representation in National Executive Committees at the Congress, women are still largely disadvantaged in the South African society. Women representation in public service is still below average. Most women lack access to paid employment and dominate the informal sector. Women are also still largely affected by domestic violence, are underrepresented in the education sector, and are discriminated by cultural laws for instance land ownership.

2.7.5 Research on Women and Justice in South Africa

Research in this area largely focuses on how women are affected by different situations for example, culture, crime, poverty, inequality, and disease. Justice in these studies is conceptualized as: 1) The outcome of the judicial process. 2) The expectations of the citizens based on their political contract with government or the legal obligation that holds the government responsible. 3) What the citizens are entitled to in light of the legal framework and the expected culture of constitutionalism. Justice in this case is seen as outcome oriented, and is firmly linked to the bill of rights in the legal framework. Every action by members of the society or government is determined as right or wrong, success or failure, just or unjust, based on these principles and perspective. However, there is scanty literature on the process of seeking justice.

There are two main arguments about obtaining justice in the existing literature. The first argument is that it is difficult to get justice. The way justice is defined limits the extent the system can address issues affecting women. For example, when emphasis is given to political and economic issues at the expenses of social issues, women are largely disadvantaged. Because of such definitions, women did not adequately share their stories during the South African Truth and Reconciliation Commission hearings (Borer, 2009, pp. 1769-1793). Women also face increased violence, part of which is as a result of the structural issues (Mogale et al., 2012, pp. 550-594). Redistributive justice after the end of apartheid is yet to be achieved (Lenkabula, 2005, pp. 103-116). A critique on the Truth, Justice, and Reconciliation Commission shows that women experiences were not comprehensively considered (Kashyap, 2009, pp. 449-467).

One of the greatest challenges is how to sustain the policy set by government, for instance in areas like HIV/ AIDS (Heywood & Shija, 2010, pp. 640-646). Socio-economic conditions like poverty, cultural diversity, and the legal systems may make it difficult to attain justice (Cornwall & Molyneux, 2006, pp. 1175-1191). In such cases, achieving collective efforts by mobilizing people towards a common agenda is not easy (Leonard, 2011, pp. 113-129). Keeping the protection of the women's freedom as priority is difficult as well (Marle, 2003, pp. 255-278). Therefore, public participation in democratic governance is not fully functioning (Vincent, 2011, pp. 264-277). In some cases men resist gender based changes (Dowrkin, et al., 2012, pp. 97-120). In this struggle women issues are treated as a private matter and so do not acquire significant public attention (Waetjen & Mare, 2009, pp. 63-81).

The second argument is that obtaining justice is possible. Since 1990s, the government has demilitarized the prison systems and transformed the prison conditions based on the constitutional rights (Luyt, 2008, pp. 299-323). Despite of various challenges, women who have access to leadership demonstrate significant commitment to issues concerning the community for example education. Their leadership characteristics include compassion, spirituality, and care (Mogadime et al., 2010, pp. 797-821). Looking at issues of justice from the perspective given by NGOs based research, the conceptualization of justice makes women appear as victims and men as perpetrators of violence. This conceptualization ignores the lived reality that is

more than the oppressor-oppressed relationships (Mindry, 2009, pp. 556-568). This shows that a well-balanced and comprehensive conceptualization of justice and gender related issues would provide much more details relevant in advancing the subject.

Violence against women realized in South Africa represents the struggle for justice (Wagner 2011, pp. 483-504). However, in this struggle women have more opportunities to challenge the legislations and conditions in society which undermines them (Hames, 2011, pp. 1313-1327). There is great potential for change, despite all the existing challenges (Outwater et. al., 2005, pp. 135-154). In such cases, the power of women has been revealed in their ability to form networks that serve as a resource in social justice (Phendler, 2008, pp. 23-40). In summary, we can observe that despite of the progress made, the socio-economic conditions of the South African society constitute the major setback in achieving justice in the society, particularly for women.

2.8 Public Policy and Rights Issues: Kenyan Experience

In the previous section, we examined public policy and rights issues, mainly with reference to women rights issues in the South African experience. We realized that South Africa is a multi-cultural or a multi-ethnic community, with inequalities existing along ethnic bases. We also realized that the rights issues in South Africa were entrenched in the country's legal framework. Therefore, the rights movements in South Africa largely used a political process to address these issues. Success stories in South Africa is attributed to the resilience of women participants in the political struggle for reforms, change in the conscience of the African masses to persistently demand freedom and rights for all, and strong women networks.

In this section, we will examine public policy and rights issues: the Kenyan experience. We want to examine women's struggle for justice since the pre-colonial period to present. We want to know what it was like for Kenyan women to pursue justice. The importance of this section is to provide a foundation for understanding justice issues for women in the wider national and historical context. This section will

also expose the factors that contributed to achieving justice, as well as the major barriers to justice in this context.

2.8.1 Introduction to Kenya

Kenya was formerly a British colony. It inherited the social, economic, and political structure of the colonial government (Deflem, 1994, pp. 45-68). Kenyan historians largely agree that the form capitalism that was practiced by the colonial government, whose legacy the government holds now, was different from capitalism practiced in the modern market economy. This is because the colonial government tied together imperialism, colonialism, and economic exploitation in their colonial government structure. Women, who had some power and opportunities before the colonial period, lost all their, social, economic, and political space, since the colonial government did not recognize women as citizens (Ndege, 2009, pp. 2-10). Very little changed for women until 2010 when Kenya obtained a new constitution seeking to correct the past injustices by giving women equal opportunities, resources, and providing fair administrative action.

The following section will examine women's struggle for justice in Kenya. The section contains both a collective history, as well as short narratives about key women figures in Kenyan reform history. The section attempts to highlight experiences that surround the role these women played in the struggle for justice, the context, and the implications this has on access to justice in the wider Kenyan context.

2.8.2 Women and Justice in Kenya: A Historical Overview

This section draws reflections on women's historical struggle for justice for the benefits of all Kenyans. The history of women seeking justice in Kenya can be divided into four eras. The first era is the colonial era (1920s-1962). During this period, women were denied citizenship, lost their public identity, access to opportunities, power and resources. The second era is President Kenyatta's era (1964-1978). During this time, the state focus was on building nationhood and combating ethnic and political disintegration that had divided the countries on ethnic, regional and political ideology lines. While politicians from one ethnic community and region supported socialism and were associated with Russia, politicians from the other

community supported capitalism and were associated with the west. During this period, women issues were not given priority. The third era is President Moi era (1978-2002). During this period, women issues gained national recognition because Moi relied on the national women's league called Maendeleo ya wanawake to build nationhood after the ethnic and political disintegration during the first 14 years after independence. This is the era where expansion of the agenda of women took place. This was the period of the rise of the civil society movements in Kenya as well as multi-party democracy. The final period is the current era (2003 -). Gender related concerns are safeguarded by the constitution.

Evidences show that this struggle was not an easy one, but that which demonstrates outstanding brevity from women who did not just become successful, but the best Kenya has ever produced globally. Contrary to the widely known myth that gender issues are a foreign idea, history shows that Kenyan women on all occasions in history stood boldly to challenge the powers that dehumanized not only women, but Kenya's future as a whole. History reveals that women like all other Kenyans valued nationhood and therefore sacrificed all they had to make Kenya a better place. In their tender but stronger hearts, they carried the heavy burden, to pursue the transformation of the Kenyan society.

1) Kenyan Women during the Colonial Rule

Kenya's diversity is not just about culture. It also reflects the inequalities that exist in the society. This is because the indigenous communities were excluded from development by the colonial government (Ndege, 2009, p. 3). From the beginning, the colonial governance structure did not encourage participation and equality. The British were not interested in welfare. Therefore, Christian missionaries who owned the hospitals and schools controlled the welfare sector. They were pro-colonial government. Only Christian converts and their regions accessed education and power (Ndege, 2009, pp. 3-4). This explains why we have non- indigenous and indigenous African Societies in Kenya.

Kenya has also a geographical diversity. Central Kenya, western Kenya, and some parts of the Rift Valley host the Kenya highlands (Chweya, 2006, pp. 4-17). Western Kenya has gold fields as well (Shilaro, 2000: 6-10). The British were interested in the immediate economic gains. Therefore, they provided infrastructure

development especially roads and railway in these areas, so that they could transport agricultural produce and minerals outside the country. So these areas were open for development than the rest of Kenya. Even after independence, Kenya continued this kind of investment policy that focused on immediate returns ((Chweya, 2006, pp. 4-17). As a result, the indigenous communities who largely lived in the semi-arid areas did not have access to such infrastructure.

Although African cultures largely gave more power to men than women, the colonial system worsened the situation, by creating a system of full male dominance. For the first time, in Africa's history, a family became the grass root political unit of the British colony. Women were not recognized as citizens during the colonial regime. Formerly, in Matriarchal cultures like the Kikuyu, and even some patriarchal cultures like the Kipsigis, Luo, and the Nandi, women had access to resources, power, and opportunities. Women were also allowed to acquire wealth, and marry younger ladies. Such women had status equal to that of men in that society (UNHABITAT, 2012, p. 42). An older wealthy and single woman who needed children would marry a younger lady, who would go out, find a man of her choice, and bear children for the woman who married her (UNHABITAT, 2012, p. 42). The essence was the freedom that came with wealth acquisition. With such freedom, women became equal to men in social status. The society through its value systems protected the right for women to work, earn status, and make decisions.

The introduction of the British law in 1889 gradually eroded the customary laws that defined property rights. Customary laws were integrated with colonial attitude and ethic. Council of elders became more authoritarian, accumulated colonial power and exercised its mandate. These laws were also modified to serve colonial interests (UNHABITAT, 2012, p. 44), which had nothing to do with women empowerment, or gender based social justice. The little rights enjoyed by women to work, acquire wealth, own and control property, and make decisions were lost (UNHABITAT, 2012, pp. 45-47). Unlike the pre-colonial context where women were part of the council of elders, the colonial system chose only few men to authoritatively rule the society.

The British value system also differentiated between private and public life. Men were allocated public life with economic and political power. Women were

allocated private life. The colonial law further required men to control the household, because a household had become a political unit under the colonial government. Therefore, women also lost their control of the household. Opportunities in the education sector were given to men, with missionary schools only providing basic life skills education to women (UNHABITAT, 2012, pp. 48-49).

Women were among the most affected victims of the colonial capitalistic systems. In Kenya's history, women suffered more than men during the colonial and post-colonial period. Likewise, women who came from minority or marginalized groups suffered more than those from ethnic communities that largely interacted with either the colonial government or Christian missionaries. The word minority in Kenya refers to that community that still largely holds on and practices indigenous traditions, which limits its access to human and technological development, or has little or no adequate representation in the government.

Minority groups are generally few in number compared to the larger ethnic communities. As a result, minority groups tend to have little or no influence on policy making as well as access to resources, information, democratic power, and network linkages other communities have access to. Minority groups are also closely tied to their geographical locations and have limited mobility. Because minority groups refused to be Christianized, they did not access human development (education and healthcare) which was only provided by churches to their adherents or regions where there were many Christians (Ndenda, 2009, pp. 117-175). Only Christians got church scholarships to study within and abroad and at independence, they dominated government. Minority groups were also hostile to colonialism and were evicted from their land, denied opportunities, and resources (Ndaskoi, 2002, pp. 71-13). Likewise, women were denied political power and opportunities by the colonial government. It is until 1977 that women first held National Identity Cards (Rotich, 2011, p. 2).

Therefore, post-colonial capitalism inherited, is a complex form of imperial capitalism that has assumed ethnic power and dimension over time, and thrives on the elements of colonial legacies, which are yet to be scraped off from government's practices. This shows that the gender problem in Kenya is a more complex issue.

2) Women Seeking Justice after Independence: The Kenyatta Era and Moi (1963-2002)

There are five key features in the Kenyan context which are very significant in understanding the experiences and achievement of Kenyan women who took a bold step to pursue justice. The first feature is the inherited colonial socio-economic and political structure, which was capitalist and imperial in nature, had no welfare systems, marginalized women, and had no mechanisms or provisions for women empowerment. In a feature on NTV television program titled *Makers of a Nation* (October 24th 2008), a story was told of the British women who began a women's league in Kenya in 1952. Although the league was claimed to promote the welfare of the Kenyan women, historians argue that the British authorities sought to use the organization to gather intelligence about African guerilla war fare for independence, from the unsuspecting elite African women.

After independence, the women league now under the domain of African women was used to propagate policy issues and provide mechanisms that addressed the provision of economic skills for women; child welfare; maternal health; family planning; women welfare; and women business promotion. Women pursued these goals despite the 14 year rule of President Jomo Kenyatta, who largely ignored the women's initiatives. Kenya's second president, Daniel Arap Moi realized the potential and local networks women had. He immediately gave the women league, land in Nairobi city to build economic assets for development. Moi also abolished laws that allowed for the seizure of property in order to pay debt, in case the creditor died. This law was oppressive to widows, whose property was seized after their husbands died. By 1980, the women's league had more than 100,000 members country wide. Moi enjoyed the support of women as a country wide and grass root political next work.

The second feature is the role of Christianity in Kenyan politics; which was positive because most of the women who rose to prominence in Kenya came from Christian families that had access to education, and health care. Christianity also played a negative role since it was largely on the side of government and largely undermined reforms and reformers, who addressed among other things, women issues. In the feature *Making of the Constitution* (NTV television, July 13th 2010),

historians argue that before the church joined the reform movement, pursuing reforms appeared to be a personal problem of the reformers who were seen to be fighting government. Moi was a shrewd president who went to church every Sunday. National media popularized him as the father and mother of the nation. He was introduced in public functions as farmer number one, teacher number one, politician number one, business man number one, and number one in almost everything that would come in the mindset of the broadcaster.

But since 1980s, church leaders began to break ranks with President Moi. They joined reformers, criticized the government particularly about abuse of power, corruption, and brutality against civil society and political activists. Since it was impossible to battle the police and successfully hold political rallies in public, church leaders offered cathedrals as the only public space in the country for discussing constitutional reforms. They reduced their time for preaching in order to set apart some time to allow civil society and political activists to talk about reforms. Both Catholic and Protestant Bishops countrywide built a network to speak for the people and for the reforms. Some vocal priests who were critics of government died under mysterious circumstances, while others were brutally beaten.

Features of priests in purple and white clothes leading civil society and political activists in protests across the streets of Nairobi became common. It is this influence from the church that gave moral value to the reforms. The public began to realize that civil society was not propagating individual interests, but genuine concerns of the country. It is during this period that Professor. Wangari Maathai's Green Belt Movement propagating democratic governance and conservation of the environment became a thorn in the flesh of Moi's government. This was because propagating environment conservation meant that bureaucrats in government would not get free forest land, as it was formerly distributed by the former president Moi.

Elite women during this time emerged strongly in Kenya's public space and made significant difference in the quest for justice. Hon. Martha Karua resigned from the judiciary and opened a law firm, through which she represented political activists detained by Moi's Government. Former Deputy Chief Justice Nancy Baraza who was by then a human rights activist lawyer began to provide voluntary legal services to young people who were arrested protesting and taken to court secretly at

night. Hon. Charity Ngilu stood as Kenya's first woman presidential candidate, while Prof. Julia Ojiambo became the first woman in Kenya to form a political party. These women influenced Kenyan politics by giving public policy a gender perspective. Therefore, the first ever reforms that began to take into account gender issues.

The Church cohesively held together and supported the movement for change driven by civil society, law professors, political scientists, lawyers, and former exiles who had returned from abroad. The church also worked with civil society to petition World Bank, IFM, and other donors to stop funding Moi's government, until he released all detained activists, and paved way for multi-party politics and constitutional reforms. In Parliament was a rebellious strong opposition, while in the courts and in the streets were an equally strong civil society and an agitated public.

The third feature is the former president Moi's 24 year rule (1978-2002) popularly known as *Nyayo* rule (literally meaning following in the footsteps of the former leadership), which intimidated women reformers who seemed to step on the government's toes. However, President Moi stands in Kenyan history as a president who had a special personal commitment to promoting women empowerment. Although he did not develop institutional or legal mechanisms for women empowerment, he understood promoting women empowerment as a personal commitment national leadership should make. To demonstrate this, he appointed women in key positions in government, and build girls high schools in every district in Kenya. Currently in each of the 47 Counties of Kenya, there are several Moi Girls High Schools.

Moi's leadership began to turn sour and authoritarian after the 1982 coup attempt, which aimed to get him out of power. Moi, an under estimated and soft spoken politician from the Kalenjin minority surprised many, especially the elite bureaucrats from the Kikuyu majority who had dominated government, during former president Kenyatta's 14 year rule. Moi ensured the imprisoned about 4000 Kenya Air force soldiers convicted of the coup attempt. He banned multi-party democracy, introduced detention laws, and criminalized political debate. Martin Shikuku, one of the longest serving detainees and political activist said "Those days, you could not dare, when you were powerful, to say Moi! Moi! No! To say Moi, Moi, you were to look behind, sideways, then whisper Moi! (NTV, July 13th, 2010).

Moi's era closed many opportunities for women empowerment, participation in governance, and political decision making. He was a great friend to those women who supported the ruling party, and was a nightmare to those who opposed his rule. He changed the constitution and personalized the state power. He had immense control over parliament and the Judiciary to an extent that he could manipulate these two significant state organs. Finally, the parliament and the judiciary had no power to provide checks on Moi's rule (Adar & Munyae, 2001, pp. 1-19).

The fourth issue is the international conflict between capitalism as a western agenda, and Marxism as a Russian agenda. These influences played key roles in Kenyan politics and had direct or indirect effects on women and their initiatives. While all male political figures in Kenya had a blessing either from the west or Russia, women leaders had none. They consolidated their struggle for change based on their ideologies, limited networks, friends and family support, constituents, young people, women groups, civil society, and personal achievement.

In 1966, Kenya experienced the first political split. This was just three years after independence. In this young nation, the opposition formed a socialist party which historians argue had a backing from Russia. The ruling party on the other side had support from the capitalist western countries. These divisions took an ethnic dimension in the country and polarized the socio-economic and political system, which was already imperial and capitalistic. However, the women's league did not split. It remained the only organization in the country that had a national outlook. Historians argue that this was the only national tool to foster unity and development, by the time Moi became president in 1978. As a result, he was attracted to the organization and embraced its support (NTV TV, 2008a).

The fifth issue is the cultural bias based on which women were intimidated, dismissed, ignored, or denied support for empowerment or development initiatives. However, in some cases, culture was a major boost in the women's achievements. This is because of the cultural diversities across the country, and the varied treatment of the women in these cultures. While in some parts of northern Kenya, girl child education did not matter, in central and western, Kenya, educating girls was a symbol of a learned person in the village. The decision to educate girls commanded great respect for the respective family. To be appointed in local

leadership for instance in school board, local, and national political positions, and one needed to demonstrate that he or she had educated her children including girls.

2.8.3 Women, Justice and the Kenyan Constitution

This section answers two questions: (1) What did women gain from the new constitution? (2) Of what importance is the Bill of Rights to women in Kenya? The Kenyan constitution (Republic of Kenya, 2010) recognizes the rights of women, particularly gender equity including social justice, parity and fair representation. The constitution seeks to realize essential values of human rights, equality, freedom, democracy, social justice and the rule of law. According to Article 2 (4) any law, including customary law that is inconsistent with this Constitution is void, while according to clause (6) any international treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.

According to Article 10 (2) the national values and principles of governance include—(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; (c) good governance, integrity, transparency and accountability; and (d) sustainable development. According to Chapter four Bill of Rights, the Bill of rights applies to all laws and binds all state organs. Article 21 (3) All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

According to Article 27 (3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. In clause (4) the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. According to clause (8) the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

Other provisions are: Right to freedom and security including freedom from violence, torture, inhuman treatment, and detention without trial (Article 29); individual right to own property anywhere in Kenya (Article 40); right to highest standards of health care (Article 43); and right to marry a person of the opposite sex by consent and form a family (Article 45). Article 47 (1) and (2) of the Constitution of the Republic of Kenya states (1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”. The constitution also provides for the formation of the Kenya National Human Rights and Gender Equality Commission to promote human rights and gender equality (Article 56). This commission is an independent commission.

Since the Bill of Rights applies to all laws and binds all state organs, it is also reflected in the other chapters of the constitution for instance: Elimination of laws, customs, and practices that propagate gender discrimination in access, ownership, and use of land resource (Article 60); protection of the dependants of the diseased persons holding interests in land (Article 68); public accountability for public decisions and recruitment based on merit (Article 73); The Independent Boundaries and Electoral commission to ensure constitutional compliance in political representation (Article 81); and Political parties to comply with the constitutional standards guiding the electoral process (Article 90).

Other provisions include: The National Assembly to consist 47 women representing the 47 counties (Article 97); 16 women to be nominated by political parties to the Senate. Two additional women one representing the disabled and one representing the youth to be nominated to the senate (Article 98); to promote gender equality and ensure competitiveness and transparency in the recruitment of Judges (Article 171), the Judicial Service Commission shall include two Judges of the High Court (one man and one woman), two lawyers (one man and one woman), and two members of the public (one man and one woman); provision for equal opportunities for training and advancement in the public service (Article 232); and the chair person and vice chairperson of a public commission shall not be of the same gender (Article 250).

In a summary we can observe that women's struggle for justice in Kenya has grown gradually over time and has expanded in scope, particularly in response to the changes in the country's political environment. Like in the case of South Africa, women inequalities have an ethnic base and are inherent in the socio-economic, legal, and political structures of the country.

Since the British government did not have welfare programs, education, health, and human resource development depended on the Christian charity work, which was limited to regions where Christian missionaries were active. While Kenyatta's government gave little focus on women, Moi's government empowered women on one hand and limited democratic and political freedom on the other. Moi rewarded women who supported his rule and punished those who opposed it. Democratic freedoms were partly expanded during the multi-party Kabiki's government on the other hand created more economic reforms that provided access to economic empowerment for women. Finally, the new constitution has widely expanded the rights and protects the political, social, and economic rights of women. Success for women in Kenya is largely attributed to networks between women individuals, movements and other national movements. Like in the case of South Africa, women rights have been largely achieved through a political process. Like in the US, women movements largely appealed to the conscience of the elite, rather than the masses. Apart from women movements, individual Kenyan women also came up with incentives to boost the quest for justice.

2.8.4 Women, Justice, and the Kenyan Society

1) Gender and Politics

Women political leadership is associated with attempts to solve problems related to poverty. The pursuit of political power is embedded in the fact that women issues are forgotten in the public policy process. Therefore, women receive little benefits in areas such as agriculture, education, health, trade, and equity in resource distribution. There are few women leaders in senior management positions. In case of a management challenge, women leaders are judged too harshly. Kenyan political structure is dominated by men from the grass roots. Therefore, women struggle to get access to the political space. Women politicians develop their

visions from their experiences as young girls growing up. What they seek to accomplish is shaped by what they experienced in the past. They also show concern for a human development approach to national development (Kamau, 2008, pp. 8-35).

The most common perception is that men are well suited for legislative posts than women. Political candidates are largely selected by few male political leaders who have heavy influence on the respective party politics. Women attempts to compete for political seats receive little support amidst little attempts by media, to educate the public on the importance of women representation in parliament. Poverty and low levels of education among women hinder efforts to recruit women who can compete politically with men on an equal basis. Women with families often receive opposition from their spouses and extended family, especially the in-laws. Kenya has a patronage based political system where political parties do not follow the rules but the will and interest of the patrons. Even when the laws require gender neutral rules to govern the selection of the candidates, selection procedures are twisted in a way that they favor men in the long run (Oduol, 2008, pp. 38-51).

Although Kenya has opened opportunities for women to participate in politics by laying down laws seeking to enhance the affirmative action policy, resources required to enable these women take advantage of the opportunities are lacking. This act of neglect is enhanced by the political propaganda that women issues as issues of the minority are not priority in public policy but subordinate issues. Therefore, the society privatizes the issues of women and fails to grant such issues due public attention. Kenyan politics is an expensive business, given the cost of networks required for a politician to get the numbers worth winning. Political campaigns demand huge sums of money. Sometimes crafting a political message for a local audience does not entail issue based politics, but what resonates with the society's thinking and wishes. In such a context where men have a cultural advantage, women tend to lose (Okoti, 2008, pp. 54-55).

Increasing the number of women in political leadership has been a fundamental struggle in Kenya. In the entire East and Central African region, Kenya has the lowest number of women in parliament. In 2007, women's share in parliament in Kenya stood at 9 %, Tanzania at 30%, Uganda at 30%, and Burundi at 32%, and

Rwanda at 49%. In 2007, a Bill seeking to create 50 special Parliamentary seats for women in Kenya did not succeed on the floor of the house. On the other hand, political campaigns are characterized by verbal and intimidating abuses and physical violence, which is in most cases taken for granted by the law enforcing agencies (Okumu, 2008, p. 78).

Since the introduction of Multi-Party democracy in 1992, only the 9th Parliament (2003-2007), had 18 female Members of Parliament out of 222 Members of Parliament. This was the largest number ever in Kenya's history. About half of these 18 were elected while the other half were nominated. Most women contesters for these positions drop because of violence, harassment, or discriminatory political party systems. There has been no political will to domesticate international laws that provide frameworks for equal participation in politics. In the 9th parliament, Members of Parliament under the age of 45 years constituted less than 20%, while Kenyans under the age of 45 years constitute 84.9 % of the entire population. This pattern reflects the way government allocates resources in National development, where women issues are underfunded (Ombati, 2008, p. 92).

2) Economy and Work Place

About 50% of Kenyans live below poverty line (International Monetary Fund, 2010). Issues of women, justice and the Kenyan society are embedded in issues of gender inequalities. According to the 2009 census, about 50% of Kenyans are women (Republic of Kenya, 2009). Over 75% of Kenyans live in the rural areas. Rural economy is largely built on informal agriculture and micro enterprises. Micro enterprises are therefore a critical economic pillar acting as a socio-economic base in the creation of much needed skills, employment, and generation of livelihoods.

Studies show that entrepreneurial characteristics such as age, education, attitudes and perception have a significant relationship with the growth of micro and small-scale enterprises in Kenya. Women also lack capital and education compared to men. There are no clear policies that can effectively guide gender based development (Naituli et al., 2006, p. 7). In rural Kenya, aged women are more likely to get opportunities to engage in micro enterprises for instance dairy farming, than young ladies who lack the cultural right to own land, have no capital, and are expected to grow and get married somewhere else rather than establishing business at home (Mulu-Mutuku, et al. 2006, pp. 24-29).

3) Education and Training

Although girls like boys have equal rights and opportunities to basic primary and secondary education. The number of girls in secondary education decreases particularly among poor families which have few resources to pay for additional fees and other expenses required in secondary school. As a result, some families choose to send boys to secondary school because they believe the boy child will be with the family always, while the girl child will get married and leave the family.

Semi-arid areas which are largely inhabited by indigenous communities have little or no access to education facilities. The few education resources available are far from the populations that are to benefit from the facilities. While the level of education among indigenous communities is relatively low. Girls are more disadvantaged because they are more tied to family roles, for instance looking for water in these semi-deserts. Insecurity issues for instance as a result of banditry makes girls more vulnerable than boys in such areas. Although the threat to human life is the same, families will risk letting the boys travel over 5 kilometers to go to schools but not girls.

Since Kenya began the Free Primary Education in 2003 without adequate facilities, there are more pupils in class than the teacher can handle. Most rural and sub-urban schools are under developed and receive little or no help from government. Rural schools are largely built by local communities or churches. Afterwards, the schools are registered by government. Government then pays the teachers while the community or churches provide infrastructure. In Kenyan slums, poor families that cannot afford the cost of taking their children to the already overcrowded schools decide to take their children to low class private schools in the slums. This is because such schools charge relatively low fees. Most of the teachers in these schools are either untrained, or trained but waiting for government employment. These means that trained teachers in these schools are there on a temporal basis (UNESCO, 2005, pp. 1-121).

A study on the efforts to implement gender policies in university in Kenya shows that private universities admit substantial amount of female students compared to public universities. Although most of these admissions are in Arts related

courses, private universities provide a more conducive learning environment. Private universities are also expensive. Therefore, few women can access higher education. There are fewer women in senior management positions in the universities. This means that the influence of women on policy making is minimal. Promotions are not necessarily based on merit, but other factors like political connections. Women find it difficult to pursue a PhD while working in the universities because they have multiple roles to play, limited time, and have no financial support to pursue higher education. Women are also marginalized in interviews therefore limiting their opportunities to access higher job opportunities.

There is lack of relevant legislations and goodwill among higher education implementing authorities. This is because universities are protected by the law to freely choose the courses they teach, hire staff, and manage the universities without interference from the state authorities. Therefore, there is no monitoring agency that ensures that the universities comply with gender equality policies. Kenyan universities are conservative, with rigid structures, and rigid way of management (Onsongo, 2006, pp. 36-38). Since vocational and life-long learning is largely technology driven, rather than development driven, women also lack behind (Bennett, 2006: 78).

Through self-help groups, women provide themselves a forum for the dissemination of gender-specific training in the areas of agriculture, health, education and micro enterprise. Although the effectiveness of the self-help group as a forum for gender-based training for advances in agriculture, science, technology and entrepreneurship; lack technical support from government and non-governmental organizations, it represents one of the most sustainable initiatives that can be used to enhance gender based policies. The self-help group concept began in rural Kenya as a women's initiative for availing ready cash for emergencies as well as support for occasions such as weddings and funerals. The composition, leadership and informality of these groups provide a regular forum for peer education which can be used to identify local development issues and introduce interventions for the alleviation of poverty. This model is convenient and effective because it is owned by women (Mutugi, 2006, p. 81).

4) Environment and Environmental Health

Since the largest population of Kenyans live in rural areas or sub-urban regions they face multiple environmental risks. Environmental problems bear an enormous burden, particularly on women, children and the elderly. Hence the need for practical policy strategies needed to assist women and children in reducing the environmental hazards associated with traditional roles. Women who largely use charcoal and wood fuel are affected by high levels of carbon monoxide. Therefore there is need to include gender perspectives in environmental policy, particularly domestic management of environmental risks and health hazards (Lugo, 2006, p. 89).

According to the Republic Kenya (2010b), the level of knowledge of family planning in Kenya stands at 95% women and 97% men. The use of family planning methods had also significantly increased, with women who have been sterilized increasing from 49 percent in 2003 to 54 percent in 2008-09. However, about 46% of married women use family planning methods. Unplanned pregnancies stood at 17% while mistimed pregnancies stood at 26%. However, women still have limited choices despite the available health care provisions. This is due to socio-cultural demands for children. About 92% of Kenyan women receive ante-natal care. Child delivery care slightly improved from 40% in 2003 to 43% in 2009. Maternal mortality remains high at 414 per 100,000 child births. About 56% of households were under Malaria protection. Concerning attitudes towards people living with HIV/AIDS, about 92% of Kenyans are willing to take care of people living with HIV/AIDS; 68-80% say they would like to buy fresh vegetables from a HIV positive vender; while 76-80 % of parents are willing to have their child be taught be a HIV positive teacher at school. More than 99% of Kenyans are aware of HIV/AIDS while 90 % of women indicating preference for faithful relationships as a way of reducing HIV/AIDS. About 47 % of married women have experienced domestic violence. Women seem to accept domestic violence as a way of life. Therefore, this practice limits the efforts to combat domestic violence in Kenya (Republic of Kenya, 2010, pp. 20-24).

5) Public Administration and Public Governance

Local government is one of the public agencies that work together with citizens in enhancing national development. Working with citizens means

collaboration where national issues are localized while local issues are effectively taken into account when shaping public policy. This mechanism provides opportunities for inclusion of the citizens into public governance strategies. However, women are ignored in the consultative process. This shows weakness in organizational culture and operational procedures required to foster gender-sensitive analyses and consultative process (Mwangi, 2006, p. 102).

6) Indigenous Communities, Peace and Conflict Resolution

In traditional times, casualties of ethnic conflict were largely men. However today, most casualties are women and children. In traditional conflict, war was guided by ethics. Cultural value systems did not allow attacks on women and children because they were seen as sacred and protected by the gods. Fate would befall warriors who attacked women and children in war. Such an act would bring back a curse upon the land. The army would lose war and their children or future generations would encounter fate in their lives.

However today, women and children are the most affected. They face physical violence, starvation and poor sanitary conditions, as well as rape and other forms of sexual violence. Although women face such difficulties, they have shown resilience in overcoming despair, and in building peace. This shows the importance in understanding the cultural role of women in peace building and integrating such perspectives, experiences, skills, and resources in the policy process (Ekuam, 2006, p. 142).

7) Culture and Gender Issues

Perceptions, stereotypes, and images that negatively portray women hinder efforts made to achieve equality. Cultural taboos imposed by the society on women, influence the societies' perspective of gender equality. In this case, women empowerment is associated with usurping the rights and role of men, rather than a human development initiative. Words have long term effects on the psychology of the society. Words plant visual images in the minds of people. These images influence the way people think of something, the way they make judgments, and the way they act. When stereotypes portray women as weak, women receive little attention and support in the public sphere. When stereotypes portray women as in war against men, women empowerment initiatives receive resistance or lack of support from the men who

dominate the control of the political, cultural, and economic sphere (Mazrui, 2006, pp. 160-163).

The culture of silence on gender issues makes it difficult to collect information and fully document the magnitude of gender related issues. Violence against women begins as early as fifteen years, and is tied to the socio-economic changes in the life of a woman. The level of education has minimal implications on domestic violence, although women with lower levels of education are likely to experience more domestic violence. Domestic violence is also embedded in marriage, divorce or separation. Among some indigenous communities, female genital mutilation still continues despite the enactment of the Children's Act of 2001, which criminalized the activity (Khasakala-Mwenesi et al., 2004 pp. 239-251).

Living in poorer households, being in a polygamous marriage, having a husband who drinks alcohol, and being in sales, agricultural, or unskilled jobs significantly increases the wife's risk of physical and sexual abuse. The wife's education is largely associated with physical and sexual abuse, but the relationships are not linear. The wife's age and number of children also contribute to physical abuse. Sexual abuse is largely registered among husbands with low levels of education (Kimuna & Djamba, 2008, pp. 333-342).

According to the Marriage Act of 2009 (Section 19, cap 150), a person under the age of 18 years can be married. However, certificates are not offered in such a case. In such a marriage, a parent or a person with lawful custody provides consent for the marriage in writing according to the provisions of this Act. In cases where the person under the age of 18 intending to be married has no parent or lawful custodian, such consent can be given by the Minister, Judge, the Supreme Court, or the Registrar of Marriages, after satisfying state inquiry into the issue. However, marriages for minors under the age of 16 years are prohibited (section 35, 2), Republic of Kenya (2009).

Although it is legal for 16 year olds to get married under such provisions, such laws may be prone to abuse especially among the poor communities. This law negatively impacts on the children's act of 2001, under which child marriages are prohibited. Social perceptions emerging from such issues may encourage indigenous communities and the poor not to take girls to school. In Kenya,

cases where girls at the age of 16-17 years are dropped from school to be married are common phenomena among poor indigenous communities.

The Kenyan law provides for five options for one to choose from when intending to get married. These are 1) African customary laws of the various cultural groups. This is where polygamy falls. 2) Hindu Marriage and Divorce Act (chapter 157), based on Hindu law and governing adherents of the Hindu faith. 3) Mohammedan Marriage and Divorce Act (chapter 156), based on Islamic law and governing adherents of the Islamic faith. This law is also provides for polygamy. 4) The Marriage Act (chapter 150). This provides for marriages for Kenyans intending to marry under civil law. This law also applies to marriages between Kenyans and non Kenyans. 5) African Christian Marriage and Divorce Act (Chapter 151), based on Christian tradition, but applies to the wider context governing people who choose to marry under the formal law, regardless of their cultural or religious background. While these options reflect the diversities in Kenya, they also reflect the embedded socio-structural and religious inequalities that discriminate against women. Women in general have less power to make these available choices, given the socio-economic, cultural and religious complexities governing marriage and divorce value systems and processes (Baraza, 2009, pp. 1-10).

In a summary women are still disadvantaged in many areas, for instance, they are underrepresented in political decision making and in public service. Most women live in rural areas with little access to basic infrastructure, economic opportunities, and health care. Cultural taboos and stereotypes also limit women access to property and education.

2.8.5 Research on Women and Justice in Kenya

Literature on women and justice in Kenya is still very scanty. However the existing literature indicates both negative and positive views about seeking Justice. Just like the South African experience, literature focuses on the outcomes of government functions for instance public policies.

The argument that it is not easy for women to get justice in Kenya is based on government actions, structures, or policies that are seen to be not taking seriously issues affecting women. A study done by the Federation for Women Lawyers in

Kenya (FIDA) indicates that Kenya is a patriarchal society, where women's rights are violated with impunity; where developmental policies largely cater for male interests and promote inequalities and where laws affirm subordinate and unequal roles for women and girls. The structured discrimination is mirrored through women's exclusion in development and decision making, marginalization and invisibility of their key concerns in policies, nonparticipation in public spaces and the fact that they constitute a disproportionately large number of victims of physical, psychological and sexual abuse (FIDA Kenya, 2011, p. 8).

Other scholars do not rule out the difficulties in getting justice in Kenya. Instead they emphasize focus on the realized opportunities as the basis for asserting that it is possible to get justice. For example, the local communities are seen to have more participatory potential Smucker, et al. (2007, pp. 1-2). This is a good incentive for women seeking justice. Social power for change in Kenya is strong since it has survived many attempts to thwart it in the past. Although at some point it appears submerged, it resurfaces over again (Brownhill & Turner, 2004, pp. 39:95).

Women, Business and the Law is a World Bank research initiative which focuses on gender differentiations in legal treatment, in areas affecting women's participation in the economy. The research is based on the following determinants: 1) Accessing institutions. Studies based on this determinant explore women's legal ability to interact with public authorities and the private sector in the same ways as men. 2) Using property. Studies here analyze women's ability to access and use property based on their capacity to own, manage, control and inherit it. 3) Getting a job. Studies here assess restrictions on women's work such as prohibitions on working at night or in certain industries. 4) Providing incentives to work. Studies based on this focus examine personal income tax liabilities, taking into account the tax credits and deductions available to women relative to men. For the first time, this topic covers not only taxation, but also the public provision of childcare and education (World Bank and International Finance Cooperation, 2012, pp. 1-26). 5) Building credit. Studies here identify minimum loan thresholds in private credit bureaus and public credit registries and tracks bureaus and registries that collect information from microfinance institutions. 6) Going to court. Studies here consider the ease and affordability of justice by examining women's access to small claims courts, which

can facilitate access to the legal system for small business owners, making it cheaper and faster for women who own businesses, which tend to be smaller, to resolve disputes (World Bank and International Finance Cooperation, 2012, pp. 1-26).

According to the research conducted in 141 economies worldwide, Kenya was the highest reformer, particularly in socio-economic and legal issues that affect women. Since the new constitution came into effect on 27th of August, 2010, Kenya had recorded the highest number of reforms eliminating the legal differentiation between men and women. Women like men had freedom of movement within and outside the country. This followed legal reforms withdrawing restrictions on getting a passport and other traveling documents. The customary law was subjected to the constitution. Elements of the customary law which are inconsistent with the constitution were rendered void. Now, women have equal rights before, during, and after marriage. Women are equally entitled to inheritance. Kenya has also improved the legal system fast tracing court procedures for small claims. Only Kenya made changes that affected the use of property data. Accesses to institutions like the courts or other key institutions in economic development have also been improved. Women have the right convey Kenyan citizenship to their children as well (World Bank and International Finance Cooperation, 2012, pp. 1-26).

2.9 Conceptual Framework

Literature shows that policy implementation as a success or failure can be caused by interrelated factors. As shown in figure 2:10, the heart of this research is to analyze the factors limiting indigenous women to access justice. Actual policy delivery which entails bureaucratic capacity and resources, as well as contextual realities which include community life and political commitment, are the main components that can influence the implementation of the right to administrative justice, particularly in the context of rights issues or can limit access to justice.

Since the purpose of this study is to analyze the contextual factors limiting indigenous women to access justice and recommend strategies to improve the Bill of Rights, the context is central to the conceptualization of this study. Therefore, the

design of the conceptual framework needs to take into account the centrality of the context and how it relates to the main components of implementation.

Variables selected from the literature are those that are core to policy success or failure, particularly in the context of rights issues. The variables are based on the logical relationship.

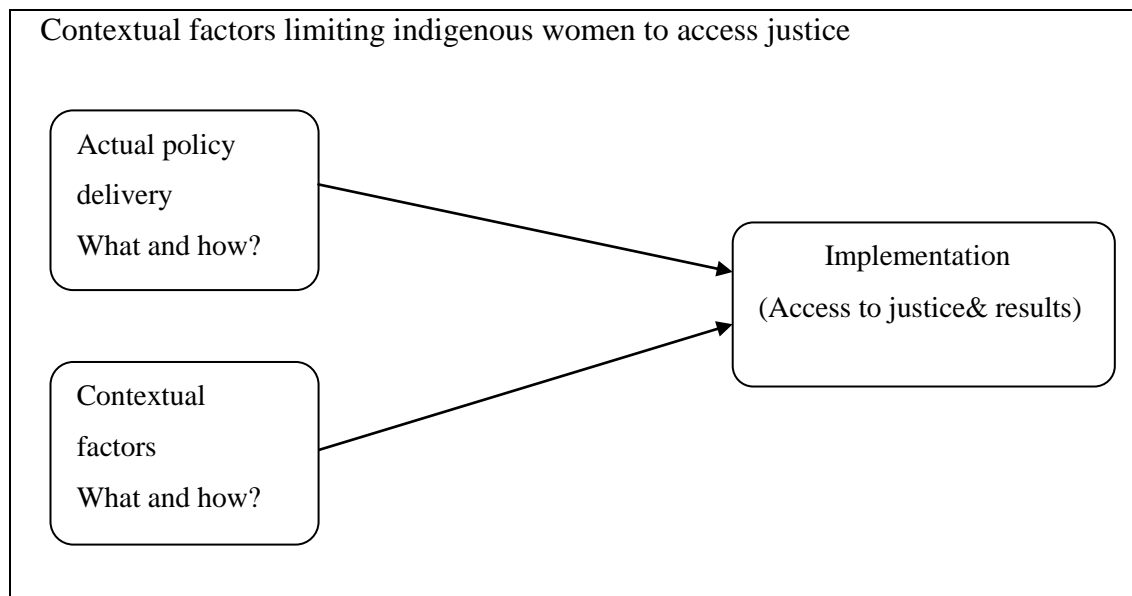


Figure 2.1 Conceptual Framework

2.9.1 Actual Policy Delivery

This is the way the policy is delivered in light of: the circumstances at hand, logic of the Bill of Rights, and the national policy reform framework. Actual policy delivery involves conceptualizing the original intention, motives, and ultimate purpose and comparing it to the real implementation experience at hand. Examining actual policy delivery takes into account documenting information about what is happening in the program. Information from lived experiences, particularly what individuals go through or went through in the process of seeking, justice can unveil issues around the program, which need to be addressed. To examine the actual policy delivery is to examine how close the program is to the original intention or what counts as the basis for claiming that the program is deviating from the original intention, or is providing insufficient or wrong intervention.

Other areas to examine are whether the implementers lack the training or motivation to implement, whether organizational arrangements facilitate accessibility, and whether there are other support programs aiming at reinforcing the main program, for instance awareness creation, public relation strategies and other related questions. Actual policy delivery also takes into account the bureaucratic capacity. Bureaucratic capacity from a rights issue perspective refers to the technical and moral capacity of public bureaucracy to deliver the intended results. Under normal circumstances a policy handed down the bureaucratic structure is expected to be implemented as required. When citizens seek public services from public agencies, they expect the bureaucracy in these agencies to act better than before. According to the process theory, bureaucracy is a continuation of politics and so politics becomes part of the implementation process. It is also important to note that different agencies within government bureaucracy have different interests. These means that implementation of the policy takes into account bargaining and struggles for negotiating the interests of a variety of parties that have major influence on the implementation success or failure. Actual policy delivery also takes into account resources. Resources in the context of rights are an inequality issue. Therefore we examine issues like what determines policy decisions at the local level, where the court is located, other relevant services in the area, budgets, human resources, staffing, family and community support that is necessary for facilitating access to justice. Looking at resources from the perspective of the community, we examine the elements of social capital for instance social cohesion, spirituality, support systems, and role models.

2.9.2 Contextual Factors

Contextual factors include all that is in the context which limit or enhance access to justice. This entails economic, cultural, religious, and political forces that have influence on the implementation process or limit access to justice through the role of the society.

Political commitment is one of the contextual factors. When we look at political commitment as a variable in the context of rights issues, the underlying assumption is that the government or implementers in some way are not willing to implement the policy, or may not implement the policy the way it is intended. This

assumption is derived from the concept of implementation games. The other assumption is that local politics may hinder the implementation of the policy, even when the government or implementers are willing to implement the policy. Under normal circumstances both national and local politics have a role to play in the implementation of the policy. Sometimes, it takes a vibrant local politics to influence the national politics which in turn pressures or convinces government to act.

Contextual factors also include contextual realities. Contextual realities refer to just how things are in this region, because of the way this region is. Contextual realities are learned from the experiences of the local people and how the experiences are different compared to other regions in the country. It also takes into account how people go about their daily life, or how they act in certain situations, because of the circumstances they find themselves in, and have little or no control over them. Contextual realities reflect the how the socio-cultural, economic, and political context affect implementation, whether policy measures put in place to improve public service delivery procedures are working, how well the program is organized, the quality of services provided, whether the program is being delivered properly, and other concerns raised by the target beneficiaries and experts, or discovered by the researcher through participant observations.

Community life is also part of the contextual factors. Community life refers to all things local people do in that community in order to meet their daily life needs, achieve their dreams as individuals and members of the community, and fulfill the requirements of the culture. Daily life is a socio-cultural rhythm members of society fit in. Community life is expressed in the socio-cultural behaviors and practices that exhibit what it means to be a man, a woman, a child, a son, a daughter, a mother, a father, a neighbor, and a kinsman or woman. It is lived by the members in a ritualistic way. It is a life lived in respect to the traditions, norms, and values of that community. It involves the way members of the community react to what is different or new to that particular community, which they think can help or destroy their community.

Community life also includes the stereotypes assigned particular members of the community or public policy. It also takes into account attitudes or community actions that are strongly expressed, or silently performed in order to symbolize what that community stands for or what some members of that community feel.

Community life is a life characterized by cultural stewardship. This is where members do all they can in their own interests, and in the interest of the community, to preserve what they inherited from their fore fathers and mothers, and to pass it on to the next generation.

Community life also include symbols, art, music, and stories that are shared in order to regulate the society, and to resist what some members of that society consider harmful or not relevant to the community. Stories, music, and other symbols may also express what the society fears and can resist or resists.

2.10 A Summary of the Literature

Public policy means government choices, actions, and inaction. It goes beyond what is reflected in the government records. It involves government activity and commitment to implement the text, and the way it actually implements it. Public policy is influenced by political process, bureaucratic behaviors, government machinery, and the external environment. Public policy theories help us understand what determines the nature and the content of public policy outcome. The relationship between seeking justice and public policy is that seeking justice means seeking to benefit from government policy as a citizen with rights to benefit.

Public policy arises from a public problem and is intended to respond to the public problem. The actualization of the policy from the text to real life experienced outcomes depends on the government institutions and machinery, the constant effect of the pressure from interest groups, the preferences of the elite, interests and expected benefits of all parties involved, the constitution, moral and legal public accountability, government authority, effective role of actors in government and outside government, and political strategies like coalitions, policy advocacy, and the interest of government to protect itself in the political arena and to benefit from the policy outcomes.

Philosophy of public policy is the examination of basic principles underlying public policy, the search for the ultimate outcomes, and the critical examination of the policy implications. Best practices in policy performance are those that: balance between authoritarianism and democracy, maximize abilities, talents and knowledge,

are implemented in the context of an educated and critical mass, are carried out by right leaders with competitive knowledge, virtue and relevant value system, implemented within the rule of law and infrastructure development, and are intended to improve the well-being of the people, without which government must be held accountable.

Public policy as a rights issue emerged from contextual circumstances and evolved in scope and content. Both contextual factors realized in the international arena and the UN convention on rights are key factors informing the rights policies in individual countries. The Bill of Rights is a section in the constitution that provides for the rights and fundamental freedoms citizens are entitled to in a given country. The Bill of rights can be categorized into human rights, civil rights, economic rights, and constructed rights. The role of the Bill of rights is to help individuals in society to achieve the freedom they need for their well-being.

Policy implementation models show that the socio-economic factors of a given context, actors in the implementation process, the way the policy is implemented, the circumstances under which the policy is implemented, and the meaning the society makes out of the policy can determine policy success or failure. Implementation success or failure can also be determined by political power or interests. The implementation processes, strategies, structures, resources, and information can also determine policy success or failure. Finally, knowledge of the societies value preferences and choice of the best alternatives can determine policy success or failure as well.

Policy implementation experience from the US, particularly policies related to rights of women shows that implementation failure is largely caused by the bureaucratic reluctance. This is where the bureaucracy is unwilling to implement public policy either in totality, or as intended. On the other hand, implementation success has largely been as a result of court orders. This means that women achievements have been largely won through court orders and sanctions rather than bureaucratic will. This is because rights policies largely attract political or bureaucratic resistance. The strength of women movements, particularly networks is a major source of policy success. Finally, incentives by individual women leaders have also played a key role in policy success. This is where individual women leaders at

local and national level create initiatives to personally push forward women rights agenda. Both women networks and individual incentives are characterized by a strong resilience. Apart from political pressure, the efforts to achieve rights also focus on addressing the conscience of the decision makers.

On the other hand the South African experience shows that the Apartheid regime deliberately intended to exclude African women from the benefits of public policy, using the legal framework. As a result, women organized resistance movements that opposed the legislations. Their movements were a political struggle organized to influence protection of rights, through a political process. The success made in this struggle was the realization of plural democracy and later the comprehensive constitutional reforms. Factors behind the success can be attributed to the strong women networks and resilience demonstrated by the participants. Unlike the American experience, which largely succeeded through the judicial process, the South African women experience largely succeeded through a political process. Since there were few South African women political leaders at the time, rights movements were largely organized by trade unions since this was the arena where more elite women were dominant. Unlike the American movements that focused on addressing the consciousness of the elite, the South African movements largely focused on addressing the consciousness of the masses.

Although South Africa has made considerable progress in some areas for instance securing 1/3 women representation in parliament and 50% women representation in National Executive Committees at the Congress, women are still largely disadvantaged in the South African society. Women representation in public service is still below average. Most women lack access to paid employment and dominate the informal sector. Women are also still largely affected by domestic violence, are underrepresented in the education sector, and are discriminated by cultural laws for instance land ownership.

Women's struggle for justice in Kenya has grown gradually over time and has expanded in scope, particularly in response to the changes in the country's political environment. Like in the case of South Africa, women inequalities have an ethnic base and are inherent in the socio-economic, legal, and political structures of the country.

Since the British government did not have welfare programs, education, health, and human resource development depended on the Christian charity work, which was limited to regions where Christian missionaries were active. While Kenyatta's government gave little focus on women, Moi's government empowered women on one hand and limited democratic and political freedom on the other. Moi rewarded women who supported his rule and punished those who opposed it. Democratic freedoms were partly expanded during the multi-party Kabiki's government on the other hand created more economic reforms that provided access to economic empowerment for women. Finally, the new constitution has widely expanded the rights and protects the political, social, and economic rights of women. Success for women in Kenya is largely attributed to networks between women individuals, movements and other national movements. Like in the case of South Africa, women rights have been largely achieved through a political process. Like in the US, women movements largely appealed to the conscience of the elite, rather than the masses. Apart from women movements, individual Kenyan women also came up with incentives to boost the quest for justice.

Despite of the progress made, women are still disadvantaged in many areas, for instance, they are underrepresented in political decision making and in public service. Most women live in rural areas with little access to basic infrastructure, economic opportunities, and health care. Cultural taboos and stereotypes also limit women access to property and education.

CHAPTER 3

RESEARCH DESIGN AND METHODOLOGY

3.1 Research Design

3.1.1 The Purpose of the Research

The purpose of this research was to analyze contextual factors limiting marginalized persons to access justice in Kenya, with a view to recommend policy strategies to improve implementation of the Bill of rights. This nature of research problem required two types of evaluation namely 1) Implementation evaluation and 2) formative evaluation.

In implementation evaluation, I wanted to know what was going on in the program and how the program was developed (Patton, 1987, pp. 27-28). Therefore, I asked implementation questions like: how is the implementation process conducted? How is the program organized? What is the program doing? What services are provided to the clients? How are these services delivered? What are the formal and informal activities undertaken in the program, in order to deliver the desired results? What does the staff do? Is the program operating the way it should?

Formative evaluation is conducted for the purpose of improving the program. It focuses on the quality of the program. The reason for doing so is to find ways to improve the program, so that it can be more responsive to the needs of the clients. In formative evaluation, we get to know the strengths and weaknesses of the program (Patton, 1987: 29). Therefore, we ask questions like: what is working and what is not working so well? What are the perceptions of the program participants and of the staff?

3.1.2 Research Design

This was a qualitative research design. The reason for choosing this approach was that the study required an analysis of the phenomena in its real life context and

natural environment. Qualitative research design is used when one wants to understand the holistic picture of the subject and the participants involved. This includes analyzing the experiences of individuals, processes, interactions, and documents (Flick, 2007a, pp. ix-x).

Such an analysis requires the exploration of the context, the specific phenomena of interest in the context, as well as the way the phenomena is related to the inquiry. The study also requires description of events, processes, context, and experiences. Furthermore, a study based on qualitative research design provides explanations based on interpretation of relationships between phenomena. This is because the study focuses on the perspective of the participants, which also takes into account the participants' situations, experiences and emotions (Boeije, 2010:32-33).

3.2 Research Paradigm

The philosophical foundation of this research design is Interpretivism. Interpretivism is an anti-positivist school of thought, which holds that the interpretation of phenomena should be derived from the cultural and historical world view.

3.2.1 Ontology

Concerning ontology or the question of what is reality, interpretivists believe that reality is socially constructed and depends on the mind. There are also multiple realities for example if you believe that witches exist, then that is your reality (Chilisa, 2012, p. 32).

3.2.2 Epistemology

Concerning epistemology, knowledge is subjective since it is socially constructed and is mind-dependent. Truth is in human experience and therefore what is true is culturally, historically, and context bound. Therefore, a community's stories, belief systems, and spirituality constitute legitimate sources of knowledge (Chilisa, 2012, p. 33).

3.2.3 Application

The assumptions about the nature of reality, truth, knowledge, and values underlying this paradigm are: 1) Reality is socially constructed and contextual; 2) knowledge is subjective because it depends on the mind and is socially constructed; 3) reality is what the mind creates and is bound by the values of the interpreter. Therefore, truth is context dependent. Multiple realities constructed from the same phenomena are all acceptable (Chilisa, 2012, pp. 31-41). In this regard, research based on interpretive paradigm focuses on social relationships, mechanisms, and processes, through which members of a given community or context create their own social world. When undertaking such a research, researchers ask: what kind of things people do, how they do them, for what purpose, and what do they mean to the participants (Chilisa, 2012, pp. 33-41).

According to the interpretive paradigm, there is no objective social world out there. Different people under different circumstances interpret the social world based on the way they construct it (Thomas, 2010, p. 51). Representations of social life are constructed from evidence and ideas (Ragin, & Amoroso 2011, pp. 8, 59-76). The focus is to gain a rich and intensive understanding of the phenomena. The researcher attempts to pursue an in-depth understanding of the environment of the phenomena, taking into account the multifaceted nature of social situations. First, data is collected as crude data. Afterwards, the researcher builds an explanation out of it by interpreting or making sense out of the information (Thomas, 2010, pp. 124-129).

Since truth lies within human experience and can be obtained through thinking, perceiving, and understanding action; while the social world is a complex text that can be interpreted from various perspectives depending on time, tradition, space, and the interpreter; the researcher takes interest in meanings, symbols, beliefs, ideas, and feelings. The social meaning attached to phenomena is emphasized in this paradigm (Bailey, 2007, pp. 53-54). Therefore, interpretation involves uncovering the unknown from the phenomena (Bellany, 2012, pp. 248-249).

3.3 Research Type

This is a qualitative. The nature of qualitative research as a flexible design and a growing discipline allows researchers to craft various methods, in one study so that they can study phenomena beyond the limits of one approach. Crafting new approaches to qualitative study was necessitated by: 1) The need to use methods to supplement each other (Flick, 2007b). 2) The need to bring more insights into the study. 3) The interest of qualitative researchers to develop not only new knowledge but also new approaches to research. 4) Some qualitative research approaches are used in disciplines where such approaches were not used before, for instance policy evaluation studies.

When using mixed qualitative approaches, we ensure the following principles: 1) the qualitative approaches are based on the same philosophical assumptions (epistemology & ontology). 2) There is need to explore or examine an issue further, or from a different perspective. 3) There is availability of data. 4) The approaches resonate well with research questions. 5) The researcher's view on the suitability of the method in the study (Richie & Lewis, 2003).

3.4 Tools for Data Collection

3.4.1 Documentary Research

Documentary research involves collecting data from secondary sources for instance records, books, journals, documentaries, symbols, and art. In documentary research the researcher reviews literature, and analyzes other secondary sources of data using conceptual tools. Collecting secondary data involves reviewing literature (Riedel, 2000:1). Documentary research was used to collect data from government records, journals, research reports from state agencies and non-governmental organizations, documentaries, and News media video clips on major national events relevant to this study.

3.4.2 Problem Centered Key Informant Interviews

Problem centered Key Informant Interviews were used in this study. The method was suggested by Witzel (2000), and has been used mainly by German

psychologists to study people or groups of people. Problem Centered Key Informant interviews are used by researchers to pursue a deeper understanding of a particular problem or issue. The interview guide is designed in a way that the informant is able to answer questions directly or by telling stories. The selection of the informants gradually proceeds from the interview process.

This method fits well with the interpretive paradigm, since it is theoretically based on subjective viewpoints. Therefore, the method is not subject to any particular form of data interpretation. The method fits this study because it facilitates the study focus on the cases and process (Flick, 2006, pp. 161-162). The interviews were standardized (Silverman, 2010, p. 194). According to Sarantakos (2005, pp. 270-285) interviews are reflective, directed towards reality, stimulating, and prioritizes the respondent.

A standardized set of open ended questions will be used to interview all key informants in all aspects of the study. Patton (1987, pp. 112-113) observes that standardized interviews are good when the researcher is interested to obtain variations in responses. The tool is also good since the researcher has limited time with the participant and may not have another time to meet the participant again. Therefore, it is necessary to utilize the interview as much as possible.

3.4.3 Story Telling

Story telling is a research approach where the researcher treats the story as a window through which the experience of the individual can be captured. In storytelling, the story teller should not be interrupted. The most important thing is the experience gotten from the story and not the story itself (Bernard & Ryan, 2010, pp. 247-263). Therefore the experience of the story teller is the main focus (Sarantakos, 2005, pp. 279-281). Oral histories take into account personal reflections of the individuals as story tellers in the community or organization (Creswell, 2013, pp. 70-73). This tool guides the researchers' understanding of the social process. Researchers focusing on historical events and seeks to develop general theoretical explanations from the events (Bachman & Schutt, 2012, pp. 234-238). Story telling as case provides wisdom, insights, and engages the intellect and emotions in a way that people naturally learn by identifying with the situation (Simons, 2009, p. 150). Stories

in this research are event narratives. These are stories where the narrator has gone through particular struggles and has gained some insights or experiences to share (Gibbs, 2007, p. 68). Story telling was used to collect narratives about women seeking justice. When conducting research using storytelling, the main focus of the story is what happened when the participants were seeking justice, and how these participants felt.

3.4.4 Observation

Observation entails a systematic noting and recording of events, behaviors, and objects in a social setting under study. One can use checklist or holistic description. The focus is capturing patterns, behaviors, and relationships (Rossman and Marshall, 2006, pp. 98-99). To observe, you watch things with an intention to know what is happening. You watch more than one time. As you watch, you listen with the intention to capture new details even from the obvious things you see, or are used to seeing (Bernard & Ryan, 2010, pp. 20-23). The researcher follows a formal process where the researcher notes phenomena and repeatedly examines phenomena and notes information obtained (Angrosino, 2007, p. 54). Observation method is used in situations where data is obtained by experiencing a real life experience in its natural context (Mason, 2002, p. 85). In direct observations, the researcher creates an opportunity to make direct observations (Yin, 2012, pp. 109-114). When observing photos, art, symbols, and structures, the meaning should be interpreted based on the cultural context within which the phenomena portrayed exists or existed (Banks, 2007, pp. 41-42).

Observation of videos and photographs is a method that has been used by historians, anthropologists, and lately in other fields of social science. While long time ago, the study relied on photographs and film taken long time ago, the internet age has made it easier to use online or digital resources for direct observation. Currently we can watch socio-political or natural events occurring far away from us, as if we were just a step away. We can feel it and make sense of what is happening. We can watch documentaries or media reports on cultural rituals, natural disasters like floods, war, speeches, newspapers, or the way a particular people live. While these videos and photos are taken for other reasons other than our research, the interpretivist

paradigm allows us to analyze different features of our interest in these videos, documentaries and photos, and to elicit information which we can interpret, in order to make sense of the issues relevant to our research (Marshall & Rosssman, 2011).

Videos are evocative and profoundly moving. They document rituals, social life, ceremonies, events, non-verbal behavior, and conditions that shape human life in a given area. They are also important because they preserve events that occurred, still exist in people's memories, but cannot be replayed in real life situation. Therefore, they give a researcher a rare opportunity to see, feel, and experience that event. A recent film called *Intimidad* (Marshall & Rosssman, 2011) documents the emotional challenges of an immigrant family in Mexico. When analyzing video clips and documentaries, the researcher takes into account that the meaning and intention of the one who created the film is different from the meaning derived from the same video clip or documentary by the researcher. Therefore, emphasis is put on the researcher's interpretation of the features in the film or documentary (Banks, 2007).

To endure validity, video clips that were used in this study were those produced by certified media stations in Kenya, as well as documentaries from credible film companies, organizations, and individual scholars or development practitioners. Some of the documentaries were made by organizations to promote advocacy issues; others were socio-cultural documentaries for education and entertainment, while others were media reports highlighting various development or political challenges in the area.

3.4.5 Interview Process

In this study, I used remote interviews, particularly email and Skype interviews. I used Skype when I was seeking: consent, clarifications, additional information, negotiating participants' response timeframes, sending reminders, and building continuous relationships and access to the participant. I used email interviews to obtain the main body of data. I began by establishing contact. Then I discussed my research with the participants and made the request to interview them. Upon agreement, I send the interview questions and made a follow up, twice a month. At first, I sent a whole set of interview questions to the participants. When I received responses, I read through, identified gaps, issues of interest to pursue, realized new

probing questions to ask, and then I wrote back a thank you email, and expressed the desire to ask some clarifications. After negotiating this, I sent the second set of probing or clarification questions, in relation to the former email. I hardly sent the third email seeking clarifications, because by the time I received the second email with interview responses, the questions I had, had been well answered.

Remote interview are conducted because of challenges such as distance between the researcher and the participants, availability, time constrains both on side of the researcher and the participants, and finally the internet world has created its own conceptual or alternative setting, as natural as the social world without internet. When elites who are always busy, or when individuals who have suffered psychosocial pain are participants in a study, such people feel pressured by the demand of immediate response to some interview questions. They prefer to respond to interviews at their own convenience. Email interviews give them a good opportunity to do so (King & Horrocks, 2010).

3.5 Participants

Participants in this study were individuals who had either knowledge of, or experience with issues of indigenous women seeking justice, the mobile court policy, and the socio-cultural, economic, and political context of study. These were:

3.5.1 Lawyers

Lawyers in this study were women rights lawyers who represent indigenous women in rights issues for instance through policy advocacy, consultancy, or during trial. These lawyers have numerous experiences and knowledge about the justice process, how the mobile court policy was implemented, how it is working, what indigenous women go through when seeking justice, the success and failure of the policy, and what should be done to improve the implementation of the Bill of rights. They have accumulated varied knowledge from their daily experience handling women rights related issues, as well as conducting policy research and advocacy programs regarding women's rights.

3.5.2 Civil Society Officials

Civil society officials are leaders of civil society organizations working to ensure the safeguard and benefits of the indigenous people from public policy. Some civil society organizations work on policy issues, others work on support programs that are intended to help victims of injustices access justice, while others work on several women rights related issues. While some civil society organizations deal with women issues including indigenous women issues, others specifically focus on indigenous issues only. In this case civil society leaders from both quotas will be reached out to, in order to participate in the study.

3.5.3 Government Officials

Government officials mentioned here were those officials working in the justice system in the region. These include the judicial officers, the prosecutors, and the police. Government officials have real life experiences of what happens to individuals seeking justice, as well as the implementation process.

3.5.4 Individuals with Direct & Indirect Experience

Individuals who have been directly or indirectly involved in seeking justice, or helping women seek justice were involved in the study. These individuals were, civic leaders and officers worked in programs where relevant public services were offered to those seeking justice. The choice of individuals was based on the fact that because they interact with individuals seeking justice, they have an experience of what goes.

3.6 Data Collection Process

The study was conducted for a period of 11 months (June, 2013 to April 2014). Initially, I intended to travel to Northern Kenya to collect data. However, seven months before I travelled to the region, a group of bandits from the Turkana community attacked a neighboring Samburu community and took away over 400 cattle in a raid that left several people killed and others wounded. A day later, the bandits ambushed and killed about 42 police officers who were trying to pursue them,

in an attempt to rescue the cattle. They also took away the guns the slain soldiers had. The decision by the government to send the military to the region to pursue the bandits, disarm them and restore security was opposed by area Members of Parliament who used legislative power, political influence, and court orders to stop the operation. Members of parliament from the region argued that it was unconstitutional to use the military in homeland security operations the police should be carrying out without approval from parliament. Some politicians argued that the conflict was political than socio-cultural. The incident took place about four months to general elections.

At this time, military units had begun to arrive in the region ready to begin the operation. People in the region began to flee to other areas as soon as the first military units arrived in the area. Even though the military did not carry out the operation which was halted for about a year, their presence in the region caused communities to flee. The military continued to camp in the area for months. Leaders from the Samburu community continued to call upon government to provide security, but some including leaders from the Turkana community were opposed to military operation. Instead, they demanded inter-community dialogue and reconciliation. Several reconciliatory meetings were conducted, but government continued to demand that the community to surrender the guns bandits took away from slain soldiers.

Inter-ethnic conflict in the region continued, with a series of revenge attacks between the Turkana community which from which the bandits who killed police officers had come from, and the Samburu community which had lost its cattle and members of the community during the raid. Government continued to insist on the military operation. On several occasions, efforts to begin the operation were stopped by court orders after leaders from the region sought judicial intervention. As a result, government used small units of anti-stock theft paramilitary police officers to carry out targeted small scale operations over time. Because of the complex terrain of the region, and the migration nature of the nomadic communities, who only live temporarily in an area before they migrate to another, I was advised by my key informant, a senior police officer not to travel to the region for security purposes.

After a series of planning and suspending data collection process, I realized that I was stagnated. The situation was not going to change anytime soon. It was

escalating from time to time with continued inter-ethnic revenge missions. At the national level, government politics had shifted from banditry and northern Kenya inter-ethnic conflict to Kenya's military operations against Al-Qaeda linked Alshabaab in Somalia. Some of my key informants from Northern Kenya informed me that banditry was no longer government priority. Banditry had been left to paramilitary police units who were not going to finish the operation soon. As a result, I consulted my supervisor and decided to restructure my research design.

The prolonged unresolved conflict in the wake of political uncertainties was imposing constraints on the study. This situation affected my research in several ways: 1) I had to change methods of data collection in order to adopt alternative methods of inquiry; 2) I changed the process of data collection; 3) The fiscal costs reduced; 4) Because it was not safe to travel to the place and conduct interviews, I was not able to interview provincial administrators and local politicians. However, in response to this, I used alternative sources. Some of the changes made were: more reliance on secondary data; replacing participant observation with direct observation; replacing direct interviewing with email & Skype interviewing; and replacing field based phenomenology with online phenomenology approach.

Furthermore, this incident brought into perspective the important function of the police service in the justice system and the criminal court procedure. While the earlier research design had largely focused on the courts, I found the incident, in which the country lost about 42 police officers in a single ambush, interesting to pursue in relation to the role the police play in the justice system. As a result, I decided to adjust the focus of the research to include the experiences of the police and how these experiences hinder or promote access to justice. I also began to look for key informants from the police population working in the region. Following this new development, I decided to list down and contact police officers who I knew and who were working in Northern Kenya.

I had learned from the incident that majority of police officers working in Northern Kenya came from different parts of the country. I found this phenomenon interesting because just like racial relations, ethnicity largely influences social interactions in public service in Kenya. As a result, the experiences of police officers from a different socio-cultural context working in Northern Kenya would provide

insights helpful in understanding among other things, the social conditions under which the police live and work, in order to ensure access to justice. However, to get such information, reflexivity was required. Therefore, I requested police officers who I knew and who came from Western Kenya to participate in the study. These were participants I could easily relate to.

3.7 Gaining Access to Participants

3.7.1 Use of Personal Connections

I used my personal connections to access participants. Having worked with the civil society in Kenya, for the last seven years, I had an idea of the challenges that characterize data collection in rural areas, as well as access to experts. This is because I had previous research and advocacy experience. Social interactions in daily life in Kenya are structured, with complex social boundaries. It is more or less a society of connections. You need to get to know someone if you want things to be done at least efficiently. Taking a personal responsibility to push for what you want, gives you a better chance to accomplish your objectives within the required timeframe. Kenya's public service is a constrained one. From nurses in the hospital, court clerks and judges in the bar, to the police, everyone is under immense pressure. It takes an effort beyond the usual kind requests to win an opportunity to interview public officials and get adequate information. Therefore, you need to know someone who trusts you in order to navigate through these social boundaries, get what you want, get it well, and adequately.

Connections with Quaker mission centers in Turkana and Samburu. As a Quaker priest, I had access to the Quaker Mission in Turkana and Samburu. I had visited and worked with the leaders of these missions between 2006 and 2010. Some of the leaders in these missions were former colleagues in the seminary. The reason for using this approach is that research becomes easier when the researcher is known by the community leaders (Liamputtong (2010, pp. 61-73). The Turkana Quaker Mission began in 1970. Samburu Friends Mission on the other hand was established in 1995, as an extension of the Turkana Mission. The Missions promotes welfare programs to the community for instance education, health, as well as development

programs like peace, conflict resolution and inter-ethnic reconciliation, and justice (Friends United Meeting, 2012). While doing research, two American Quaker missionaries working on justice in the region helped me access the participants and voluntarily provided research assistant services.

Connections with participants from the police. All of the police officers who accepted to participate in the study were people I knew well. We came from the same clan, ethnic community, and we spoke the same language. Some of them were my peers; we grew together, attended high-school or college together, or played for local soccer teams some years back. During December holidays, when most people go up country to visit their parents, we would meet in the evening stand at roadsides or sit in a local restaurant and tell stories of the past year. Maintaining peer relationships and friendships with members of one's clan is an important value in my community. It is part of the socio-cultural morality and spirituality. Maintaining this norm later came to help me in research.

Unlike other participants who found interest in the outcome of the study because they were working on matters of access to justice as well; participants from the police were not interested in the outcome of the study. They knew that government was already aware of their challenges but had not solved them. What motivated them to participate was the kinship and friendship I had with them. As I result, all I did was to conduct a socio-cultural ritual for each of them, a ritual we do when we want to get important assistance from peers or elders. The ritual is called "washing the elders' face" or "bringing the stalks before elders." It simply means that if you want important assistance from your peers or elders, you buy them goat meat, or traditional drink. The value of the ritual is not in the amount you buy, but in the fact that you use the ritual to acknowledge the value of those who are going to assist you. By doing so, the ritual binds you and them into a commitment to help one another. This ritual is done only once before the help is given.

3.7.2 Use of Culture Brokers

I used culture brokers in cases where I did not know the participants. Culture brokers are selected because of their knowledge of the subject (Chilisa, 2012:169-170). The role of culture brokers is to recruit potential participants, link the researcher

and the participants, and help interpret or clarify issues related to, or values of the participant's culture. They also help reduce misunderstandings (Liamputtong (2010, pp. 61-73). I had four culture brokers. Two were Quaker priests. One worked at the Quaker mission in Turkana since 1970s and was from the Turkana community. The other priest was from the Samburu community, and worked in the Quaker mission in Samburu since 1995. The third culture broker was an American Human rights activist I had worked with on several projects in Kenya between 2004 and 2010. This activist helped me to connect with human rights lawyers working on issues of indigenous communities. The fourth culture broker was an officer at the Kenya Embassy in Bangkok. This officer linked me to judicial officers and lawyers from the Turkana community. He also interpreted or clarified cultural issues in the data because he came from the same community.

Working with culture brokers, key informants and through personal connections was an informative experience. Although this was my dissertation, I realized that cultural brokers wanted to be part of the project by contributing their voice and perspective to it, specifically because I was writing about issues that concern the area and issues they were working on. As a result, their motivation was a major resource to my research. I also realized that this was an opportunity to invest strongly in planning and involve them more in planning, so that I could get the data I wanted with the limited resources I had.

I also kept communicating with them and used the communication as a way to: 1) obtain more insights about the region and issues of justice; 2) Establish research relationships beyond the relationships we had before; and 3) negotiate and re-negotiate time, space, common interests, and diverse perspectives. As a result, I spend more time on building relationships and planning just as much as I spent on actual data collection. I learned that planning was something I had to do throughout the research process, and an opportunity to collect and analyze data along the way. It is important to note that the nature of my study, technical requirements for instance credibility, referential adequacy, limited resources, as well as the contextual challenges I had prior knowledge of, determined the culture brokers I chose as I continued to learn about the challenges that emerged from the research experience.

3.7.3 Use of Research Assistants

As indicated earlier I used research assistants. Two of the research assistants were American Quaker missionaries working on issues of justice in the region. The other two were African priests working in Quaker missions in the region. The basis for selecting the research assistants were: 1) relationship with and access to the research population and participants; 2) experience working on justice related matters in that context; 3) personal motivation/incentive to help improve justice in the community; 4) willingness to help me in this research project; 5) education and knowledge of research work; 6) personal connections; and 7) trust.

The two priests had Bachelor degree education, and frequently work on research projects and report writing. Samburu and Turkana Quaker missions were established by Quakers to provide welfare services for instance peace and justice, education, and health to the Turkana and Samburu communities. Over time, these mission centers became community centers providing other services like Alternative to Violence program (AVP), peace and conflict resolution, and inter-ethnic reconciliation programs.

3.7.4 Portrayal of Involvement

When collecting data from key informants (lawyers, judicial officers, civil society officials, and individuals with direct or indirect experience with the process of seeking justice, I let the participants know that research was being done and I introduced myself as the researcher (Overt). I introduced myself through emails and phone call conversations, made the request seeking the participants' acceptance to participate in the research. I also explained the purpose of the study and sought consensus before I went on to conduct the study. The purpose of playing the overt role is to ensure that the participants are fully informed about the research and can respond in light of the research purpose (Rossman & Ralliss, 2012, p. 151).

3.8 Data Analysis

Data is what you see going on in everyday life or at a particular time. It is about the impression you get, which you will later verify based on evidence. It is

about identifying, examining, and making sense of the intuitive insights that come to your mind when you see people reacting to a particular issue or something (Rossman and Rallis, 2012). It comes from what people say, think, and feel. Some data just naturally occurs. You don't need to ask a question for you to invoke them, for instance socio-political events, television shows, and archival documents (Loseke, 2013).

To analyze data, the researcher generates themes and categories from the gathered data, by looking at the natural variations in data, depending on the differences in context, and interactions between varied entities (Patton, 1987:150). According to Punch (2005:197-199), and Barnard and Ryan (2010), the techniques involved are: Editing, segmenting (data reduction), and summarizing; generating themes from data; designing charts, diagrams, and drawing conclusions. The process involved making initial sense of data, reducing observational and interview data to issues, themes, or areas of exploration, and interpretation. The process begins before field work and continues throughout the process of data collection (Simons, 2009, p. 122).

Data Analysis involves two issues: 1) the search for patterns and 2) the search for an explanation why that particular pattern. In data analysis, we identify, develop, modify, and interpret ideas, by stating from our own perspective, what the data mean in light of the research. We remain critical, take note of disagreements, weigh facts with evidence, explain unique cases, look for alternative explanations, and try to fit negative cases into our explanation (Bernard and Ryan 2010: 109-111).

3.9 Technical Issues in Data Collection and Analysis

3.9.1 Secondary Data

The Criteria for selecting secondary data used in this study was based on Riedel (2000). Data from government entities was certified. To ensure quality control, data was obtained from government websites, journals, books, and national newspapers.

3.9.2 Primary Data

Credibility: Credibility is the equivalent of validity in quantitative research. Since qualitative research seeks multiple realities and therefore multiple truths, research findings are credible if they represent multiple realities and truths revealed by the participants. To ensure this, I built relationships with the participants, in order to avoid false or merely convenient answers. I also used peer briefings, and data cross examination (Chilisa, 2012, pp. 165-166).

Triangulation: Triangulation is the use of various methods, data sources, and investigators in order to reduce biases. I used methodological triangulation, which takes into account comparing data collected by interviews, observations, storytelling, documents and discussions. I also used triangulation of sources when examining data about community history, and the process of seeking justice. I ensured triangulation of investigators by involving local or relevant research assistants, and comparing ideas to different theoretical perspectives (Chilisa, 2012, p. 167).

Referential Adequacy: Since I was a research tool in this study, I ensured that I was well versed with the context of the study. To do this, I familiarized myself with the context by reading thoroughly and watching digital documents about the context, history, and the people. Referential adequacy requires that the researcher should have an interest in the conceptual knowledge of the phenomena, should have the capability to conceptualize large amounts of data, should have the ability to take a multi-disciplinary approach, and should have good investigation skills (Chilisa, 2012, p. 168).

Reflexivity: Reflexivity refers measures put in place to ensure that the closeness of the relationship between the researcher and the participants does not negatively affect the research. The significance of reflexivity is rooted in the assumption that the value of the truth obtained from the participants depends on the closeness of the relationship between the participants and the researcher. Therefore, the way the relationships are handled could positively or negatively affect the way the researcher experiences research process and content. Over involvement of the researcher for example negatively impacts the research process. To address these issues, the researcher records his/her fears, perceptions, feelings, frustrations, thoughts, ideas, problems, and concerns separately, and then continuously assesses the difference between what he/she obtains from the participants against his/her own ideas (Chilisa, 2012, p. 168).

Quality: To realize quality, issues are clarified and data is cross checked to ensure accuracy. Contextual information is recorded in detail. Thick descriptions including memory, images, contextual knowledge, and interpretations are included in the text. All useful information about the subject or phenomena including impressions, reflections, and interpretations are taken into account (Richards, 2005, p. 51). Ensuring quality also calls for selecting credible respondents (Flick, 2007b, p. 86).

Ethics: Ethics in this research was based on the American Psychology Association (APA) Guide (Gravetter & Forzano, 2012, pp. 71-98). Ethics is not about morality. It is about doing research by accurately and adequately adhering to the proper conduct required of researchers. Major ethical issues considered in this research are: 1) Ensuring that the researcher and the research process do not harm the participants. 2) Privacy and confidentiality. 3) Institutional approval. 4) Competency. 5) Record keeping. 6) Informed consent. 7) Ensuring that incentives are not used in a way that coerces or buys participants 8) Sharing the research report with the participants.

Table 3.1 Technical Issues in Data Collection and Analysis

Item	Details
Credibility	Rapport & Substantial engagement, Peer briefing, data cross examination, & members checks
Triangulation	Methodological triangulation, Triangulation of sources, triangulation of investigators
Referential Adequacy	Familiarity with the context and phenomena, interest in the conceptual knowledge of the phenomena and the capacity to conceptualize large amounts of data
Reflexivity	Closeness of the relationship between the researcher and the participants; the researcher to record, his/her personal feelings, ideas, thoughts, frustrations, concerns, & problems faced in the study; and the researcher to record, post interview impressions
Ethics	American Psychology Association (APA) Guide.

3.10 Summary

This section is about research design and methodology used in the study. In this study, I used documentary research, narrative research, and hermeneutic phenomenology approaches to qualitative inquiry. I used email and Skype interviews to collect data from key informants. Skype interviews were largely used for introduction, clarifications, and follow ups. Email interviews were used to collect data except from police officers because they did not have access to emails. Observation was based on documentaries and digital documents like commission of inquiry video clips, National Television news video clips, and recorded relevant forums. The study was conducted for a period of 11 months (June, 2013 to April 2014). I used personal connections, culture brokers, and research assistants to access the participants in the study. I also identified myself as a researcher and let participants know that I was doing research.

Participants in this study were individuals who had either knowledge of, or experience with issues of indigenous women seeking justice, the mobile court policy, and the socio-cultural, economic, and political context of study. These were lawyers, judicial officers, and civil society officials, government officials working in the justice department, and individuals who had direct experience or indirect experience seeking justice. Ethical issues such as credibility, triangulation, referential adequacy, reflexivity, quality, were applied.

CHAPTER 4

RESULTS OF THE STUDY

4.1 Introduction

As stated in Chapter 1, this study sought to analyze contextual factors limiting indigenous women to access justice in Kenya, with a view to recommend policy strategies to improve the implementation of the Bill of Rights. This chapter is about implementation. The following three questions will be answered in this chapter: 1) What is the socio-cultural, economic, and political context of implementation? 2) How was the implementation process conducted? 3) What are the contextual factors limiting marginalized persons to access justice? The chapter is organized into three main sections. The first section is about the socio-cultural, economic, and political context of implementation. The second section is about the implementation process. The third section is about contextual factors limiting Indigenous women to access justice. A part from the general study of contextual factors limiting marginalized persons to access justice; eight cases on access to justice in Kenya are presented. These cases focus on institutional and socio-cultural factors that hinder marginalized persons to access justice. Three groups of marginalized persons emerge from the study namely 1) Women; the police; and low and middle class families.

4.2 The Context of Implementation

This section answers the question: What is the socio-cultural, economic, and political context of implementation? The purpose of examining the context of implementation is to understand the conditions or environment, in which the implementation process was conducted, and to identify and analyze contextual factors that positively or negatively influence policy implementation. This perspective is informed by the Contextual Model of policy implementation, which assumes that the

context of implementation bears factors that can positively or negatively influence policy outcomes. Policy stakeholders inside and outside government can propel policy success or failure, depending on the role they play in the policy implementation, and the way they actually do it in a given context. Experiences from the evaluation of health care reforms in the US shows that social economic conditions of the society, the meaning the society makes of public policy, and the way it is administered can lead to policy success or failure for instance: the policy may be inadequate, the solutions provided may be immediate and unsustainable, social complexities may make it difficult to run the project effectively, society may not be able to handle policy requirements, and may see or find the welfare bureaucracy intimidating (Dye 2011, p. 105).

This context is not a homogeneous context. It is heterogeneous. It is a context that has three other contexts within it namely: the national context, the context of Northern Kenya, and the indigenous people's context.

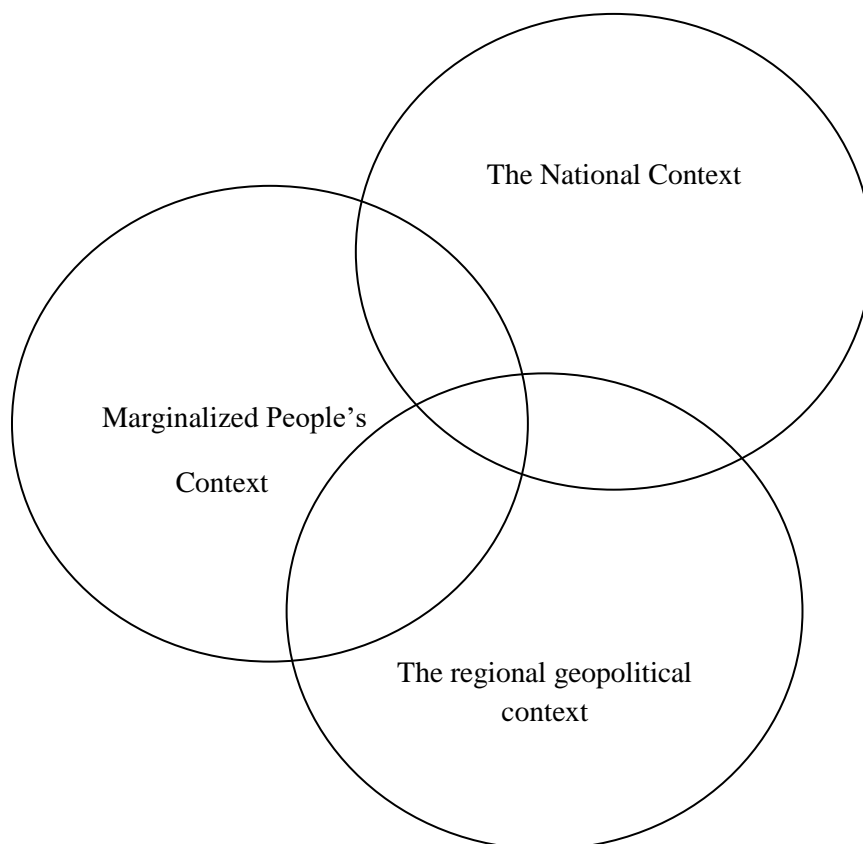


Figure 4.1 The Context of Implementation

The national context is the wider context of implementation. It is important to analyze this context because the implementation of the mobile court policy, to enable access to justice is a national policy, implemented from a top-down dimension, and is influenced by the larger national socio-political and historical factors which shape national policy. The regional geopolitical context is important because every region in Kenya is historically, socially, politically, and economically different from other parts of Kenya. These distinctive features have bearing on policy implementation, given the cohesion and dysfunctions between national government, county government, and the informal-traditional oriented socio-political systems of governance. The marginalized people's context is important because this is the immediate social, cultural, and political world where marginalized people live, and daily strive to access justice. These three contexts do not exist in isolation. They exist in relation to each other. They form the complex experiences marginalized persons seeking justice go through. Therefore, the cases of marginalized persons seeking justice are cases of individuals who live in three worlds. They live in the national world called Kenya, regional geopolitical context, and the world of the marginalized people which is always around them.

The context of implementation is the context, within which the mobile court policy seeking to provide access to justice was implemented. At the top, it is the context where the Executive, the Judiciary and the Legislature struggle with the process of implementation, particularly in ways that each seeks to protect its interests such as autonomy, power to protect self and control the other, and public support. Even though the Judiciary is not a political institution like the Executive and the Legislature; the context of implementing reforms in Kenya is such that the separation of powers under the new constitution provide for citizens to judge these three arms of government separately. As a result, the context of implementation is that where these three arms of government rival each other as they work together. While the executive and the legislature seek political support in terms of votes and popularity, the judiciary seeks to increase and maintain public confidence.

Politically, this is not a context that is new to political stalemates. It appears that since independence, Kenya has constantly experienced a series of political struggles. Like the earth rotates around the sun in order to create a new season, it

seems policy change and implementation in this context, tends to move forward well when political actors respond to political conjunctures. Without that setting where the country is constantly fixed in a rational axis driven by the force of political conjunctures, things seem not to move forward. Looking at the major policy changes that have taken place in this context, particularly the shift to multi-party democracy in 1991 and constitutional reforms 2007-2010, the following pattern can be formulated: 1) a socio-political condition grows worse under government inaction; 2) then follows a major protest or conflict where lives are lost and property destroyed due to civil disobedience and police crackdowns; 3) series of highly mobilized media and civil society efforts pressure government and other involved actors to act; 4) under highly monitored pressure and over the blood of those lost their lives in what they believed was a genuine struggle for change, all political actors agree to introduce change. It appears to be a context where you need to force things, and sacrifice some people, in order to get things to work. It is a context with high levels of reluctance from the side of government; and high levels of political activity from opposition, media, and civil society. Over the past decades, it has always taken a conjuncture to get the government to act on reforms.

At the lower level, it is the context where court magistrates work to deliver justice. It is where the police interact with the society seeking to investigate cases, arrest offenders, and work with victims and witnesses in order to ensure justice is delivered. It is the context where indigenous Turkana and Samburu women live and strive daily to access justice, when they need it. As you will see later in this chapter, this is a harsh context that forces the police, who seem alienated from government to create synergies with the society, especially when the survival of these police men and women becomes essential more than maintaining law and order.

4.2.1 The National Context

4.2.1.1 Ethnicity, Politics and Government

Politics is defined as who gets what, when and how (Lasswell, 1936 in Roskin et. al., 2006, p. 2). It is about how to get power, how to maintain it, and how to use it to benefit the interests of the stakeholders. Public policy includes both political processes and behavior (Dye, 2011, p. 14). There are public policy theories which

link politics to public policy in various ways. Elite theory for instance, assumes that public policy reflects the preferences of the elite rather than the masses. Group theory on the other hand assumes that public policy is the result of the influence of the interest groups to negotiate with government in order to achieve a better policy deal (equilibrium). Public choice theory assumes that public policy is like a give and take social contract where government provides policy benefits in exchange of political support from the citizens (Dye, 2011, pp. 19-24). Similarly, systems theory assumes that public policy is the government's response to the demands of the people. These demands can be in form of pleas for action or support citizens give to government (Anderson, 2011, pp. 19-20).

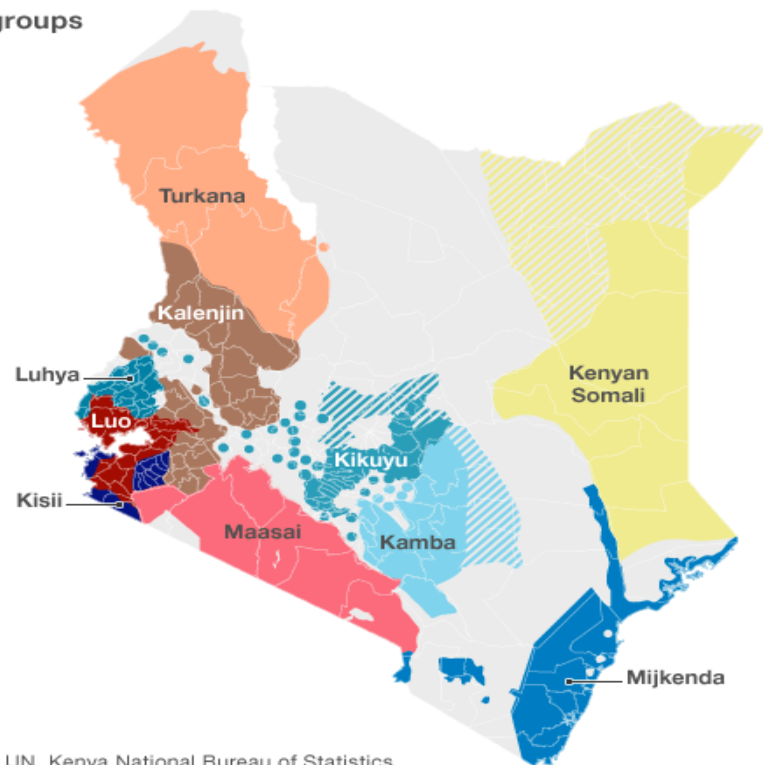
Kenya is a nation made up of many tribal nations: Kenya is a multi-ethnic country where ethnic communities have geopolitical bases. Although these geopolitical bases were formerly tribal territories, they have been shaped by colonial and post-colonial politics to create more or less tribal nations within the nation. This diversity is not only an identity, but has within it, a constant and complex power struggle between the dominant and the dominated ethnic communities. This struggle influences the way decisions on national benefits, opportunities, and resources are made, and how these benefits, resources and opportunities are shared or distributed.

Ethnicity as social reality represents the innate cognitive and moral challenge Kenyans have to deal with as they interact with others of different ethnic groups. We are socialized in communities where social cultural systems socialize us to be different from the other, see others different, and maintain this distinction between them and us. The cognitive challenge is how we can be consciously or unconsciously aware of our difference, maintain it, and at the same time relate to others in ways that they equally feel to belong. It is important to note that ethnicity as a socio-cognitive sense of belonging, does not necessarily lead to harming others. However, the complexity of social interaction, within which individuals see themselves as different from the others, often tend to create an environment where social relations create problems.

Distribution of ethnic groups

Ethnic groups

Kikuyu/Meru	22%
Luhya	14%
Kalenjin	13%
Luo	11%
Kamba	10%
Kenyan Somali	6%
Kisii	6%
Mijikenda	5%
Turkana	3%
Maasai	2%
Others	6%



Source: Kenyan embassy to the UN, Kenya National Bureau of Statistics

Figure 4.2 Distribution of Ethnic Groups in Kenya

Table 4.2 indicates some of the conceptual terms used by different ethnic groups in Kenya, when referring to an individual from a different ethnic group. The moral connotation shared across these conceptual terms is that ethnic identity, though socially constructed is distinctively a constituent of one's human hood. However, when shaped by historical experiences, ethnic identity can acquire a more complex and deeper meaning, which may be negative or positive, depending on the context within which ethnic identity as an issue comes about. Sometimes these conceptual terms can be used to invoke compassion or care, while in other cases; they are used to instigate hatred or prejudice.

Table 4.1 Ethnic Terms Used to Refer to the Other

Ethnic communities	Conceptual Terms	Meaning in English
Luhya	Mnashivala	A person from the other world/planet
Kikuyu	Mkabila	A person from another tribe/tribalist
Turkana	Ebukut	A person from another tribe
Masai	Ilmang'at	the other

Depending on the way they are used, these concepts can trigger emotional & cognitive reactions of one's identity in relation to the other. This can generate cohesion, prejudice, or conflict

Source: Author

To understand the Kenyan context of indigenous communities regarding access to justice, we need to understand the relationship between ethnicity, politics and public policy. Aristotle argued that everything takes place in a political context, because everything that happens around us is determined by the existing political system (Roskin, et. al. 2006, p. 2). Kenya was a British colony until 1963 when it gained independence. Since then, Kenya has had four political regimes namely Kenyatta era (1963-77), Moi era (1978-2002), Kibaki era (2003-2012), and the current Kenyatta era (2013-). To understand the role and place of ethnicity in Kenya's policy context, one needs to examine the use of tribes in the colonial and post-colonial period. It is important to note that before colonialism, there was nothing like Kenya. Kenya was actually a creation of the British government, to bring together under colonialism, a collection of different tribal territories, using various methods ranging from Memorandum of Understanding to occupation. The British colonial ideology was to use ethnicity as an instrument to divide and rule these tribal territories (Robertson, 2008).

The colonial policy required and enforced ethnic segregation. Just like apartheid in South Africa, ethnic segregation was enforced to control ethnic interaction in Kenya. Using colonial population control policies, the colonial government assigned different tribes varied powers in the colonial socio-political

structures, prohibited inter-cultural marriages across tribes, and restricted inter-tribal relations. The new colonial tribes were seen as permanent identities based on colonial stereotyped descriptions of each tribe, the perceived occupation and power of the people from that particular tribe, and the prescribed inter-tribal relations expected of that identity. While the Masai for instance were assigned identities like dark skinned, thin, tall and warrior like, the Kikuyu were described as light skinned, short, fit for farming (Robertson, 2008).

The Colonial law also required that African political organizations to be limited to ethnic territories. Early political activism and organization was restricted to tribal territories, values system, worldviews, needs, and interests. Before independence, Kenyan tribal political parties were to form alliances in order to create a national party. At the time Kenya had two major tribal parties namely KANU (Kenya African National Union) whose members were mainly from Kikuyu and Luo tribes and KADU (Kenya African Democratic Union) whose members were mainly from the Kalenjin tribe (Orvis, 2001).

Kenyan politicians throughout history have created ethnic centered governance structures, rather than democratic governance structures. During the first year of independence (1963-64), Kenya had a West Minister model of government with Prime minister and Governor who was the Queen's representative. However, this structure was abolished and replaced with imperial presidency. Politicians at the time argued that traditional African governance systems did not have two centers of power. Therefore, the West Minister model was a foreign concept created fuel conflicts in a Kenya that was ethnically disintegrated. Later on, President Kenyatta created an 'inner cabinet' which was comprised of ministers and high ranking civil servants, and relatives dominantly from the Kikuyu ethnic community. The 'inner cabinet' which was also called 'the family' was the body that authoritatively determined public policy. President Moi likewise followed the same governance system. The 'inner cabinet' or 'the family', in both Kenyatta and Moi regimes, adopted policies that benefited their respective ethnic groups and regions (Kivuva, 2011).

Kenya's presidents throughout history have utilized ethnicity as a tool to gain state control, maintain power, and distribute policy benefits. After independence, Kenya was ethnically disintegrated. At this point, the formation of

nationhood required a policy for ethnic integration and national cohesion as well as that of national development. However, this did not happen. Instead, Kenyan presidents used tribalism as a political tool to keep political power and control. President Kenyatta the first president for instance allowed local political elites to compete for tribal supremacy to represent him at local level, and act with autonomy so long as they did not interfere with the central government politics. Although this looks like some form of democracy, it was a reinforcement of the role and place of tribes in national politics, an ideology and practice that entrenched ethnicity in national development and killed nationhood. During his reign he said “Power will never leave the house of Mumbi” (Orvis, 2001). Mumbi is the venerated matriarchal ancestor of the Kikuyu tribe. Therefore, this statement was interpreted to mean Kenyatta’s political intention to maintain Kikuyu dominance in executive power. In the modern Kenyan politics, the statement is used to express resentment against the Kikuyu dominance in power and its consequential ethnic politics of exclusion.

When President Moi took over power, he systematically replaced Kikuyu political elite with Kalenjin political elite. Moi later centralized and ethicized power after the 1982 coup attempt failed. The coup was organized by Kenya Air Force soldiers mainly from the Luo tribe. Attempts to liberalize democracy in Kenya during the 1990s only reinforced tribal politics, with almost every major tribe forming a political party. In 1992 general elections for instance the following major tribal parties participated in elections: KANU (dominantly Kalenjin), National Democratic Party (dominantly Luo), Ford Kenya (dominantly Luyia), and Democratic Party (dominantly Kikuyu), Social Democratic Party (dominantly Kamba). In 1997 general elections, KANU and NDP formed an alliance (Orvis, 2001).

Throughout history, Kenyan governments were hostile to, and crushed efforts to cultivate the culture of democracy required for the improvement of justice. Justice works well in a mature and well-functioning democracy. However, the cost of building democracy in Kenya was not only brutal, but a bloody one. Although Kenya has not had a civil war, or a successful coup, it has experienced a systematic execution, torture, detentions, and mysterious disappearances of political activists. In 1974 during Kenyatta’s era, one Member of Parliament was murdered, three detained, and three others imprisoned for challenging the executive (Kivuva, 2011).

Moi's 24 year rule (1978-2002) is also seen as the period when the civil service was more politicized and democracy suppressed. Civil servants were supposed to demonstrate their loyalty to the government by participating in political acts like campaigning for KANU and those candidates Moi supported (Kivuva, 2011). In 1982, Moi banned multiparty democracy making Kenya a one party state. During his regime, the laws were amended to enforce and extend executive power, limit rights, and weaken political opposition. His administration increased the power of the executive, and reduced the independence of parliament and the Judiciary. In political practice, Parliament became subordinate to the ruling party KANU. Provincial administration was used to run KANU political affairs like reviewing political meetings, and had powers to prevent elected members of Parliament to address their constituents. Suppression of press freedom, detention without trials, arbitrary arrests, torture, alleged assassinations, and disappearances of political activists, police brutality, and excessive and unchecked use force by security agencies increased in 1980s and 1990s (Adar & Munyae, 2000).

In 1991, Moi banned Prof. Ngugi Wa Thiong'o's book "I will Marry when I want", which he argued attacked African political dictators in post-independence Africa. Ngugi later ran into exile. In 1993, University Academic Staff Union, seeking to promote academic freedom was banned, and its leaders detained between 1993 and 1995. In 1998 for instance, Presbyterian Church Minister Rev. Timothy Njoya was arrested and beaten by police officers who raided the Cathedral in Nairobi, after suggesting before the press that Kenyans should hold discussions on critical questions affecting the country (Adar & Munyae, 2001).

Indigenous communities are at the periphery of Kenyan politics. Politics play a major role in public service delivery. In the justice system politics can act as a catalyst or a barrier to justice delivery. This is because to a large extent, major decisions determining access to justice are determined through a political process, and are largely influenced by political actors for instance the politicians, civil society, or the power of the voters. Kenya's politics is dominantly ethnic in nature. It thrives on ethnic loyalties and tribal allegiance. Individuals or people who are close to the presidency usually gain preferential priority to access or acquire opportunities, resources, and other public policy benefits. Political parties are ethnic. Experiences

from the last three general elections (1997-2007) show that it takes ethnic alliances to win a general election. The five major tribes in Kenya namely Kikuyu, Luhya, Luo, Kalenjin, and Kamba have strong ethnic patronage, mobilize the highest number of voters, and constitute national leadership because most of Kenya's political elite have throughout history come from these communities (Battera, 2013, pp. 114-125). This shows that indigenous communities are at the periphery of Kenya's political power and leadership. Therefore, they do not have the voter power to influence public policy in their favor; neither do they have influential political voice in the decision making process.

Indigenous communities are underrepresented in Kenya's civil service: "The verdict is that Kenya has a crisis of exclusion," were the words of the Chairperson of the National Cohesion and Integration Commission during the launch of the Report on Ethnicity in the Civil Service (2011), the first one since independence. About 70% of government jobs are occupied by five major ethnic communities (Kikuyu, Kalenjin, Luhya, Luo, and Kamba). The Kikuyu occupy 22.3 % of the civil service jobs, the Kalenjin 16.7 %, the Luhya 11.3 %, the Kamba 9.7%, and the Luo 9.0%. In contrast, among the indigenous communities, the better off Turkana occupy 1.2% while the worse off Samburu occupy about 0.690 % of the public service jobs (National Cohesion and Integration Commission, 2011). Given Kenya's political history, there are two implications for this: One, the five major tribes which dominate Kenya's politics, have had high political participation levels, and have held political power, dominate representation in the civil service as well. Two, given the large population size and high voter turnout of the five major ethnic communities, indigenous communities which are small in population size and have low or medium voter turnout, often have less political consequences on governments, particularly when public policy is determined on the basis of voting power.

Table 4.2 Ethnic Representation in the Civil Service

Ethnic Group	Population	Population %	No. In the civil service	% in the civil service
Kikuyu	6,622,576	17.7%	47,146	22.3 %
Kalenjin	4,967,328	13.3%	35,282	16.7%
Luhya	5,338,666	14.2 %	23,863	11.3%
Kamba	3,893,157	10.4%	20,490	9.7 %
Luo	4,044,440	10.8%	19,025	9.0 %
Turkana	855,399	2.6 %	2,112	1.2 %
Samburu	223,947	0.58%	1,457	0.690%

Source: National Cohesion and Integration Commission, 2011.

Table 4.2 shows ethnic representation in the civil service by comparing the majority 5 ethnic communities namely Kikuyu, Luhya, Kalenjin, Kamba, and Luo and the two minority ethnic communities namely Turkana and Samburu. It is important to note that in Kenyan politics, top jobs in the public sector are offered partly on the basis of political party or ethnic loyalty. Following in the footsteps of their political leaders, top public sector managers exercise patronage when hiring employees. Ethnic Representation and State departments

Table 4.3 shows severe cases of ethnicity in ministries and state departments. The table indicates in percentage, the representation of one dominant ethnic community in each of the state departments and ministries. The name of the particular community was withheld in the report. This data suggests that constitutional provisions which require that: the processes for appointment and promotion must be fair competitive and merit based (Article 232 (1) (g); the requirement to ensure the representation of Kenya's diverse communities must be met (Article 232 (1) (h); and state agencies must provide equal opportunities for appointment, training and advancement, at all levels of the public service, for both men and women, members of all ethnic groups, and persons with disabilities have not been effected.

Table 4.3 Severe Cases of Ethnicity in Ministries and State Departments

Ministries /Department	Percentage of Staff from one dominant Community
Statehouse	45.31%
Higher Education	33.70%
Local government	34.19 %
Metropolitan Development	33.70%
Public Works	34.63%
Tourism	34.96%
Transport	39%
Cooperatives	30.42%
Energy	31.58%
Environment and Natural Resources	31.2%
Finance	32.27%
Labor & Human Resource Development	32.38%
Livestock Development	32.46%
Roads	31.56%
Water and Irrigation	31.23%
State Law Office	32.62%

Source: National Cohesion and Integration Commission, 2011.

The data also indicates that the National Cohesion and Integration Act of 2008 which required that members of a single community should not occupy more than a third of employment positions in an office was not effective. Therefore, there is need for a legislation that will ensure the following: ethnic balance in the civil service; equal opportunities; openness and transparency in recruitment practices; competency; affirmative action policies for marginalized communities; and merit based appointments and recruitments (National Cohesion and Integration Commission, 2011). However, provision for merit based appointments can be used to discriminate minority groups whose members are relatively less qualified.

The ethnic nature of Kenya's politics hinders efforts to enforce the culture of the rule of law. Kenya's presidency even after reforms remains a powerful

institution able to navigate checks and balances. Election experience shows that to win presidency in a general election, one requires the support of 2-3 major ethnic communities out of 42, under the umbrella of ethnic based political party coalition. Political parties are ethnic based and are primarily held together by ethnic loyalties. Minority groups are usually included in political parties on the basis of tokenism. Policy entrepreneurship in Kenya is usually crafted on ethnic symbolism and identity. Ethnic communities are historically, socio-culturally and politically different; regional bases; and vary in levels of inequalities, injustices, and public policy benefits. This makes it difficult to form a nationwide political synergy for change. Loyalty to the tribe comes first before the nation.

4.2.1.2 Gender, Society, and Access to Justice in Kenya

Theorizing gender, society and justice in this study takes into account human rights theory perspective and critical theory perspective. These theoretical perspectives are interwoven within the context of post-colonial situation in Kenya. The reason for doing so is to understand, analyze, and expose injustices in their complex natural setting.

To theorize gender, society, and access to justice from the critical theory perspective means that we are seeking to empower the marginalized gender. The key assumption here is that privilege or disadvantages depend on one's gender and or ethnicity. In this case, we put emphasis on several things for instance: 1) conditions or structures that facilitate or under which injustices are committed; 2) the context in which social struggles, alienation, and domination occurs; 3) interpreting the meaning of social life through the lens of historical problems or current issues that disadvantage the marginalized; 4) exposing what is often ignored or taken for granted when studying or discussing issues that concern the marginalized; 4) appreciating the fact that there are a set of experiences that inform the way the marginalized people think, perceive, feel, interpret reality, and respond to issues; 5) a critique of the society and envisioning new possibilities (Creswell, 2013, pp. 30-34).

To theorize gender, society and access to justice from a human rights theory perspective means that we hold on the core belief, that the goal of human rights is freedom. Freedom is intrinsic, innate, and natural and it is not socially acquired. However, the environment in which an individual lives limits that particular

individual's freedom. This is because as it is the nature of human beings, an individual relies on external factors for survival. Since an individual depends on external factors such language, behavior, perspectives, socio-cultural, economic, and political circumstances and systems for survival; certain measures above these factors should be put in place to regulate human interaction in ways that the individual is able to realize the desired freedom (Mensch, 2010: 1). With this theoretical perspective, we can then seek to identify and expose that which limits the freedom of the individual in life.

Justice in Kenya is a historical challenge: History is a powerful force that can influence public policy. This is because history shapes the perspective and values of public administrators, the policy environment, and governance tradition that inspire government decisions (Vigoda, 2002, pp. 1-22). Therefore, public policy influenced by the colonial legacies will definitely end up exploiting citizens in some way, instead of providing what they are entitled to. Therefore, dealing with ethnicity, justice and public policy in Kenya is dealing with a complex historical issue characterized by a series of unresolved socio-political challenges.

The meaning of nationalism: Nationalism is about a feeling that you belong to a particular nation and that that nation is better for you and even that your nation is better than the other or others. It involves a sense of pride and loyalty. As opposed to alienation, nationalism is that intimate feeling one has with his or her country. It is also about how individuals share in the collective interests, visions and dreams actual policy benefits and the way they feel about it.

The nation of Kenya from its colonial foundation and structure undermined true nationalism and unconsciously achieved discriminatory goals. As earlier stated, Kenya was a creation of the United Kingdom. It was a political territory built on the extreme principles and practices of capitalism and colonialism, without concern for welfare (Deflem, 1994, pp. 45-68). Colonialism in Kenya created a three class society. The British were the first class, Asians particularly from India were second class, and Africans were third class. The core political purpose of creating this type of class society was to ensure unequal distribution of public policy benefits (Ogot & Ocheing, 1995). Like caste system, progression from one class to another was ultimately restricted. What this means is that the class system in Kenya was not

created by free market economy, but was politically constructed and entrenched in the economic system as colonial machinery. Without concern for welfare it is difficult to nurture a sense of nationalism, especially when inequality systematically prevails.

Colonialism in Kenya developed from imperialism, a political culture of domination and economic exploitation. Exclusion was a fundamental principle, behavior, and practice in colonial governance. Colonial authoritarianism replaced indigenous leadership and governance systems, which had some level of consultative processes. Community consensus was killed and replaced with imperial appointments of British collaborators. Furthermore, the colonial government crafted a mockery of democracy, by constituting local councils, tribunals, and leadership that was male dominant, installed by and accountable only to the colonial administration. For the first time in African history, governance by distance was introduced and entrenched public administration (Ndege, 2009). In Kenya's colonial system, women were structurally assigned a lesser status than men (Amutabi, 2007, pp. 118-121).

In March 2013 General elections, Uhuru Kenyatta leading the Jubilee Coalition; a political party dominated by the Kikuyu and the Kalenjin ethnic communities was declared president. Raila Odinga leading the CORD coalition, dominated by the Luo, Luhya, and Kamba ethnic communities lost the elections. Raila then contested the results in the Supreme Court. On March 16th 2013, Barack Muluka, a columnist wrote an open letter to Uhuru Kenyatta in the Standard Newspaper (16th March, 2013) saying "...some of us did not vote for you...you did not defeat us, we elected you. But if the thinking is that you "defeated us", then you should let us know... if you discriminate against us, we shall also discriminate against you...you have to make us feel like we belong...if you do not, we shall say " Their government, Their president..." This statements exhibit some collective ethnic fear that underlie Kenyan politics. They represent the sense of alienation anticipated when a leader from one or a coalition of ethnic communities take over political power and how it translates into the new sense nationalism.

Table 4.4 shows some of the selected statements indicating feelings about nationalism, particularly regarding ethnicity, exclusivity, inclusivity, democracy and justice. These statements indicate how historical injustices have shaped the national consciousness.

Table 4.4 Select Feelings about Nationalism

The freedom we enjoy today was earned by the blood of the patriots and their sacrifices must never be in vain...The greatest honor that we can give them is to live for the higher ideals that they envisioned for Kenya...their passionate dream for an equitable, free and just Kenya must be our driving force today and the years to come (President Uhuru Kenyatta, 2013).

I don't think it means a lot to us, because we are still unemployed we have no jobs, we have no hopes ... As we watch the president speak today ... we are still facing the same struggles as we were facing 50 years ago...this country only works for the elite...they mastered the art of tribalism (Boniface Mwangi- a journalist, 2013).

Mzee Jomo (first president) failed this test. Mzee Moi (second president) did not do well either. As for Mzee Kibaki (third president), a test of nationhood has been a total disaster. I see a most rocky road for President Kenyatta in 2014 if he does not drop the draconian and exclusivist path that his government has chosen (Barrack Muluka- a columnist, 2013).

In 1963, we broke free of seventy years of imperialist chains, emerging from harrowing colonial rule with electrifying national pride and infectious dreams. But no sooner had we said “freedom” than we became victims of a new form of imperialist tyranny; only that this time it had nothing to do with skin color! (Ababu Namwamba- a lawyer and Member of Parliament, 2013).

I used to think –growing up in Kutui in 1960s-that everything was possible...I was so optimistic about Kenya...I doubt that a Kenyan child today can imagine such lofty dreams...no greater vice exist in Kenya than a tribe... the demagoguing of the tribe...Kenya has become more tribal as it's gotten older...the tribalization of the state has quickened in the last three decades...Kenyans, if we can even call them that, have lost their national consciousness (Prof. Makau Mutua,2013)

No amount of appeal for national unity or reconciliation will appease the nation: Anger, frustration and disappointment is the mood among those who are seen as “outsiders”...because of the way they voted, their ethnic identity, and their absence in the corridors of power (Prof. Anyang' Nyong'o, 2014).

Source: Standard Media, Kenya @50 & Aljazeera, Kenya: An African Success Story

At independence in 1963, the Kenya dream, as articulated by the Jomo Kenyatta, the founding father of Kenya, was to eliminate poverty, ignorance, and disease. However, Kenya has developed even more other problems, without solving these three, which at first were seen to be the key challenges of the new born East African nation. The feelings expressed in table 4.4 represent the experience of the marginalized and how they consequentially perceive Kenyan nationhood, in contrast to the way the ruling elite do. This scenario at the minimum represents two collective experiences namely pride and alienation. These two experiences are important in this study, because pride and alienation permeates the perception and behaviors of those who participate in the implementation of the Bill of Rights.

Governance in Kenya is facilitated by structures and legacies that are meant to marginalize women. Governance in Kenya is based on a capitalistic industrial economy characterized by large scale inequalities. Over the years, this structures and legacies have created a society that is capitalist and dominantly patriarchal. As result, women are largely displaced to the paid and unpaid domestic work (Edgell, 2012, pp. 27-30).

The colonial government set a precedence to expose African women to mass and systemic injustices, which were justified by the political system. One of the worst early cases where the state perpetrated mass injustices against women and legitimized the actions, was during the 1950s MAU-MAU revolution. MAU-MAU was a Swahili language code name for pro-independence revolution. MAU-MAU literally meant the British should go back to Britain so that Africans can get independence. The revolution took place from 1952 to 1960. In 1952 Governor Sir Evelyn Baring declared a state of emergency and obtained authorization from colonial office in London to detain MAU-MAU members without trial. During this period, the government launched “operation anvil” in which about 150,000 MAU-MAU members and sympathizers were detained in over 150 detention camps called “the pipeline” which were located country wide. During the operation, the colonial government sent soldiers to the villages, away from the battle ground to arrest women and children and detain them as a strategy to demotivate and break down MAU-MAU movement. The detainees were moved from one detention camp to another, tortured, killed, male detainees were castrated while female detainees were sexually assaulted with broken bottles (Kenya Human Rights Commission, 2007).

The mass torture of women was meant to force the MAU-MAU movement to surrender. This form of state driven injustice was one of its kind and new to Africa in the following ways: 1) In African ethic of war fare, women and children were never tortured or detained when captured in war. 2) This was the first mass injustice perpetrated and justified by a ruling authority. 3) Since the government legitimized the act, no one was held accountable. On the contrary, this new art of state driven injustice has been largely perpetrated in various forms by government agencies against indigenous women in the post-colonial Kenya.

The quest for independence was envisaged in the struggle for nationhood. Kenyans out of lived experiences of oppression and discrimination saw the struggle for independence as a moral enterprise (Ogot & Ocheing, 1995). It was struggle for the liberties of men, women, children and the future of all regardless of ethnicity. For women in particular, their struggle for independence was twofold. Women, especially MAU-MAU women became the target of the colonial administration, were arrested, and tortured. Their contribution to independence struggle was their resistance. Some women provided logistical and resource support to the MAU-MAU fighters. Most of these women were squatters whose land had been forcefully acquired by the colonial government. Even though among the Kikuyu land was owned by families and or the community; women practiced crop farming to earn their livelihood, while men kept livestock (Brownhill and Turner, 2004: 168-169).

Even after independence, women continue to face discrimination; even when mechanisms exist to protect their rights. Women are underrepresented in in the political and legislative positions including even in cases where the law safeguards their opportunities: Table 4.5 shows women representation in Kenya's Parliament since independence. Table 4.6 shows women representation in the 11th Parliament, Senate, and County Executive positions after the new constitution.

Table 4.5 Women Representation in Parliament: 1st to 10th Parliaments

Parliament	Period	Total No. of Constituencies	No. of Elected Women	Available No. of Slots for Nomination	No. of Women nominated
1 st Parliament	1963-1969	158	0	12	0
2 nd Parliament	1969-1974	158	1	12	1
3 rd Parliament	1974-1979	158	4	12	1
4 th Parliament	1979-1983	158	5	12	1
5 th Parliament	1983-1988	158	2	12	1
6 th Parliament	1988-1992	188	2	12	0
7 th Parliament	1992-1997	188	6	12	1
8 th Parliament	1997-2002	210	4	12	5
9 th Parliament	2002-2007	210	10	12	8
10 th Parliament	2008-2012	210	10	12	6
			50		25

Source: Kihoro, 2007 in Kamau 2010, Kenya Parliament Records.

The role of the Parliament is to represent and address the problems of the people, to legislate, determine the allocation and spending of public resources, and exercise the oversight role over national revenue and expenditure, the conduct of the executive and other state organs, and to declare war or extension of states of emergencies (Republic of Kenya, 2013). Because this is done in a democratic process, it requires the voice, values, and power of the majority to influence policy, mobilize, and pass legislation. It also requires majority even to get an agenda on the floor of the house supported, or deliberated upon effectively. When we have few women represented in parliament, then women issues often receive limited attention or support in the parliamentary processes. Data in table 4.5 indicate that women representation in parliament since independence has been weak. Data in this table shows that even though the law provided for 12 slots for nomination, women were less nominated to Parliament compared to men. The data also shows that since independence, the number of women elected to parliament was very minimal.

Although women issues constituted a major component of the colonial struggle, these issues were pushed to the periphery at the realization of the post-colonial Kenya. While it is evident that women just like men, or in some cases more than men suffered from colonial repression, women issues were not identified, exposed, and made part of the priority agenda during the colonial struggle, as well as during the formulation of Kenya's post-independence vision. The suffering of Kenyans was made more collective therefore pushing women issues to the periphery. Kenya's post-independence vision, which has remained Kenya's national dream, dominating the political discourse, was fighting poverty, ignorance, and disease. While this dream looks inclusive, failure to identify issues like justice, fairness, and equity, when in the real sense these are the issues that provoked the struggle for independence, demonstrated a deliberate political attempt to erode state consciousness of the past issues that bedevils the nation.

Most of the customary cases examined indicate that the court considers customary law as a major basis in determining civil cases. While customary law is considered legal as long as it does not contravene the constitution, the essence of customary law is to preserve the interests of the community more than those of the individual, particularly when the interests of the individual are radically different from those of the community. Section 3 (2) of the judicature Act requires that "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay" (Mukaindo, 2013).

In some cases, customary law disadvantages women or makes them more vulnerable to injustices. Case summaries presented in table 4.6 Indicate these.

Table 4.6 Select Court Rulings on Civil Cases

Pauline Ndete Kinyota Maingi v. Rael Kinyota Maingi (Civil Appeal No. 66 of 1984) dismissed provisions of a will and upheld the Kamba customary law; the deceased's custom. The court ruled that: "...before wishes of an African citizen of Kenya who has made a will directing where his mortal remains should be interred could be given effect to, the executor of his will must prove that the African custom was repugnant to justice and morality or inconsistent with written law, otherwise, such wishes would not be given effect to."

In *Njoroge v Njoroge & Another* (2004)1KLR, Justice Ojwang ruled that marital status was more relevant to burial and that 'it was the marriage regime rather than the succession regime that should prevail in determining questions of burial.'

In the case of *Salina Soote Rotich v Caroline Cheptoo & 2 Others* (Civil Appeal No. 48 of 2010) the court upheld Keiyo customary law that made it a taboo for a man to be buried at his in-laws.

In the case of *Charles Onyango Oduke & another v Samuel Onindo Wambi* [2010] eKLR the High Court accorded the wish of a deceased woman to be buried at a place of her choice. The court was guided by the earlier case of *James Apeli and Enoka Olasi v. Prisca Buluka*(Civil Appeal No. 12 of 1979) where the court had allowed the widow's wishes to bury the body of the deceased in accordance with the deceased's oral will. In his judgment, S Eric Law had stated in part: - "...if the deceased has left directions as to the disposal of his body, though these are not legally binding on his personal representatives, effect should be given to his wishes as far as this is possible...The duty of disposing of the body falls primarily on the executor..."

Source: Mukaindo, in National Council for Law Reporting, 2013.

4.2.2 The Regional Geopolitical Context of Northern Kenya

It is important to note that while the entire study is about access to justice in Kenya, this study gives special reference to the cases in Northern Kenya because this is a geopolitical context with policy preference envisaged in the Bill of Rights and other parts of the constitution as a marginalized region. There are a set of historical

experiences, geopolitical issues, as well as socio-cultural features that make marginalized communities living in Northern Kenya different from the rest of the country. These features form the contextual lens through which social reality is constructed. Failure to realize this context, within which marginalized issues are explained, is denying the social reality of the marginalized persons.

To theorize the experiences of the marginalized communities living in Northern Kenya, we anchor contextual lens on human rights theory. Assumptions underlying this theory are that: 1) Freedom is innate and natural. It is not socially acquired. 2) However, external conditions which an individual relies on, or which interfere with human life like socio-economic and political circumstances, culture, geographical location, historical experiences, language, and other human experiences either provide support or limit the extent an individual can realize freedom. 3) Therefore, one's freedom is limited to the choices, behaviors, practices, perspectives, and opportunities these external factors can provide to an individual. 4) When we examine the relationship between an individual and these factors in a particular context, we can be able to see the way that particular individual is limited by these external factors, or the way the individual is exposed to better opportunities to realize freedom. 5) Since the Bill of Rights seeks to enable citizens to access benefits from public policy, examining human experiences in light of human rights theory and the Bill of rights enables us to see the pitfalls, where to improve, and what to improve, so that citizens can access justice.

Northern Kenya unlike other parts of the country is a marginalized underdeveloped region. The region is a semi desert with limited infrastructure and complex geographical terrain. The region has limited rains in March and October, with harsh temperatures ranging from 29 °C to 36°C.

Politics of Northern Kenya are built around socio-cultural structures, are based on the ethnicization of territories, and thrive on the power conflict between government and local political patriarchs: Roskin et. al., (2006) argues that everything happens in the context of politics. Therefore, politics matter because those who participate in it influence the decisions that govern the life of everyone. Roskin further argues that because almost everything is political, there is need to study nearly everything.

As opposed to issue based politics, ethnic factors largely influence the way public problems are identified, perceived, or addressed. The regional consciousness that Northern Kenya is a different socio-political and economic territory from the rest of the country is widely accepted. Territories, even provincial administrative units have ethnic names for particular ethnic groups. These identities are not mere names, but the symbols of the power and perceived legitimacy of a particular ethnic community to own and control that particular territory. Frequent inter-ethnic or inter-clan conflicts over territories reflect this strongly entrenched belief, and it informs the way communities address important matters, for instance conflict over natural resources like water, pasture, and land use.

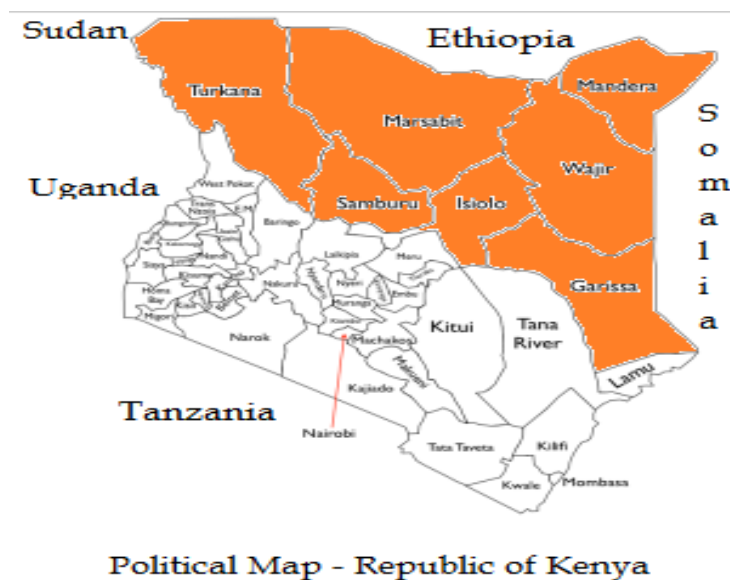


Figure 4.3 Map of Kenya Showing Northern Kenya

Northern Kenya is also one of the parts of the country where insecurity is high. The region experiences frequent inter-ethnic conflicts over resources, which have claimed hundreds of lives. The security situation in Northern Kenya is worsened by insecurity in the neighboring Somalia, Ethiopia, South Sudan and Northern Uganda. Refugees running from war in Somalia, or rebel attacks in Ethiopia, South Sudan and Northern Uganda, cross over to Kenya seeking refuge. This cross-border interaction has contributed to increase in small arms, light weapons, and recently

grenades and Improvised Explosive Devices. Over past decades, the government has been launching military and police operations to disarm communities in conflict. However, this policy has not reduced the number of illegal small arms in the region.

Because of ethnic politics, local politicians are also tribal patriarchs. They legitimize their political role in society by playing policy entrepreneurship between the tribe and the nation. When an incident occurs in Northern Kenya, local politicians who also play tribal patronage find an opportunity not only to criticize the government, but also to demonstrate their vigilance in protecting the tribe from the nation. The culture of politicians protecting their tribes rather than allowing the law to protect them as citizens is rooted in the traditional conceptualization of leadership, where chiefs and Kings protected their people. Decades of colonial and post-colonial experiences lead to the shift of substantive power from traditional chiefs to politicians, who have modernized this power and usually exercise it in response to dynamic political situations on our time.

Local politicians also benefit from the alienation of Northern Kenya, because it renders government irrelevant and makes them a populist alternative. With limited political appeal and social consciousness to anchor public concerns on legal intervention, politicians become more relevant, because they exploit the vacuum as an opportunity to demonstrate alternative power and intervention. Although they don't do much to assist the society, they become a higher populist alternative after the socio-cultural systems that communities rely on.

The colonial policy that created Kenya as we know it now ended up modernizing the rest of the country, and militarizing Northern Kenya. Before the colonial period, the land we now call Kenya was a territory inhabited by many ethnic nations, some monarchies while others federations. Colonialism was not the same to all ethnic communities in Kenya. Some ethnic communities were colonized through occupation, coercion, and eviction, while others were colonized through collaborations and indirect rule. Because western, central and coastal regions had great agricultural and industrial potential, the British settled in there and modernized the region. This was because colonial economic interests demanded investments where there were immediate economic returns. Since the Northern tribes like the Turkana, Samburu, and Somali were militant, resistant, and has access across the

border. The British found it difficult to control these tribes. Furthermore, the British also saw the Italian operations in the horn of Africa and the expansion of the Ethiopian empire as a threat to their welfare in Kenya. As a result, they made Northern Kenya a military buffer zone, an attempt to combat the expansion of the Ethiopian and Italian empires (Mburu, 2000).

The resilience and self-reliance of the Turkana people, to protect their own community due to decades of marginalization, undermines the meaning of Kenyan nationhood, since government wins less legitimacy in this region: By late 1800s, the Turkana community was already militarized. The Turkana for instance traded with Swahili-Arab slave traders at the East Coast of Africa in a Bata trade where the Turkana accepted ammunition as a currency. By 1910, the Turkana community had private army units that protected the community, land and resources (Mburu, 2000). In an attempt to control Turkana, the British army made major military raids in Turkana in 1913, 15, 17, and 18, in what the British government defined as military raids to prevent the Ethiopian occupation of Turkana territory, which was then a territory occupied by the British. These operations failed because of a persistent political and armed resistance, harsh and complex geographical terrains which the British found difficult to endure compared to local people (Lokuruka & Lokuruka, 2006, pp. 121-141).

In 1926, the British Military operation to disarm the Turkana failed after they refused to surrender their arms, and instead chose to fight back. The British had demanded that the Turkana surrender their guns to show submission to the British colony. As a result, the colonial government declared Turkana a closed district, meaning that those who wanted to go in and out of Turkana required a special authorized passport. As a result, the Turkana over time developed loyalty first to the ethnic nation/tribe and second to Kenya (Lokuruka & Lokuruka, 2006, pp. 121-141). Over the years, efforts to transform the society to prioritize loyalty to the nation before the tribe have not been successful.

During the cold war era, the struggle between the socialist and capitalist movements took ethnic and regional dimension in Kenya. Political leaders from North Eastern Kenya preferred the socialist form of government and ideology linked to Russia, while the government under Kenyatta and later Moi preferred capitalism. The

US was a major force that influenced the decision of Kenya to deny Kenyan Somalis a federal-socialist government, and later secession from Kenya. Earlier in 1948 and 58, the US had also opposed attempts by the British government to create a greater Somalia, by joining Northern Kenya to Somalia. However, the Kenyan Somalis have continued to resist efforts to be integrated into Kenya (Abdullah, 1997). As a result, this resistance has led to the marginalization of Northern Kenya.

In Northern Kenya, the struggle went beyond political debate and within few years turned into a secessionist war linked to and supported by the Russian influence in the neighboring Somalia. The war known as the *Shifita* war has had far reaching policy implications on Northern Kenya. There are for instance some laws both formal and informal, which apply specifically to the people of Northern Kenya, or affect the people of Northern Kenya differently than other Kenyans. The Outlying Districts Ordinance of 1902 which prohibited movements of the people of Northern Kenya from their region was repealed in 1960s and in 1997. This law declared Northern Kenya a closed area, and required that people of Northern Kenya prove their legitimacy of residence (Nunow, 2000). This indifference legally and politically justified and over a long period of time, has made it almost a political and public administration tradition, to undervalue and to ignore issues affecting the people of Northern Kenya.

State driven violence in Northern Kenya is a structural injustice that was entrenched in the justice system and legitimized during and after the *Shifita* war 1963-68. Between 1963 and 68, Kenyan Somalis demanding to Secede from Kenya and be part of Somalia began guerilla warfare against the government of Kenya. The war came after the late 1950s-early 1960s debate on whether Kenya should be a socialist or capitalist state had failed. The debate had contributed to the rift and tensions between the Northern Kenya and central government in Nairobi. The agitated armed Somali groups with support from Russia and Somalia launched militant attacks on government installations and the police. In response the government of Kenya launched a military operation in the region. Soldiers used tactics like: destroying human settlements; killing hundreds of livestock upon which Somali nomadic economy and life depended upon; creating military blockades around oasis leaving communities with no access to water; and torture. The operation which took three

years ended in 1968, with the withdrawal of Russia's support, economic crisis in Somalia, and inability of the Kenyan Somali's to keep the fight. Even though the war ended, Northern Kenya communities were profiled as a threat to National security. Soldiers and the police were granted immunity from prosecution when conducting operations in Northern Kenya (Ringquist, 2011).

Since the region experiences more legal restrictions and minimal policy benefits, ethnic communities in Northern Kenya depend on members of their ethnic communities across borders for instance, the Kenyan Somalis will rely on Somalis of Somalia, while the Turkana of Kenya will rely on the Turkana of South Sudan or Uganda. In this case kinship loyalties and alliances have continued to be stronger and supplement nationhood.

For over 100 years, Christianity has largely shaped Kenyan politics, policy, and the socio-political thought. The role of missionaries in the modernization of Africa is critical in understanding the gap between Northern Kenya and the rest of Kenya. Before colonialism, during the colonial period, and after independence, churches have dominated the provision of welfare particularly education, health, and leadership development. Christian missionaries played a fundamental role in the preparation of Kenyan independence. Kenya's first political leaders were individuals who studied in missionary schools and given Christian scholarships and resources. Some of them were sons and daughters of religious leaders who had studied abroad, because they had access to resources. The idea of adopting western lifestyle and values, Christianization of politics, public policy, public service, and the legal system has heavily borrowed its moral philosophy from Judaism and Christian traditions and values (Allen, 2013). This model of modernization has been a disadvantage to Northern Kenya communities which throughout history have been Muslim or indigenous with limited resources, and have largely resisted Christianization.

4.2.3 The Marginalized People's Context: Samburu and Turkana

Although the context of the marginalized people as referred to in this study goes beyond the case of the Samburu and Turkana. This study puts specific reference to the context of the Samburu and the Turkana because these are minority communities; part of the minority groups the new constitution in Kenya identified as marginalized persons; particularly for the purposes of the intended future

redistributive policies. There are other marginalized contexts in this study for instance cases on individuals seeking justice in other parts of Kenya, other than Northern Kenya. However, these case contexts are analyzed for the purposes of case comparison and synthesis which shall be conducted later in the final chapter.

Indigenous people are different from other ethnic communities in Kenya. First, indigenous people are a minority. Usually, indigenous communities are smaller in size compared to the dominant ethnic communities. Second, indigenous people throughout history have benefited less from the colonial and post-colonial regimes, because they largely resisted colonization and adoption of western values and lifestyle. As a result, they are largely marginalized. Third, indigenous socio-cultural rights are undervalued compared to the dominant modern culture. Fourth, the economy of the indigenous communities is largely informal agriculture or business enterprises. Indigenous communities also: practice retaining cultural lifestyle, which they attribute to common ancestral origin and collectivity; maintain the use traditional institutions and social organization; largely depend on natural resources in their respective territories; suffer exclusion and discrimination from the mainstream socio-political system; practice common traditional religion and spirituality; and largely utilize traditional roles and occupations for livelihoods (Mukundi, 2009).

Table 4.6 Indigenous Communities Issues in Kenyan Constitutions

Rights Issues	Independence Constitution ,1963	Constitutional Changes 1967-2009	New Constitution (2010)
Land rights	Silent	Only property rights (section 75,114-117)	Community land tenure (Article 63)
Political participation	Regional assemblies & quota system	Reserved seats for special groups & regional assemblies abolished	Minority Representation in the Senate, National & County Assemblies
Revenue allocation	By executive but no specifics	By Parliament approval but no specifics	0.5% for marginalized areas & additional 15% country governments

Table 4.6 (Continued)

Rights Issues	Independence Constitution ,1963	Constitutional Changes 1967-2009	New Constitution (2010)
Affirmative action	silent	silent	For minorities (Article 56)
Gender issues	silent	silent	Section 27 (8), gender representation secured. But no provision for women from minority groups

Source: Author based on Abraham, 2013.

Most of the indigenous communities in Kenya are largely pastoralists, hunters, and gatherers. The Masai and the Turkana also practice agriculture. Apart from the Masai and the Turkana, other widely known minority ethnic communities are the Samburu, Somali, Ogiek, Endorois, Borana, Gabra, Boni, Sabaot, Elmolo, Burji, Gaaljancel, Munyayaya, Orma, Rendile, Sekuye, Talai, Yaaku, Sengwer, Watta, and Pokot (Mukundi, 2009).

Indigenous groups' issues were largely ignored in constitutional reforms until 2010. Before 2010, very little changes were made to address the rights of indigenous communities. Many changes came with the 2010 new constitution which seeks to realize equality.

4.2.3.1 The Turkana

The Turkana people are part of the Nilotic ethno-linguistic communities of Africa. In Kenya, they are found in Turkana County, which is located in the North-western parts of Kenya, North Eastern part of Uganda, and Southern parts of South Sudan. Turkana County is about 68,680.3 Sq. Km. The region is a semi desert, hot, with little rainfall patterns ranging from 300mm to 400 mm per year. The county neighbors Uganda to the west, Sudan to the North west, Ethiopia to the north, Marsabit County to the East, Samburu County to the South East, and Baringo and West Pokot counties to the South and south east respectively. Turkana County stands

355 meters above sea level with a temperature ranging from 25°C and 35°C. The population of the region is approximately 445 071 male and 410 328 female, with a population density of 12.45 people per Sq.km. The County is represented in the Legislature by 6 members of Parliament and 1 senator (Devolution Kenya, 2013).

The Turkana people are believed to have originated from South Western Sudan. Over time, the community has interacted with other pastoralist communities from Uganda and Ethiopia. At some point, the interaction has been harmonious for instance members of the Turkana community engaging in cross cultural marriages with members of other ethnic communities. In some cases, it has been hostile relationship characterized by inter-ethnic conflict over resources for instance water and pasture (Lokuruka & Lokuruka, 2006, pp. 121-141).

The Turkana community is a more or less militarized ethnic community in Kenya. Its proximity to Southern Sudan and Northern Uganda which had decades of civil war provides a greater access to high level guns. Usually, government conducts disarmament exercise in the region, especially when inter-ethnic conflict levels go high. However, this policy has proven futile, given the thriving cross border gun trade. There are two schools of thought about the militarization of the Turkana community namely the conquest hypothesis and the self-defense hypothesis.

The conquest hypothesis: This is the narrative that the Turkana advanced military might with political intentions to conquer and occupy new territories. The hypothesis was advanced by early western historians to explain the British military incursion in Turkana during the colonial period. Western historians argue that the Turkana adopted aggressive militarism with the intention to expand their territories, conduct raids and war fare for survival.

Self-defense hypothesis: On the contrary Turkana historians argue that although the advancement of Ethiopia in the 20th century fueled gun trade and the militarization of the Turkana community, the community did not have any political ideology, strategies, or structures to conquer new territories and rule over them (Lokuruka & Lokuruka, 2006, pp. 121-141). The Turkana had to adopt military techniques to defend themselves from aggression launched by the Ethiopian and British forces who invaded Turkana since late 1880s. Therefore, it is in the belief in self-defense that the Turkana have advanced their military strategies and used them, whenever they are attacked (Collins, 2006, pp. 95-119).

During the Second World War, the British in a twist heavily recruited men from the Turkana community into the Kings Africa Rifles, a military unit that was sent to fight Italians in Ethiopia, and other armies in Africa and Asia. However, Turkana was not developed, even though it contributed more troops. During 1980s and 1990s, the Kenyan government covertly armed the Turkana with arms particularly AK 47 rifles, which the military had disarmed the Somalis in North Eastern Kenya, during the Shifta period (1963-68). The political motivation for this is not known (Mburu, 2000). However, history indicates that conflict issues in the region are socio-political.

The transcending reality in here is that the Turkana, based on their own lived experiences, have made a collective decision to acquire guns and military strategies, and use them to protect their interests as a community, whenever they feel threatened. By doing so, they demonstrate the most vital critique to the government policy. A community defending itself, when the constitution guarantees every citizen the right to access state protection is the best way ever, to demonstrate government failure in its fundamental and essential responsibilities.

4.2.3.2 The Samburu

Majority of the Samburu people live in Samburu County which is a semi desert with temperatures ranging from 25°C and 33°C, and a minimal annual rainfall ranging between 200mm to 250 mm. Samburu are also found in Marsabit and Isiolo Counties (Devolution Kenya, 2013). The region inhabited by the Samburu is in the central northern Kenya. Its location exposes the region to security externalities from Somalia, Ethiopia, and South Sudan.

The Samburu are a kin to the Masai of Kenya. They originated from Ethiopia. They settled in these areas, particularly Marsabit, Isiolo, Baringo and Turkana after they were expelled from Laikipia, following the 1911 treaty between the British and the Masai leader Lenana. The Samburu community is ruled by council of elders. Decisions are made at village level. If the situation is more critical decisions are made at clan or tribe level (equal to a district in modern terms). Customary law demands that elders be consulted for any undertaking in the community (Lanyasunya, 2009). Table 4.7 shows major inter-ethnic conflicts in Samburu in the recent years.

Table 4.7 Major Inter-ethnic Clashes in Samburu in the Recent Years

Year	Major Inter-Ethnic Clashes in Samburu
2005	Marsabit: Ethiopian raiders shoot dead 76 people including 22 school children in a cattle rustling revenge attack (BBC, July 14 th , 2005).
2006	Marsabit: 16 Ethiopian raiders and 1 Kenyan woman shot dead in a fight between Kenya police and Ethiopian raiders, just a month after 17 other Ethiopian raiders were killed in the region (Nation TV, October 6 th , 2006).
2006	Pokot raiders attack Samburu, shoot dead five people, and take away 1492 cattle 1502 sheep & goats and 1 donkey. In revenge attack the Samburu attack Pokot, shoot dead 2 people and take away 400 goats and 20 cattle (Kenya Police, April 26 th , 2014).
2009	On the 15 th of October 2009, Pokot raiders attacked a village in Samburu and shot dead 21 people. 10 Pokot raiders died in the shootout. Local people claimed the motive of the attack was to push Samburu people from their land (Kenya Human Rights Commission, 2010).
2012	On the 10 th of November 2012, 42 Police officers are shot dead by Turkana bandits in Suguta valley during a cattle rustling attack on a village in Baragoi, Samburu. The bandits take away 400 cattle (NTV, 17/11/2012)

Although the Samburu are not as militarized as the Turkana, they have had access to guns since as early as the 1960s shifta war; they have raided the Turkana and have had to defend themselves when the Turkana raided them. The practice of cattle rustling is a common inter-ethnic practice between these communities. The Samburu living in Marsabit are sometimes attacked by the Oromo from Ethiopia in cross-border cattle rustling. Those living in Baringo have inter-ethnic clashes with the Pokot, while those living in Baragoi clash with the Turkana.

4.2.3.3 Common Thematic Issues between the Turkana and the Samburu

1) Customary Law and Socio-cultural Structures. These communities have strong established customary mechanisms for dispute resolution. Authority to mediate in disputes and render verdict is vested in the councils of elders. Elders also regulate the way of life in the community. They control marital relations, resources, networks, boundaries, and ethnic identity. Councils of elders also run customary courts, as an intervention into issues affecting the members of the society. The legitimacy of these courts is derived from the socialization to obey the tradition, the value system of the members of the society, and the good will of the society to obey the law and implement the ruling of these courts. A range of issues are tried and settled in these courts for instance crime, socio-economic disputes like water, livestock, and land use, domestic quarrels, other civil disputes (Karimi,2004). However, because of the current migration and education, there is a minimal shift in the cultural orientation of the indigenous people. This indicates the changing trends in the socio-cultural world of the people (Cheserek, et. al., 2012).

Councils of elders and customary courts are dominantly patriarchal and pro-elderly. Women and young people are largely excluded from the decision making process. Even though they are allowed to participate in dispute resolution mechanisms, they don't have equal access to voice. Among the Samburu, women sit in the outer cycle while men sit in the inner cycle. If a woman wants to voice an opinion in the council, she has to speak indirectly through a male relative, or speak to the women's council which will then forward the issues to the community council for consideration. Both council or elders and customary courts or judicial sessions are based on hearing cases, seeking clarifications, probing, mediation, and consensus. Participants include traditional authorities, elders, and lately important people in the society for instance teachers or business people. In some cases, local provincial administrators like Assistant Chiefs or Chiefs attend these sessions for instance when cases like land or livestock issues or crime and security are examined (Karimi, 2004).

The wealthy, the wise, and the rhetorical largely control socio-political influence in the society among the Turkana. Social organization is based on

the right to livestock, land, water, pasture, kinship, and relationships between individuals. A man is allowed to marry many wives in these communities. As militarized societies, manhood is means being a warrior. Dignity and respect comes with fighting. Among the Samburu, girls are married of soon after circumcision. Usually, this happens at the age of 12 years. Uncircumcised girls and boys look after cattle, while married women look after cattle and household activities. Men rule and take care of security (Karimi, 2004). Traditionally, the practice of cattle rustling was merely a socio-cultural practice. However, in modern times, the commercialization of cattle raids has transformed the practice into a violent inter-ethnic economic enterprise, with market and political actors beyond the indigenous communities (Cheserek, et. al., 2012).

Tables 4.8 and 4.9 provide information on dispute resolution, classification of offenses, and fines. The tables also show socio-cultural institutions used in dispute resolution, and variations in the way the Turkana and Samburu communities view offenses.

Table 4.8 Dispute Resolution and the Classification of Offenses

Institutions of Dispute Resolution		Classification of Offenses	
Turkana	Samburu	Turkana	Samburu
Extended family	Family	Relational	Relational
Neighborhood	Extended family	Offenses	Offenses
(clan)	Neighborhood	Domestic violence	Domestic disputes
Tribe	Peers	Adultery	Rape
	Council of elders	Murder	adultery
		Criminal	Criminal Offenses
		Offenses	Murder
		Murder	Theft
		Adultery	
		Theft	

Source: Author Based on Karimi, 2004.

Punishments for various offenses vary depending on the weight the community puts on an issue compared to the other. Among the Turkana, it appears adultery and theft attracts a more severe punishment than murder and rape. Among the Samburu the murder and theft appear to be taken more seriously than rape and adultery which are treated with secrecy.

Among the Turkana, dispute resolution begins by taking an issue to the extended family, then to the clan, and finally to the tribe in case it prevails. Domestic disputes like inheritance, quarrels, property ownership, adultery, and murder are classified as both relational and criminal offenses. Dispute resolution is primarily the responsibility of the individuals responsible, and the patronage of the elders and society. Public opinion, interest, and intervention even in personal, family and private matters are highly valued. Punishment, obligations, responsibilities, and fines are fixed, even though they can be negotiated considering socio-economic circumstances of the guilty one. Among the Samburu cases like rape and adultery are solved secretly and never brought to the public. However, the militarization of the indigenous communities and the politicization of cattle rustling and inter-ethnic violence continue to weaken the ability of the traditional dispute resolution processes and mechanisms. This is because there is no political will or effective government policy to support or strengthen these systems (Kenya Human Rights Commission, 2010).

Table 4.9 Offenses and Fines

Offenses	Fine in Turkana	Fine in Samburu
Murder	30 cattle if the slain is a man, 60 if the slain is unmarried woman, & 40 if the slain is a married woman	49 cattle if the slain is a man. Silent in the case the slain is a woman
Adultery	Severe beating, burning, livestock of the offender taken by the complainant, and ritual-social stigmatization, ridicule,	Mob justice. Usually adultery cases are addressed with secrecy and rarely talked about

Table 4.9 (Continued)

Offenses	Fine in Turkana	Fine in Samburu
	public humiliation, and cleansing ritual	
Rape	Severe public beating, 1 bull and 1 white sheep or goat for ritual sacrifice, and 10 cattle in case of pregnancy	Mob justice. Rape cases likewise are treated with secrecy
Theft	Public beating, and or a family can chose to kill its member if found to be a thief; or forgiveness if the thief was found to have stolen because of hunger	One found guilty is required to pay three times what he stole. If the animal was eaten, those who ate will also pay 3 times the value of the animal

Source: Author based on Karimi, 2004.

2) Religion and Spirituality. The Turkana believe in one god called Akuj. Akuj rarely intervenes in human affairs. Elders are believed to possess spiritual powers and can mediate between the spiritual world and the physical world. They can invoke blessings and curses and can influence one's destiny. They are custodians of righteousness in the society. Religious rituals are used to seal covenants in dialogue. Belief in dreams, diviners and fortune tellers, miraculous healing, and power to control nature for instance make rain or send drought constitute key beliefs in the society. Religious faith among the Turkana is so concrete that any diviner is expected to demonstrate supernatural power consistently in everyday life; otherwise the society will be skeptical of his spirituality. Animal sacrifices like blood, milk, horns are used in religious rituals (Karimi, 2004). The spread of Christianity in Turkana began to take root in 1970s. However, because of the cultural complexities, Christianity spreads slowly in the region. In 2006, it was estimated that about 15% of

the Turkana people were Christians (Jenkins, 2006). Recent accurate data is hard to find.

Like the Masai, the Samburu believe in one God called Nkai. Nkai lives in the mountains. The term Nkai is also used to refer to spirit related trees, rocks, springs and the spirit of a person. There are charms for healing, fertility, prosperity, protection, and all other needs. People can pray directly to Nkai during public gatherings. The evil spirit is called Milika. He is responsible for all evil and misfortunes. Like the Turkana the Samburu believe God, even though real, is distant from their daily activities. As a result, diviners predict the future and cast spells in order to influence the way things will happen in the future (Karimi, 2004).

Christianity began to take roots in Samburu in 1990s. By 2007, it was estimated that about 8-9 % of the Samburu people were Christians. Recent data is hard to find. Like the Turkana Samburu people are reluctant to convert to Christianity. Those who have converted to Christianity are largely those who received Christian welfare aid like education, health, and relief. Most Samburu Christian converts are women, children, and young people. This is because elders and leaders refuse to convert (Jenkins, 2007).

3) Economic activities. These communities largely rely on pastoralism and limited agriculture for income and livelihood. Unlike the Samburu, the Turkana also practice fishing. For decades, these communities have practiced traditional cattle rustling, as a way to show bravery earn bride wealth, acquire and increase livestock. Given that these communities neighbor each other, they have raided each other many times, fought each other, and forcefully acquired livestock from each other in cycles of clashes such that it is not possible to trace who owns which particular livestock. The inability to settle this question often leads to new cycles of inter-ethnic clashes (Karimi, 2004).

Although traditional cattle rustling was a socio-cultural practice, which had rules of engagement for instance rules on compensation, reconciliation, not to attack women and children, and not to conduct cattle rustling for business purposes; today, politicians and business people have influenced its transformation into a criminal activity, where bandits raid communities, shoot people indiscriminately, forcefully acquire livestock, and then transport it outside the county for sale (Kenya Human Rights Commission, 2010).

4.3 Implementation Process: The Mobile Court Policy

This section answers the question: How was the implementation process conducted? First, we examine the background to the judicial reforms. The reason for doing so is to understand what led to the reforms in the Judiciary. Second, we examine the reform process. The reason for doing so is to find the political and policy linkages between the reform process and the reforms and how this influenced implementation. Third, we examine the meaning of judicial reforms and access to justice. Here, we look at the policy theory within the framework and spirit of the new constitution. Fourth, we give a step by step account of what actually happened during the reform process from the time the constitution was promulgated to the time the mobile courts began to function hence providing access to justice.

4.3.1 The Background to Judicial Reforms

To theorize judicial reforms, theories of public policy like the elite theory, group theory, public choice theory, process theory, institutionalist theory, and Human rights theory provide the lens through which we can make sense of the background to the Judicial reforms. As stated earlier in literature review, policy is about government choices to act or not to act in particular ways. Government makes choices throughout the policy process because it wants to accomplish particular intended goals. It is important to note that these choices are made in a political environment where government is constantly responding to political forces that concern it (Colebatch, 2007, p. 52).

According to the elite theory, the elite who have power in society determine public policy because they shape the opinion of the masses, and influence the government's decision on the society's value system (Dye, 2011, pp. 14-24). Human rights theory on the other hand assumes that to achieve the desired potential, one requires freedom to do so. However, freedom in society is socially constituted because there are environmental factors that limit the individual to realize the desired potential. This happens when these environmental factors act as forces that determine the individual's worldview, behavior, practices, and choices. Therefore, to understand the problems an individual faces, one ought to look at the experiences of the

individual in relation to the environment. In this case, the role of the Bill of rights is to regulate these environmental factors in order to enable the individual get the freedom required to realize the desired potential (Mensch, 2010, p. 1).

Kenya's judiciary has evolved over the past five decades from a colonial judiciary, which was relatively small in size and structure, to a post-independence judiciary that is more expanded in terms of scope, structure, and size. Over the years, about four major reforms have been conducted in the judiciary with the goal, to improve public service and access to justice. The Magistrate Act of 1968 which led to the first reforms after independence enabled the transformation of the judiciary from the Colonial African Courts to the Judiciary of the Republic of Kenya (Bowry, 2014).

Table 4.10 Major Reforms Kenya's Judiciary

Year	Major Reforms Kenya's Judiciary
1963 & before	Colonial African Courts (lower courts)
1968	Creation of the High Court and Magistrate Court (lower courts)
1977	Creation of the Court of Appeal
1994	Creation of National Council of Law Reporting
2003	Government sent 23 judges for early retirement because of incompetence and other professional issues
2010	Creation of the Supreme Court
2011	Creation of mobile courts in formerly marginalized areas

At this time, the High Court was established creating a two tier judiciary structure with the High Court and Magistrate Courts. In 1977, the Court of Appeal was established making the Judiciary a three tire structure. In 1994, the National Council of Law Reporting, a semi autonomy agency was established to review the law, judicial rulings, monitor the functioning of the Judiciary and recommend reforms. In 2010, the Supreme Court was established making the judiciary a four tire structure. Mobile courts as an extension of the Magistrate's courts were also established in 2011 to improve access to justice in areas that were formerly marginalized. The judiciary also obtained administrative and financial autonomy

based on entrenched constitutional provisions (Bowry, 2014). It is also important to observe that unlike the 2010 constitutional reforms, the previous reforms were largely conducted by the parliament with a minority opposition or the executive, for instance the 2003 surgical reforms in the judiciary, where government sent home 23 judges for early retirement, over issues of incompetence and professionalism (Rawal, 2013). There were no legal provisions to ensure wider public participation for instance via referendum.

Throughout history, Kenya's policy process has been dominantly elite oriented and driven. Before multi-party democracy in 1990s, Kenya's policy making process was largely driven by the elite. This was due to a number of factors for instance: 1) the colonial political structure and culture which was inherited at independence and reinforced throughout in 1960s, 70s, and 80s lacked both values and human intent for democratic participation. 2) Because of the injustices conducted during this period, and the persistent struggle for change; the ruling elite had to resist change by preventing reforms through strategies such as exercising strict control on policies that facilitate the functioning of the judiciary. To be able to do this, the elite retained the policy making power. Even after the realization of multi-party democracy, the elite still yield immense power in Kenya's policy process.

The politics of judicial reforms in Kenya rotates around historical injustices as a justification for the need to change. Issues of rights and justice were at the heart of the quest for independence and the Kenyan nationhood, multi-party democracy, and lately the new constitution. This political discourse often divides the country between those who agitate for reforms and those who more or less seek to maintain the status quo. Kenya is a country with a vibrant civic culture where interest groups strongly believe they can influence policy by participating in the political activities that aim to determine the policy change.

History portrays Kenya at independence as a nation with a justice system that did not always work for common people. A former British colony, Kenya inherited a British Judiciary system at least in principle. This judiciary was part of the colonial administration where judges were appointed by the colonial administration and gave primary loyalty to the colonial master, even though they appeared to serve everyone

equally. Besides, there was no constitutional guarantee for the independence of the judiciary in the Kenyan colony (International Bar Association, 1996).

Because of the nature of colonialism, Kenyans hardly even if not in all cases, enjoyed the privileges and protection British citizens enjoyed under the same arm of government. While addressing the British Parliament, Foreign Secretary William Hague said “The British government recognizes that Kenyans were subject to the torture and other forms of ill-treatment at the hands of the colonial administration...it sincerely regrets that these abuses took place and that they marred Kenya’s progress towards independence” (Reini, 2013). With a well-functioning judiciary, one would anticipate that such issues would not have happened at the level they did. Therefore this indicates a judiciary that was skewed against ordinary Kenyans and largely protected the elite.

The legacy of unimpartial judiciary vulnerable to manipulation by the executive continued in Kenya’s post-independence era. After independence in 1963, Kenya continued to employ judges on contract basis until 1993. Their salaries were subsidized by the British government. Most of these judges were British with few expatriates from commonwealth countries. Because not many Kenyans were qualified for these careers by then, the number of Kenyan judges grew gradually and slowly. Contracting a judge was a preserve of the executive. The process was not open to public, and the renewal of the contract depended on how the judge satisfied the executive. The removal of the judge on the grounds of misbehavior or incapacity depended on a commission of inquiry appointed by the President (International Bar Association, 1996).

The running of the judiciary was dominated by political interference from the executive. In the past, presidential comments predicting the outcome of cases pending determination by the court was seen as a strategy of the executive to influence judicial decisions. The judiciary did not protest against the presidential interference. While there were some cases where the president predicted the outcome yet the court determined the contrary, there are other cases where the judicial determination reflected the prior presidential comment. One of such cases was in March 1993, when President Moi, while addressing a political rally in Nakuru directed magistrates not to grant bail to suspects charged with illegal possession of firearms. The following week,

Chief justice Hancox issued a circular to all magistrates ordering them not to grant bail to suspects judged with illegal possession of firearms (International Bar Association, 1996).

In 1994, president Moi censured the court by saying that the courts did not have the jurisdiction to determine the application of security regulation. Moi argued that such power was the reserve of the police. The president was responding to a previous high court ruling, where the court acquitted Father C. Mirango who had been accused of contravening security regulations prohibiting movements into areas affected by tribal clashes. Furthermore, Moi in 1992 and 1995 through presidential directives ordered the courts not to keep away from all cases involving the ruling party KANU. In another case, the president while in a political rally in Kerugoya (February, 1994) announced that the government would not allow the registration of the University Lecturer's Union. When doing so, University lecturers had taken a case to court, seeking the court of appeal to compel government to register their union. The case was pending in court. In June 1994 the Court of Appeal dismissed the case (International Bar Association, 1996).

Historically, the justice system was also used by government to abuse power, harass political rivals, and deny justice for private gains: In an eviction case (1993), members of the Kikuyu community who had settled in Enosopukia, a region historically dominated by the Masai were evicted by the members of the Masai community during tribal clashes. The victims then took their case to court. When the case was brought before the court in 1995 for hearing, the Attorney General entered a nolle prosequi and stopped the case. Politicians, lawyers, priests, and university lecturers who were critical of government would be in more or less a pattern arrested, charged with sedition, released on bail, then on the eve of hearing the case, the Attorney-General would enter a nolle prosequi and drop the proceedings. In 1993 alone 36 out of 85 opposition Members of Parliament were arrested, charged, and acquitted in a similar manner when they opposed different government policies. Reported experiences also indicated that some clerical staff received bribes to prevent cases from getting to trial. Cases of missing court files have been common in Kenya's judicial history (International Bar Association, 1996).

It took a conjuncture to introduce fundamental reforms in Kenya. Even though there were continuous attempts to improve the way the Judiciary worked, such efforts did not yield much until Kenya experienced the 2008 post-election violence—a major political watershed in the country's political history. Political experiences show that such conjunctures lead to a critical departure from previously established systems, norms, practices and a new era of political life. This is because conjunctures bring together a unique set of circumstances that provide a window of opportunity for achieving significant changes (Ganesan, 2013). In the context of such an opportunity, political activities aiming at influencing policy can be seen in light of group theory. Group theory assumes that public policy changes when the influence of the interest groups decreases or increases (Dye, 2011, pp. 19-24). Therefore, this theory emphasizes the role of interest groups in shaping policy outcomes.

Lack of public confidence in the judiciary was one of the major reasons for reforms. Before 2008 post-election violence, Kenya had long standing disputes over land rights, cycles of inter-ethnic violence and impunity, long standing disputes over social and economic rights, distribution of wealth and other policy benefits, and well established vigilante groups. Politicians during political campaigns exploited these historical injustices and constructed a perceived hope that the outcomes of the general elections would help solve these problems. When election results were announced on 27th of December 2007, the opposition rejected the results and called for mass action. What followed was an outbreak of violence in many parts of the country. The violence, which took about a month, left 1200 people dead, 41,000 houses destroyed, and 268,300 people displaced. Efforts to settle the dispute in court was rejected, with the opposition citing lack of confidence in the judiciary (United Nations High Commissioner for Human Rights, 2008).

The search for sustainable reconciliation demanded comprehensive reforms. The immense loss suffered amidst political unwillingness to dialogue and reconcile, called for international intervention (South Consulting Ltd. 2009). As result, The Panel of African Eminent persons chaired by Kofi Annan led the reconciliation efforts which helped the country reach the National Dialogue and Reconciliation agreement on 28th of February, 2008. This agreement was then legislated as The National Accord and Reconciliation Act (2008). The Act provided for the transitional coalition

government 2008-2012. The task of the transitional government was to ensure the realization of the four agenda items of the Act namely:

- 1) Immediate action to end violence and restore rights and liberties
- 2) Immediate measures to address humanitarian crisis, promote reconciliation and healing
- 3) How to overcome political crisis
- 4) Address long standing issues including constitutional and institutional reforms, tackling unemployment and poverty, inequity and regional balances, consolidate national unity, address impunity, and promote transparency and accountability.

Reforming the judiciary was a fundamental priority in the comprehensive constitutional reforms. To implement the National Accord and Reconciliation Act of 2008, the government was required to reform the whole government structure. It was a comprehensive government restructuring where the power balances between the judiciary, executive, and legislature were re-allocated. From a centralized government, Kenya adopted a devolved system of government. As a political process and activity centered on the long standing historical issues, the goal and values of the reforms were largely shaped by history and the contextual experiences within which national reconciliation and healing was sought. Therefore, it is important to note that while the elite largely shaped these reforms, the outcomes of the reforms were a blend of synergies between the preference of the elite and the historical experiences of the people.

4.3.2 The Reform Process

The policy process model views policy as an activity going through various stages from problem identification to implementation. Policy is implemented through bureaucracies, public expenditures, regulations, and other activities of the executive agencies. As a political process, policy implementation is influenced and shaped by the political activities and the context of the time (Dye, 2011, pp. 19-24).

On the other hand, public choice theory argues that political parties, individuals, and interest groups seek to maximize benefits in politics just like in the market. Given that politics is about who gets what when and how, government enters

into a social contract with citizens, and interest groups who agree to obey the law and support government, in exchange for the benefits they will get from government, for example protection, liberties, and resources. It is in this case that the constitution comes in as a binding sacred document that seeks to hold everyone accountable, for the benefits of all (Dye, 2011, pp. 19-24). Reforms provide a very conducive and attractive political arena for government, interest groups, and policy communities to sell their agenda to the public, sometimes for political reasons. In practice, reforms take place in a political setting similar to a political campaign, where parties engage each other and strive to win the political support of the public.

The political process behind the review of the constitution largely influenced reforms in the judiciary: The review of the constitution, which marked the fundamental basis of the reforms in the judiciary was based on the Constitution Review Act (2008). The Committee of Experts which conducted the constitutional review began their work on the 2nd of March, 2009 and completed the work on 27th of August, 2010, when the constitution was voted for in a referendum and passed. Besides the Committee of Experts, the Review Act of 2008 provided for the inclusion of Parliamentary Select Committee on the review of the constitution, the National Assembly, and Citizens through a referendum (Committee of Experts on Constitutional Review, 2010). While the use of a multi-agency approach to constitutional review ensured diversity, inclusion, and more representation of public interests, the government during implementation has avoided, delayed, or watered down aspects of the constitution it found complex or contrary to its interests.

To a considerable extent, the constitutional reforms, part of which was the reforms in the Judiciary were a combination of legal and political consensus. The ideal assumption is that the interpretation of the law ought to be objective. However, in a legislative and political process, lawyers and legal practitioners take sides in legal interpretation. Like in trial, some lawyers represented the political view of the government and argued for minimal and largely regulated rights, and a judiciary controlled by the executive. Other lawyers supported the opposition and civil society movements who pursued more expanded rights and freedoms, devolution, as well as the separation of powers, with a judiciary that enjoys administrative and financial autonomy; as well as one that is protected by the constitution from political

interference executed by the executive or legislature. Some of these issues, which were difficult to settle by the Committee of Experts writing the constitution, were politically agreed upon based on political compromises, by Parliamentary Select Committee on the review of the constitution, the National Assembly (National Assembly of the Republic of Kenya, 2010). It is also important to note that marginalized groups were represented by civil society organizations like the Kenya Human Rights Commission, Kituo Cha Sheria (Center for Legal Empowerment), and Federation for Women Lawyers (FIDA). However, not all issues affecting the marginalized groups were addressed, for instance land and property rights, and socio-cultural rights. Some of these issues were left to Constitutional Independent Commissions to address based on legislations that Parliament was to enact. Such challenges set a base for implementation failures, due to legal and political complexity of the policy content and process.

The process was also characterized by cynicism, apathy, suspicion, and deepened hardline political positions, which continued during the implementation period. Earlier attempts to successfully conduct constitutional reforms in 1997 and 2005 had failed due to disagreements on issues such as: The bill of rights, imperial presidency, separation of powers, devolution, independence and supremacy of the constitution, and mechanisms to ensure checks and balances. However, at this time maintaining the status quo was not popular because it was associated with being anti-reforms. It was like being loyal to the dark past that had caused the country much grief, inequality and injustices (Committee of Experts on Constitutional Review, 2010). To pursue the status quo option, political forces in government directly or indirectly frustrated reforms for instance by delaying to finance implementation, or institutionalizing new state agencies that were critical to reforms.

The bill of rights in particular, was crafted out of a synergy of interests and grievances of the interest groups that participated in the reform process. Some of these groups had suffered or represented communities that had in the past suffered some sort of injustices. Interest groups representing women for instance demanded more access to resources, political representation, land rights, access to justice, and state protection from gender based violence (Maingi, 2011). Minority groups demanded more access to justice, public service, land rights, political representation, re-

distribution of resources, addressing past injustices, and equality (Abraham, 2013). However, the fate of implementation was largely left to the government that has since remained under the control of a political system that is largely patriarchal, and dominated by Kenya's major ethnic communities.

4.3.3 The Meaning of Judicial Reforms and Access to Justice

In chapter 1, we observed that the Committee of Experts who drafted the new constitution of Kenya were looking for a way in which the constitution can be used to address historical injustices and inequalities. In their expert judgment, according to the collective popular political view of the time and based on various historical cases showing state abuse of power, it was evident that Kenya lacked political will and human intent to address historical injustices and inequalities. As a result, it was necessary to look for a mechanism to regulate the way future governments will address injustices and inequalities. Therefore, the Committee of Experts chose the South African experience as model for Kenya. In an attempt to address historical injustices created by the apartheid regime, South Africa created a strong Bill of Rights and entrenched it in the constitution.

Borrowing from Chapter 2 (Bill of Rights) of the South African 1996 Constitution, the Committee of Experts crafted chapter 4 (Bill of rights) of the Kenyan constitution, which provides for the right to administrative action. Article 47 1) and 2) of the Constitution of the Republic of Kenya states 1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action".

The rationale for these constitutional provisions was to address inequalities by providing constitutional measures requiring government or state agencies to establish rights based approach to public policy. Now that public policy in Kenya has become a right, individuals or the public have the legal and political basis for demanding access to public services. In this case, we assume that if implemented, the Bill of rights will enable citizens to get better services than before. In order to comply with this requirement, the Judiciary in its reforms, decided to create mobile courts, as way to provide access to justice, in areas that were formerly marginalized, and did not have

access to court services. The Mobile court is a policy that allows the judiciary to facilitate magistrates and judges to go where people are and settle their disputes. The policy theory underlying the Judicial reforms, within the framework of the new constitution is devolution, meaning decentralizing justice by bringing it closer to the people, and in ways that they can easily access it, because it is now their right.

Access to justice means that justice mechanisms are devolved and restructured in ways that translate into fair court processes. This means that every person, even marginalized ordinary people can easily access services from the courts, or demand not only their right to services, but also accountability. Courts are required to apply their powers to promote equality, fairness, effectiveness, human dignity, and protection of lives and property. Access to justice as intended in the reforms also means that the judiciary will ensure that courts are available in areas that people can easily reach, so that they can get services. It also means that access to justice procedures will be efficient enough so that those seeking justice and not constrained beyond their ability to continue to seeking justice.

Table 4.11 The Framework and the Spirit of the New Constitution

Article 47 (1): The right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) The right to demand state accountability and responsibility if one's rights or freedoms are adversely affected, or denied, or violated

Other Constitutional Provisions

Article 27, Equality & freedom from discrimination: State is required to protect all people equally from discrimination & address the successive marginalization of the disadvantaged groups

Article 29, Freedom & security of the person: State is required to protect all individuals from violence from both private and public entities

Article 40, Right to property: State is required to protect to property of individuals and groups

Article 56, Minority rights: State to protect and address special needs of minorities

International Provisions

International convent on civil and political rights (1966) Article 27, State to protect ethnic minorities' right to culture, practices, and language

International convention on elimination of all forms of racial discrimination (1965) Article2, State to establish measures to ensure racially disadvantaged groups equally enjoy human rights and fundamental freedoms

Source: Author, based on Kenya Human Rights Commission, 2010.

Table 4.11 shows the relationship between the implementation of mobile court policy, the constitution, and international laws and conventions to which Kenya is a signatory to. This is because Kenya's new constitution provides for inclusion of international law as part of Kenyan law. This means that international laws are part of Kenyan law (Judiciary 2013).

Table 4.12 The Meaning of Access to Justice

-
- People understand the constitution or the law or the policy that seeks to serve them
 - Information on rights is easily available in the public domain
 - State agencies protect everyone equally
 - Courts are available and it is easy for everyone to get services from them
 - There is available physical infrastructure to facilitate the process
 - The culture provides a conducive environment for the judicial system to function well
 - Cases are processed efficiently
 - Court decisions are enforced efficiently
-

Source: International Commission of Jurists, 2011.

4.3.4 The Reform Process: What actually happened?

The Nature of the Reforms: The Judicial reforms were not done in isolation, but were part of the comprehensive national reforms. This means that the reforms included not only the restructuring of the judicial structure but also the entire justice system, the government, and the structure of the state. The constitutional reforms focused on the restructuring of the government and the redistribution of resources or public policy benefits in a way that was intended to address inequalities. Kenya's new constitution was a radical departure from the old one because it brought into place three distinctive legal features that did not exist in the old constitution namely: the sovereignty of the people, the supremacy of the constitution and the rights of individuals and communities (National Council for Law Reporting, 2012).

Core to the reform strategy in the judiciary is providing access to justice from a rights based approach. To ensure the realization of access to justice, several mechanisms were enshrined in the constitution namely:

1) Accountability: Article 10 of the constitution also requires the Chief Justice to give an annual report to the nation on the State of the Judiciary and the Administration of Justice. This includes the achievements made in the previous year and challenges experienced (Mutunga, 2012, p. 1). The purpose of this is to provide public accountability and to ensure a sustainable model of a rights based approach to public policy.

2) Administrative and financial autonomy: Apart from the separation of powers as stated in the constitution, the Judiciary has administrative and financial autonomy as well. This is a measure to ensure that the judiciary has adequate independence to make autonomous decisions that will result to a better justice system. The main mandate of the Judiciary is to ensure that all people have access to justice. Before the reforms, most people did not have access to justice. Access to justice had been hindered by lack of physical access to courts because of long distances, complex and unfriendly procedures, lack of information on court processes and procedures, delays in determining cases, and alienation from the justice system (Mutunga, 2012, p. 1).

3) Establishment of Constitutional offices: The Judicial reforms were prioritized in the implementation of the new constitution. This was because of reasons such as: 1) lack of faith in the Judiciary was seen to be the main reason why Kenya sunk into 2007/8 post-election violence. Therefore, prioritizing judicial reforms was essential to the reconciliation process. 2) The implementation of the other aspects of the constitution would always yield disputes. As a result, Kenya required a judiciary that it would trust and rely on when settling disputes. 3) Kenya was looking forward to another general election in 2013, which required a new judicial system well-functioning before the election time. Therefore in the year 2010,

Citizens had the right to participate in determining who became a judge or a magistrate. The reforms began in 2011 with recruitment of more judges and magistrates and increase of courts countrywide. The judicial Service Commission, which is a state independent commission, is in charge of the recruitment of judges, magistrates, and judicial staff. The judges, magistrates, and other members of the judicial staff are recruited through competitive and transparent mechanisms that allow participation of citizens at recruitment level, and legislative level, particularly in the appointment of judges and magistrates. At recruitment level, the commission asked

members citizens to submit their complaints to the commission and appear in person to give testimony, if they had objection on the appointment of a particular individual to the position of the judge or magistrate. This indicates the significance of the rights of the citizens in the public policy and public policy benefits.

Citizens had the second opportunity to give their submissions to the parliamentary Select Committee on Justice and Constitutional Affairs when the names of the successful candidates were examined by the committee, before taken back to parliament for approval or rejection. The names of the successful candidates were forwarded to the president for appointment. The rationale behind this process is that people have the constitutional right to directly participate in public policy because it affects them.

In 2011, the Judicial Service Commission recruited the Chief Justice, the Deputy Chief Justice and the Supreme Court judges who were hired competitively from outside the Judiciary. All serving judges and magistrates were vetted afresh in a process that saw unfit judges fired and new judges hired. By putting in place competitive, transparent, participatory, and autonomous mechanisms for hiring judges and magistrates, the aim was to get better services free from direct political interference.

Table 4.13 Kenya's Judicial Reform Process

<p>2010: New Constitution comes into effect. Establishes the separation of powers and independence of the judiciary, the judicial service commission is created, financial and administrative autonomy of the judiciary is established.</p>
<p>2010-11: Judicial reforms begin. An Over whole of the judiciary New Chief Justice, deputy chief justice, and the supreme court judges (all from outside the judiciary). Vetting all judges and magistrates, firing unfit judges & hiring new judges</p>
<p>2011-2012: Increasing high courts & establishment of the mobile courts in marginalized areas in order to ensure access to justice.</p> <p>2012-2016: Establish more courts nationwide and in formerly marginalized areas. Increase strategies for people focused public service delivery. Simplifying procedures for accessing justice</p>

The reforms in the judiciary have focused on the need to regain public confidence through better services and continuous accountability. This is because the justice system in the old order of the constitution did not focus on serving the people. Ordinary citizens were largely alienated from the justice system, because of the colonial legacies and the elite interests that controlled the justice system. The reforms also focused on providing access to justice by increasing the number of judges and magistrates to preside over cases. Court infrastructure throughout the country has been expanded in the recent past. To address inequality and injustices regarding access to justice, the reforms focused on marginalized areas for instance northern Kenya, where communities like the Turkana and Samburu largely live. Other areas the reforms took into account were the reduction of case backlog, the use of ICT in service delivery, the fight against corruption, increased training, and mobilization of resources to finance operations, and a re-affirmation of judicial independence (Mutunga, 2012, p. 2).

4.3.4.1 Kenya's Judiciary and the Mobile Court Policy

From the institutionalist theory, we learn that political activities which facilitate policy implementation process center around government institutions for instance the presidency, the courts, municipal authorities, and the bureaucracy. In this case, the implementation of public policy depends on the authoritative action, power and legitimacy of government institutions hence the actualization of the policy from the text to real life experienced outcomes depends on government institutions (Dye, 2011, pp. 12-13).

Article 159 (2) mandates the courts to ensure that the Bill of Rights is realized by following the guidelines listed in table 4.14 below (Rawal, 2013).

Table 4.14 Authority of the Judiciary

a) Justice shall be done to all irrespective of status
b) Justice shall not be delayed
c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.
d) Justice shall be administered without undue regard to procedural technicalities;
e) The purpose and principles of this Constitution shall be protected and promoted.

Kenya's courts are subdivided into the following: The Supreme Court headed by the Chief Justice, the Court of Appeal, the High Court, the Magistrates Courts, and the subordinate courts for instance the Kadhi's courts which deal with Muslim issues of marriage and inheritance. There are also local tribunals which are constituted occasional. The Mobile Court Policy largely falls under the 1st pillar of the Judiciary Transformation Framework 2012-2016, which is people focused delivery of justice (Rawal, 2013). Under this pillar, the Judiciary seeks to create a rights based approach to justice, which is tailored in ways that are responsive people's needs.

The Magistrate Court which constitutes the lower courts handles the largest amount of cases. Therefore, its jurisdiction is very important in achieving the goal of the Judiciary to enhance access to justice. As indicated table 4.15 its functions are supervised by the High Court. The mobile court is the main unit of the judiciary that implements the mobile court policy.

Table 4.15 Kenyan Courts and their Functions

Court	Functions in Brief
Supreme Court	Established under Article 163 of the Constitution; the highest court of the land; hears presidential election petitions; appeals on decisions from the Court of Appeal, cases on interpretation of the constitution, or other cases which the Court of Appeal certifies as of general public importance.

Table 4.15 (Continued)

Court	Functions in Brief
Court of Appeal	Established under Article 164 of the Constitution; hears appeals from the High Court and any other court or Tribunal prescribed by an Act of Parliament
High Court	Established under Article 165 of the Constitution; hears criminal and civil matters, and interprets the Bill of Rights; has jurisdiction to supervise magistrate courts, subordinate courts, tribunals, and other bodies mandated to perform judicial or quasi-judicial functions; the Industrial Court, Land and Environment Court are established under Article 162 (a) and (b) respectively as courts with High Court Status)
Magistrate/ Subordinate Courts	Established under Article 169 of the Constitution; hears criminal and civil cases; Subordinate courts include Kadhis Courts dealing with issues of Muslim marriage, personal matters, and inheritance; Courts Martial; and Tribunals

Source: Rawal, 2013.

It is important to understand the status of the judiciary at the time the mobile court policy was being implemented. The reason for this is to gain insights into the capabilities of the judiciary at the time the mobile court policy was being implemented. If we understand what the situation was like at this time, we can be able to relate fundamental implementation issues to the conditions of the judiciary at the time of implementation. Table 4.16 shows the status of the Judiciary as the year 2013. The table shows the number of court stations in the country, the number of magistrates and judges, and the number of judges and magistrates the country requires by the year 2016. The table also shows the number of cases filed and cases pending before the court. The number of cases filed indicates public confidence in the judiciary. The number of cases pending before the court indicates the burden the judiciary had in ensuring access to justice at the time the mobile court was being

implemented. While this table does not capture everything required in understanding the status of the Judiciary, it captures the most fundamental things required in order to understand the status of the Judiciary regarding access to justice. Data on the additional number of judges and magistrates indicate that there is still a lot to do to ensure that the judiciary has adequate staff to ensure access to justice. This means that the implementation of the mobile court began at a time the judiciary had many pending cases in court, when had inadequate staff, and when it was facing a considerable increase in new cases filed. This means that the judiciary was implementing the policy when it was already constrained.

Table 4.16 The Status of the Judiciary 2013

Cases filed for all courts in the year 2012/13: 116,754
Cases resolved: 190,093
Cases pending before the court: 657,760
Number of judges: 120
Number of magistrates and legal officers: 542
Number of judicial staff: 3,822
Number of court stations: 150 (Magistrate Courts) & 20 (High Courts)
Number of additional court stations required: 27 (High Courts) & (172 Magistrate Courts)

Source: Judiciary, 2013.

The Mobile court policy is the public policy where the judiciary establishes courts in areas that were formerly marginalized. The judiciary facilitates magistrates and judges to travel to regions that had no access to justice in the past. It is called mobile because contrary to the past when people used to travel long distances seeking the services of the court, the court is taken where people are. Mobile courts are basically magistrate courts brought closer to the people.

As stated earlier the reason the mobile court policy was designed was to ensure access to justice by bringing court services closer to the people, particularly the marginalized groups, and regions that did not benefit equally from the services

provided by the justice system, in the era of the old constitution. Some of the marginalized groups in this context are the women, and the indigenous communities who live in formerly marginalized regions.

As observed earlier, the assumption behind the mobile court policy is that a democratic country governed by a democratic value system and constitution should be able to provide public services in a way that meets the minimum constitutional requirement; particularly the rights based service delivery. The policy is also based on the assumption that in a democratic society where people pay taxes and are entitled by the law to hold the government accountable, then public service delivery must be driven by understanding and responding to the needs of the people irrespective of the ethnic diversities that exist in the nation. The other assumption behind the policy was that Kenyans had for decades actively participated in the political struggle for multiparty democracy which they gained in 1992. They had actively participated in the thereafter democratic elections, and struggle for the new constitution which they gained in 2010. During these processes, Kenyans had been educated through political activism and civic education about the importance of rights, some of which motivated them to join the political struggle for change. They had in many occasions been mobilized to participate in the writing, dialogue, and voting for or against the new constitution. Therefore, this knowledge and experience would give Kenyans basic understanding and motivation to participate in implementation of the Bill of rights, particularly by demanding for rights that concern them. However, due to lack of infrastructure information in remote areas of Northern Kenya did not reach all marginalized communities. In this case, one would anticipate that not all marginalized communities were well informed about this policy.

<p>1. Right to administrative action: “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair</p> <p>2. Mobile Court Policy: Establish Magistrate Courts in marginalized areas in order to ensure access to justice</p> <p>3. Goal: To improve public service delivery (access to justice) in order to meet the constitutional requirement which is the right to administrative action</p>
<p>4. Policy measures: (1) Take courts closer to the people; (2) Simplify procedures for accessing justice; (3) Educate the public so that people understand the constitution, rights, and the mobile court; (4) Make the information easily available in the public domain; (5) Ensure state agencies are treating everyone equally; (6) Make it easy for everyone to access courts and get services from them; (7) provide physical infrastructure to facilitate the process; Cultivate a conducive socio-cultural environment within which the justice system can function well; (8) Process cases efficiently; (9) Enforce court orders or rulings effectively</p>
<p>5. Implementing Agency: The judiciary (courts), Police, individuals seeking or participating in seeking justice, Office of the Director of Public Prosecutions, executive (finance and public expenditure and appointments), legislature (checks and balances, and legislations) , political actors (both at national, county, and local levels)</p> <p>6. Envisioned outcomes: Access to justice, improved justice systems, a rights oriented society</p>

Figure 4.4 Implementation Process: Translating Mobile Court into Policies

The first face of the implementation process is translating the constitution into policies. After translating the constitution into the policies, intended policy outcomes are generated. In this case, the mobile court policy is a response of the Judiciary to the constitution, particularly the Bills of Rights, which require that everyone is entitled to the right to administrative action. In this case the judiciary through the mobile court policy seeks to meet the constitutional requirement, to ensure that all citizens have access to justice. The policy also focuses on providing justice to all people in areas that were formerly marginalized for instance regions inhabited by the indigenous communities.

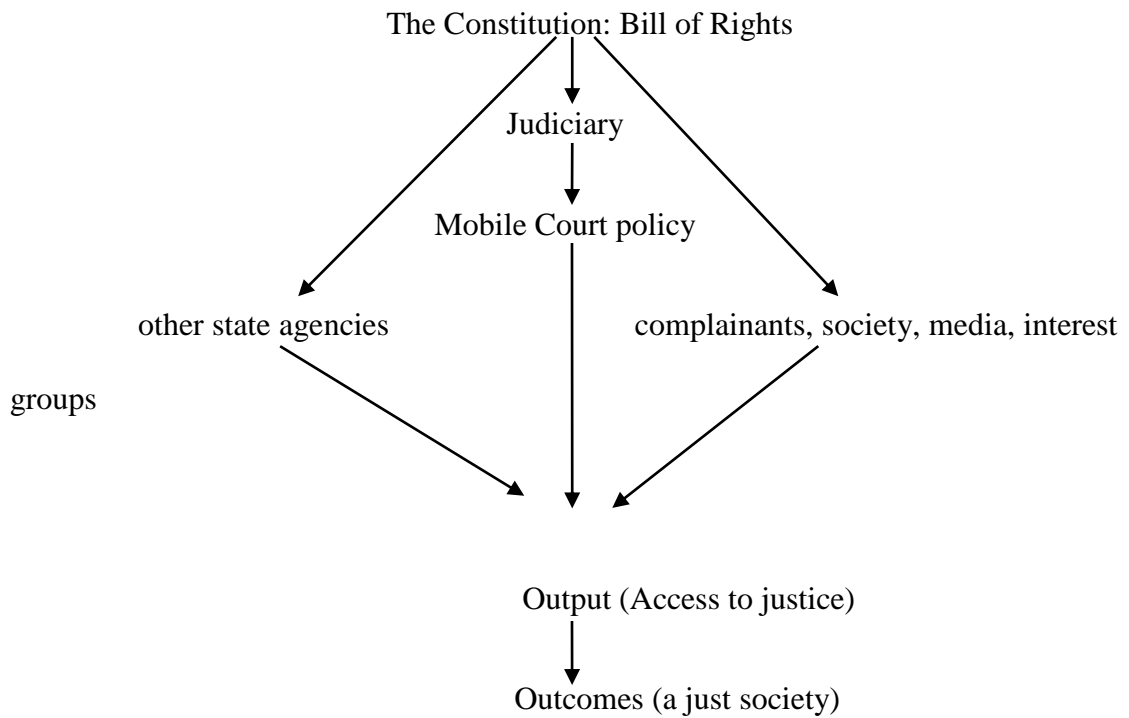


Figure 4.5 Implementation: Main Actors in the Implementation Process

It is important to note that the main actors identified in this study are those actors that are important in the implementation process. These actors are also mandated by the Kenyan Constitution to participate in the implementation process. In this case they have a major role to play in ensuring access to justice. Therefore, their actions and the way they play their roles can limit or expand opportunities to access justice. There are two sets of actors in the implementation process. The first set of actors is the state or government related actors. These are actors who are entrusted the responsibility by the state and or the constitution to implement the policy. They are required by the law to ensure that the policy is implemented as intended. The second set of actors is the individuals seeking justice. These individuals though may be influenced by some factors when seeking justice; they are not required by the law to do so. They do it voluntarily, because they are affected by the situation at hand. Therefore, though access to justice is a right, the decision to seek it is voluntary.

The judiciary generated the mobile court policy in response to the constitutional requirement. It is the implementer of the policy as well. The policy seeks to provide access to justice. However, there are other actors in the

implementation process for instance state agencies, individual complainants, media, society, and interest groups. The Kenya Police Service provides law enforcement and order. This entails all security matters. The police also carry out arrests and investigation of cases.

The Legislature provides checks and balances. Members of parliament for instance have power to demand ministerial statements concerning the state of the affairs of the country, a particular area, or an individual whose case is of public interest. Since members of parliament represent the interests of their constituents, they can bring a motion to parliament requiring government to take policy action, or can seek the intervention of the legislature in matters of public interest. Apart from the legislative roles, members of parliament are politicians and therefore have a political interest in or responsibility to policy entrepreneurship. By taking active role in mobilizing political support for a particular policy agenda, members of the legislature can influence public policy at any level of the policy process. They can influence policy implementation through demands, pressure, support, budgeting, inquiries and monitoring.

Complainants are those affected by a particular decision and as a result, they take action to seek justice, because it their right to do so. Complainants may be assisted by civil society or other interest groups. Like politicians, civil society and interest groups contribute to the implementation of the Bill or Rights by demanding that related policies be implemented as intended, by keeping vibrant the culture of constitutionalism and rule of law, and by stimulating the desire and demand for rights based society. These entities also monitor the implementation process, raise public concerns, consult, research, and document implementation problems. They also help implementers, government, and other political actors in understanding challenges at hand, and developing insights to how better such challenges can be solved.

4.4 Contextual Factors Limiting Access to Justice

This section seeks to answer the question: What are the contextual factors limiting marginalized persons to access justice? In order to respond to this question it is important to: 1) examine the way the mobile court policy was implemented, and 2)

examine individual cases of marginalized persons seeking justice. This is done putting in mind the meaning of access to justice and the policy measures put in place to realize it. We also take into account, various theoretical insights from implementation models earlier examined in this study since these models help us understand policy implementation failure or success.

Political model of policy implementation assumes that policy implementation can be positively or negatively influenced by the politics of the time. Implementation experiences show that politics can influence: the shift in the goal of the policy; make the policy more expensive and complex; shift in financial planning and public expenditure; compromises that make the project lose track; can cause fear of ultimate failure, increase anxieties, stimulate withdrawals, and sustain or provoke unresolved conflicts (Pressman & Wildavsky, 1973). The original intention of the policy can be twisted or short changed by the bureaucracy. Governments make good policies then declare that the problem is solved, even when they don't know how to implement it (Bardach, 1980).

Management model assumes those factors such as rules, stakeholder conflicts, unclear or no communication, resources, and misdirection (Denhardt, 2011, p. 75), structures, processes, and behaviors exhibited in the implementation process can influence implementation (Christensen, et al. 2007, p. 15). Rational model puts emphasis on information, choices and resources, while contextual model puts emphasis on the contextual conditions (Dye, 2011, pp. 15,105).

4.4.1 Overall Judiciary Reforms Output 2011-2013

It is important to remember that even though mobile court policy focuses on the marginalized groups and areas, the policy is part of the wider judiciary reforms to ensure access to justice countrywide. Therefore, mobile courts are affected by the conditions of the other courts operating in non-marginalized areas. The overall output shows that reforms to provide access to justice were not an exercise in futility. Data shows that in a period of 3 years (2011-13), the reformed Judiciary was able to finalize about 0.6 million (611,227) cases. Data also show that public complains have not significantly reduced over the past three years. Some of the complains that have been reported include case delays, slow service, missing files, poor services,

corruption, delayed judgments, adjournments, delayed rulings, delayed orders, nepotisms, lost exhibits, damaged exhibits, date allocations and delayed rulings (Judiciary, 2012). More judges have also been hired. This shows increased efforts by the state to increase access to justice. Increase in funding also shows that the reforms have provided for increased funding. Section 27 of the Judicial Service Act (2011) provides for the Judiciary to receive gifts, grants, and donations from donors in support of its objectives. Under this provision, UNDP and World Bank have partnered with the Judiciary to provide funding for infrastructure (Judiciary 2013).

Table 4.17 Overall Judicial Reforms Output 2011-13

Item	Year 2011-2012	Year 2012-2013	Total
Cases finalized	421,134	190,093	611,227
No. of Judges hired	63	51	114
No. of Magistrate hired	109	66	175
Public complains addressed	9,776	9,093	N/A
Annual Judiciary Budget	Ksh: 7,465 Billion	12,157 Billion	19, 703 Billion

Source: Judiciary 2012 & 2013.

4.4.2 Mobile Court Policy in Turkana and Samburu

The mobile courts in Turkana and Samburu are part of the 20 mobile courts established in the country. The Table 4.18 shows mobile courts per county

Table 4.18 Mobile Courts per County

County	Home (Magistrate) Court Station	No. of Mobile Courts
1. Garrissa	Garrissa	4
2. Kajiado	Kajiado	1
3. Kitui	Kituyi	1
4. Baringo	Kabarnet	1

Table 4.18 (Continued)

County	Home (Magistrate) Court Station	No. of Mobile Courts
5. Kirinyaga	Wang'uru	1
6. Homa Bay	Mbita	1
7. Lamu	Lamu	2
8. Samburu	Maralal	1
9. Marsabit	Marsabit	1
10. Turkana	Lodwar	3
11. Isiolo	Isiolo	2
12. Nandi	Kapsabet	1
13. Kilifi	Garsen	1
14. Bungoma	Kimilili	1

Source: Judiciary, 2013.

In Turkana, the Magistrate Court is in Lodwar. Lodwar is both the County and Provincial Administration Headquarters. There are three mobile courts provided in the region to ensure access to justice. This indicates an attempt to address inequality since the number of mobile courts redistributed to the region particularly to help the indigenous Turkana is higher than other counties. It also indicates how dire justice is required in this region. In Samburu and Marsabit counties, one mobile court is taken to Samburu while another to Maralal. These two courts seek to provide indigenous Samburu with access to justice.

The core of the mobile court is to reduce the distance between the court and members of the public who need court services. It is basically an extension of the mainstream court program. By bringing the court closer to the people, it is anticipated that it will be cheaper, faster, and easier to access justice than before, when the courts were far away from the people. A Mobile court consists of a judicial officer, usually a magistrate, a court administrative assistant, a prosecutor, and security officers usually the regular Police or Administration Police. They run on a maximum of five days in a

month. Sometimes, they run one day each week, while in other cases, the five days are spread out once in a month. Court sessions are held in tents. In the last two years, 109 Land rovers have been allocated to facilitate mobile court services (Judiciary, 2013).

Because of the temporal nature of the mobile court, the Judiciary identifies particular administrative areas where people have no access to courts. An area is chosen and a mobile court is opened in that area. Members of the public in that area are informed of the court schedule indicating specific days when the mobile court will be visiting the area to offer court services. Mobile courts operate under the jurisdiction and supervision of the parent court that is, the District or High Court to which the mobile court is affiliated. Technically, this means that mobile courts seek to address disputes that emanate from designated judicial administrative areas hence reducing actual or potential caseloads the parent District Court has to address from that given area.

As an extension of the Magistrate Court, mobile courts address both civil and criminal cases such as arson, robbery, sexual crimes like rape, theft, land disputes, and domestic violence. Like in mainstream courts, a case begins with filing a case and the plaintiff being notified, then followed by investigations, mention, hearings, ruling, and appeals in cases where parties in conflict chose to. Members of the public are made aware when a mobile court has been opened in their area and the days it operates. Based on this schedule, they can visit the courts and file cases or seek information they need. Once a case is filed, parties in conflict are offered court appointments in order to follow through their cases. There is no actual timeline for each case, since the time the case takes depends on other factors such as investigations, availability of parties in conflict, witnesses, as well as judges.

Mobile courts are held in tents pitched in a designated field set apart to host court sessions. In some cases, the court sessions are held in a hall formerly or during other times used for other public functions. Often times, the place is located within the Provincial Administration grounds. Within the vicinity is the office of local Provincial Administration, usually the Assistant Chief, Chief, or District Officer. An Administration Police Camp providing security for the Provincial Administrators and in charge of the entire rural security in the region stands nearby. Most Administration

Police camps in rural areas consist of between 8-12 police officers. This is where suspects if arrested are held prior to the court sessions. In criminal cases, suspects arrested and held in other police stations are transported to this place early in the morning before the court session begins. Judicial officers don't live here. They come from a distant town only to administer judicial services. In the evening, they return.

Northern Kenya is dry most of the year. Temperature runs over 30 degrees at average. Strong winds sweep all over the place after every few minutes. Water, food and transport are the most expensive services. They are rare to find, often limited in supply. A few local restaurants sell some local food. During market days and events such as mobile court day, they are often full. Unlike in other parts of Kenya where you will find a health center at least near every local Provincial Administration Offices, medical services in Northern Kenya are scarce. However, you can find a pharmacy shop nearby. It may not have all necessary drugs and the attendant is often not a physician but a pharmacist.

About four cases are attended to by the judge or magistrate every day. However, more cases are filed every day and more court appointments made in the court registry. In the case of the mobile court, the court registry is a table or a desk stationed a few meters from the main mobile court tent or hall. The court arrangement follows the mainstream court order. The judge or the magistrate sits in the front middle area facing the pew. The plaintiff's chamber and the complainant's chamber stand sideways facing each other, and in between the judge's desk and the pew. A few police officers stand around in guard. At 4:00 pm, the court will close the session of the day. People will return the next court day.

When hearing and determining cases mobile courts follow the normal court procedure. When seeking justice, one is required to follow the following procedure:

Step 1: You have a case; you want to take to court, where do you begin?

Civil cases are ones that involve two or more parties in the form of individuals or organizations (referred to in law as "legal persons"). The manner in which civil cases are brought before a court of law and the procedure involved is governed by two statutes; Civil Procedure Code and the Civil Procedure Rules of 2010 (Kenya Law Resource Center, 2011).

When you have been wronged and you want to take the case to court, it is advisable that you hire an advocate to represent you as they understand the technicalities of the legal process. You can also pursue the case on your own. Whether you pursue it alone or hire counsel, the law requires one to draft a legal document called “a plaint” detailing the issues that form the basis of your case. You then file the plaint in the registry of any court near you that has jurisdiction to handle the matter. That is the beginning of the case.

Step 2: How do you proceed?

After filing the case, you are required to give a copy of that very plaint that you filed in court to the person you are suing so that they can be able to go through the allegations you have preferred against them and defend themselves. That other party is then required to file their defense in court; you are served with a copy of the same after which you file a “reply to defense”. The date during which the case is to be mentioned or heard will then be allocated by the court.

Step3: What happens during the process?

During the process, there is exchange of documents if required by another party. If for example a party wishes to access documents that are in the possession of the other adversarial party and which are critical to their case, the court may give an order that those documents be given to that party. If the party being sued (“defendant”) chooses not to reply to the allegations, the court may, based on the facts of the case of the plaintiff, give ex parte judgment.

There are pre-trial conferences where parties involved in the case are brought together to try to identify the issues that are to be determined by the court. This seeks to avoid confusion that would otherwise arise in court if the court was to blindly adjudicate on the case without setting out what the contested facts are.

Step 4: Full Hearing

Once this has been finalized, the case proceeds to full hearing after which the case is determined. Charges are heard, witnesses are cross examined and evidences are examined. Upon completion, the case is determined.

In the case of a criminal offense, seeking justice involves both the police and court procedures. The following procedure derived from the Criminal Procedure Code applies (National Council for Law Reporting, 2009):

Step 1: Case reporting and seeking arrest of the offender

First, the case is reported to the police. Once the case is reported, and the police have been informed and known that an offense has been committed, the police may move to arrest the suspected offender or in may seek a warrant of arrest from the court before they arrest the suspect. The purpose of the warrant is to provide the legal foundation for arresting a suspect.

Step 2: Booking

Once the suspect has been arrested, the police obtain personal information from the suspect including photographs, finger prints, and other details that will help in the investigations. If charges are not filed, the accused is released. If charges are filed, the case is processed further.

Step 3: Appearance in court

Kenya's law requires an arrested person to appear before the court within 36 hours after arrest. This is to avoid the abuse of detention law by the police. At this point, the charges are read, and the accused is informed whether the offense committed warrants bail, the amount to be paid, or whether the offense and or circumstances, according to the determination of the court, do not warrant bail. It is the court that determines whether the accused will be bailed or not and at what cost the bail will be granted. Determinants for bail include the severity of the offense committed, the criminal background of the accused, and the risk of the accused fleeing from prosecution if released on bail.

Step 4: Preliminary hearing

At this stage, the case is mentioned and the judges or magistrates, considering evidences from the prosecutor and the defendant, decides whether there are grounds to establish that an offense was committed, and whether the case should proceed to full trial or whether it should be terminated. If there are grounds for establishing that the case was committed, the prosecutor files a formal accusation seeking to prosecute the accused based on the established grounds that an offense was committed. Once this is obtained, the court grants the accused detention or bail.

Step 5: Arraignment in court

Having formally filed charges against the accused, the accused is arraigned in court, charges are read, and he or she is required to plead guilty or not guilty. At this

point prosecutor and the accused can bargain on the plea acceptance, so that the case does not proceed to trial. However, the accused have a right to trial if they refuse to bargain or take the plea.

Step 6: Trial and determination

Trial involves hearing charges and testimonies, cross examining witnesses and testimonies, and examining documentary evidence. In trial, the prosecution has the burden to prove beyond reasonable doubt that the accused committed the offense. When the case is done, the court determines the case based on the evidence presented, witness testimonies, and the provisions of the law regarding the case.

4.4.2.1 The Success of the Mobile Court Policy

1) Taking justice closer to the people. Taking justice closer to the people provided a direct intervention into major offenses that have been committed for decades, without state intervention. This is the primary and most essential policy action towards eradicating traditional practices where murder, rape, assault, and violence, cases were solved customarily. In a context that has been marginalized and alienated from public policy benefits since independence, mobile courts do not only address justice concerns, but also represent a shift in the way government treats marginalized communities under the new constitution. This policy also symbolizes the constitutional demand for the state to treat everyone equally and to show that the state is concerned with the critical issues that affect the marginalized communities and the country at large.

2) Realizing equality in public service delivery. As indicated earlier, entrenched inequality was one of the major ways to differentiate between indigenous communities and the rest of Kenyans. This is because indigenous communities were largely marginalized compared to the rest of Kenyans. Taking courts close to the people made it possible for all Kenyans to be subjected to the same judicial adjudication of disputes under the same law. In some parts of rural Kenya, where murder cases for example are still resolved customarily; mobile courts ensure that people in rural areas are served by the same law as those in towns where there are

3) A quicker way to solve disputes. Mobile courts have shown that they are mechanisms for quicker resolution of disputes. This is because mobile courts reduce the menace of backlog of cases in courts. As indicated earlier in

this chapter case backlog has been a major challenge in Kenya's judiciary. New cases being filed in the wake of thousands of pending cases indicate a judiciary that is likely to face continuous constrains. Some of the disputes addressed by the courts are petty offenses, which in the past piled up in courts, because justice had not been devolved. Solving petty offenses in time makes society function better. It also helps society to appreciate the role of justice in daily life. When a society learns to take petty offenses to court, and when it finds the courts an efficient mechanism to address such disputes, the society develops a rights based culture, where individual members of society become conscious of rights they are entitled to, and how to demand them through legally established justice system.

4) It is easy to file a case. The judiciary provides for individuals who are seeking justice, but have no money to pay for court fees, to be exempted from paying court fees. Individuals who have no writing abilities are allowed to make oral application. In this case, the court administration provides writing services for such individuals. If an individual seeks to stop infringement of his or her rights, such an individual is allowed to write a letter or an email to a judge, seeking to appear before the court and pursue this right. This means that one can petition a court using a letter (Kilonzo, 2013).

4.4.2.2 Challenges and Failures in Implementing the Mobile Court Policy

1) Inadequate physical access. Even though mobile courts bring justice closer to the people, the sparsely populated Northern Kenya, and the nomadic life of the people make it difficult to adequately realize the objective to ensure that courts are close to the people. "Mobile courts rarely visit most far-flung regions of the vast Turkana and Samburu counties where the nearest court is more than 100 km away" A lawyer observed. Most of the areas in Turkana, Samburu or Marsabit Counties are inaccessible by road. The judiciary in Kenya has no choppers. Therefore, the idea of mobile courts remains a remote one to local people. Complex geographical terrains, lack of physical infrastructure, and long distance. These conditions undermine the basic working condition standards public servants would require in order to deliver better public services. It also undermines the ability of the local people to seek justice under conducive conditions like the rest of Kenyans.

Members of the public in this region cannot afford the basic luxury of using a bus for public transport.

2) Financial access remains a major barrier to justice. Even though the Judiciary pays for the administrative costs, particularly court fees, personal costs incurred in pursuit of justice remain high. Therefore, middle income and low income families or individuals here cannot afford to pursue justice in courts because of basic things such as high traveling costs. People incur high traveling costs because of scarce public transport infrastructure. To travel around villages in this region, one needs a four wheel drive truck, land rovers, or motorcycles. The cost of purchasing and maintaining such vehicles is expensive.

Non-governmental organizations and tourists hire land rovers and Land cruisers for travel services. Few private individuals have commercial trucks used to transport both passengers and cargo from the interior rural areas to the main towns. However, these trucks are not always available, because they respond to cargo and passenger supply and demand dynamics in the area. If you need one, you will be required to wake up early before dawn, catch up one when it's already full, squeeze yourself inside and endure the congestion until you get to town. Even if you succeed, there is always a risk that you may not get one back home. Therefore, people literally walk long distances, tens of kilometers for them to get basic amenities like water. There are areas where women travel for a whole day just to reach an oasis or a military water distribution center, in order to fetch water and get it back to their homes. Children and youth alike walk herds of cattle to the oasis and by the time they get home, its already getting late in the night. It is not strange to see people stop military or Administration Police trucks and ask for a lift to town or the next bus stop. Soldiers here have come to understand that they need to lend a hand even where they are not required by the law to. Traveling is basically a nightmare; it is not something you can do every day. Even people here don't do it that way.

While you may get street food on your journey to town, accommodation is always very expensive. Affordable accommodation will be in bar lodges. They are not good for families because most of them are night clubs. People here play music loud and all night long. They drink and sometimes fight. Customers are largely male long distance traders, soldiers on military exercises in the region, and

local prostitutes. My friend, a police officer and devout Christian on his first trip to the region, entered several of these bars. Looking at the scene, he could not stand the strange world he had encountered. He walked outside, went and spent a night under a distant tree, with one eye open and his hands tightly holding his luggage. He advised that if one needs a safe, calm, and dignity worth accommodation, tourists resorts will be the best, however much expensive, complicated, and far they can be.

3) Not many people fully understand their rights. To pursue justice, members of the public need to understand their rights. They also need to know that access to justice is a right and not a privilege or a political promise under the new constitution. They need to know where the mobile court is procedures and its working schedule. If they know this, they can demand it even when it is not provided. But many people are not aware of this. There are few organizations working on rights issues in the region. These organizations rely on donor funding which is seasonal and unsustainable. Therefore, the awareness and training programs they run benefit a limited size of the population.

In 2012, the Judiciary began rights and legal awareness programs. These programs are run in collaboration with the Law Society of Kenya and the office of the Attorney General (Judiciary 2013). However, pilot programs are yet to be established in the regions under study. The last wider public discourse on rights issues was during the 2010 constitutional referendum campaign. After the new constitution was passed, a few mentions on rights widely occur in political rallies when politicians comment of rights issues. However, these comments are not always accurate, comprehensive, and educative, but reactionary political instruments to underscore a particular political agenda.

4) Information is not easily available in the public domain. Even though the court simplified procedures to access justice, this information and other necessary information for instance where mobile courts are held, when they are held, and what to do when you want to pursue justice is not easily available. Currently, there is no community or national radio programs providing this information. Print media alike does not provide such information. In rural areas, public information is passed on from various top government agencies to local provincial administrators like chiefs and assistant chiefs. These administrators are

then supposed to make announcements during their local council sessions, and hope that those who attend the councils will spread the information across the entire society. This system of information sharing and dissemination is not reliable, efficient, and cannot guarantee accuracy or adequate detail when used to convey information.

5) Ensuring that state agencies are treating everyone equally. This study did not find information where the court treated individuals seeking justice in ways that were unequal. However, a human rights lawyer interviewed observed that she had documented complaints about the way internal security agencies especially chiefs, assistant chiefs, and Administration Police handle cases reported to them. These complaints suggest that some chiefs, assistant chiefs, and officers involved use socio-cultural lens when interpreting issues and making decisions for instance whether to book a case or not. This lawyer further shared her experience about a case she was handling. It is a case of a girl about 14 years of age scared by her father, who had brutally beaten her mother during a domestic conflict.

The traumatized girl ran to the Chief's camp which was about half a kilometer away to report the case. Upon arrival, she met two Administration Police officers who were on duty. While screaming, she told the story. One police officer appeared concerned. The other one looked at him and in what seemed like a joke said, "Hey officer this normal here, we have been around you know." Then he turned towards the girl like one who wanted to take charge of the case, but on the contrary said "My daughter, go and report first to your grandfather or uncles or the village elder. It is not good to take such a case from a child because you cannot be sure of what children see in their parents' fight." Politely he walked the girl out of the station and sent her back home. "Should I tell him that you are coming" the girl asked. "Don't! We know how to do our work; just go we will know what to do." The officer said. However the police did not act this case.

In this particular case, the police did not record the statement neither did they go with the girl or after the girl to investigate or verify the assault. In such cases the individual dignity and right to be seen and heard as an individual when seeking intervention from the justice system is undermined by the cultural perception and belief that in matters such as this, children are not individual enough to witness a

case, report it, and demand or pursue intervention from state agencies. The police and the provincial administration in Kenya form part of the internal security mechanism. They are also part of the justice and court procedure, particularly regarding criminal offenses, and even civil offenses where some amount of force is required in order to process the case. Therefore, their failure to treat everyone seeking justice equally contributes to the failure of the entire justice system to provide access to justice; and in particular limit the extent courts can intervene in public matters that pertains settling disputes and seeking justice.

6) It is not easy for everyone to access courts and get services from them. As indicated earlier, long distances, infrastructure, and inability to pay high costs of seeking justice limit the number of individuals who can access courts and get services from them. Lack of support systems, information and awareness also hinder the extent courts can provide services to the members of the public in need of such services. Government or non-state agencies have not been able to provide adequate physical infrastructure to facilitate the process of seeking justice in the region, and cultivate a conducive socio-cultural environment within which the justice system can function well.

7) Dysfunctions and delays in case processing undermine efficiency. Factors such as time taken to investigate cases and availability of witnesses within the expected or required timelines determine the time taken to process a case. A police officer observed that usually in this context, and given the geographical complexity and the low socio-economic conditions of the majority members of the society, it takes longer to make arrests, investigate cases or obtain necessary information required to process the case. As a result, courts adjourn hearings or suspend cases because the prosecution cannot continue in the absence of such information, particularly in cases when it is not even easy to determine when such information can be available. The police also lack enough resources to investigate cases, while the office of the Director of Public Prosecution does not have adequate staff to provide prosecution services. Formerly the role to prosecute was assigned the police. But under the new constitution, the Office of the Director of Public Prosecution is required to hire and distribute adequate specialized staff to provide prosecution services (Judiciary, 2013).

8) There are inadequate established support systems to ensure that access to justice is efficient and reliable. For the justice system to work there is need to have programs such as witness protection, victims and witness assistance services, and legal assistance programs. These programs are yet to be established in the region. Few non-governmental organizations provide free legal assistance to women who experience domestic violence or related civil suits like inheritance. However, this assistance is not adequate since these organizations do not have enough resources to serve the overwhelming demand for legal assistance. Mission centers like Friends (Quakers) Mission in Turkana and Samburu provide shelter for girls but under local arrangements with local provincial administration and through mediation with the parents.

9) Enforcing court orders or rulings effectively: A lawyer observed that there are cases where files or evidences go missing. Witnesses also go missing in some cases, and cannot be traced so that they can be served with court orders seeking to compel them to come before the court and give evidence. Efforts to use security agencies to track these cases often go futile. Cases of missing files and failure to arrest offenders, or serve them with court orders are deliberate intentions by members of the involved state agencies to indirectly disobey court orders and the rule of law in exchange of some interests or illegally acquired benefits.

This culture of impunity is emulated from top government leadership where court rulings have not been enforced either by the executive or legislature. This shows that the state tends to obey the law when it is working for them. This situation also suggests a context where the politician or powerful individuals are exempted from obeying the rule of law by the very law enforcers who are required by the constitution to enforce the rule of law. This kind of unconstitutional custom enforced by agencies like the police limits the ability of the justice system, to deliver justice equally. It also undermines the authority of the courts to protect the rights of the individual. Table 4.19 shows select cases where high level state officers disobeyed court orders. In all these cases, no action was taken against those who disobeyed court orders.

Table 4.19 High Level State Officers Disobeying Court Orders

Senior State Officers	Brief Case Details
2014: Chief of Defence Forces	Mombasa High Court warns Chief of Defence Forces for disobeying court orders to release 26 Ex-Soldiers detained by the Kenya Defence Forces over dissatisfaction of duty, and asks their lawyers to file charges against The Chief of the Defence Forces (Standard 8 th May, 2014).
2014: Inspector General of Police	Kencent Holdings Company sues Inspector General of Police for Contempt of court. The Inspector General failed to obey court order to evict 10,000 squatters from the farm owned by the company in Mombasa (Standard, May 7 th , 2014).
2014: Interior Principal Secretary	High Court orders Police to arrest Interior Principal Secretary for disobeying court orders. The Interior Principal Secretary, while serving as permanent secretary in 2011 disobeyed court orders which directed him to pay money to a business man (Chepkemei, Feb 5 th , 2014).
2014: State House Chief of Staff	Chief of Staff disobeys court prohibiting him from appointing the chairperson and staff of the Teachers Service Commission, contrary to the Teachers Service Commission Act (Standard, January 28 th , 2014).
2014: The Senate	The Senate disobeys court order barring the senate from starting the Impeachment process of Embu Governor before his case is heard and due process followed (Standard, Feb 5 th , 2014).
2012: Transport Minister	Transport Minister disobeys court order by refusing to reinstate Kenya Airport Authority employees who were sacked for going on strike to demand better pay (The Star, April 17 th , 2012).
2003: Minister for Local Government	In 2003, the Minister for Local Government defied court order which sought to prevent him from revoking the nomination of a councilor of Mombasa city council (Mbote and Aketch, 2011).
2003: Minister for Tourism and Information	In 2003, the Minister for Tourism and Information defied court injunction restraining the government from taking over a building whose ownership was in dispute (Mbote and Aketch, 2011).

There is a historical pattern that suggests that government officers and powerful individuals linked to the executive or the political wing of the ruling party tend to disobey court orders, especially when these court orders contradict their interests. This disobedience further indicates that when one is politically connected to government, or when serving the executive in a powerful position such a person does not need to worry about court orders, in case they are issued against such a person or office, as long as that regime is still in power and the individual is still serving that regime. This tradition of disobedience can easily be passed on to the lower levels of public service as it has in the past been widely shared in the public service.

10) There are more new cases filed in non-marginalized areas than marginalized areas. This is happening because people in non-marginalized areas have more access to courts. They understand better opportunities provided by the reforms in the Judiciary. They also have good physical infrastructure to facilitate their search for justice. As a result, they file more new cases than those in marginalized areas. This has implications on access to justice in marginalized areas, because this trend does not close the inequality gap in access to justice. It also influences resource distribution in the Judiciary and other organs of the justice system, because attention will definitely go to where services are needed most, particularly in the case where the political system base public policy on voting power of the population.

11) Constrained staff. The establishment of the mobile was not proportional to the new staff deployed to these areas. A judicial officer observed that in most cases, the officers serving magistrate courts within the region were assigned new roles in the mobile courts. As a result, the workload increased without proportional increase in staff. This makes judicial officers to overwork. In the long run, it undermines the effectiveness of the justice system delivery.

12) The management did not consider providing or ensuring provision of basic amenities for those seeking and delivering justice. Human dignity, especially in the justice process is a fundamental right. In this case, it is not only the dignity of those seeking justice, but also those who participate in the process. One judicial officer observed that mobile court sites missed some of the basic amenities such as bathrooms, restaurants, and sales stores. As a result, scarcity of such amenities

and related discomfort delayed, interrupted, or made some of those seeking or participating in justice miss court mentions or court proceedings. Therefore, lack of basic amenities in areas where mobile courts were established undermined human dignity.

13) Inadequate legal aid and legal representation. The ability of the court to process many cases and improve on the quality of service delivery partly depends on the availability of qualified lawyers serving in the system. The entire judicial reforms led to the scarcity of qualified lawyers in the country, even though it opened opportunities for admitting new lawyers. This occurred when the new constitution and reforms provided more opportunities for lawyers to apply for positions of judges and magistrates, as well as prosecution officers. As a result, there were few lawyers remaining to play the role of advocates. In 2013, the judiciary admitted 832 lawyers to serve as advocates (Judiciary 2013). However, a judicial officer observed that most of the lawyers are concentrated in cities and major towns, and rarely work in remote areas where mobile courts go, unless they are dealing with a very critical case, where they are highly paid. As a result, legal aid and representation remain scarce for indigenous communities.

14) The initiative to establish alternative justice systems is still at infancy stage. The 2010 constitution provided for local tribunals as a means of increasing access to justice. In the architecture of the Judiciary, local tribunals provided for the Judiciary to train local council of elders for instance on legal basics and mechanisms through which such councils can be able to help in settling civil disputes for instance inheritance, land, marriage and related cases. One of the pilot programs in Northern Kenya was established in Isiolo county in 2013 (Judiciary 2013). However, this program is yet to be implemented in Turkana and Samburu.

15) The slow pace at which bills on justice system are reviewed and processed before discussed and passed by the legislature delays efforts to access justice. As indicated earlier, reforms in the Judiciary were comprehensive in nature. Therefore, to realize access to justice required passage of several bills and implementation of the respective Acts. In an attempt to realize this, the Kenya Law Reform Commission, which is an agency within the Judiciary successfully, drafted a total of 23 bills between 2011 and 2013. By June 2013, 11 of these bills were pending

at various respective ministries while the remaining 12 were still under review and consideration at respective ministries and state departments. Some of the pending bills were Witness protection agency bill, contempt of court bill, the petty offenders bill, the victims of offences bill, and legal aid bill (Judiciary, 2013). None of these bills had reached the legislature for debate, passage and implementation. This shows that state bureaucracy partly contributed to the delay in access to justice.

16) Delays in other aspects of devolution hindered access to justice. Devolution was the heart of the new constitution. It was all about addressing inequalities and historical injustices, by bringing public services closer to the people. The committee of experts who drafted the constitution anticipated in the implementation regulatory framework that, reforms in the Judiciary would go hand in hand with reforms in the police and implementation of county governments. They thought that a reformed Judiciary would work with a reformed police service and be able to get support from county governments particularly in establishing resource base at county level. By 2013, the Office of the Director of Public prosecution had opened offices in 29 of the 47 counties among them Isiolo, Lodwar, and Marsabit. The agency had 474 prosecution counsels serving in 20 counties and with a pending workload of 10,043 cases to prosecute (Judiciary, 2013). An office was yet to be established in Samburu. This showed that the Office of the Director of Public Prosecution devolved inadequate services and at a slower rate. A judicial officer observed that there were cases where the police would make arrests and investigate cases, magistrates were ready to hear cases, but there were not enough prosecutors to prosecute the cases at a quicker pace as intended.

Even though police reforms began in 2009, about a year before reforms in the Judiciary came into effect; implementing police reforms were slower than implementing reforms in the Judiciary. While in the ideal sense, the police should to be neutral and should provide services equally to all members of the public, in Kenya's history the police have been used as a political instrument to centralize power, maintain political dominance, and suppress democracy and opposition. As a result, police reforms attracted more political interests which in the long run delayed the reforms. To correct this imbalance, the new constitution and respective police reforms provided for a semi-autonomous police service, where even though the police

service is an arm of the executive, the Inspector General of Police is safeguarded from political interference by security of tenure.

Kenyan presidents since independence have maintained dominant control over the police force, and the executive during the reforms appeared to maintain the status quo. In 2011, the National Police Service Bill, National Police Service Commission Bill, and Independent Police Oversight Authority Bill were passed. However, these laws have not been fully implemented, partly due to lack of political will. Senior officers in the police were also resisting the reforms. Human rights organizations have also reported the formation of elite police units which are used for extra-judicial killings, besides the growing complains about the general involvement of the police in corruption (Maina, 2013). However, one of the most challenging problems for the police is the staff shortage and expansion of police bases in the marginalized areas. Kenya has about 40,000 police officers serving a population of about 40, million. This translates to a police to population of 1:1000, which is below the international standards (Omeje and Githigaro, 2012). In marginalized areas like Northern Kenya, which are sparsely populated yet larger in size, police shortage is quite high.

17) Indigenous communities still prefer settling disputes using cultural mechanisms. “Many people in Turkana and Samburu prefer having their disputes resolved by the village elders and the chiefs rather than by any court of any description. The largely pastoral community tends to be against the whole idea of courts and this is a hindrance to the devolution of the judiciary to the people.” A lawyer observed. A judicial officer also observed that Local people are not used to the court system and usually find some concepts of the judicial process such as cross-examination, oath-taking and others to be strange to them.

18) Prejudice limits the service delivery. A human rights activist observed that members of the indigenous communities are looked down upon and are not given due respect in service delivery. This is because some public officers from dominant ethnic communities image members of the indigenous communities as second class citizens with no political power, and who do not have equal right to public policy benefits. such attitudes promote a sense of pride in the public servant delivering services, while on the other hand promote a sense of alienation in the

member of the public seeking public services. In the long run, members of indigenous communities turn back to their traditional dispute resolution mechanisms, lose confidence in government policy, and develop resilience for sustainable socio-cultural mechanisms for self-governance and indigenous dispute resolution.

4.4.3 The Role of Civil Society in Promoting Access to Justice in Kenya

For policy to be realized, it must be implemented. Under ideal circumstances for instance, one would expect that the justice system will just do its work, without need for political or civil society intervention. One would anticipate that the police will book cases, investigate, arrest offenders; while courts will efficiently receive cases, try them without delay, and make rulings that reflect justice without impartiality.

However, implementation is a continuation of politics through bureaucracy. Implementation gives the bureaucracy an opportunity to make policy decisions when they translate laws into rules, when they decide what is appropriate and what is not, and which action to take. Bureaucrats have their own values and motives which lead to policy bias during implementation. Because implementation is part of the policy making process, interests groups for instance civil societies representing the interests of the affected groups lobby, campaign, and mobilize political support to influence the policy process or decisions. Interest groups also use political pressure or judicial intervention to get government to take particular policy action (Dye, 2011).

Statement of the Seventeenth Annual Johns Hopkins International Fellows in Philanthropy Conference (2005) stipulates that in order to ensure access to justice, civil societies can do a number of things for instance: 1) raising awareness about injustices occurring in society or about places where victims can access help; 2) searching for the causes of the injustices committed and disseminating the findings; 3) building the capacity of individuals, communities, and institutions involved in the process of seeking and providing access to justice; building networks and partnerships; 4) influencing decisions; and monitoring outcomes.

The idea of civil societies in Kenya is tied to the traditional and historical customs of the Kenyan people coming together and pulling resources together in order to achieve common goals. Besides traditional civil societies which were ethnic

oriented and focused, modern civil societies grew out of historical experiences where Kenyans created civil society organizations to: raise funds to provide welfare (education and health); promote political agendas such as independence (1920s-63) or multiparty democracy (1980s-90s); and participate in the policy process for instance the constitutional reform and implementation (Gitonga, 2014). Today, the national fundamental role of civil societies is to participate in and ensure effective and full implementation of the constitution, particularly the Bill of rights and fundamental freedoms.

Today, there are about 70,000 civil society groups registered under the Registrar of Societies Act (1968), and directly regulated by government. There are also over 6,500 civil societies registered under the NGO Act of 1990, which is replaced by the Public Benefit Organizations Act (2013). These organizations operate under self-regulatory policy under the NGO Board. Major barriers that hinder the work of civil society include: restrictions on foreign affiliations of political nature, without prior approval by the NGO board; government discretion to investigate, arrest, and search any civil society; incase the society is unlawful, the burden of proof in on the society; limited funds and other technical resources particularly for grass roots or local organizations; denial of registration based on vague grounds, government discretion to set conditions for civil societies; and no fixed time set for registration or review of a civil society. Miscellaneous Amendment Bill (2013) was rejected in Parliament in its second reading in December 2013, on grounds that it sought to cap the amount of foreign funding NGOs can receive at 15% of their budget. In this case, NGOs would only receive more than 15% of their budget from foreign donors if they demonstrate that they require funding due to extraordinary circumstances (Gitonga, 2014). While some of these legal restrictions are good in the letter, political experience in Kenya indicate that they can be used by government to interfere and manipulate the role of civil society in promoting justice, rights, and democracy.

What makes the work of civil society in Northern Kenya different from the rest of the country is the context. The Context of Civil Society Initiatives in Northern Kenya can be understood better in light of the prevailing perspective that since colonial times, northern Kenya tends to be part of Kenya, only on the basis of

territorial integrity. The region is not governable hence no need to invest public resources there. This colonial government attitude that Northern Kenya is ungovernable was expressed in the following quote: “There is only one way to treat these northern territories,... to give them whatever protection one can under the British flag and otherwise to leave them to their own customs as far as possible, under their own chiefs. Anything else is uneconomical (Barber, 1968 in Mkutu & Wandera, 2013, p. 14).” This attitude tends to suggest a nation building crisis, where government over the past decades has seen the people of Northern Kenya as a people who do not identify with Kenya but only their chiefs and customs. As a result, they do not allow government authority to penetrate their territories; they resist participating in policy compliance, and do not view government as a legitimate authority over them. Therefore, they are not worthy of public spending.

The purpose of this case is to give an overview of the role of civil society in ensuring access to justice in Kenya, but with specific references to cases in Northern Kenya. By doing so, this case sets a background for understanding the role, absence, and presence of civil societies’ activities in the following cases. Its larger ramification is to point to the policy implementation gap existing as a result of inadequate and ineffective contribution of the civil society in efforts to realize access to justice in Kenya.

While information on the number of civil societies working in Northern Kenya is not available, some of the civil societies working in the region undertake initiatives such as: advocacy for justice, change of the legal framework, laws, and processes; monitoring, documentation, and publicity of human rights violations; and educating the society about human rights and fundamental freedoms. As interest groups, some of these organizations also send representatives to participate in the related policy making process. At times, they form coalitions to pressure government to change laws or implement policies of particular interest to the groups they represent, or the public at large.

Kenya Human Rights Commission (KHRC) is one of the organizations working to help realize access to justice in Northern Kenya. The organization was founded in 1991 by five Kenyans living in exile in the US and Canada. It was later registered in 1994 as an NGO. It is the leading and most established human rights

organization in the country. The organization works with other human rights networks countrywide to realize human rights and fundamental freedoms through the transformation of the legal framework, laws and processes, as well as behaviors and practices of actors in and outside the justice system. Based on the experiences of the people, the organization advocates for policy change and transformation of governance systems in order to realize a people focused rights based society. Other activities of the organization includes; research, monitoring, and documentation of human rights issues; media and publicity of human rights violations. Some of the previous accomplishments of this organization are pioneering the process to: 1) Investigate and prosecute perpetrators of the 2007/8 post-election violence at the International Criminal Court (ICC); and 2) establish Truth Justice and Reconciliation Commission TJRC (Kenya Human Rights Commission, 2014).

The purpose of establishing TJRC was lobbying for the inquiry into, investigation, and prosecution of the persons responsible for the historical injustices, most of which happened in Northern Kenya going back to 1960s. This initiative emerged from the 2010 constitutional requirement, to address historical injustices. To implement this provision, civil societies advocated for the formation of the Truth, Justice and Reconciliation Commission (TJRC). However, civil societies had been working on this agenda since 2003 but had not succeeded, partly because of lack of political will. Since earlier attempts had failed, civil societies used the new constitution making process as an opportunity to advocate for the constitutional provision for the commission, an initiative that succeeded (Mue, 2010).

However, its implementation was characterized by several obstacles for instance: 1) government appointed Ambassador Bethuel Kiplagat, a former senior official in President Moi regime implicated in the same injustices to head the TJRC; 2) Parliament passed TJRC Act which provided amnesty in ways that would protect senior former government officials responsible for the injustices; 3) while the law provided a short timeline to appoint commissioners (41days), the practicality of the politics of appointment made it difficult to ensure a through process of appointment. As a result, commissioners were appointed without proper consultation and representation particularly of the victims; 4) the court did not act on a petition by TJRC commissioners seeking court ruling on the resignation of the Ambassador

Kiplagat as the chair of the TJRC commission; and 5) some victims' groups and civil society organizations withdrew from the process (Mue, 2010).

By the year 2014, the TJRC report had not been made public after being submitted to the President. No implementation had been made from the report's recommendations. It appears not much had been achieved by a coalition of civil societies working for over 10 years to advocate for one common agenda, access to justice through an effective Truth and Justice Reconciliation Commission. It is also important to note that the offenses for which this commission sought to address involved powerful political figures, some who were still working in government, as well as security agencies like the police and the army. The scope of the offenses involved hundreds of people who had lost lives and large amounts of property destroyed, besides cases of torture and other abuses. While these cases show that the justice system does work well on issues of Northern Kenya, it also shows that in matters of critical political interest to government, the people tend to lose regardless of the value of their lives and property destroyed or affected.

Human Rights Watch is an international organization that conducts investigation into human rights violations in about 90 countries worldwide. The organization focuses on human rights abuse incidents or places where such incidents repeatedly occur. Witnesses and victims directly involved in the incident are interviewed and human rights violations documented. Non-interview evidence is also gathered and documented. In order to influence change, this organization largely focuses on research and media as advocacy strategies to obtain and publicize information on human rights violations (Human Rights Watch, 2014). In Northern Kenya, this organization has in the past focused on the abuses committed by security agencies, bandits, or ethnic militias, as well as government action in response to human rights violations.

Center for Legal Empowerment (Kituo Cha Sheria) is an NGO that seeks to provide legal aid, legal education, and advocacy regarding issues such as forced migration, governance, and other human rights abuses that affect the poor and the marginalized persons. The organization seeks to empower the marginalized poor to achieve transitional justice, and combat human rights violations through reformed institutions. The organization focuses on community land protection, accountability of

essential services, realizing citizenship rights, and environmental justice. It also works with partners from the concerned communities to research, document, and advocate rights issues. Its contribution in the past includes: 1) providing legal clinics to members of the society; 2) representing the poor and marginalized persons in cases regarding private or group rights; and 3) advocacy, formation, and participation in the following national commissions of inquiries: The Commission of Inquiry into Irregular and Illegal Acquisition of Land (Ndung'u report); Commission of Inquiry into 2007/8 Post-election Violence (Waki Report); and the (Kriegler report) Independent Review Commission on the 2007 General Elections in Kenya (Kituo Cha Sheria, 2014).

It is important to note that while this organization unlike other organizations provides legal aid to marginalized and poor people; its services do not cover the entire Northern Kenya region. It is also important to note that while the Waki report was partially implemented and the Kriegler report was fully implemented; the Ndung'u report, which is about land, a major concern for marginalized communities in Northern Kenya has not been implemented, and like the TJRC report, its recommendations have not been made public by government. This indicates the difficulties civil societies face when addressing the most critical issues that affect the people of Northern Kenya, issues which are of potential political interest to government as well.

Federation for Women Lawyers (FIDA) was established in 1985 to advance the rights of women in Kenya. The organization deals with a range of issues for instance gender based violence, health rights, women participation in leadership, women land and property rights, and legal education. To promote justice, the organization conducts programs such as public interest litigation, legal representation, self-representation, and pro-Bono lawyers' scheme. The organization also promotes alternative dispute resolution programs like the mediation in family disputes, engagement in transitional justice system, and provision of psychological support. Its contribution to policy making has been in areas of civic engagement and education, and drafting and sponsoring of private bills to parliament particularly those bills that concern or affect the rights of women. Its past contributions include: 1) participation in the legislative process of the following laws: 1) the new constitution making process; 2) the Reproductive Health Bill; 3) and the Marriage Bill (2014).

It is important to note that since 2008, parliament has repeatedly rejected to pass the Reproductive Health Bill which has been systematically presented to parliament for deliberation, discussion and passage almost every year. For about 7 years now, issues of controversy have been abortion, and use of contraceptives for family planning especially among young people. Members of Parliament have enjoyed support, and at times political pressure to repeatedly reject the bill from the dominant Catholic and evangelical Christian population, with relative support from Muslim faithful. FIDA opposed the passage of the Marriage Bill (2014).

Marriage Bill was supposed to ensure that the constitutional right of every citizen to property and civil liberties is implemented and realized. Although the original intention of the bill was to consolidate and harmonize all marriages for purposes of legal accountability, and to ensure that the rights of women and children regarding inheritance and property and during divorce are safeguarded; Members of Parliament added a clause to allow men to marry many wives without consent. Despite pressure from FIDA and religious communities on the executive not to sign the bill into law, the president signed it into a law. Issues of inheritance, property rights, and divorce are critical issues affecting marginalized people, most of who practice customary marriages. A legislative flaw in this area and the use of executive discretion not to address such an issue presents another case, where political interests prevail over the rights of the marginalized individuals. For the people of Northern Kenya, most of who still hold on customary practices, the implementation of marriage bill 2014 was a lost opportunity to address their problems.

Catholic Justice and Peace Commission (CJPC) was formed in 1988 to promote peace and justice in Kenya (Catholic Justice and Peace Commission, 2014). The organization seeks to promote governance and democracy, peace conflict and resolution, civic education, and constitutional reforms programs. The organization works with Catholic dioceses countrywide. Its past contribution to peace and justice includes: 1) Issues of inter-ethnic conflict and cattle rustling in Northern Kenya, 2) Formation of the Truth Justice and Reconciliation Commission (TJRC), 3) adoption and implementation of the National Cohesion Act; and 4) advocacy for the prosecution of the perpetrators of the 2007/8 post election violence. Its emphasis is on peace conflict resolution

Since 1902, the work of Quakers in Kenya has focused on promoting equality through community empowerment for instance building of mission hospitals and schools, and engaging in peace building. Since the colonial government did not invest in welfare policy to provide education and health, particularly for colonial reasons, Quaker programs focused on providing alternative to government welfare policies. In their advocacy, Quaker organizations maintain minimal direct engagement with government on issues of policy in favor of providing services to marginalized communities need. Until 1970s Quaker initiatives were concentrated in western Kenya, where they have built 515 primary schools, over 200 high schools, two technical colleges, and three hospitals (Musonga, 2014). In 1970s, they moved to Northern Kenya where they built their first mission center in Turkana, and later expanded to Samburu in 1990s (Friends United Meeting, 2012).

Since 1930s, Quaker organizations have used a two way approach to engage communities regarding girl child empowerment: 1) Engaging the community by persuading and educating members of the community to voluntarily give their girls for education in Quaker schools, at free or subsidized costs, and 2) providing long term shelter for girls who ran from their families seeking refuge in Quaker missions because of abuse or desire for education. In both approaches, they prefer mediation and alternative to dispute resolution rather than direct legal engagement.

This case shows that established civil society organizations provide little or no services such as legal assistance or witness protection. To marginalized individuals or communities in Northern Kenya, these services are critical to realizing access to justice, yet they are the least addressed. This case also shows that these civil societies did not succeed in realizing access to justice particularly in areas where the political interests of the government contradicted the need for justice on the side of the marginalized people. It is also important to note that in order to realize justice, faith based civil societies have preferred alternative dispute resolution mechanism over the direct legal engagement. Unlike Catholics who also engage government in policy advocacy, Quakers largely focus on providing alternative to public services.

This study did not find specific NGOs focusing on Northern Kenya issues. Available studies show that Northern Kenya issues have been brought to the national platform by national NGOs like Kenya Human Rights Commission, Center for Legal

Empowerment, or International NGOs like Human Rights Watch or International Bar Association. The strength of national and international NGOs is that they have networks, power, and resources to influence policy change in Kenya. Their weakness in addressing issues of Northern Kenya is that they serve the region occasionally, especially when there is a major socio-political crisis. They don't have offices in the region. As a result, they sent research teams when need arises to gather information, document cases, write report and advocate for justice. While this is important, marginalized people of Northern Kenya need more services for instance legal empowerment or legal aid centers or witness and victims assistance programs. These NGOs are also constrained in resources hence they cannot achieve much for the people of Northern Kenya, given that working in Northern Kenya is more expensive than the rest of the country, because of limited infrastructure.

4.4.4 Case Studies: Lived Experiences from Account of Stakeholders

4.4.4.1 The Life of a Police Officer in Western Kenya

The police play an important role in justice delivery. In criminal matters, the police are part of the criminal court procedure. Police officers book reported cases, make arrests, investigate cases, and enforce the law. The police also provide security and ensure peace and order in the society. Therefore, understanding the lived experiences of the police officers can provide insights into factors that hinder access to justice.

In Kenya, the police have many nicknames. Most of these names are relational nick names. They are names members of the society nick name the police as they continue to interact with them in society. These names carry a range of meanings some moral others cognitive. They denote identity, respect, fear, dislike, love, and acceptance, among other things. Some of the names are:

- 1) Serikali (meaning government). This name is used when police are described or perceived as an embodiment or manifestation of government character, will, or action. It emerges from years of repression experience where Kenya worked like a police state, and where the police were used to enforce not only government policy but also politics. Usually, this name is used when the user intends to make a conscious appeal to the audience to respect, not question, be careful, follow,

or fear the actions, character, or presence of the police in question. When used, the assumption behind the use is that government as we know it in policy and the police as a security agency are one two sides of the same coin, embedded together, inseparable and one in the other. This means, if the police do something to you, then that is what government has done to you.

2) Mzee (for a male police officer) and Madam (for a female police officer) are words used to salute an elder or someone in place of honor. In most cases, citizens use these words when talking to the police, when reporting cases, or when explaining something. They are used to communicate respect and the legitimacy of the police in a given situation. As attitudinal expressions, they are meant to facilitate the conversation between the police officer and the citizen, and enhance good public service delivery environment, by invoking self-worth values police officers need in order to serve the people with pride, justice, and dedication. Sometimes, passenger service drivers and conductors use the terms when negotiating prosecution and bribes with the traffic police on the roads. The assumption behind using the words is that the police deserve, or expect respect when engaging with citizens. If you don't show it to them, they will not serve you, can frustrate you, or will make things difficult for you. This means that the police other than the professional police you expect of them are human beings with feelings. Therefore, they react depending on the way you relate to them.

3) Poonyi, Pai, Karau (Slang terms used to refer to police officers). Usually these words are used when the user wants to conceal the identity of the police officer, as the subject of discussion. These words emerged from slang language speakers in Nairobi, who wanted to discuss their experiences while interacting with the police, but feared that the police would be anywhere present listening to them. Therefore, they created alternative terms to refer to the police, so that they could speak freely about the police, without the police noticing. Poonyi is the literary manipulation of the word 'police' by removing syllables 'lice' and replacing them with the syllables 'oonyi'. Pai is the manipulation of the word 'spy' by removing letters 's' and 'y' and replacing letter 'y' with letters 'ai'. Karau is crafted from the Swahili word karaya which is the name of a tray or basin. Because the police shield looks like a tray, the users take the syllables 'kara' and add letter 'u'

to form *karau* (Ogechi, 2005). The usage of this word in reference to the police show a sense of fear which people live with when they think of the police presence. Fear in moral sense shows a relational gap, lack of trust or confidence. When used, the users assume that there are unknown police officers in the vicinity not to protect them, but to spy on them, for unknown motives likely to lead to uncertain consequences. To protect their freedom of speech and the right to share experiences and concerns, they have to craft terms to use, and keep changing this terms, as soon as the police realize. The ultimate goal is to protect oneself from the police.

These names show how the police are understood or perceived in daily life. They also show the assumptions behind the way people relate to the police, as well as the moral judgments that guide their attitudes. Apart from the way the police are understood and perceived, they are human beings, living their lives like any other person. They have socio-economic struggles they face every day, and have aspirations to succeed in life like any other person.

Policing in Kenya, as in many parts of Africa is a colonial legacy, where the police service was concentrated at government headquarters, sought to enforce law and order, protect the property of the colony, and minimize resistance from the local people. Little has changed since independence. As a result the police have served the interests of the elite, and have over time grown to operate with impunity, to the advantage of themselves and those whose interests they serve (Mkutu, 2008 in Mkutu and Wandera, 2013: 15). This shows that since pre-independence, policing in Kenya has little to do with protecting the lives, the property and rights of the citizens. This view emerges from a set of experiences, where the police force is used by the elite as a political machinery to serve particular private interests as opposed to the public interests it is expected to serve.

The police service in Kenya has evolved since colonial times. The three main branches: the Administration Police, the Regular Police, and the General Service Unit were formed at different times in Kenya's history for different purposes. These three branches have existed separately each with different values, almost not identical to each other. However, what brings them together in not only the police structure, but also their role in ensuring access to justice. Apart from the General Service Unit which is an elite paramilitary police force assigned special tasks,

the Regular Police and the Administration Police are daily involved in the public affairs, working to enforce the law and ensure access to justice. These two branches are part of the criminal procedure, provide public security, and are used to enforce the law in the daily public life. Therefore, cases in this study will focus on police officers from these branches.

The Administration Police was formed in 1902 to assert colonial government control in rural areas, along the borders, and to ensure that the tax policy was effective. The Administration Police Act of 1958 transformed the force into Administration police service, and expanded its mandated to involve public administration services. The force operates as part of the Office of the President and Provincial Administration. Currently, it has several units including Internal Affairs Unit, Cyber-crime Unit, Rural Patrol Unit, Rapid Response Unit, and Community Based Policing Unit (Carter, 2013).

The Regular Police was formed between 1887 and 1902 as a force to provide security for the Imperial British East Africa (E.B.E.A.) Company. At the time, the force was concentrated at the Coastal City of Mombasa was militarized. With the construction of the British East African railway to Uganda, the force began to spread inland with more police officers hired to protect colonial interests in new cities of Nairobi and Kisumu. The Migration of criminal groups of White South Africans to Nairobi (1914-1918), WWI and WWII, and Kenya's revolution for independence in 1950s lead to the increase of police officers, early professionalization, and organization of the force into several responsive units. During WWII, the police force was continuously militarized and deployed alongside Kenyan soldiers in Northern Kenya, to carry out reconnaissance missions against Italians who were in Somali and Ethiopia. In 1948, the General Service Unit was formed for deployment in foreign missions, to provide security for the Head of State, and to respond to emergency security situations. Other units that have been created in the force include: Criminal Investigation Department, the Dog Unit, Police Air wing, Anti-Stock Theft Unit, Anti-Motor Vehicle Theft Unit, Tourism Police Unit, Presidential Escort Unit, and Anti-Terrorism Unit (Kenya Human Rights Initiative, 2002).

Three observations can be made from this experience: 1) During colonial period and after independence, policy changes in the police forces

largely focused on militarization of the force. 2) The scope of these policy changes reflects changes or increase crime dynamics. 3) Policy changes did not address other important aspects of policing for instance justice, rights, or improved public service delivery. Human rights violations by the police force remain a major setback in the relations between the police and the society. Between 2008 and 2012, human rights groups estimated that the police were responsible for 1,000 extra-judicial killings. Most of the reported cases show that the police are involved in unlawful killings, forced disappearances, torture, use of excessive force, and inter-ethnic violence (US State Department, 2012).

Table 4.20 Select Cases of Human Rights Violations

Date	Select Reported Incidents
November, 2011	2 Police officers suspended and charged with the murder of a man and his 12 year old son outside his house in Nairobi
January, 2011	3 police officers suspended for shooting and killing 3 suspected carjackers who had already surrendered
March 30, 2013	Police shoot and kill 5 demonstrators in Kisumu while they were protesting the Supreme Court's decision to uphold 2013 presidential election results.
December, 2010	High court sentences 6 police officers to death after shooting and killing 7 taxi drivers in Nairobi
December, 2012	Nairobi Police chief opens investigations after some of the 400 people arrested following terror attack on 9 &10 of December,2012 were reported missing from Shauri Moyo Police station
2011	Government fails to compensate 19 victims of police shootings according to court orders after the victims won civil suits against the state
2009	Police upon government order forcefully evict 2,000 squatters from Mau forest and destroyed their property

Table 4.20 (Continued)

Date	Select Reported Incidents
May, 2011	Investigative journalists Mohamed Ali and Denis Onsaringo file complaints with the Police Commissioner flowing threats on their lives after they filmed an investigative series on police complicity when dealing with cocaine seizure. The series were broadcasted on KTN TV
December, 2011	Police at Pangani Police deny lawyers from Kutuo cha Sheria, access to refugees who had been detained indefinitely without taking them to court

Source: Author, based on Kenya Human Rights Report (US State Department 2012, 2013).

The gap between the police and the society in Kenya has grown out of experiences of malpractices realized in the police work. A survey by Transparency International (2013) indicated that bribery prevalence in the police stood at 71% the highest in the country. The police had the largest share of national bribe at 33.1% and the highest perceived impact (45.6%) in the country. Of the total bribes offered, 36% of the bribes were given to quicken the public service compared to 26% of the bribes given for undeserved services.

More than half of the Police respondents in a baseline survey conducted by the Police Oversight Authority (IPOA) said they had participated in or witnessed police misconduct such as unwarranted shootings, assault, brutality, and threat of imprisonment (US State Department, 2013).

However, there is more to the life of a police officer than human rights abuses, more than the reported incidences when errant police officers violate the law. This is why there is more to know, more about the experiences of the police officers, their fears and their struggles. There is more to know about the conditions under which they work, serve, kill or get killed, fail or succeed. These conditions are probably more complex than the way they finally act at work place. As this case will show, police officers like other Kenyans believe in a better Kenya. They

struggle with life, endure the high cost of living, are ignored by government when they seek better pay, work extra hours and engage in multiple occupations in order to take their children to school and care for their families.

When they try to do their work, and do it as best as they can, they get killed with little support from government. Some of the people they passionately try to help deny them intelligence or even betray them to their enemies. As this case will show, some police officers largely come from the lower class. They join the police force not only as a sacrifice to serve their nation, but as an alternative opportunity to help those they love. When they risk their lives in line of duty, they do so as way to remain faithful to the alternative choice they made, when they could not realize the best dream they ever had, because of the structural socio-economic conditions that determined their limits. Every day, they continue to face complicated security situations in which some will continue to die, as they try to make the best out of the least they are provided for by government.

This is a case about Alulu (not his real name), a police officer working in Western Kenya, and a participant in this study. The role of this case is to set a comparative base for the life of the Police officers in Northern Kenya, which we will look at in the next section. Based on the lived experience of this policeman, we will show an example of a police officer who is a parent, and a citizen, working for the state in order to improve his life. Through his experience, we seek to elicit insights about the police officer the government looks to for access to justice.

Like other civil servants, police also have their own problems with government. Good pay is one of them. Workers' strikes are common in the country. Teachers, nurses, doctors and lecturers, tend to strike in turns after every few months. Though they demand different amounts of money, they have one complain in common. They usually claim that the ever increasing high cost of living and a double taxation system leaves them with inadequate income to live on. Unfortunately for the police, section 47(3) of the National Police Service Act (2011) prohibits police officers from calling or participating in any strike. Under article 24 (2) (b); the constitution provides for the fundamental right and freedoms to form, join, or participate in the activities and programs of a trade union. Furthermore, the constitution provides for the National Police Service Act to set limits for the right to

fair labor relations (Constitution of Kenya, 2010). Attempts by the legislature to entirely take away the right of the police to form, join, or participate in all activities of a trade union based on section 47 (e) of the National Police Service Act were ruled null and void by the Industrial Court (Mwobobia, 2013). Thereafter, the rights of the police officers to form, join, or participate in all activities of trade unions remain a matter of legislative politics, awaiting the amendment of the National Police Service Act.

The Daily Nation (November 5th,2012) newspaper quoted the assistant minister in the Office of the President saying "It is true that somebody has been circulating some text messages to the effect that there will be a strike, but we have yet to catch up with the sender." On 1st of November 2012, Banks remained closed during morning hours and cash was not transported because concerned police units did not turn up on duty. Police radio played music instead of providing police communication (NTV). In response the Internal Security Minister announced an 8% salary increase for the police. On 7th of July, 2010, media reported that Junior Administration Police had gone on a slow strike over pay increase. In their strike, they jammed the police radio system, and failed to provide situational reports to their seniors. Some police units were reported to have failed to report on duty on time which caused delay in opening of institutions like banks, while others walked in the streets with half uniforms and guns, but failed to provide routine patrol check ups as usual. Law courts and traffic control points remained without police presence for hours (K24 TV).

Even though it is not an official holiday, the seventh of July is a symbolic day in Kenya's political history. This day, on the 7th of July in 1990, politicians and civil society activists mobilized people and held a demonstration for multiparty democracy in Nairobi. The demonstration ended in a riot with the police. Though it was bloody, it opened for multi-party democracy in 1991. Since then, dissatisfied groups particularly those that demand rights and expanded freedoms hold demonstrations on this day to symbolize the continued fight for rights and freedoms. Therefore, the attempt by junior police officers to strike is not an act of rebellion, but an expression of the increasing difficult socio-economic conditions the police live with.

Alulu was born in 1963 in Western Kenya. His father was a primary school teacher. This gave him a good learning environment right away from his childhood. After successful completion of his primary education, he joined Friends School Kamsinga. Even though he was bright in class and studied in one of the best high schools in Kenya, he could not continue to university because his six younger siblings needed education too. As a result, his father asked him to join a teacher's college soon after high school, so that he could pave way for his younger brothers and sisters to study. It is a common practice for a parent from low income families to ask the first born of the household to drop his/her vision for college or university, in order to help parents save funds to pay school fees for the younger siblings.

However, Alulu chose to join the police force rather than teaching. In 1984, he joined Kenya Police Training College Kiganjo. After police training, he was posted to Kisumu, a city 100 kilometers away from his village. He worked in Kisumu until 1995, when he was later transferred to Kakamega about 37 kilometers from home. While serving the police, he worked in the regular police service for six years, and the traffic police department for 10 years, before he was promoted to the rank of inspector where he served as a police prosecutor. He was happy that unlike some of his friends, he worked close to his home most of the years he had been in the police service.

Alulu goes home regularly. He attends community social events like fundraising, funerals, soccer sports and drinks in a local bar. He regularly sponsors a local soccer team with donations during Christmas or Easter holidays. I first met Alulu in June 2010, when I was chairing a fund drive, an initiative to raise funds to help the family of the late Villance Libosho, a Moi university Student who was killed in an industrial accident, while on his fourth year engineering internship. People nicknamed him councilor, because of the jovial comments he often made on local social and development issues, which he felt could have been addressed better had the local politicians focused on such issues.

He had children in high school and college. He often visited them and would attend parent's day himself, a day he believed was the opportunity to engage school administration on education issues, and learn from others about how

best to equip children for education. He believed that visiting his children in schools increased accountability and helped him to learn more about his children, something he thought other parents should be doing. He thought that teachers gave extra-attention to students whose parents visited them and talked with the teachers about their children's affairs. He repeatedly talked of his parents as the best parents who regularly monitored his studies and often created opportunities to be involved in their children's education.

Alulu is a successful farmer. He runs large scale sugarcane and corn farms. He hires the farms from land owners and practices commercial agriculture, to supplement his income. He began this initiative in 1990s after borrowing a loan from the Kenya Police Cooperative Society. He partly attributed his sustainable success to the opportunity he had to be available to assist his family to monitor the workers in the farm or sales on the market. He believed that to be a successful farmer, one ought to find time to be present in the farm or on the market. He thought that besides monitoring and helping in making decisions, being present was a motivation not only to the workers but to his family as well. He owned a tractor which he leased to farmers who needed to transport goods to the market. With this tractor, he was also able to cut agricultural input costs. He had built a four bedroom modern house in the village, a house he believed a successful police officer should have. He expected that when he dies, they would put his coffin in the verandah, where friends would come to view his body, and appreciate the work he did when he was a police officer. One of his dreams was buying a fancy car before his first born daughter got married.

Even with the little salary amidst socio-economic constrains; he found that there were opportunities in the region for hardworking and innovative police officers to utilize. The cost of living is low, and food supply is high most of the time. Infrastructure is available. Information system is effective to enable effective police communications. Police stations have vehicles to conduct patrols. Population density and living in permanent settlements makes it easy for the police to provide security, conduct surveillance, and control crime. Good road networks can easily enable the supply of security personnel in case officers in one area are overwhelmed by a security situation. The level of organized or gun related crime is still low in the sense that it takes months, before a shooting incident is reported.

Alulu lived a relatively comfortable life, a life he said police officers in western Kenya relatively enjoy. The cost of living in the region allows them to live on what they earn, save some and can develop if they are development conscious. Police authority and independence is well asserted in the region. Police stations are well resourced to conduct basic police services. Western Kenya has many schools, some of the best schools in the country, which gives police officers an opportunity to live with their families and educate their children in good schools at a minimum cost. The region has good hospitals as well, making it easy to access health services when one is in need. Alulu wanted to retire from here.

Police stations are well designed. Most of them were built during the colonial period and the first decade after independence. Police officers have good houses, with water electricity and water. They enjoy basic modern amenities. Alulu however observed that with increased recruitment, newly recruited officers would soon face housing shortage unless government invested in police housing strategies. Because western Kenya is safe, members of the public, police officers and their families feel safe most of the time. Attacks on police officers were rare. Even those police officers who did not live with their families had more opportunities to visit them. Worry about the safety of the police officers on duty was uncommon.

4.4.4.2 The Life of a Police Officer in Northern Kenya

Initially, my interest to examine the life of police officers in Northern Kenya was driven by my prior knowledge of the region as a conflict zone with underlying injustices. I was aware of insecurity and unresolved conflicts in the region. The 1963-68 shifta war for instance is still an emotional issue in Kenya. For the minority groups like the Somali's is it still a wound that need healing and reconciliation. But this is not the only case. The 1984 Wagalla massacre in which the Kenyan security forces in an operation to disarm communities with illegal guns, were accused of rounding up Somali men, detained them naked and without food for four days, and finally shot hundreds of them, still raises concerns regarding the way security forces do their work. Witnesses told the Truth, Justice and Reconciliation Commission that about 482 victims were killed in the shooting (Kinyanjui, 2014).

Until today, anyone or group regardless of ethnic background found in possession of illegal guns, suspected or caught in banditry, is treated as a shifta. The word shifta was crafted by the military to refer to Somali rebels in 1960s. Cases about security operations in Northern Kenya region involves complains about torture, extra-judicial killings; destruction of property, and barricading oasis and water ways in order to starve communities resisting surrendering guns or believed to be hosting bandits (Whittaker, 2008). The use of the word shifta as a security label referring to suspects found in possession of guns in Northern Kenya has a political connotation indicative of a non-citizen rebel out to destabilize national security. This condition highlights the uneasy historical relations between security forces and local minority groups in Northern Kenya. This situation remains a major challenge for government to deal with.

Living in Kenya, you hardly go for a month, before you hear of a banditry incident in Northern Kenya. Men, women, children, police officers die during such incidents. In what appears like a policy trend, government in response sends police and military units to the region to disarm communities, especially when killings persist. When the operation is done, a new season for human rights organizations to conduct fact finding missions, and document human rights violations begins. Reports come out, commissions of inquiries are formed, and sometimes it becomes a major political campaign recipe until things cool down. At this moment you think it's over, until after several weeks, when you hear of another banditry attack. For decades, it appears that this is how the situation is, how indigenous communities with banditry units live side by side, how the government intervenes, and how security forces respond to threats.

One time I asked Isaac a security officer whether security forces truly torture people when disarming communities and he agreed that they do. I asked him why they did not just arrest men and leave women and children alone. He looked at me, laughed for a while, and then said "A bandit will never give you his gun, you can torture a bandit, cut him with a knife even if you want to, but he will never surrender his gun. The only way to easily get him to cooperate is to tell him 'if you don't surrender your gun, I will sleep with your daughter as you watch' this way, they surrender guns quickly." Based on what I knew at the time, I considered the police

inhuman, trivial, and inconsiderate. Even though I had considerable knowledge on how the police had conducted operations in the past, I believed there was more to the life and work of police officers in the region than the operations they conducted. With this behind my mind, I went on to further examine the life and work of police officers in Northern Kenya and how that promoted or hindered access to justice.

On the 10th of November 2012, something different and drastic happened in Kenya's security history. It was a Saturday that exposed another side of police officers working in Northern Kenya. This fateful day, brought into perspective the pain and the agony police officers go through, and the sacrifice they make to ensure peace and order. This dark Saturday, was the day when about 42 police officers were ambushed and killed by bandits as they tried to rescue livestock stolen from Bendera village, Baragoi District, Samburu. A glance at the corpses scattered in the jungle in police uniforms, some of them eaten by hyenas, you would see that alienation in Northern Kenya is not just something local people experience. The police too have their own share that silently depicts the gap between the government and these law enforcers.

It all began with what the survivors of the attack called a betrayal and a leaked security operation in Suguta valley. This valley is one of Kenya's most challenging terrains in the Northern region. In 1997, Samburu District Commissioner in a police helicopter was gunned down by bandits in this very valley as he tried to provide air surveillance, soon after bandits had stolen livestock from Samburu. In the November 10th operation, survivors of the attack reported that they were ambushed by bandits early at dawn as they prepared to pursue the bandits and rescue about 400-500 cattle that had been stolen. The officers who had been mobilized from different police stations in and outside the province had arrived at the District headquarters a day earlier. Before dawn, they were transported by Lorries to the distant hills where an assembly point had been designated. However, because there were no roads into the valley, they walked about three kilometers up the hills where 42 of them were shot and killed as they descended down the valley in pursuit of the bandits.

The fallen police officers were new in the region, were unfamiliar with the complex terrain in which they were ambushed, ran out ammunition in the shootout, witnessed their ground commanders die first, and lost communication

contact with police headquarters before they died. The six who escaped death were found three days later wandering in the jungle trying to find their way out. They were dehydrated, had gone without food, and were still in shock. In the midst of uncertainties, they searched for their dead colleagues and gathered them in heaps under the thorny acacia shrubs. As the nation lingered in shock with little briefing from government, the bodies of the slain police officers were still in the jungle three days after the killings took place. Under the scorching sun, about 30 degrees, the rotting bodies burned.

A police helicopter sent to transport the bodies or survivors to Nairobi stood still at the district headquarters after it developed mechanical problems. For three days, it had not been repaired. Back in the jungle, the six police survivors, journalists, a handful of Kenya Red Cross volunteers from the region, and villagers continued to look for the bodies of the slain officers. “We will abandon this work and let the police do it themselves. This is their own work” remarked one Red Cross volunteer who appeared disappointed and angry.

While the killings of bandits and police officers are not new in Northern Kenya, losing 42 police officers in a single incident was serious enough to think something was wrong. This particular incident exposed what police officers go through in order to provide security in this part of the country. Local politicians and experts observed that the operation was politically instigated. Politicians from Turkana community argued that the operation had been ordered by a Samburu Member of Parliament, and was intended to use the police to attack Turkana villages and displace members of the Turkana community before March 2013 general elections. Use of violence in Kenyan politics even to this extent is a common practice. The Samburu Member of Parliament denied the allegations. The internal security minister also reported the government had arrested and charged a local councilor who government believed coordinated the banditry attack against the police. The councilor was a former General Service Unit inspector. The General Service Unit is a paramilitary wing of the Kenya police which provides Special Forces services like security of the Head of State, works in foreign missions, and deals with prevailing or extreme criminal activities. It took about a week for the president to send military units in the region, but the military operation was halted several times in a series of months due to political pressure and court orders.

While the politics of the operation prevailed, the challenges the police go through in their daily duty though well exposed took a peripheral stage. The police appeared more or less like the marginalized indigenous communities they served. Their fate and luck alike was based on the fact that they had friends and enemies in both government and the community. From government and the community, they had friends who supported them and came to their rescue. They also had there in enemies who organized or supported their execution in the line of duty. It appeared that the most immediate thing the government, the elite, and the community of politicians did was to pick up their challenges, politicize them, and transform them into political agendas for private gains. Varied political songs played on and on, but it appeared the real issues affecting police officers in Northern Kenya were buried along with the slain soldiers. As a Kenyan, I did not find that strange. It is just the way we do politics in that part of the world.

The police spokesman when addressing the Police Oversight Authority described the operation as “an operation gone sour” and “a serious tactics failure”. But the fact that it took three days for government to intervene and transport the slain police officers from the jungle to Nairobi; showed that there was more to the challenges the police faced. One wounded officer found three days after the attack as he tried to fight for his life said the bandits after shooting the officers, searched for the bodies in the jungle, collected guns, and went with them. When they found injured police officers who had run out of ammunition they shot them in the head at a close range. One would wonder if some lives would have been saved if the rescue or reinforcement operation would have been launched as soon as the attack began.

At Baragoi district headquarters, where slain police officers first gathered before the operation, a few things were happening on the third day after the attack. Several contingent of police officers mobilized from other parts of the country had arrived to pursue the bandits further, help in collecting the slain officers, and look for the lost guns. But not much was happening even at that time. Some officers told journalists that their allowances had not been paid. Other basic supplies like food and water had not been distributed to them. At the nearby market, some families were packing their belongings on trucks ready to leave the region. They had heard that the government was going to send in the military to disarm the people. Therefore, they

wanted to leave as soon as possible. Politicians from the region had already called a press conference and termed the president’s intention to send military units to the region unconstitutional and politically motivated.

In the midst of all these, a number of statements were made by senior police officers, experts, and politicians in various forums concerning the life and work of the police following this fateful incident. Some of these statements provide insights into factors that hinder access to justice.

Table 4.21 Select Statements Concerning the Life and Work of Police Officers

Significant Statement	Formulated meaning
“Once beaten, you have to be prepared, they are well equipped” Internal security minister	Police are not always equipped and prepared to handle even unpredictable circumstances until a major loss occurs
“This is a purely tactical matter which has been very aggravated by ill equipment...what were those officers were doing there without bullet proof vests? ... If the member of public who brought this information, if the commander told him ‘I do not have the required equipment to carry out the operation, therefore I am not going to do anything about it’ what would have happened?” Police spokesperson	The police work with ill equipment which exposes them to risk. At times their tactics are below the performance level they need in order to enforce security, law and order. They face ethical dilemma choosing between refusing to do the job for their own safety, and laying down their lives at their own risk their for the safety of the members of the public who run to them for intervention
“This operation is ill advised because it is a testimony that our internal security apparatus have totally failed. A local people are worried that women, children and youth will be tortured” (Member of Parliament).	Issues that should be addressed are internal security system failure, and protection of human rights. The government’s approach is therefore misinformed and not addressing the real problem

Table 4.21 (Continued)

Significant Statement	Formulated meaning
“What the government of Kenya did in Baragoi (Sending military units to assist the police) was to overthrow the constitution” (Member of Parliament)	Use of the military in police operation and within the jurisdiction of the police work is unconstitutional. Therefore the legality of the government operation is in question.
“Collective punishment is a thing of the past...in fact there is no such a thing as cattle rustling. The actual offense is robbery with violence” (Dr. Okuru Aukot, lawyer).	The law does not recognize cattle rustling. It treats it as robbery with violence hence you can't punish a whole community for a robbery committed by a few

In Nairobi, families, friends, and relatives of the slain police officers had been gathering at the Kenyatta Hospital mortuary for four days in tears and anxiety. Some grieving parents and relatives reported to media that their slain sons were below the age of 30 years, had just finished police training and had barely worked for one month and received their first salary. Some were the sole breadwinners in their families. A young man weeping said his slain brother was the only person who had finished high school in the entire family. This shows that unlike the judges and magistrates who come from middle income and wealthy families, a considerable number of Kenyan police officers come from the poor class. Hence like the rest of the poor, their legitimate concerns, don't seem to matter that much, especially in a nation where politics of inequality, capitalism and exclusion prevail.

A journalist reported a case where a father angered by the government reluctance to rescue the police, left his home in North Eastern Kenya travelled hundreds of miles to Samburu, went down to the jungle, looked for his slain son, found him, and carried him home for burial. He did not care anymore about government protocol. There were other families who had traveled from Eastern province to the jungle to look for their slain sons. This act of self-determination showed lack of confidence not only in the police administration, policy and governance but in the government as well.

Having learned these, I wanted to know more about the lived experiences of police officers in Northern Kenya and how these experiences influenced their functions as service providers in a justice system that sought to improve access to justice. Therefore, I decided to identify police officers who I knew were working in Northern Kenya. These, officers Norman, Felix, Evans, Wicky, Max, Fire, and Chris (these are not their real names) provided helpful insights into understanding the lived experiences of police officers in Northern Kenya. I was not able to find a female police officer to interview.

My first contact was Norman, a close family friend. Before Norman was transferred to Samburu, he served as a Police Inspector in the Kenya Airport Police Unit (KAPU). He was transferred to Northern Kenya in 2006 when the government made the decision to transfer the whole KAPU force working at the Jommo Kenyatta International Airport, following a political controversy, in which the then opposition leader and former Prime Minister Raila Odinga claimed powerful rogue officials in government had brought in the country, two Armenians mercenaries to assassinate him. Despite demands by the opposition and Parliament, details following the inquiry into the whereabouts of the two men Arthur Margaryan and Athur Sargaryan have not been released by government until today. Norman appeared a collateral damage following a political controversy or a victim of public policy decision making even though he had been promoted to a high ranking position after serving in Northern Kenya for about 9 years.

Felix was another informative contact I successfully sought and found. He was 29 years old. While in high school, we played for the same soccer club. He was open, clear and precise when asked questions. After being recruited in the police at the age of 19 years, Felix served in the regular police for 3 years before he was recruited to join Flying Squad, a unit in the police tasked to combat specialized crimes. He was transferred to Northern Kenya in 2011 on disciplinary and probation grounds. Though he did not disclose why he was disciplined he called it a second change he had been offered, under circumstances that would have led to his dismissal from the police.

When I asked Norman whether transferring police officers on disciplinary grounds was a common practice, he said many factors are considered in a

transfer. However, because the police do not have hardship allowance or compensation in case of death in line of duty, police commanders are reluctant to transfer officers in Northern Kenya. It is difficult to motivate them to work under difficult conditions while others in other parts of the country enjoy relative comfort. As a result, commanders may use discipline as an opportunity to give a second chance to soldiers who need a second chance at a point when they would have been sacked. It appears to motivate police officers; police commanders compensate lack of hardship allowance with second chance opportunities.

Growing up in western Kenya, both Max and Chris were my age mates. We underwent traditional circumcision together in 1988. We all call each other Vakochi, a Luyia language word meaning people of the same age set from the same clan, who can advise or help one another.

My interaction with Max and Chris while they was serving in Northern Kenya, indicated that police officers also compensate lack of motivation by being more tolerant and considerate when supervising junior officers. Max and Christ served in the same police post. They were only 8 police officers in the station and had no vehicle. The nearest police station was about 30 kilometers away. They said having served in various police stations in Northern Kenya; they found commanders more tolerant than in Nairobi where they had served earlier. Chris observed that “Here it is more about clinging together for survival. They have been in the force longer and they know that when we work under such difficult circumstances without compensation, they don’t need to crucify us when we make little mistakes.”

Wicky and Fire worked in a different post. They were serving in the Administration police unit of the Kenya police. Though it is a unit of the police, it operates as a separate branch of the provincial administration and internal security department. The Administration Police provide security to provincial administrators, government building and installations, rural and border control and security, and as well as rapid responses to insecurity. Since they graduated from the Administration Police Training College, Wicky and Fire have been working along the border and in rural areas of Northern Kenya. Unlike the others who were transferred here from other towns, they have always worked in rural areas and along the borders. They had been waiting for a transfer to town for about 10 years. Both observed they hardly had a day

of rest, because they have to be on duty every day, given that there were very few police officers in the district, yet with overwhelming work.

Evans was different. He was my former classmate at the university. He suspended his university education to join the Administration Police. He was very passionate about being a soldier and he hoped that one day, he will become a Provincial Administrator after advancing his education. Unlike the others who joined the police because they were pursuing careers, Evans joined it because it was a family trait. His father, uncles and grandfather had served in the Administration Police unit and in the Provincial Administration. He said that even though Northern Kenya was a risky place to work, serving there for more than 10 years and going through the ranks would earn him a brighter future and respect in the force.

Several themes emerged from the experiences these police officers shared. Insights that underlie these themes can further the understanding of contextual factors that hinder access to justice.

It's about survival. The life of police officers working in Northern Kenya is largely about survival. A police officer observed that some police stations have between 7- 15 officers. These officers have no vehicles or motorbikes to conduct patrols. The stations are also sparsely scattered across the districts and counties. In case a member of the public wants the police to arrest a suspect, he or must provide the transport cost for the police officers and the suspect. In case of major conflicts like banditry, the police must conduct the headquarters for additional officers in order to combat the crime. This means that police officers here largely handle petty offenses like theft or physical fights and have no resources and equipment to handle large scale crimes which are most frequent and violent in the region. The police are also unable to pursue and investigate individuals who commit crime and go into hiding because members of the public cannot afford the cost of transport which police officers require to pursue such individuals. Without equipment, police hardly receive and get information about offenses committed and the whereabouts of suspects. As a result, committing offenses and hiding even just in the distant village or town is a common practice.

Police officers are also underpaid. A lowest ranking police officer earns about \$US 265 per month. The cost of living in Northern Kenya is higher than the rest of the country because all food products and other commodities are imported from outside the region. Police officers observed that in the absence of hardship allowances, they paid more for the cost of living than the rest of their colleagues serving in other parts of the country, yet they also worked under more difficult conditions. Failure for the government to enact laws that would provide for the police working in hardship areas to earn hardship allowances and other incentives is one of the regrets police officers here live with. A police officer said “This money is not enough to support even ourselves, yet we have many other members of our families who depend on us. So when you see government not taking action to increase salary, or give us allowances, you feel they don’t appreciate police work.”

Living on tradeoffs. “Life here is like the market, you live on tradeoffs. It’s like always giving something off in order to get another.” one officer remarked. Officers observed that while serving in other parts of the country, they had some relative dignity and comfort that allowed them to assert their independence when interacting with the members of the public. But the constant state of needs in Northern Kenya has made them to learn to depend on the community for some of the fundamental things they need, for instance basic amenities or even food supply. When members of the community give police free gifts and offers such as goats for meat, such a continuous practice make the police supplement their income with free gifts from the community. In this case, it becomes difficult for the police to independently perform duties in that community. Because of lack of adequate communication equipment, police officers use their private cell phones to conduct official duty. This means that they need to depend on the members of the public seeking services for the cost of calling card or use their own money and expect repayments from the members of the public. Such conditions make the police trade off their independence and dignity in order to gain resources required to perform their functions well.

It is difficult to settle in Northern Kenya. Police officers transferred from other parts of the country like Nairobi, central, coast, or Western Kenya find it difficult to settle in Northern Kenya. One reason is that while police officers can live with their families when working in other parts of Kenya, lack of basic infrastructure,

amenities, insecurity and harsh living conditions in Northern Kenya make it difficult for police officers to live with their families in the region. Therefore, they live alone and only see their families once a year when on leave. Those transferred from Nairobi observed that they had to transfer their families to western Kenya when they were transferred to Northern Kenya because they lost their houses in Nairobi. Those who had children in schools were required to find new schools in western Kenya and for some; their children's education was interrupted. While government payed for the cost of the transfer of the police officers it did not provide allowances for family resettlement. These changes have effects on the psychological and social well-being of police officers, because in the long run, they see the transfer as a burden government imposes on them, hence they lose morale for work.

Power connections determine who goes to Northern Kenya. "No one wants to go to Northern Kenya" a police officer remarked. A part from transfer on the basis of disciplinary or probation grounds, those who are transferred to Northern Kenya are those with no power connections in the police force. Most likely, they are officers who have no relatives or friends in the high ranking positions of the force. They largely belong to the poor class, worked hard to join the force, and were recruited on the basis of merit. Their survival in the police force purely depends on loyalty and obedience, because they have no Godfather to shield them from such transfers. Yet in their faithfulness, they are assigned the most difficult areas of the country to enforce the law.

The problem of housing. Police officers observed that they lived in makeshift houses. Most of them were studio like rooms some of them round in shape. They are made of timber, iron sheet walls and iron sheet roofs. Fire, a 6.5 feet tall police officer, a giant of a man said police many police officers of his height hardly stood in their houses because their heads would often hit the roof. The houses do not have electricity and water. They use kerosene lamps or candles for light and have to buy dry batter cells for their radios. They have no access to television. Because of hot temperatures, they sleep with doors and small windows open, unless it is a cold night. Such a living condition does not motivate police officers to work effectively and passionately.

Concern for family. The magnitude of insecurity in the region makes police officers live in constant worry about their lives and their families. Norman

shared his experience witnessing three police officers who were shot dead at different times, by bandits because they were caught unaware while talking to their family members or after talking to their family members on phone. He observed that while it is not safe for them to do so, concern for family is such overwhelming to an extent that police officers have become counselors to their families. Family members live in constant worry just like the police officers. They call quite often. They want a daily update. Because of the communal nature of family life in Africa, more than one family member calls in a day. While interaction provided moral support for families, it weakens the performance of some police officers.

Table 4.22 Select Statements from Junior Police Officers

Significant Statement	Formulated meaning
“No one wants to go to Northern Kenya”	Northern Kenya is a difficult place to work. One can’t voluntarily chose to go there
“ It’s like a police officer does not need a house”	Government does not care about the living conditions of the police
‘Here if you want to survive, encourage yourself’	There are no incentives to offer the police morale and motivation. The police motivate themselves in order to live through the challenges. It is about their lives
“you don’t know if you will ever return home alive”	The life and work of police officers is characterized by considerable uncertainties or unpredictable circumstances
“When you arrive they keep telling you ‘remember this is Northern Kenya”	You must be resilient, expect things not be usual, be tolerant, better get used to it, this is how we do things around here, it’s not a big deal here, sorry but that is how it is

Table 4.22 (Continued)

Significant Statement	Formulated meaning
“If my daughters were not in high school, I would have resigned”	Police work is a sacrifice to family, something an officer will do for their loved ones, rather than enjoy it as public servant

The select statements in table 4.22 indicate that police officers find Northern Kenya a difficult place to work. They work there because they probably have no other alternative. They also find government not concerned with their living conditions. They lack motivation and therefore just work as a sacrifice for the ones they love, because they don't find pride in serving the nation under such circumstances. They live and work in the midst of uncertainties, in which they are required to: develop resilience; not expect things to work well as usual; and get used to this kind of life for their own survival or understanding. These conditions do not provide the resources and environment necessary for ensuring that police do their work in ways that promote access to justice.

Initially I thought the police were inconsiderate, inhuman, and that they enjoyed working in northern Kenya. I assumed that torturing people during police operation gave them some form of pleasure and imposed reverence and power over the population. I assumed that unlike the marginalized people of northern Kenya, the police enjoyed privileges and protection from government. At the time I was concluding this study, I believed that both the police and the people of Northern Kenya are alienated from government and public policy benefits. The police like the people of Northern Kenya are marginalized. The extreme injustices the police commit, they do it for their survival. Even though it is not right for them to do so, it is a fact in what they do. The police like the indigenous people of Northern Kenya suffer from the externalities of Kenya's politics of exclusion and class.

These experiences do not empower the police to effectively function to ensure access to justice. Such experiences also fail to create a conducive environment, where the police and members of the public can freely work together, based on

mutual support and respect for the rule of law worth establishing a just society. Therefore, there is a reason to raise considerable doubt as to whether an alienated police officer, one alienated by the government and the people, with no equipment, living on the edge of poverty, and in a hardship area where friends and foes look alike, can be able to adequately dispense police roles for access to justice as intended in the Bill of Rights. I realized that it is not just the gap and relational tensions between the people and police that hinder justice, but also the gap and relations between the police and government.

4.4.4.3 The Case of Gladys Tarus vs. the Military

In this case, where the channels of appeals are not clear, why can the assistant minister interpret the rules in favor of the applicant in the spirit of the new constitution...In the spirit of the new constitution, interpretation is always in favor of promoting human rights and not against human rights Mr. Mugatana Member of Parliament and lawyer (Kenya National Assembly, 2010).

As indicated earlier in this chapter, access to justice means that: 1) People understand the constitution or the law or the policy that seeks to serve them; 2) Information on rights is easily available in the public domain; 3) State agencies protect everyone equally; 4) Courts are available and it is easy for everyone to get services from them; 5) There is available physical infrastructure to facilitate the process; 6) The culture provides a conducive environment for the judicial system to function well; 7) Cases are processed efficiently; 8) Court decisions are enforced efficiently (International Commission of Jurists, 2011).

To realize access to justice, the role of the courts is of fundamental importance. This is because the authority to ensure that rights are central to the socio-economic life of the people is vested in the Judiciary (Rawal, 2013). However, whether marginalized people can access justice remains a major challenge. The possibility of the marginalized people to go through the justice system, without experiencing undue procedural technicalities, without justice being delayed, and without unwillingly substituting the justice they desire with alternatives like reconciliation, mediation, arbitration and traditional dispute resolution remains a hurdle.

On 8th of October, 2010, the Kenya Defence Forces conducted a military recruitment exercise in Baringo Central District. Gladys Tarus was one of the candidates that attended the exercise. She passed all the military tests and was admitted to the Recruits Training School in Eldoret on 25th of October, 2010. The Assistant Minister for Defence told Parliament that Gladys was the best candidate during the exercise. The Assistant Minister told Parliament that on 25th of October 2010, military doctors conducted another set of tests according to military recruitment procedures, which found Gladys pregnant. She was reported dismissed from the Recruits Training School on 26th of October (Kenya National Assembly, 2010). Daily Nation (November 10, 2010) reported that on October 8th, 2010, the day of military recruitment in Baringo Central district, military recruiting officers barred men from the exercise saying that they would only pick a woman from Kabarnet Division (Gladys' Division). In this case, men would be selected from other Divisions of Baringo Central District.

Upon her dismissal, her family conducted human rights groups on 31st of October and began an advocacy process to try to pressure government to help her return to the Recruits Training School. A network of civil societies, activists, and media pressured government to intervene. The Baringo Human rights Group with the help of media contacted the area Member of Parliament who raised the case in Parliament. On Wednesday November 3, 2010, the case was discussed in Parliament (Daily Nation, November 10, 2010). Unlike the, the Parliamentary Committee on Equal Opportunity which conducted the inquiry and completed its report much earlier; it took about 1 year and 6 months for the Parliamentary Committee on Defense and Foreign Relations to release its official report to Parliament over the case. Information about the report which was adopted on 21st of June, 2012 is not available (Republic of Kenya, 2012).

After dismissal Gladys conducted three independent pregnancy tests at Moi Teaching and Referral Hospital in Eldoret, Kenyatta National Hospital, and Mediheal Hospital. Results from these tests showed that she was not pregnant. The test at Moi Teaching and Referral Hospital was sponsored by Standard Media Group (The Standard, November 10, 2010).

The point of contention was: 1) Whether Gladys was pregnant at the time she was examined 2) If she was not pregnant, whether she was supposed to be re-admitted to the military training school. The defense ministry representing the Military in Parliament argued that military law requires recruits not be pregnant during recruitment and training. As a result, tests conducted by the military doctors on 10th of October, during recruitment did not find Gladys pregnant. However, tests conducted on 25th of October when she reported to the Recruits Training School found her pregnant. As a result, she was not allowed to be re-admitted into the military training. The military denied any case of corruption or unfair dismissal on the basis of discrimination. 3) Given that medical reports from the independent government doctors certified by the ministry of health contradicted medical reports from the military, what was the ministry of defense going to do to address the difference?

The Parliamentary Committee on Equal opportunities concluded that Gladys was not pregnant and that her dismissal was discriminatory. The committee argued that independent tests conducted by government doctors certified by the ministry of health after Gladys dismissal showed that she was not pregnant. In response, the Assistant Minister argued that independent medical examinations conducted by government doctors were different because Gladys had interfered with her pregnancy, a claim he could not scientifically substantiate. The military refused to consider these tests even after being presented with the results. In its decision, the military relied only on reports from military doctors and refused to consider the case further. The ministry of defense further refused the request by Members of Parliament to convene a medical board to further examine the case, since medical reports from government doctors and those from the military doctors were in contradiction. The Assistant Minister for defense told parliament that the ministry could not convene a medical board to examine a recruit; instead senior military doctors had been assigned a duty to examine the case further (Republic of Kenya, 2010).

Gladys, a Kenyan athlete won several trophies locally and internationally, trophies that brought national pride for the nation. Even after losing her case against the military, she continued to pursue her dream trying over and over again to attend recruitment exercises. Table 4.23 shows some of the select statements

she said during her struggle for justice. These statements show a typical example of the experiences of a marginalized person exhibiting determination, hope, and alienation.

Table 4.23 Select Statements about the Struggle for Justice

“He (the officer who dismissed Gladys) told me what is there, just go home, you will try next time, he said ‘your position has been taken’, he said ‘you see this number? When we come to Kabarnet next year, you will tell me and I will recruit you by force” (Citizen TV, November 10, 2010)

“I would have been the first child in my family to secure a job, all my siblings are jobless, but now my dream has been cut short” (The Standard, October 30th, 2010).

“I would like you to help me go back to Recruits Training School, because this is my dream” (The Standard, November 10, 2010).

“Due to my young age, I still have a lot of chances. I have not lost hope that someone will one day give me the Army slot I worked so hard to get” She said in tears (Daily Nation, October 25th, 2013).

Gladys’ case ended on the floor of Parliament. In the end, she was not re-admitted into the military. The case was not taken to court. Her later attempt to attend military recruitment exercise in October, 2013 went futile after she was not admitted on the basis of low academic record. On this occasion, only one girl from Baringo Central, her District was recruited in the Army (Daily Nation, October 15th, 2013). In 2014, she attempted Kenya Police Service recruitment exercise but was unsuccessful. At this time, the Police Service Commission had lowered the entry graded to D+. However, Citizen Television reported that her recruitment results indicated “medically unfit” without any further explanation (Citizen TV, Wednesday July, 2014).

In this case, Gladys and her supporters understood the constitution. They were well informed on rights which were well publicized in the public domain.

However, state agencies particularly the ministry of defense and the military did not protect everyone equally. On the contrary, government protected the military officers and the military institution against one individual citizen seeking justice. Even though parliament acted impartially, and ruled in favor of the constitution, it was limited in the extent it could go in establishing further truth, or ensuring that government obeyed its ruling that the victim deserved to be re-admitted into the military. Courts were available and it was relatively easy for everyone to get services from them in this part of the country. However, Gladys' case was not taken to court. Alternatively, the bureaucratic adjudication by the military administration and the ministry of defense, and the Parliamentary Committee on Equal Opportunities which has legal powers equal to the high court heard the case in time, and gave contradictory rulings.

There was available physical infrastructure to facilitate the process for instance hospitals, media, and transport systems. As a result, the case was efficiently executed. The culture provided a conducive environment for the justice system to function well. There was adequate support and political pressure for justice for instance support from: Federation for Women Lawyers (FIDA); Kenya Human Rights Commission; Media; Individual Members of Parliament; Kenya National Union of Teachers (Baringo District); and the Women Parliamentarians Caucus. The case was processed efficiently. While the military decision was enforced efficiently, Parliamentary decision was not enforced but rather rejected.

This is a case where attempts to further investigate what actually happened in the military recruitment process which resulted in Gladys' dismissal were aborted by the Ministry of Defense. Efforts by parliament to uncover the truth were frustrated by the policy decisions of the Ministry of Defense and the military. Avenues to get to the bottom of the matter were sealed. It is a case where the Ministry of Defense rejected both the appeal for Gladys' case as well as her re-admission to the Recruits Training School. The Ministry of Defense did not express any commitment to change its policy in the future; neither did it admit any weakness in the recruitment process. Gladys did not get re-admission in the military. Her attempt to join the Kenya Police Service Recruitment did not succeed either. She continued working as an athlete, running for the country.

We feel there is an element of discrimination and unfairness against the recruit. This woman must be taken back immediately to train and serve the country. Parliamentary Committee on Equal Opportunities Chairperson, Mohammed Affey (Standard, November 2, 2010).

4.4.4.4 The Case of Villance Libosho vs. New Kenya Cooperative Creameries

For months, Nelson used to spent lonely times in his banana plantation in quietness, weeping and mourning for the death of his first born daughter Villance Libosho. On one occasion, he attempted committing suicide, thanks to good Samaritans who intervened to save his life. The most painful experience in his life and that of his family was not only the loss of a daughter, but also the institutional and economic barriers to justice. This experience is comparable to other cases analyzed in this study. It focuses on what happened to the individuals who were seeking justice. The aim is to exemplify the struggle marginalized persons go through when they engage the justice system while seeking justice. The goal is to mobilize the reader around socio-economic and institutional factors that need to be addressed if marginalized people are to get justice in Kenya.

Villance was born in 1986 in Kakamega District. She attended St. Joseph Primary School and St. Agnes Shibuye Girls high school. She was the first girl in the District to join Moi University and to pursue Bachelor of Science (Production Engineering). In February 2010, she applied for internship at the New Kenya Cooperative Creameries (New KCC). Upon successful admission, she began her internship on 12th of April, 2010. Unfortunately, she was killed on 4th of June, 2010 in an industrial accident while working at the New KCC plant Miritini Mombasa. She was a fourth year student.

At the time of the incident, New KCC was a public company and the largest dairy industry in East Africa. It operated under the Ministry of Cooperative Development and Marketing. The company which almost collapsed in 1990s was being revitalized by government, an initiative that began in 2003. The industrial plant at Miritini Mombasa, where Villance was killed was undergoing renovation in preparation for re-opening of the industry.

I knew Nelson quite well. He lived in the neighborhood. I saw his children including Villance grow. Nelson was a primary school head teacher. His wife Noel was a farmer and entrepreneur. He was a family friend. As a result, I was actively involved in the mobilization of the efforts in pursuit for justice following Villance's death. I was in Mombasa on that fateful day, when Nelson contacted me about 7pm in the evening, and asked me to meet the New KCC manager, and find out if his daughter was still alive or dead. At the time, Nelson and family were in western about 1,500 kilometers away. The company had informed him that his daughter had an accident and was in critical condition. As a result, they needed him his relative or friend immediately. I met the manager that evening, found out that Villance was dead, informed Nelson and a network of friends in the city, and went to view and confirm the state of body at the mortuary the next morning.

Apart from the New KCC manager, I had an opportunity to talk to a number of people for instance: two fellow engineering intern students who witnessed her death while working with her; the company's public relations manager who worked with us for a day or two as we organized for the funeral; Villance's boyfriend, who also worked in the company and was very helpful in mobilizing the people who were present and had an idea of what happened; the security guard at the mortuary; one mortuary attendant; the doctor who examined the body on the day of the accident upon, arrival at the Coast General Hospital and who conducted the post mortem examination two days later; Nelson's family lawyer; and the police officers from Chagamwe Police station who handled the case.

Witnesses to the accident said at 1 pm, during lunch hour, the manager ordered the intern students to lift, carry and fix a heavy pasteurizer machine before going for lunch. Because the company did not have a folk lift machine, they were ordered to lift and carry it manually. As they carried the machine, pulling it along a rail metal above their heads, the machine overwhelmed them, slipped off their hands and fell towards Villance. As she tried to escape, her workshop coat, caught in the pieces of metal stocked in the building held her up. Unfortunately, the heavy machine fell on her and crushed her head. She died instantly at around 1:30 pm. She was then rushed to the hospital where the doctor confirmed her dead before arrival. The students were working without helmets because they were not offered. The building

was also under construction. As a result, other construction projects were going on in the same place at the same time.

Villance's parents understood the law. They hired a lawyer who interviewed some of the witnesses, gathered preliminary information, wrote to the company, and advised the family. There was a strong social network which volunteered information that was basically resourceful for the case. However, the police were reluctant to conduct investigations; they did not secure the accident site, did not interview the witnesses, rather they interviewed the manager. When asked for the investigation report, the police always told Nelson's family lawyer that they were still investigating the case. The best information they provided to the lawyer was the statement recorded after the accident occurred. In this case, state agencies involved except parliament did not treat everyone equally in the way they handled the case.

There was adequate physical infrastructure to facilitate the case. Even though courts were available and easily accessible, challenges in investigations and securing evidence hindered the efficient progress of the case. As a result, there was insufficient evidence to proceed with the case to trial. The culture provided a good environment for the judicial system, except in the case of the conduct of the police and the Ministry of Cooperative Development and Marketing. Villance's parents were educated. They knew the value of education and had a good social network that provided moral, intellectual, and legal support. Kenya Union of Teachers (KNUT) Kakamega branch mobilized efforts to conduct the area Member of Parliament to attend the funeral, take the matter to parliament, and mobilize political support to pressure government to act appropriately. Moi University Students Union and faculty of engineering students publicized the case on social media and held demonstrations in the funeral urging the area Member of Parliament to take action. Local community radio stations also provided advocacy.

Villance's case was presented to Parliament by Hon. Kizito Mugali, Member of Parliament for Shinyalu Constituency on 23rd of June, 2010. The case was raised as a matter of urgent public importance demanding a ministerial statement (Republic of Kenya, 2010). Ministerial statements inform Members of Parliament about matters of government policy or actions concerning something that has happened or is happening, which Members of Parliament consider of public interest

or concern (Parliament of the United Kingdom, 2014). Ministers are asked questions about issues or departments, for which they are officially responsible.

In Villance's case, the point of contention was: 1) What were the circumstances surrounding the death of Villance Libosho Lukhavi while on internship at the New KCC Miritini facility? 2) Whether these circumstances involved negligence on the side of the company? 3) Measures the minister had taken to ensure that the family had been compensated (National Assembly, 2010).

The Minister for Cooperative Development and Marketing told Parliament that on 4th June, 2010, at about 2:00 pm, while in the company of other members of the engineering team, an ex-Nyahururu pasteurizer (a machine formerly used in another plant in Nyahururu town) machine that was being moved accidentally slipped and fell towards Villance's direction. Unfortunately she was not able to escape in good time. The Machine fell on her and she was seriously injured. She was immediately rushed to Coast General Hospital where she was pronounced dead upon arrival. The accident was immediately reported at Changamwe Police station. "At the time of the accident, she was working on a building that was under construction. It was unfortunate that the girl was on the other side of the machine which was sloppy, and it slipped and smashed her." The Minister told parliament. The minister also reported that there were many machines moving all over the place. As a result, he had talked with the company executive to see how best to protect lives in the future, so that such things don't happen. The minister argued that compensation was a matter of personal insurance scheme. Regarding negligence the minister denied that negligence occurred (Republic of Kenya, 2010).

Since the main question in this case is access to justice, it is important to explain what would have happened under normal circumstances. I asked a human rights activist and a police officer, what would have happened if Villance was killed in an industrial accident in Kenya when the justice system was functioning as it should. The following are the things they listed:

- 1) There would have been a mandatory police investigation as well as an investigation by the government agencies charged with protecting worker safety. This is a right for any worker harmed on the job and these investigations are conducted at no cost to the worker or family.

2) Involved persons (including anyone present at the time) would be questioned / interviewed, and statements taken which become part of the legal record and can be used later in a court case.

3) Police investigations become part of the public record, and the results of the investigation can be obtained by the family once the investigation is concluded. Sometimes there is a fee for the photocopying of the documents, otherwise the documents are available by right and asked for under the “Freedom of Information Act”.

4) Police actions during the investigations can include:

(1) Telling people not to leave the country and making themselves available and their whereabouts known to the police during the course of an investigation

(2) Arresting or jailing any suspects. Charging of a crime needs to happen within 24 hours of an arrest (people cannot be jailed indefinitely without being charged with a crime). Crimes can include murder (there are many categories / levels of murder - some are manslaughter, involuntary manslaughter, accidental death, wrongful death, accessory to murder), or lying to investigators and withholding information from investigators.

At the same time as the police investigation, the state agencies charged with workplace safety would be investigating the incident and workplace itself to see how the incident happened. Some of the concerns they would look at can include:

- 1) Is the workplace unsafe?
- 2) Was the victim performing duties outside of his or her normal job responsibilities?
- 3) Were there unsafe pieces of machinery being used?
- 4) Were unsafe practices being employed?
- 5) Was this an accident or a deliberate act?
- 6) Is the workplace up to code – that is, are they complying with the many regulations that protect general worker safety.

Later state agencies investigating the case would read the police accounts and submit their own report that is also part of the legal record. The eventual course of action by the lawyers (hired by the family, and those hired by the company

to defend itself) would be determined by these findings. The owners or responsible parties can be charged with a crime or ordered to pay fines if they are found negligent including the manner in which the workplace is kept or managed.

I asked further, at what cost this case would be taken to trial. From a legal perspective, I was informed that in cases such as this, if a person has died or been injured at the hands of another (including industrial accidents, auto accidents and medical malpractice), there are plenty of lawyers available to help. They most often work on a contingency (or conditional) fee. This means that if they take your case after having reviewed the reports from police and from the investigations, you don't pay any money up front. If they win your case, and they are sure they are going to win it if they agree to take it at all, you will pay them a percentage of the settlement. This can be as high as 35 – 40%. The most favorable aspect of this is that a case with merit is likely to be taken by a lawyer at no initial cost to the plaintiff, so a plaintiff with no money has as much of a chance at justice and restitution as someone who could afford a lawyer.

Furthermore, most wrongful death cases like Villance's are settled out of court when there is investigation well conducted, facts are established, and witnesses are available and willing or can be compelled by the court to testify. Since the facts in such cases are documentable and obvious, it costs the company less money to settle than to pursue a court case, including the "soft costs" of bad publicity. These kinds of cases are covered regularly in the media. If the case were to go to court and the defendant found guilty, they can be held liable for the legal costs of the plaintiff, which can be more incentive to settle out of court. Therefore, Villance's case was a missed opportunity.

In Villance's case major steps and procedure in investigations were not taken into account. It appears the minister used bureaucratic adjudication to deny negligence on the side of the company, particularly on the basis of information he received from the company. The minister did not commit to further investigations regarding the issue. In light of the minister's narrative of events and considering, the nature of the case and public interest, this is a matter that required immediate further investigation and determination.

The major barrier to justice in this case, which was in fact an injustice, was that this case was not investigated as it was supposed to. Like in the case of

Gladys, this was another case where further investigations were frustrated by government systems that were not willing to work on the case further. Like the Ministry of Defense in the case of Gladys Tarus, the Ministry of Cooperative Development and Marketing under which New KCC operated played a defensive role rather than facilitating investigations. The minister prejudged the case and made a final verdict on the basis of preliminary information given to him by the company and the initial police statement. The family did not proceed with the case, after private legal investigations indicated that evidence sites were not secured by the police, but destroyed by the construction that was going on at the site. Information about witnesses was also concealed.

4.4.4.5 The Case of Mercy Keino

On the 17th of June, 2011, Mercy Keino, a former Masters Student at the University of Nairobi student was killed under unexplained circumstances. The Girl was last seen alive on the night of 17th June, 2011 while attending a party at the Wasini Luxury in Westlands Nairobi. Her body was found on the wee hours of the morning along Waiyaki way Nairobi. Following pressure from Members of Parliament, media, University students, and human rights groups, the Director of Public Prosecution ordered an inquest to establish the cause of her death, after the police investigations failed to establish what caused her death. By 4th of April, 2013, 23 witnesses had testified before the court. At the time, the prosecution was looking forward to call 33 more witnesses to testify (The Standard, Thursday 4th April, 2013).

This is an example of a case that reached trial. Currently, the case is before the court. While the court will determine the cause of her death, and the end of the case will determine whether justice was served, the purpose of this case is to account for the struggle for justice. Based on reported events, the case exhibits socio-economic and institutional factors that hinder access to justice. Mercy's case serves as a typical example to exhibit the struggle for justice in Kenya, when necessary conditions like: availability, will, or interest of the media to continuously cover the story; well-coordinated socio-political networks to push for the case to reach trial; investigations going beyond what the police can do to gather evidence and establish facts; and when there are resources to push the case to trial; even when the accused is a powerful figure.

Mercy's father, a lecturer at Moi University told the public inquest that his wife called him on 18 of June and informed him that he could not trace their daughter after she attended a party with a friend. He called the fiancée who confirmed that Mercy had accompanied her friend called scholarstica to a party at Wasini luxury home in Westlands, Nairobi and she could not be traced. Her death occurred just two months after her father had negotiated pride price with her fiancé's parents. Mr. Keino told the inquest that when he visited the club where her daughter had been to the party, a security officer said two men brought Mercy out of the party and dumped her at the gate. Two women came, took her back to the party, only to be thrown out by another two men. This time she came out running away. He said he asked other two guards at the club who showed the gate the girl passed through as she ran from the club, followed by two men. The gate was towards Waiyaki way, the street Mercy's body was later found. That was the last time she was seen (Daily Nation, December 16th, 2011).

Initial Police account reported by media showed that Mercy accompanied her Cousin Scholarstica who had been invited to the party by another friend called Jacky. Mercy and Scholarstica met Jacky and two men who were strangers to the cousins at a petrol station at Hurlingham. At that time, one of the men took their names saying he had to inform the host of the party who was coming to the party. The man then escorted them to the house where the party was held, left the party and returned with other young women. Juja MP William Kabogo arrived at the party in company of another man who identified as Joram. There were about 10 men and 12 young women aged between 20 -25years in the party. Some reports said it were Mr. Kabogo's body guards who got Mercy out of the party; while other reports said it was the security guard (Daily Nation December 16th, 2011). During the public inquest, the police had two theories of the case. One police officer investigating the case said that Mercy was killed in an accident, ran over by vehicles; while the other police officer said investigations showed that Mercy was killed somewhere else and dumped on the road (The Star, Wednesday 23rd July, 2014).

Charles Keter, Member of Parliament for Belgut constituency disputed the report by police that Mercy had been killed in a road accident and her body had been run over by vehicles. He raised the matter in parliament demanding further

investigations (The Star, Wednesday 23rd July, 2014). A care taker at Wasini luxury Homes told the public inquest that he saw Mr. Kabogo step on Mercy who had fallen down on the floor and slap her twice as other two girls and his body guards pleaded with him to stop the assault (Capital FM, September 11, 2012). Member of Parliament for Belgut Constituency Charles Keter provided political support to the family, accompanied the Mercy's father to the police to record statements, and made press statements adding political voice to the efforts made to realize justice (Daily Nation December 16th, 2011).

It is important to understand why Mercy's case captured much public attention, yet it appears like any other criminal case. The following issues can help shed light on the issue. 1) Given the contradictory investigation reports it was not clear whether Mercy was killed in a road accident or somewhere else. 2) Statements of witnesses at the club which indicated that she might have fled the club for unknown reasons required further investigations. 3) Reports that Mr. Kabogo attended the party and was seen assaulting Mercy raised more questions given that Mercy was later found dead. 4) Reports that a witness called the police to inform them of a body that was seen tossed on Waiyaki way from a dark Mercedes Benz raised suspicion that could not go without further investigations. 5) Reports that the Police Commissioner disputed the murder theory in favor of the road accident theory, on the basis of preliminary investigations was not satisfying. 6) The Director of Public Prosecution (DPP) found police investigations inconclusive hence ordered a public inquest into the issue. The DPP said there was no sufficient evidence to show the girl was killed in a hit-and-run car accident (Daily Nation, December 16th, 2011).

However, there is more to this case. The following issues can help provide more insights. 7) The case was about a university of Nairobi student, whose father was also a university lecturer. Since 1960s, university of Nairobi community often volunteers to get involved in national issues of political interest. 8) It occurred in the heart of the city where media attention is high. 9) It involved a political figure, Mr. Kabogo who in 2010 was named a drug baron suspect by the Internal Security Minister (Citizen TV, December 22nd, 2010). That was a good story to cover because it attracted media interest. (10) The Political will by Mr. Keter then Member of Parliament for Belgut mobilized political pressure and support for the case to

continue. Keter is a very influential politician with firm stand and passion on issues of justice in Kenya. Mercy came from his constituency.

Police failures exhibited in Mercy's case included: 1) Failure to trace identifiable witnesses and bring them to court; 2) police presented to court only the senior police officer who investigated the case; 3) on one occasion, the police investigating officer came to court without witnesses; 4) an officer investigating the case was ordered to hand over the file before he completed analyzing the evidence and another one was asked to take over under unexplained circumstances; 5) the investigating officer reported that the key witness in the case was missing, while the counsel representing the Office of Director Prosecution argued that the said key witness was not missing, and that she was living in Kiambu county. The police had just failed to reach her (Daily Nation, March 25th, 2013).

This case reached trial, partly because the people involved understood the constitution and the law. They realized the limitations in the police investigations and addressed them in time. Information on rights was easily available in the public domain. The vast majority of the participants in the case were quite informed on rights. Media followed up the case from time to time and highlighted the pitfalls in the case. It conducted good publicity of the case particularly in ways that kept the public conscious of the justice issues that were emerging from the sad experience. Even though Parliament did not order an inquiry through parliamentary committees like in the case of Gladys Tarus, it provided political support that gave strength to the public inquest ordered by the Director of Public Prosecution.

Unlike in the other cases discussed in this study, the Director of Public Prosecution intervened in the investigations when the police were conducting investigations in ways that appeared partial. By doing inconclusive investigations, by making conclusions before investigations were complete, and by failing to bring witnesses to court, the police appeared to conduct their work in ways that would in the end deny Keino's family the justice it was seeking. Courts are available and it was easy for everyone to get services from them. In this case like in the case of Villance, the problem was more about how the police conducted investigations. There was available physical infrastructure to facilitate the process. The culture was strongly pro-justice. This created a strong environment for the judicial system to function well

even when the police functions in the case were interfered with. The major challenge in this case, was the way the police handled investigations.

4.4.4.6 Structural Silence, Crime and Justice: A Study of a Samburu Girl

The reason for taking the courts closer to the people after the reforms in the Judiciary was that courts should be available to hear and determine cases. In fact, the mobile court policy is redistributive. This means that it is aimed at providing justices to marginalized communities that did not have access to justice before. The authority of the courts is to enforce the Bill Rights. Courts exist to assert the rights that protect human dignity and fundamental freedoms.

The availability of courts in society attracts public expectation that courts shall protect women, children, and individuals who cannot defend themselves, because they are vulnerable to exploitative forces in society. However, as this case will show, bringing the court closer to the people does not necessarily mean that marginalized individuals and groups will access justice. This case will show that there are several invisible and visible barriers that stand in the way of indigenous people who try to seek justice from these courts. The reason for telling this story is to raise awareness of the existing socio-cultural, economic, and bureaucratic barriers that stand between the courts and the individual. By doing so, we hope that we can mobilize the reader around the narrative about the importance of breaking the identified socio-cultural and structural barriers, so that the courts can play a more effective role in enforcing rights and settling disputes in society as intended.

In this section, I will present an event narrative about a Samburu high school girl who disappeared as she tried to seek freedom from a forced marriage. It is a story that exposes negligence on the side of the local provincial administration, lack of concern from society, and the interrelationships between poverty and family as well as culture and wealth. It is a story of a girl who did not get justice because she was a poor girl, who found it difficult to wrestle with a culture that did not care about her future. With diminishing strength, she found it hard to fight a wealthy rural man who controlled her family. It is a story of a girl who was disappointed by a provincial administration that frustrated her efforts by turning her in to the traditional elders who cherished and venerated the outlawed forced marriages.

In this story, I present what happened when Lona (not her real name) was seeking justice and how people involved felt. Within this narrative, I will also use hermeneutics approach to look at the larger meaning of this narrative or parts of this narrative. In this case, this narrative is a vehicle that takes us through the sociocultural context in which Lona lived and strived to seek justice. The purpose is to show how the worldview, structural and power relations of the time influenced the actors who denied Lona her future. The reason for using this approach is to expose factors that hinder indigenous women from accessing justice.

Lona was in her first year in high school when she ran away from home. That evening, Lokorio, a security guard at the Friends (Quakers) mission heard her hit and shake the gate. She wanted it open quick. She had come to see Carra (not her real name) an American missionary and Isaac (not his real name) the head of the Mission. She was seeking refuge at the mission because she had learned that her poor parents were preparing to circumcise her then marry her off to a wealthy man in the village. The man had already paid some of the dowry, an unknown amount some of which the father was using to prepare for her circumcision. Before joining high school, Lona was among the bright girls in her district. Her hard work and intelligence had won her a scholarship from John Sarrin scholarship fund, an American Quaker fund for needy students around the world. Lona wanted to become a doctor so that she could help her community achieve better health outcomes.

Lona learned about the plan to marry her off as soon as she returned home for mid-term break. Her parents happily informed her of the decision to marry her off and asked her to immediately join the preparations. She reluctantly accepted, but after a few hours of deliberation, she sneaked out and fled to the mission. In this remote region, Lona saw the mission as the safe place to run to. For years, this mission has helped hundreds of girls to secure their lives from early marriages, through cultural transformation programs. Usually, this programs use dialogue and education to encourage wiling indigenous families to educate girls. Like Lona, some girls are sponsored for secondary education.

After Lona shared her story, Carra wanted to call the children's department, human rights commission or the police but Isaac who was the head of the mission, and who came from the community refused the idea. Isaac said that because

of the larger relationship between the mission and the community, the suitable government authority to inform was the chief. The chief is a local provincial administrator. Isaac argued that the chief would hear the case, talk to the parents, and determine whether to take the case to the police, inform the children's department, or the human rights commission. He observed that because chiefs settle community disputes and mediate between government and the people, he was confident that the chief would fairly address the matter.

He also thought that if they called the police, the police would arrest Lona's parents and beat them, the community would see that and distrust the mission, and Lona's parents would curse Lona. If they called the chief, the chief would settle the matter through dialogue and would warn the parents not to do so again. Later on, Carra realized that even the chief had married off his daughters before the age of 18 years, something Isaac said he did not know before.

The next morning, they reported the case to the chief who came to the mission and heard the case. The chief then asked them to report to his office the next day. When they went, they found a council of elders waiting for them. A few hours later, the chief met separately with few elders, before he asked all people to gather under the tree, where the hearing was going to be held. The meeting began with traditional prayer to Nkai the god of the Samburu people. Carra, Lona, Lona's mother and other women sat in the outer circle, according to the tradition while the elders sat in the inner circle. Isaac presented Lona's case before the elders, while Lona's father spoke for himself.

While Isaac was still speaking, he was cut short by one elder who asked whether Isaac, one who had abandoned the traditions and joined Christianity had come back to them, with a case that he expected them to rule against their own traditions and beliefs. Elders were furious; some argued that the presence of Carra, a white woman was an insult to the reverence of their traditional council. The chief abruptly ended the meeting and called Lona and her parents in his office. After a few minutes, Lona's parents left with Lona. The chief remained in the office and did not come out to address the people. An administration police officer on duty did not allow Isaac or Carra to enter the office. Instead, he told them to go home because the case was over.

When Carra asked about the chief's judgment, the officer told him that he did not know Samburu traditions because he was not a Samburu, and that the best thing Carra would have done was to ask Isaac who knew well these traditions. When Carra insisted, the police officer told her, "Don't just blame the hyena for eating the goat. Blame the goat as well for wandering in the wilderness." Isaac later said this statement meant that Lona's parents were to blame for accepting dowry just as the wealthy rural man was to be blamed for bringing to an end a girl's education.

Elders continued to speak to each other under the tree as they looked at Carra and Isaac who stood that the door of the chief's office. The police officer soon got frustrated and furious asked them to leave. Isaac walked away to his truck, started the engine, and asked all people who had come from the mission to get in and go. "It's over, you can't do anything. You can't fight here" Isaac told Carra as they drove off. That was the last time they saw Lona. Carra's efforts to call the police and the children's department went futile since they did not respond to her request to intervene. Soon she gave up because the mission did not have the capacity and mechanisms to pursue the case.

This is a story about a girl who lost her dream as the mission watched helplessly, because the head of the mission compromised the girl's future fearing that if he defended the girl, the church would become unpopular and hence would get few converts among the Samburu community. It is a story of a chief, a local provincial administrator who upon receipt of the sad news chose to take the case back to traditional elders, instead of taking it to the court and reporting it to the children's department or Human rights commission. It is an incident in which the girl disappeared and could not continue with studies, because her efforts to seek justice were thwarted under the watch of a provincial administrator, who chose to ignore public policy, and failed to observe justice and fairness, because he wanted to be loyal and bound to the tradition. At the age of 15 years, in first year of high school, her education sadly came to an end. Lona did not access justice because justice here was difficult to find under these circumstances. Her story reflects what other women of her kind go through.

4.4.4.7 Justice and the People's way of life: A Study of a Turkana Woman

Understanding the lived experiences of individuals who have gone through the justice system after the reforms helps us to understand the way services are now delivered, areas that are functioning well, and those areas that are not functioning well. With such information, you can be able understand the factors that hinder access to justice, and can also be able to gain insights that can be helpful in formulating strategies to improve access to justice.

If you were to go back in time, to the 1st of April 2013, you would see a Turkana woman wake up early in the morning going to fetch water about 12 kilometers away. You would hear her tell her 14 year old daughter to wake up and clean the house. You would see her move out and back inside the house, and you would hear her say to her daughter "Hey wake up even if it is Easter holiday." You would see her finally leave the house, tie water cans on her donkey and leave for the oasis.

It was a busy morning with a bright blue sky. As early as 6:00 am, the sun rays had given a glimpse of what a hot day it was going to be. Strong winds were blowing all over sweeping the dust up in the air. One would hardly see through it. About half an hour after this woman left her house, her daughter decided to open the door. What followed was tragic. It was an experience that changed the lives of this family. A neighbor she well knew pushed her inside hit her on the head and defiled her. Neighbors concerned with the screams broke the door of the house and arrested the man. They later took him to the nearby police station which was about 15 kilometers away.

In this section, I present an event narrative about what happened when this woman was seeking justice? How people involved felt? What larger ramifications if any emerge from these experiences? It is a case narrative about a Turkana woman who was frustrated by the justice system in 2013, and later turned to the traditional mechanism of dispute resolution. This woman is a widow whose 14 year old daughter was defiled by a neighbor she knew well. Naka (not her real name) had a lived experience through which you can be able to see the defects and dysfunctions of the justice system even after the reforms in the Judiciary and the implementation of the

mobile court policy. Through her life experience, you can see the struggle of the poor indigenous women seeking access to justice in a justice system that is still too far to reach, complex to address, foreign to relate to, and expensive to afford. It is a slice of the lived experiences indigenous women seeking justice share, a slice that point to some implementation failures which exposes factors hindering access to justice.

Denial: Upon return, about Naka felt strange to find two of her neighbors sitting in her house late in the afternoon. “Something might be wrong” she said as she curiously looked at her daughter who sadly sat in the corner of the house. Her neighbors embraced her, cried and comforted her. “Our neighbor! How can he do this?” One asked as the other went on to tell the story. Broken and faint, Naka rushed to sell her goat to a middle man at US\$20. Even though she had gotten money to take her daughter to hospital, the nearest hospital was about 50 kilometers away and only provided outpatient medical services. Therefore, she waited until the next day. Reality was too hard to accept. One of the neighbors who witnessed the arrest said she thought it was not serious.

Safety: The next day after taking her daughter to hospital, Naka took her to the Friends (Quakers) mission center. Missionaries gave her shelter, counseling, moral support, and helped to provide funds to pursue the case. They also helped to raise funds to support her witnesses who were required to travel with her to the police station the next day. One missionary decided to pursue the case along with Naka and provide support.

Interdependency: Even though Naka expected to return soon to the police station with medical reports, in order to book the case; it took two days to convince the witnesses to come along and witness. This is because women witnesses in the case needed to ask permission from their families. Naka observed that culturally, a woman is not just an individual but tied to part of a larger society-children, family, dowry, the unborn and the dead. All these must be considered in her decision. Another informant observed that for women, there is no life outside marriage or family. To be human is to belong to the community. Therefore in some cases, community or family interests prevail against individual will.

Trivialized investigations: Upon arrival at the police station on the third day, the police argued that they could not hold on the suspect beyond 36 hours before

appearing before the court. The mobile court was not coming to the region by then. Therefore, they needed to take the suspect to court in Lodwar that very day but did not even have the means to. They began to hurriedly record statements. Some police officers made jokes about witnesses who could not articulate issues quickly. “Don’t listen to these women and take action. How do we know, maybe this man was the victim’s boyfriend.” One officer spoke sarcastically. “When I saw the way things were handled I felt the police wanted to shelve the case. Therefore I offered my truck to take the victim, witnesses, the police and the suspect to Lodwar.” said the missionary who had accompanied Naka. In Lodwar, the police secured an urgent court appearance, and remand of the suspect pending further investigations. Hearing was scheduled in a month’s time.

Sustaining the case: Although Naka had successfully secured a court hearing, she faced a number of challenges. Some of her witnesses began to resist the trial saying they were not able to cope up with police pressure. They feared that the magistrate was going to treat them the same way the police had. Others said it was not worthy to take a kinsman to the police when one could settle the matter under traditional system. One willing witness who had remained positive about the case finally gave up. She said the case conflicted with her family priorities, which she could not reschedule, because she considered these priorities part of their spirituality as a people.

Diminishing community support: With diminishing community support for state driven justice, Naka encouraged herself to pursue the case. On the day of the hearing only Naka, her missionary friend and her daughter went to court. All the witnesses had fallen back. When they arrived in Lodwar that afternoon, they found out that the court had released the accused in the morning when the case was brought before the court, in the absence of the complainant and the witnesses. Their truck had broken on their way to court. As a result, they spent some hours fixing it. Because of this they technically missed the hearing since they made no formal communication to the court beforehand.

Justice the people’s way: Naka went home a disappointed person. The accused went into hiding for several months until one morning during 2013 Christmas holiday when he was arrested by villagers while visiting his family. Immediately, the

traditional council of elders called for a customary court to try the man. Naka, her daughter, and the witnesses testified. After hearing the case from sides, deliberations, seeking public opinion, and consultations, the customary court ruled that the man be severely beaten and burned with a hot metal used to brand labels on livestock according to the tradition of the Turkana. The accused also paid one bull and one white sheep which were used for ritual sacrifice. After all these, the man walked away free, even though he was severely wounded.

This case study is an example where the mobile court policy does not resonate with the social realities of the marginalized communities, and in particular indigenous women seeking justice. It is a case in which we see people's reluctance to embrace public policy because of the frustrations and complexities they have to endure in order to access justice. The way people approach justice makes the mobile court irrelevant in such cases, hence the need to re-think access to justice by taking into account the values, customs, expectations, struggles and experiences of the people. Furthermore, if indigenous communities will consider their traditional mechanisms successful in areas where the justice system fails and their processes more efficient and friendly alternatives to the judicial processes, then indigenous communities will hardly realize the Bill of rights within their societies. This in the long run will increase inequalities in the country.

4.5 Summary

This chapter is about the findings of this study. The study shows that the context of implementation largely hindered access to justice than it promoted it. Issues such as politics of exclusion, ethnicity, historical marginalization, disrespect to the rule of law, and inequalities across regions and ethnic communities contributed to implementation failure. The study shows that the implementation of the mobile court policy was carried out by a Judiciary that was already constrained, was administratively undergoing transition, lacked effective interagency cooperation with the executive and the legislature, and worked with few judicial staff that intended. As a result, implementation success was realized in the following areas: 1) Taking the courts closer to the people; 2) Realizing equality in justice delivery; 3) Creating a

quicker way to solve disputes; and 4) Making it easy to file a case in court. However, implementation failed on other areas which exposed factors hindering indigenous women to access justice for instance: inadequate staff; delay in legislative process; inadequate resources; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in implementation process; inability to enforce court rulings; lack of legal aid; impunity; and failure to provide basic amenities suggests that access to justice is still a goal too far to reach. Women seeking justice also experience prejudice, lack of moral support from the family or community, denial, interdependency, insecurity, lack of bureaucratic will to enforce public policy, other conflicting interests, trivialized investigations, lack of resources, and conflicting family priorities.

Cases in this study show that access to justice is not only a problem of the marginalized communities, but also the non-marginalized communities. For marginalized communities, the problem of access to justice is rooted in the historical marginalization, ethnicity, and the geopolitics of Northern Kenya as a region historically excluded from development due to its resistance to integration in hope for secession in the 1960s, as well as insecurity issues. For the non-marginalized communities, the problem of lack of access to justice stems from different reasons for instance bureaucratic or political interests, lack of infrastructure, institutional failures, class and bureaucratic adjudication, especially when there are no specific laws to guide policy action.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The purpose of this study was to analyze the contextual factors limiting marginalized persons to access justice in Kenya, with a view to recommend policy strategies which can be used to improve the implementation of the Bill of Rights, particularly the right to administrative action. The study answered the following questions: 1) What is the socio-cultural, economic, and political context of implementation? 2) How was the implementation process conducted? 3) What are the contextual factors limiting marginalized persons to access to justice? 4) What policy strategies can better improve the implementation of the Bill of rights?

I used documentary research, narrative research, and hermeneutic phenomenology approaches to qualitative inquiry. I also used observation, email and Skype interviews to collect data from key informants, documentaries, and digital documents. Skype interviews were largely used for introduction, clarifications, and follow ups. Email interviews were used to collect data except from police officers because they did not have access to emails. Observation was based on documentaries and digital documents like commission of inquiry video clips, National Television news video clips, and recorded relevant forums. The study was conducted for a period of 11 months (June, 2013 to April 2014). I used personal connections, culture brokers, and research assistants to access the participants in the study. I also identified myself as a researcher and let participants know that I was doing research.

Participants in this study were individuals who had either knowledge of, or experience with issues of marginalized people seeking justice, the mobile court policy, and the socio-cultural, economic, and political context of study. These were lawyers, judicial officers, and civil society officials, government officials working in the justice department, and individuals who had direct experience or indirect

experience seeking justice. Technical measures such as credibility, triangulation, referential adequacy, reflexivity, quality, were applied. I also took into account ethical issues such as informed consent, competency, record keeping, using incentives in ways that do not buy or coerce participants, and sharing acquired information with participants for review after the interview.

5.2 Summary of the Results

In response to the question: What is the socio-cultural, economic, and political context of implementation? This study found out that implementation of the Bill or rights is influenced by three contexts. The first context was the national context. This is where resources are determined, influenced by the legislature, and distributed by the executive; and where top-down executive decisions are made. It is also where the executive and the Judiciary rival each other, when the executive looks for votes and political support, while the Judiciary looks forward to restore, increase and sustain public confidence in the Judiciary. The second context is the regional geopolitical context for instance Northern Kenya. This is a historically marginalized context, whose long term effects have alienated the region from the nation, denied the region public policy benefits; and led to dysfunctions between the national government and county governments. The relationship between the state and citizens has also limited the extent implementation has succeeded. The third context is the marginalized persons' context. This is where the immediate socio-cultural and political realities of the marginalized people limit the extent they can access justice. These three contexts exist in relation to each other and are interwoven. They also limit the necessary capabilities and conditions marginalized persons need in order to access justice.

It appears Kenya's political culture which is required to facilitate reforms and implementation is driven by political conjunctures rather than voluntary political will. History suggests that it is a context where government is reluctant to carry out its work as intended in the constitution. On the other hand, the country has a high civic culture. To get things done, people demonstrate, they sacrifice their lives in protests, and they deliberately organize political stalemates.

Kenya is a nation made of other tribal nations within it. This ethno-diversity is highly political in the sense that it creates a constant and complex power struggle

between the dominant and the dominated ethnic communities. This struggle influences the way decisions on national benefits, opportunities, and resources are made, and how these benefits, resources and opportunities are shared or distributed. In the long run, it hinders access to justice among marginalized groups.

To understand the Kenyan context of indigenous communities regarding access to justice, we need to understand the relationship between ethnicity, politics and public policy. Kenya's ethnicity is a social reality which represents the innate cognitive and moral challenge Kenyans have to deal with as they interact with others of different ethnic groups. Historically, the colonial policy required and enforced ethnic segregation. Colonial law also required that African political organizations to be limited to ethnic territories. Over time, this has ethnicized public policy and has entrenched ethnicity in national politics and public service.

Kenyan politicians throughout history have created ethnic centered governance structures, rather than democratic governance structures. Kenya's presidents throughout history have utilized ethnicity as a tool to gain state control, maintain power, and distribute policy benefits. Throughout history, Kenyan governments were hostile to, and crushed efforts to cultivate the culture of democracy required for the improvement of justice. This nature of politics and governance has over time driven indigenous communities to the periphery of Kenyan politics. As a result, indigenous communities are underrepresented in Kenya's civil service. The ethnic nature of Kenya's politics hinders efforts to enforce the culture of the rule of law. Therefore, Kenya's politics and governance represent an environment that is detrimental to justice.

Justice in Kenya is a historical challenge. Therefore, dealing with ethnicity, justice and public policy in Kenya is dealing with a complex historical issue characterized by a series of unresolved socio-political challenges. The nation of Kenya from its colonial foundation and structure was deliberately designed to undermine true nationalism and achieve discriminatory goals. Today, governance in Kenya is facilitated by structures and legacies that are meant to marginalize women.

The quest for independence was envisaged in the struggle for nationhood. It was struggle for the liberties of men, women, children and the future of all regardless of ethnicity. However, women continue to face discrimination; even when

mechanisms exist to protect their rights. This is partly because; the political process which drives the realization of the legal process remains largely unreformed even though the legal process has been reformed. Although women issues constituted a major component of the colonial struggle, these issues were pushed to the periphery at the realization of the post-colonial Kenya. Most of the customary cases examined indicate that the court considers customary law as a major basis in determining civil cases. In some cases, customary law disadvantages women or makes them more vulnerable to injustices. This shows that not much has been done to expand civil liberties that can help women realize access to justice. However, in the absence of the court, customary law helps marginalized communities to address justice issues.

There are a set of historical experiences, geopolitical issues, as well as socio-cultural features that make indigenous communities living in Northern Kenya different from the rest of the country. These features form the contextual lens through which social reality is constructed. Failure to realize this context, within which indigenous issues are explained, is denying the social reality of the indigenous communities.

Politics of Northern Kenya are built around socio-cultural structures, are based on the ethnicization of territories, and thrive on the power conflict between government and local political patriarchs. As opposed to issue based politics, ethnic factors largely influence the way public problems are identified, perceived, or addressed. Because of ethnic politics, local politicians are also tribal patriarchs. They legitimize their political role in society by playing policy entrepreneurship between the tribe and the nation. Local politicians also benefit from the alienation of Northern Kenya, because it renders government irrelevant and makes them a populist alternative. Therefore, Northern Kenya politics are elite centered rather than people centered. It appears these are politics for self-interest rather than public interest. The dominance of such politics does not create room to use politics as an instrument for reclaiming access to justice for the marginalized communities and women.

Indigenous people are different from other ethnic communities in Kenya. First, indigenous people are a minority. Usually, indigenous communities are smaller in size compared to the dominant ethnic communities. Second, indigenous people throughout history have benefited less from the colonial and post-colonial regimes, because they

largely resisted colonization and adoption of western values and lifestyle. As a result, they are largely marginalized. These communities largely rely on pastoralism and limited agriculture for income and livelihood. Unlike the Samburu, the Turkana also practice fishing. For decades, these communities have practiced traditional cattle rustling, as a way to show bravery earn bride wealth, acquire and increase livestock.

Indigenous groups' issues were largely ignored in constitutional reforms until 2010. Before 2010, very little changes were made to address the rights of indigenous communities. Many changes came with the 2010 new constitution which seeks to realize equality. Because of marginalization and the history of conflict, both the Turkana and Samburu communities which are the focus of the study are largely militarized. In response to alienation and exploitative modernization, these communities have continued to sustain and utilize their traditional customary law and judicial structures to settle disputes.

Their African Traditional Religions and values serve as the social capital that consolidates legitimacy for the customary law and judicial process. Given the public confidence the institutions have continued to receive among these communities; individuals aware of social pressure and other implications, as well as their spirituality towards traditional forms of justice, voluntarily adhere to the ruling of the traditional courts.

Therefore, it is important to note that the context of implementation is largely defective such that it does not provide a conducive environment within which access to justice can be realized. This is because there are more factors in this context that promote policy implementation failure than success. Both national and Northern Kenya politics and governance structures are exclusive, ethnic, patriarchal, and do not facilitate or efforts to promote access to justice. Historical marginalization, inequalities and unresolved injustices undermine the value for and sense of nationhood required to leverage and foster access to justice. The dominance of the customary law system and judicial processes, as well as male dominant and selfish politics has in the past failed to provide ground to expand civil liberties for indigenous women to access justice.

In response to the question: How was the implementation process conducted? It is important to first examine the background to the judicial reforms. In this case, it

is important to look at what led to the reforms; examine the political and policy linkages between the reform process and the reforms and how this influenced implementation; examine the meaning of judicial reforms and access to justice; and give an account of what actually happened.

Kenya's judiciary has evolved over the past five decades from a colonial judiciary, which was relatively small in size and structure, to a post-independence judiciary that is more expanded in terms of scope, structure, and size. During this growth, Kenya's policy process has been dominantly elite oriented and driven. As a result, the needs of the masses, particularly marginalized communities and women have not been largely addressed. Therefore, politics of judicial reforms in Kenya rotates around historical injustices as a justification for the need to change. It is important to note that issues of rights and justice were at the heart of the quest for independence and the Kenyan nationhood, multi-party democracy, and lately the new constitution which gave birth to reforms in the judiciary.

History portrays Kenya at independence as a nation with a justice system that did not always work for common people. The legacy of unimpartial judiciary vulnerable to manipulation by the executive continued in Kenya's post-independence era. The running of the judiciary was dominated by political interference from the executive. Historically, the justice system was also used by government to abuse power, harass political rivals, and deny justice for private gains. As a result there was need for reforms. This experience also indicates that the reformed judiciary that was implementing the Bill of Rights under the new constitution was one that was undergoing transformation from an old system that was partial and political to a new system that was intended to be impartial and neutral.

It took a conjuncture to introduce fundamental reforms in Kenya. The grave effects of the 2007/8 post-election violence which claimed over 1300 lives and displaced over 300,000 people reflected the importance of reforms in Judiciary, given that one of the reasons behind the violence was that people lacked confidence in the judiciary hence they opted for a political solution. Therefore, the search for sustainable reconciliation demanded comprehensive reforms. As a result, reforming the judiciary was a fundamental priority in the comprehensive constitutional reforms.

The political process behind the review of the constitution largely influenced reforms in the judiciary. To a considerable extent, the constitutional reforms, part of

which was the reforms in the Judiciary were a combination of legal and political consensus. The bill of rights in particular, was crafted out of a synergy of interests and grievances of the interest groups that participated in the reform process. However, the process was also characterized by cynicism, apathy, suspicion, and deepened hardline political positions, which continued during the implementation period. Largely the struggle in the implementation of the Bill of Rights has been how to address the culture of impunity which is propagated by bureaucrats who represent the old order.

This study focused on the implementation of Article 47 1) and 2) of the Constitution of the Republic of Kenya states 1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”. This section was borrowed from Chapter 2 (Bill of Rights) of the South African 1996 Constitution. As stated earlier the Committee of Experts who drafted the constitution crafted chapter 4 (Bill of rights) of the Kenyan constitution, from the South African constitution in order to create a constitutional measure that provides for the right to administrative action.

To translate this Article into policy measures, it was important to define it. In this case, access to justice means that justice mechanisms are devolved and restructured in ways that translate into fair court processes. This means that every person, even marginalized ordinary people can easily access services from the courts, or demand not only their right to services, but also accountability. Access to justice as intended in the reforms also means that the judiciary will ensure that courts are available in areas that people can easily reach, so that they can get services. It also means that access to justice procedures will be efficient enough so that those seeking justice are not constrained beyond their ability to continue to seeking justice.

In analytical terms, access to justice means that 1) People understand the constitution or the law or the policy that seeks to serve them; 2) Information on rights is easily available in the public domain; 3) State agencies protect everyone equally; 4) Courts are available and it is easy for everyone to get services from them; 5) There is available physical infrastructure to facilitate the process; 6) The culture provides a

conducive environment for the judicial system to function well; 7) Cases are processed efficiently; and 8) Court decisions are enforced efficiently.

Core to the reform strategy in the judiciary is providing access to justice from a rights based approach. To realize this, the initial reforms focused on creating constitutional offices and structures and legal frameworks. These reforms succeeded for instance, establishing administrative autonomy, financial autonomy, Judicial Service Commission, the Supreme Court, vetting judges and magistrates, hiring new judges and magistrates. However, while there was more success at the national level, there were more failures at the mobile court policy.

The Mobile court policy is the public policy where the judiciary establishes courts in areas that were formerly marginalized. The judiciary facilitates magistrates and judges to travel to regions that had no access to justice in the past. It is called mobile because contrary to the past when people used to travel long distances seeking the services of the court, the court is taken where people are. Mobile courts are basically magistrate courts brought closer to the people. The Mobile Court Policy largely falls under the 1st pillar of the Judiciary Transformation Framework 2012-2016, which is people focused delivery of justice. Under this pillar, the Judiciary seeks to create a rights based approach to justice, which is tailored in ways that are responsive people's needs.

Therefore, it is important to note that the implementation process was both a political and legal process. The politics of the time influenced the reform process. The essence of access to justice was to devolve the courts so that they can be available, closer to the people, and can provide services in ways that the communities who were marginalized before can find it easy to access justice.

In response to the question: What are the contextual factors limiting marginalized persons to access justice? It is important to examine the implementation success and failures. The implementation success shows the extent implementation succeeded. Implementation failures expose factors that hinder indigenous women to access justice. It is important to note that some of these factors affect the general population as well. It is important to note that the Judiciary began to implement the mobile court policy when it was already constrained.

The implementation of the policy succeeded in four areas. The first success was taking the courts closer to the people. Those who had no access to the courts

before were able to access the courts. The second success was realizing equality in justice delivery. Taking courts close to the people made it possible for all Kenyans to be subjected to the same judicial adjudication of disputes under the same law. The third success was creating a quicker way to settle disputes. Mobile courts reduce the menace of backlog of cases in courts. The fourth success is that it is easy to file a case. The judiciary provides for individuals who are seeking justice, but have no money to pay for court fees, to be exempted from paying court fees. Individuals who have no writing abilities are allowed to make oral application.

The implementation of the policy also failed in several areas. Inadequate physical access to the courts is still a major problem because even though mobile courts bring justice closer to the people, the sparsely populated Northern Kenya, and the nomadic life of the people make it difficult to adequately realize the objective to ensure that courts are close to the people. This means that mobile courts do not necessarily reduce the physical access especially where people still practice nomadic life.

Financial access remains a major barrier to justice. Even though the Judiciary pays for the administrative costs, particularly court fees, personal costs incurred in pursuit of justice remain high. It is also important to note that not many people fully understand their rights. Therefore, they cannot participate in or utilize the policy. Even though the court simplified procedures to access justice, this information and other necessary information for instance where mobile courts are held, when they are held, and what to do when you want to pursue justice is not easily available. Even though the study did not find the courts with cases of impartiality, the police were reported to be impartial. This means that everyone is not treated equally in the justice system.

Long distances, infrastructure, and inability to pay high costs of seeking justice limit the number of individuals who can access courts and get services from them. Lack of support systems, information and awareness also hinder the extent courts can deliver justice. Factors such as time taken to investigate cases and availability of witnesses within the expected or required timelines determine the time taken to process a case. There are also cases of missing case files or evidences, and withdrawal of witnesses who lose contacts with the courts and are never traced and arrested by the police.

There are inadequate established support systems to ensure that access to justice is efficient and reliable. The judicial staff is also constrained. Inadequate legal representation in marginalized areas with more new cases filed in non-marginalized areas than marginalized areas continues the inequality in access to justice. While it is important to devolve justice, the initiative to establish alternative justice systems is still at infancy stage and has not been realized in the context of this study.

The slow pace at which bills on justice system are reviewed and processed before discussed and passed by the legislature delays efforts to access justice. This hinders the ability of the judiciary to execute specific functions that require passage and implementation of such bills. Delays in other aspects of devolution hindered access to justice for instance the delay of the police to extent police posts to marginalized areas, as well as the Office of the Director of Public Prosecution to hire more prosecutors and devolve prosecution serves to all places the courts are. Because the indigenous communities are prejudiced, some government bureaucrats do not take serious issues affecting indigenous communities even when required to.

While seeking justice, women also experience prejudice, lack of moral support from the family or community, denial, interdependency, insecurity, lack of bureaucratic will to enforce public policy, other conflicting interests, trivialized investigations, lack of resources, and conflicting family priorities. These issues have not been adequately addressed by the policy to improve access to justice.

Furthermore, there are eight cases in this study. All these cases are about access to justice. They show institutional and contextual factors that hinder marginalized persons to access justice. While each of these cases has its own context and boundary, all the cases show varied contexts and perspectives from which one can understand contextual factors hindering marginalized persons to access justice. Three groups of marginalized persons emerged from the study namely (1) Women; the police; and low and middle class families. The following are case summaries.

Case 1: Implementation process: A Case of the Mobile Court Policy

This case was about the implementation of the mobile court policy. The mobile court policy was designed was to ensure access to justice by bringing court services closer to the people, particularly the marginalized groups, and regions that did not benefit equally from court services in the era of the old constitution. Findings

from this case show that implementation success was realized in the following areas: 1) Taking the courts closer to the people; 2) Realizing equality in justice delivery; 3) Creating a quicker way to solve disputes; and (4) Making it easy to file a case in court. However, the context of implementation largely hindered access to justice than it promoted it. Issues such as politics of exclusion, ethnicity, historical marginalization, disrespect to the rule of law, and inequalities across regions and ethnic communities contributed to implementation failure. The study shows that the implementation of the mobile court policy was carried out by a Judiciary that was already constrained, was administratively undergoing transition, lacked effective interagency cooperation with the executive and the legislature, and worked with few judicial staff than intended. inadequate staff; delay in legislative process; inadequate resources; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in implementation process; inability to enforce court rulings; lack of legal aid; impunity; and failure to provide basic amenities.

Women seeking justice also experience prejudice, lack of moral support from the family or community, denial, interdependency, insecurity, lack of bureaucratic will to enforce public policy, other conflicting interests, trivialized investigations, lack of resources, and conflicting family priorities. Finally, the rights based culture which was envisaged in the policy and was intended to facilitate access to justice does not resonate with the cultures of impunity, ethnicity and inter-dependency realized in the context of implementation. This created cultural conflict in implementation.

Case 2: Justice and the People's way of life: A Study of a Turkana Woman

This is a case about a Turkana woman who was frustrated by the justice system, and later turned to the traditional mechanism of dispute resolution. The case focuses on what happened when this woman was seeking justice. The reason for taking the courts closer to the people after the reforms in the Judiciary was that courts should be available to hear and determine cases. In fact, the mobile court policy is redistributive. This means that it is aimed at providing justices to marginalized communities that did not have access to justice before. On the contrary, this case study is an example where the mobile court policy does not resonate with the social

realities of the marginalized communities, and in particular indigenous women seeking justice. It is a case in which we see people's reluctance to embrace public policy because of the frustrations and complexities they have to endure in order to access justice. This case shows that bringing the court closer to the people does not necessarily mean that marginalized individuals and groups will access justice. The way people approach justice makes the mobile court irrelevant in such cases, hence the need to re-think access to justice by taking into account the values, customs, expectations, struggles and experiences of the people. Furthermore, if indigenous communities will consider their traditional mechanisms successful in areas where the justice system fails and their processes more efficient and friendly alternatives to the judicial processes, then indigenous communities will hardly realize the Bill of rights within their societies. This in the long run will increase inequalities in the country.

Case 3: Structural Silence, Crime and Justice: A Study of a Samburu Girl

This case is about a Lona, Samburu high school girl who disappeared as she tried to seek freedom from a forced marriage. This case shows that there are several invisible and visible barriers that stand in the way of indigenous people who try to seek justice from courts. This case seeks to raise awareness of the existing socio-cultural, economic, and bureaucratic barriers that stand between the courts and the individual. It is a story that exposes negligence on the side of the local provincial administration, lack of concern from society, and the interrelationships between poverty and family as well as culture and wealth. It is a story of a girl who did not get justice because she was a poor girl, who found it difficult to wrestle with a culture that did not care about her future. The purpose is to show how the worldview, structural and power relations of the time influenced the actors who denied Lona her future. This case seeks to expose factors that hinder indigenous women from accessing justice. This is a story of a chief, a local provincial administrator who upon receipt of this girl's case chose to take the case back to traditional elders, instead of taking it to the court and reporting it to the children's department or Human rights commission. The girl lost her case on the way to justice when the provincial administrator, chose to ignore public policy, and failed to observe justice and fairness, because he wanted to be loyal and bound to the tradition.

Case 4: The Case of Gladys Tarus vs. the Military

This case is about Gladys' journey seeking justice after she was dismissed from the Recruits Training school on allegations that she was pregnant. It focuses on what happened when she was seeking justice. It is a typical example of what marginalized people go through when seeking justice. This is a case where attempts to further investigate what actually happened in the military recruitment process which resulted in Gladys' dismissal were aborted by the Ministry of Defense. Efforts by parliament to uncover the truth were frustrated by the policy decisions of the Ministry of Defense and the military. Avenues to get to the bottom of the matter were sealed. It is a case where the Ministry of Defense rejected both the appeal for Gladys' case as well as her re-admission to the Recruits Training School. The Ministry of Defense did not express any commitment to change its policy in the future; neither did it admit any weakness in the recruitment process. This case means that whether marginalized people can access justice remains a major challenge. The possibility of the marginalized people to go through the justice system, without experiencing undue procedural technicalities, without justice being delayed, and without failure to realize their dreams is still a hurdle.

Case 5: The Case of Villance Libosho vs. New Kenya Cooperative Creameries

This case is about the late Villance Libosho, then a fourth year production engineering student, who was killed in an industrial accident, while working as an intern at the New Kenya Cooperative Creameries plant in Miritini, Mombasa. The case focuses on what happened to the individuals who were seeking justice. The aim is to exemplify the struggle marginalized persons go through when they engage the justice system while seeking justice. The goal is to mobilize the reader around socio-economic and institutional factors that need to be addressed if marginalized people are to get justice in Kenya. The major barrier to justice in this case, which was in fact an injustice, was that this case was not investigated as it was supposed to. Like in the case of Gladys, this was another case where further investigations were frustrated by government systems that were not willing to work on the case further. Like the Ministry of Defense in the case of Gladys Tarus, the Ministry of Cooperative Development and Marketing under which New KCC operated played a defensive role rather than facilitating investigations. The minister prejudged the case and made a

final verdict on the basis of preliminary information given to him by the company and the initial police statement. The family did not proceed with the case, after private legal investigations indicated that evidence sites were not secured by the police, but destroyed by the construction that was going on at the site. Information about witnessed was also concealed.

Case 6: The Case of Mercy Keino

This is a case about the late Mercy Keino; a former Masters Student at the University of Nairobi who was killed under unexplained circumstances, allegedly while in a private party, in which a prominent Member of Parliament attended. The Member of Parliament is reported to have assaulted her on the night before she supposedly died. This is an example of a case that reached trial. The purpose of this case is to account for the struggle for justice. Mercy's case serves as a typical example to exhibit the struggle for justice in Kenya, when necessary conditions like: availability, will, or interest of the media to continuously cover the story; well-coordinated socio-political networks to push for the case to reach trial; investigations going beyond what the police can do to gather evidence and establish facts; and when there are resources to push the case to trial; even when the accused is a powerful figure. Factors such as Mercy's family background; political commitment and political leadership to follow up the case and mobilize political support; the environment; and complimentary investigative agencies involved, partly account for success, bringing the case to trial. Usually, these resources are not available for many marginalized people seeking justice.

Case 7: The Life of a Police Officer in Western Kenya

The police play an important role in justice delivery. In criminal matters, the police are part of the criminal court procedure. Police officers book reported cases, make arrests, investigate cases, and enforce the law. The police also provide security and ensure peace and order in the society. Therefore, understanding the lived experiences of the police officers can provide insights into factors that hinder access to justice. While police officers countrywide are underpaid, engage in human rights abuses; live on strained relations with members of the society and are treated with suspicion; police officers like other Kenyans believe in a better Kenya. They struggle with life, endure the high cost of living, are ignored by government when they seek

better pay, work extra hours and engage in multiple occupations in order to take their children to school and care for their families. The case of Alulu, a police officer in western Kenya shows that working in an area different from Northern Kenya, more or less gives police officers more opportunities to visit their families; live and work in relatively better conditions than those in Northern Kenya; enjoy relative calm, assert their authority and independence as police officers; engage in other occupations if they want to; and live at a relatively lesser risk.

Case 8: The Life of a Police Officer in Northern Kenya

Initially, my interest to examine the life of police officers in Northern Kenya was driven by my prior knowledge of the region as a conflict zone with underlying injustices. I wanted to examine the life and work of police officers in Northern Kenya and how that promoted or hindered access to justice. After analyzing data, I found out that both the police and the people of Northern Kenya are alienated from government and public policy benefits. The police like the people of Northern Kenya are marginalized. The extreme injustices the police commit, they do it for their survival. Even though it is not right for them to do so, it is a fact in what they do. The police like the indigenous people of Northern Kenya suffer from the externalities of Kenya's politics of exclusion and class. These experiences do not empower the police to effectively function to ensure access to justice. Such experiences also fail to create a conducive environment, where the police and members of the public can freely work together, based on mutual support and respect for the rule of law worth establishing a just society. It is not just the gap and relational tensions between the people and police that hinder justice, but also: (1) the gap and relations between the police and government. Because the government marginalizes the police through its policies, the police feel alienated just like the marginalized people; and (2) the gap between police working in Northern Kenya and those working in other parts of Kenya like western Kenya. Those in other parts of Kenya are far better off than those in Northern Kenya. Without compensation for these hardships, police work in Northern Kenya is demoralizing.

5.3 Discussion of the Results

5.3.1 The Meaning of the Study

This study presents only a slice of the formative implementation experience of the Bill of Rights in Kenya, and in particular the factors that hinder access to justice. Therefore, on the basis of this study alone, we cannot fully account for the implementation failures and successes of the policy. We cannot also account for all factors that hinder access to justice. However, this study means that it is difficult to access justice in Kenya because:

1) There are visible and invisible socio-cultural and institutional barriers which stand between the individual and the justice system.

2) The value for politics and the bureaucratic interests is higher than the value for the constitution even though the constitution is the highest law of the land.

The study shows that while people understand the constitution, the law or the policy that seeks to serve them; they largely lack information and other resources that can help them access justice, and adequately benefit from the provisions of the law. Available information on rights is not adequate, and is not easily available to the marginalized people. State agencies still struggle with the problem of partiality. Courts are available in some areas but it is not easy for everyone to get services from them. There is available physical infrastructure to facilitate the process of justice in some areas. Marginalized areas still lack these resources. Cultures emerging from the context of implementation hinder access to justice more than they promote it. Case backlogs show that cases are not processed efficiently. Court decisions especially those that are not in the interest of the political system are not enforced efficiently.

How justice works depends on factors outside the control of the marginalized people. In the absence of infrastructure and equality in public policy; realized policy implementation failures like inadequate staff; delay in legislative process; inadequate resources; lack of information and knowledge of rights; lack of judicial support mechanisms; difficulties in accessing the courts; unresolved entrenched inequalities; discrimination; prejudice; conflicting cultures in implementation process; inability to enforce court rulings; lack of legal aid; impunity; and failure to provide basic

amenities prevails. In response, marginalized people tend to resort to traditional alternative mechanisms of dispute resolution.

While traditional mechanisms work well in the absence of infrastructure and equality for instance as exhibited in the case of the Turkana woman seeking justice; these alternatives do not help these individuals and societies to realize rights as intended in the constitution. It appears that without realizing equality in public policy and strongly investing in infrastructure particularly in areas formerly marginalized; inequality in access to justice will be partly based on the gap between traditional mechanisms of dispute resolution and constitutional mechanisms. While some of these traditional mechanisms help resolve civil cases; they lack values for rights, particularly when they are used to handle cases in ways that are contrary to the constitution and other Kenyan laws.

Cases in this study indicate that when the interests of the constitution are perceived to be in contrast with political or bureaucratic interests; then bureaucratic and political interests prevail. In the case of Gladys Tarus vs. the Military; the interest of the military prevailed against the constitutional right of the individual. Similarly, in the case of Villance Libosho vs. New KCC, the interests of New KCC prevailed against the right of the individual. In both cases, Ministers of Defense and Cooperative Development refused to initiate further investigations. These cases introduced a new circumstance under the new constitution, when bureaucrats by bureaucratic adjudication refuse to constitute a further inquiry into a case of public interest. This is a typical example showing cases where the view of rights as a higher law is challenged, particularly when it does not resonate with the existing interests and values of political and bureaucratic systems.

The variation in geopolitical contexts between Northern Kenya and other parts of Kenya indicate that there are challenges which are identical to the Northern context, while there are challenges that cut across contexts. In the case of Villance vs. New KCC, Gladys Tarus vs. the Military, and that of Mercy Keino; there is a more conducive environment created by the family, community, socio-political networks, and media. These factors are lacking in the case of the Turkana and the Samburu women seeking justice in Northern Kenya. Even though the case of the Samburu girl was a dispute between a daughter and her family, a dispute one would anticipate less

support from the family, other lacking factors such as media, strong socio-political networks, community support, and value for the education and human dignity of the girl child partly explain why the case was lost the way it was. Likewise, when comparing the life of the police in Northern Kenya and western Kenya, one finds that even though all police officers have similar challenges for instance low wages; police in Northern Kenya live in more difficult conditions, without basic equipment and resources to undertake more critical tasks. Police in Northern Kenya are more alienated from government and public policy benefits than those in western Kenya, and are confronted with insecurity more than those in other parts of the country like western Kenya.

Police failures are exhibited in all the cases studied. Some of these failures emerge from the interaction between the police and the geopolitical environment within which they work for instance, the police working in Northern Kenya find it difficult to assert their authority with independence the way those in western Kenya do; because police in Northern Kenya depend on the community, to supplement the limited resources they get from government. However, in all the cases studied across the country; police failures for instance in investigating the cases, or disrespecting the rule of law; emerge from a culture of impunity entrenched in the police service, as a service created to serve the interests of the elite who control government rather than treating everyone equally. This culture has not been challenged enough or changed in order to resonate with the rights based culture envisaged in the constitution.

A study into the life of the police officers in Northern Kenya shows that even though the police are part of the justice system and a major component of the criminal procedure in the justice system; they are likewise marginalized, largely come from the low class families, and are alienated from fundamental public policy benefits like equipment, housing, and good working conditions. This alienation does not create a conducive environment for the police to effectively function to realize access to justice. The gap between the government and the police shows a dysfunctional relationship that jeopardizes working relations in the justice system. In the long run, it hinders access to justice.

In all the cases studied, institutional and socio-cultural factors hinder access to justice. In some cases for instance the cases of Villance vs. New KCC; Mercy Keino;

Gladys Tarus vs. the Military; and the Turkana woman seeking justice; it is the institutional regulations, will, operations, and culture of the bureaucracy that hindered access to justice. Similar challenges also emerge in the case of the police living in Northern Kenya for instance bureaucratic negligence and lack of value for human life. In the case of the Samburu girl seeking Justice, it is more of the socio-cultural factors emerging from the family and community that hindered justice, as well as the failure of the immediate government institutions to take appropriate action. All these cases show limited value for the constitutional rights based culture.

Comparing the case that reached trial and those that did not reach trial; one finds that there was complimentary investigative process, one initiated by police who failed immediately, and one that was there after initiated by the Director of Public Prosecution through public inquest; and strongly supported by media and some strong political leaders. These factors were missing in the cases that did not reach trial. Other factors that were present in the case that reached trial for instance, strong and well-connected family background; political commitment and political leadership to follow up the case and mobilize political support; and the supportive geopolitical environment are factors rare in the lives of many marginalized people. Considering the struggle the late Mercy's family had to undergo to get the case to trial, it is reasonable to observe that many marginalized persons cannot afford this.

An examination into the problem of investigations shows those cases which were between the marginalized individual and a powerful institution for instance Gladys Tarus and the military and Villance vs. New KCC; or which the individual was in dispute with the family and community interests for instance the case of the Samburu girl seeking justice; the marginalized individual lost. In these cases, the bureaucracy preferred to terminate the cases rather than further investigate them even when there were provisions or alternatives to further examine such cases; the police failed to investigate or process the case as they should have; and individual bureaucrats made decisions that favored the interests of powerful side in the dispute. This suggests, that rights may work well maybe only among equals.

This study also shows the effect of complex cultures in policy implementation. Four types of cultures were realized in the implementation of the Bill of rights. The first type is the rights based culture. This is the culture envisaged in the new

constitution, particularly the Bill of Rights. It emphasizes the equal recognition and value of the individual, regardless of age, gender, race, religion or any other form of classification that undermines what it means to be fully human. It assumes that all people are equal, of equal value and dignity, and therefore must be treated equally in all cases and at all times where and when their constitutionally recognized rights demand so. This was the new culture that implementers were supposed to adopt in the implementation of the Bill of rights. However, while the judiciary appears to have adopted it, other agencies in the justice system seem to have done less to adopt this culture. Therefore, this hinders the implementation of the Bill of rights.

The second type of culture is the culture of impunity and disrespect to the rule of law. For a long time in Kenya's history senior leaders in government or those politically or otherwise connected to them disobey the rule of law. They do this because they are protected by other senior political or bureaucratic patrons. Therefore, they chose to obey the law when it is in their interest to do so, and disobey the law when it is not working for them. There is a historical pattern showing that when this occurs, government does not take action. As a result, it has become a tradition for implementers of the Bill of rights to implement only what is in their interest, and with no fear of any consequence, ignore what they find not of their interest.

The third type of culture is the culture of ethnicity and exclusion. Kenya is a nation with many tribal nations within it. These tribal nations are not equal in terms of general population size and representation in government; exercise ethnic politics; and have varied political power to influence and determine policy action, for the benefit of the individual tribal nation. In times of crisis, an individual is largely protected by political patrons from his or her community rather than the law or the state. As a result, loyalty to one's ethnic group is given more importance than loyalty to the nation.

The fourth type of culture is the culture of inter-dependence. The culture of interdependence has two dimensions:

I) The first is the traditional dimension. This is about how the Turkana and Samburu communities have been living as people with their own culture. Like any other indigenous community, these communities have their own indigenous knowledge; dispute resolution mechanisms and customary law which, they have

confidence in and rely on, for dispute resolution and justice. This cultural dimension weakens the implementation of the Bill of Rights, especially those issues the society finds of less value, no relevance, or contradictory to the tradition. In this case, the society resists, does not support implementation, or frustrates implementation efforts.

2) The second dimension is about how these communities have developed informal norms, attitudes, behaviors, and practices that guide the way they relate to government. It appears that the use of force against these communities in pre-independence and post-independence period, historical injustices, socio-political and economic marginalization and exclusion has made these indigenous societies to develop a sense of alienation. Over time, this sense of alienation has deepened. During this period, these communities have developed alternative to government solutions. This culture weakens community participation in public policy. Therefore, the right based culture which is the culture underling the Bill of Rights, and which should facilitate implementation does not resonate with the interdependence culture, just as it don't resonate with the other types of cultures.

5.3.2 The Quest for Alternative to Mainstream Justice in Kenya

The results of this study have shown that while the mobile court policy was introduced to promote access to justice for marginalized communities that did not have access to justice before, the policy failed than it succeeded in Northern Kenya. This implies that relying on the mainstream justice system alone, cannot deliver access to justice for marginalized groups because of the following factors: 1) Geographical conditions in remote areas with underdeveloped infrastructure; 2) historical injustices that have over time alienated marginalized groups from access to public policy benefits; 3) political interests in the justice system especially unfair resource distribution or lack of commitment on the side of government to deliver justice for marginalized groups; 4) existence of conflict between bureaucratic interests/culture and the law; 5) existence of conflict between the law and the culture of justice in the wider society.

A cross-case synthesis of cases examined in this study provides the following dimensions to understanding the complex relationship between gender, ethnicity, inequality and geopolitics in Kenya. These factors influence access to justice hence

they provide the rationale for considering alternative dispute resolution mechanisms as a supplement to the mainstream justice system.

Gender and access to Justice: A total of five cases examined in this study indicate gender based discrimination as a factor to be considered when discussing strategies to promote alternative to mainstream justice. Therefore, the following experiences demonstrate gender dimensions that should be taken into account when considering an alternative to mainstream justice system in Kenya.

1) The Case of Gladys Tarus vs. the Military. Gladys was dismissed from the Army Recruits Training school on allegations that she was pregnant. She appealed to the Parliamentary Committee on Equal opportunities. The committee found that independent tests conducted by government doctors certified by the ministry of health after Gladys dismissal showed that she was not pregnant. As a result, the Committee concluded that Gladys was not pregnant at the time of dismissal, and that her dismissal was discriminatory. Parliament asked the Ministry of Defense to convene a medical board to further examine the case. The Ministry of Defense refused and instead upheld the initial status report released by the military which reported that Gladys was dismissed as a result of pregnancy. This is a case where bureaucratic interests were preferred over human rights.

2) The Case of Villance Libosho vs. New Kenya Cooperative Creameries. Villance Libosho, was a fourth year production engineering student, who was killed in an industrial accident, while working as an intern at the New Kenya Cooperative Creameries plant in Miritini, Mombasa. The Police did not secure the scene. In an effort to push for investigations, Villance's case was presented to Parliament by Hon. Kizito Mugali, Member of Parliament for Shinyalu Constituency on 23rd of June, 2010. In a Ministerial statement to Parliament, The Minister for Cooperative Development and Marketing denied that negligence occurred. No effort by the ministry was made to investigate the case further. The minister prejudged the case and made a final verdict on the basis of preliminary information given to him by the company and the initial police statement. Like the case of Gladys Tarus vs. the Military, this is another typical example where bureaucratic interest prevailed over human rights.

3) The Case of Mercy Keino. Mercy Keino was a former Masters Student at the University of Nairobi who was killed under unexplained circumstances,

allegedly while in a private party, in which a prominent Member of Parliament attended. The Member of Parliament is reported to have assaulted her on the night before she supposedly died. Police offered inconclusive investigative report which sparked public protest and media scrutiny. Hon. Charles Keter, then Member of Parliament for Belgut mobilized political pressure in Parliament to push for public inquiry into the case. The Director of Public Prosecution (DPP) found police investigations inconclusive hence ordered a public inquest into the issue. This is a typical case that reaches trial because of immense networks involved and resources invested into the process.

4) Structural Silence, Crime and Justice: A Study of a Samburu Girl. This case is about a Lona, Samburu high school girl who disappeared as she tried to seek freedom from a forced marriage. Her parents wanted to marry her off to a wealthy man in the village before she finished school. Efforts to seek the intervention of the local provincial administrator to prevent the arranged marriage and get her back to school failed. The case exhibits the invisible socio-cultural barriers that hinder access to justice.

5) Justice and the People's way of life: A Study of a Turkana Woman. This is a case about a Turkana woman who was frustrated by the justice system, and later turned to the traditional mechanism of dispute resolution. The plaintiff who had defiled her daughter had escaped justice after investigations were trivialized and after she lost support to sustain the case. However, members of the community arrested the plaintiff, tried him in a customary court, found him guilty, and sentenced him according to the customary traditions. This is a typical case systemic gender discrimination women experience when seeking justice and which can be addressed through traditional dispute resolution mechanisms.

The above cases indicate that it takes more resources and persistent efforts from multiple agencies and actors in order to win a gender related case. The case of Mercy Keino and the case of the Samburu girl seeking justice indicate that when the plaintiff is powerful than the complainant, more resources and actors with media, political, and technical power are required in order to push a case to a some successful level. Unfortunately, very few women would have access to such resources, yet they are confronted with injustice most of their lifetime.

The case of Villance Libosho and Gladys Tarus indicate that even when the dispute resolution efforts have reached as high as Parliamentary level, such efforts can still be frustrated by bureaucratic agencies that are opposed to implementing proposed resolutions. Efforts to pursue gender related disputes can fail even when top state agencies are involved.

Geopolitics and Access to Justice: There are number of common factors that differentiate Northern Kenya from the rest of Kenya particularly regarding access to justice. The following are some of the major challenges. 1) Northern Kenya is dominated by indigenous/minority groups that have limited influence on Kenyan politics given their limited numbers. As a result, their voting power can't influence policy especially when resource distribution is determined on the basis of voting power. 2) Because of historical marginalization, northern Kenya has limited infrastructure for example access to roads, housing, markets, health services, adequate security personnel and public administration staff. This limits the extent justices services can be delivered to members of the public in need. These factors manifest in the following comparative cases.

1) In the following cases, there was adequate infrastructure that facilitated effective advocacy networks. Access to media and civil society groups as well as health services enabled actors to archive efficiency in pursuit of the cases. In the Case of Gladys Tarus vs. the Military, advocacy networks enabled access to certified independent medical tests that were used to challenge medical tests done by military doctors. In the Case of Villance Libosho vs. New Kenya Cooperative Creameries, the family had access to independent medical examination process and report done by doctors in the government hospital. In the Case of Mercy Keino, access to media and other infrastructure pushed the Director of Public Prosecution to open a public inquest into the case after police investigations were found to be inconclusive. These cases were about women who came from and lived in other parts of Kenya with access to infrastructure. The cases attracted Parliament intervention because there was infrastructure to mobilize political support at that level. Failure in these cases was much as a result of bureaucratic influences rather than infrastructure or geopolitics.

2) In the following cases, infrastructure and geopolitics played a major role in hindering access to justice. Complaints pursuing justice and public officials serving in different areas of the justice system were conditioned with circumstances that limited their capabilities to deliver access to justice to all people who were in need. These cases failed to a large extent because of the environmental and historical factors which disadvantage people of Northern Kenya compared to other parts of Kenya.

3) Ethnicity and Access to Justice: Ethnicity factor in these cases is historical, indirect, and almost invisible. It is largely a bout social location. Consider the following. 1) Mercy was a Kalenjin girl. She was a graduate student pursuing communication. The Kalenjin are the third largest community in Kenya. The community has had access to political power, education, and economic control for decades. Mercy's father was a university lecturer. Mercy's case was about a reported assault during a private night party in a posh area of Nairobi city, an assault that was linked to her death. It is a case that borders on crime, individual freedom to party and the right to life. Parliament intervened in her case. 2) Villance came from the Luhya community. The Luhya are the second largest community in Kenya. The community had political power, control and influence in the education and economic sector. Villance's case was about an industrial exploitation and accident that led to her death. She was an engineering student. Parliament intervened in her case. 3) Gladys was a Kalenjin girl. Her case was about equal employment opportunity. She wanted to keep her position in the Military training school. Parliament intervened in her case.

On the other hand, consider the following. The case of the Samburu girl seeking justice was about forced arranged marriage by her parents. While every ethnic community in Kenya has gender discrimination issues, the problem of forced arranged marriage reflects the challenge of systemic historical marginalization that has for decades denied this community access to education and economic opportunities which enables a community to transition through value change. This is a different experience compared to the case of Gladys whose case was about a struggle with employment discrimination and military doctrine. It is also a different experience compared to the assault case on Mercy and industrial exploitation, accident in the case of Villance.

While in the case of Gladys, villance, and Mercy, their parents and close networks supported efforts to seek justice, to the extent they won parliamentary intervention, the Samburu girl did not have such support. Only civil society at the local level intervened. There was limited available resources, networks, information and conducive environment to access support beyond this level.

Despite of the challenges raised in this section, the findings of this study have also shown that when people lack access to the mainstream justice system, or when the mainstream justice fails to deliver justice, people often seek alternative mechanisms for delivering justice. Some of these mechanisms for example the use of the customary court to resolve disputes among the Turkana and Samburu have been successful in the delivery of emotional and restorative justice, besides retributive justice. Therefore, the findings of this study provide the basis for discussing the future of justice in Kenya, taking into account the use of alternative dispute resolution.

Considering the historical exclusion and marginalization of women and minority groups especially in Northern Kenya, the meaning of access to justice must be broader beyond the act of delivering legal justice. It must include redistributive policies that address the broader issues of social justice in the region for example infrastructure, ethnic and gender discrimination, education, health, security, and other public services. It should also entail the empowerment of marginalized cultures upon whose social fabric individuals seeking justice draw their support from. This includes recognizing, supporting and legitimizing where necessary, traditional institutional frameworks and values that these communities apply to deliver justice outcomes in the absence of the mainstream justice institutions or services.

5.3.3 Alternative to Mainstream Justice: A Policy Frame of Reference for Kenya

Alternative dispute resolution is increasingly becoming an alternative to the use of the court system around the world. About 90% of cases in the US for example, are settled through out of court negotiated settlements (Austermiller, 2010). Japan since 2006, introduced within its judiciary, the employment tribunal system. The tribunal, made up of one career judge and two experts in labor issues, operates under the district court and deals with individual labor issues. The hearing is done

informally and expeditiously but the judgment is legally binding. Overloaded with labor litigation, New Zealand in 2000 abolished industrial tribunals and established Labor Mediation Service. The mediation services are offered free of charge by the Ministry of Labor (Esplin, 2007). Therefore, cases of alternative dispute resolution from other countries can provide a policy frame of reference, when envisioning alternative to mainstream justice system for Kenya.

5.3.3.1 Alternative to Mainstream Justice: Experiences from Cambodia

About 85% of the Cambodian population lives in rural areas, most of them in remote areas, away from public infrastructure and services (Luco, 2002). In most cases, the courts serve the rich and the powerful who often times receive immediate response when they launch their cases in court (Anstis, 2012). In land cases for example, Anstis observes that poor people often lose cases against the rich when the case is handled by the courts. This is partly because of inequalities that have over the years weakened the capabilities of the poor to launch a successful trial in court. The formal court process for instance excludes the poor from the justice process. As a result, they cannot challenge the cartel of businessmen and politicians who at times bribe to buy political influence over court cases or judicial ruling in their favor.

Cambodia like many post-colonial developing countries has a history of political conflict partly rooted in external influence. The country has in the past experienced decades of war and conflict (Luco, 2002). The Khmer Rouge regime, the worst in the nation's history destabilized majority of the Cambodians. It created public distrust in government and reinforced the class system entrenched by the French colonial state. Until 1990s, little was done to build judicial institutions (Anstis, 2012). Anstis, observes that despite of the nation heavily relying on foreign assistance for resources, as well as institutional capacity building, Cambodia still faces major challenges such as failing to fully implement reform programs seeking to promote access to justice. However, the nation has seen the rise of civil society groups that network around strategies such as protests and community activism to promote access to justice. The movements are part of a wider civic engagement to promote alternative dispute resolution mechanisms.

Alternative dispute resolution refers to the process of resolving a dispute outside the court system. In the past, it took 401 days to settle a commercial dispute in court (Thora & Micheal, 2005). For businesses that required efficiency in dispute resolution, the court system was not an alternative. At the time, alternative dispute resolution mechanisms were not utilized. Between 2003 and 2005 for example, a total of 182 cases were settled through arbitration. A high caseload constrained the courts. Furthermore, with relatively one court per province, only a few people had access to the court.

The rise in the use of alternative dispute resolution has not been without challenges. Cambodia's judiciary has a legacy of a judiciary traditionally established to enforce the political interests of the state rather than ensuring impartial administration of justice. Lack of basic laws protecting the vulnerable and abuse of power for example, use of extra-judicial killings to settle disputes, use of forceful evictions in land cases, abuse of detainees, arbitrary arrests, and prolonged pre-trial detentions, most of which affect the poor rather than the powerful, indicate difficulties vulnerable groups stand to face in civil or criminal disputes. Furthermore, high levels of inequality, poverty, and illiteracy among majority poor renders majority of the population vulnerable to exploitation (Noord, et al., 2011).

Like in other parts of the world, alternative dispute resolution approach in Cambodia is rooted in the Cambodian traditional approaches to dispute resolution (Cambodian Human Rights and Development Association, 2013). Generally, the following four approaches to dispute resolution are used in Cambodia. 1) Negotiation: This is where parties in conflict or their representatives seek to find an agreement over an issue of conflict without having a third party intervention. 2) Mediation: This refers to the intervention of an invited, neutral and acceptable third party intervention in a dispute resolution process. The mediator has no coercive powers to influence the outcome, but rather seeks to help parties in conflict realize mutual agreement. 3) Conciliation: This is where parties in conflict invite a conciliator to help them resolve a conflict. Like a mediator, the conciliator has no coercive powers and cannot make decisions on behalf of the parties in conflict. (4) Arbitration: This is where parties in conflict submit their concerns to the arbitrator with legal powers to settle the conflict.

The legacy of traditional conflict among ordinary people in Cambodia includes the following. 1) Young men fighting over a girl with knives. They hurt each other. 2) Neighbors fighting because a cow or pig belonging to one of the parties in conflict destroyed the other's crops. 3) A married man goes out and returns home late. His wife demands to know why. They argue, quarrel, and finally fight. 4) Rice farmers fighting over the land boundary. 5) Marriage and divorce disputes. 6) Two people fighting over land ownership or ownership of trees on a particular piece of land. 7) Family disputes over inheritance. Some of these conflicts are addressed by mediation, conciliation, arbitration, or negotiation. Neighbors, village chief, elders, or monks play the third party role in dispute resolution (Luco, 2002). Other common disputes include youth gangs, defamation, small neighborhood conflicts and violence (Ninh & Henke, 2005). Settled disputes are enforced by social expectation, pressure, and individual moral obligation to comply with the norms of interdependence in community.

Beyond the traditional ways of dispute resolution, alternative dispute resolution is also supported by law. In 2006, the National Assembly in Cambodia enacted the Commercial Arbitration Law. Commercial Arbitration law legalizes use of dispute resolution mechanisms such as arbitration and mediation to settle disputes. Uses of alternative dispute resolution mechanisms enable parties in conflict to resolve disputes quickly and at a cheaper cost, compared to use of the court system. About 40,000 disputes are settled through mediation in Cambodia every year (Thora & Micheal, 2005).

One of the areas that alternative dispute resolution has been successful in Cambodia is in resolving land disputes. The Royal Government of Cambodia in 2002 established Cadastral Commission. Cadastral Commission refers to Constitutional Land Commission established to address property disputes regarding immovable property whose ownership is in dispute. The commission is authorized to decide about the recognition of the lawful owner of the property. This includes unregistered property as well as property whose dispute cannot be conciliated by administrative land commission. The commission operates at district, provincial, and national levels. Its secretarial staff acts as staff in charge of investigations. The Chief of the Commission is appointed by the Minister of Land Management. Members of

the Commission include village elders or local authorities. When a dispute arises, the aggrieved party files the case at the local level. The accused party is informed and asked if they are willing to settle the dispute through this process. Upon agreement, investigations are conducted. An administrative meeting is held to resolve the dispute. Finally, the case is resolved or referred to a higher level. Land dispute mechanisms follow customary rules combined with cadastral commission techniques (Royal Government of Cambodia, 2002).

A review of the work of Cadastral Commission indicates that while complex cases, especially those involving powerful politicians, influential public officials and the military are often difficult to resolve, many other cases are addressed much successfully. Most of the cases involving small parcels of land have been resolved successfully. The difference between cases involving small and large parcels of land is that often times, cases involving large parcels of land are disputes that involve a local individual or individuals in contest with a powerful figure from outside the community. As a result, such cases attract interference from top authorities (Center for Advanced Study, 2006). This basically implies that alternative dispute resolution works better in handling disputes among parties living in the same area, where there is power balance, or where there is external influence to counter power imbalance.

In summary, the following factors account for the success of the alternative dispute resolution in Cambodia: 1) *The Tradition*: The tradition of dispute resolution in Cambodia provides the institutional framework, customary rules, social capital for example trust, social support, and moral obligation to commit self to alternative dispute resolution process. 2) *The law*: The law provides the national institutional framework, the legitimacy, and authoritative guideline that facilitate alternative dispute resolution process within the modern legal framework. 3) *Activism*: The civil society plays the intervention role in the dispute resolution process. Vulnerable parties in conflict seek the assistance of NGOs for instance legal assistance, lobbying, and advocacy in order to counter the political or other forms of influences that may interfere with dispute resolution process, leading to unfair outcomes.

5.3.3.2 Alternative to Mainstream Justice: Experiences from Thailand

The idea of alternative dispute resolution in Thailand is founded in the traditional moral philosophy and practices. The use non-confrontational and non-aggressive approach to settle disputes is widely practiced. However, alternative dispute resolution policy in Thailand was officially established in 1990 when the Ministry of Justice established the Arbitration Office. The office was intended to reduce high civil caseloads in the courts. In the first decade, the number of cases addressed by alternative dispute resolution remained at an average of one hundred cases per year. In the recent years, there has been overwhelming civil litigation constraining the courts. Some cases where the defendant failed to answer to the plaintiff would take up to eight months to complete. Other cases would go up to sit to ten years if there were appeals back and forth (Institute of Developing Economies, 2002).

The following types of alternative dispute resolution are applied in Thailand. 1) Court annexed arbitration: This is where the judge acts as an arbitrator while the case is still pending in court. 2) Court supervised mediation: This is where the court encourages parties in dispute to mediate, especially when the judge believes there is reasonable chance of reaching amicable settlement if the parties in conflict negotiated a settlement. 3) Out of court mediation and negotiation: Parties in conflict reach a dispute settlement outside the court process. Court supervised mediation is the most used alternative dispute resolution in Thailand. Furthermore, other public agencies facilitate dispute resolution through policy adjudication for example: 1) Interior Ministry Regulation pertaining to civil dispute settlement under the authority of the Chief District Officer B.E. 2528 (1975) authorizes the District Office to settle disputes. 2) Interior Ministry Regulation pertaining to conciliation of the village committee of B.E. 2530 (1987) authorizes the committee to act as conciliator in civil and some criminal disputes at the village level (Damsa-ard & Thammateeradaycho, 2012).

The legal framework for mediation process in Thailand provides for the following four stage process of dispute resolution. 1) Preparation stage: The mediator studies the preliminary information about the case and consults the parties in dispute. 2) Opening stage: The mediator introduces self, parties in dispute and others involved

in the process. The mediator also explains the role of the mediator, parties in dispute, others involved, and the guiding rules. 3) Interest finding stage: The mediator holds a session to find out the interest of each of the parties in dispute. 4) Solution finding stage: The mediator tries to reduce issues of dispute and explores possible solutions for each issue. Usually mediation takes between 1-6 months (Office of the Judiciary, 2014).

Alternative dispute resolution in Thailand applies to cases such as: breach of agreements; violation of other person's right to life, freedom, property, health or other rights; property ownership, divorce, inheritance, marriage, child legitimacy or custody. And criminal disputes where the law provides for compromise and where the parties in conflict agree to settle the matter out of court. Information about the use of alternative dispute resolution in Thailand largely covers labor dispute, environmental disputes, and consumer protection cases. Arbitration and conciliation are the most applied alternative dispute resolution approaches (Institute of Developing Economies, 2002).

Current statistics indicate that more cases are resolved than before. Data from the Court of First Instance for the year 2013/2014 show that 1,248,420 cases accounting for 88.19% delivered to the court were disposed of. Of these, 44.30 % of the cases were disposed of within the period of 1 month, 39.45% of the cases were disposed of within the period of 1 month to 3 months, while 10.55% of the cases were disposed of within the period of 3 months to 6 months. The results also show that civil, consumer, and criminal cases settled through reconciliation and mediation delivered to Courts of First instance accounted for 16.51% of all cases delivered by the Court of First Instance. The use of mediation and reconciliation had increased by 0.8% (Office of the Judiciary, 2016). Alternative dispute resolution policy framework in Thailand allows the judge the flexibility to move from the role of the adversary to that of a conciliator. In one the reported cases in remote parts of Thailand, a Judge is concerned about a family in dispute over inheritance. Brothers and sisters are in bitter dispute as plaintiffs and defendants. To help them resolve the dispute, the Judge asks them whether they still offer merits to their father. They accept that they do. The judge then tells them not to bother to do it anymore. The judge argues that since they are in bitter arguments and fight, the merits they offer to their father won't help him

get a better life after death and rest in peace. The shock therapy gets their attention and they resolve to settle the dispute in an amicable way (Ariyanuntaka, n.d.). This implies that part of the success of alternative dispute resolution in Thailand is the policy provision that allows the judge to apply practical wisdom beyond the law to achieve better results.

Despite of the increasing success of the use of alternative dispute resolution, challenges experienced include the following. 1) The public adoption of the approach in formal disputes has been relatively slow. 2) Some litigants file cases that are supposed to be settled by arbitration in the court of justice. This leads to case backlog, only to be realized later leading to extra costs incurred. 3) Sometimes the cost of arbitration is higher than the cost of normal litigation in court. This is because the cost of litigation is fixed and predictable while the costs of arbitration may attract hidden costs. This encourages complainants to favor litigation over arbitration (Ariyanuntaka, n.d.).

In summary, the success of alternative dispute resolution in Thailand is attributed to: 1) the legal and institutional framework that facilitates the process; 2) social-cultural practices that encourage peaceful and restorative dispute resolution; 3) a culturally relevant dispute resolution system and combines traditional wisdom, practices, roles, and the modern law; and 4) the system is well supported with resources from the government.

5.3.3.3 Thai, Cambodian, and Kenyan Alternative Dispute Resolution Policy Framework

While Kenya, Thailand, and Cambodia have quite different historical and political contexts within which issues of alternative dispute resolution arise, are understood, and resolved, there are similarities across these contexts. These similarities provide a base for making policy reference. Data from the previous sections provide insights into how similarities in socio-cultural elements of dispute resolution, classification and prescription of offenses, and legal frameworks in these countries offer relevance for making inferences, when envisioning a future policy framework for alternative to mainstream justice in Kenya. The following are the similarities in alternative dispute resolution in Kenya, Thailand and Cambodia.

Table 5.1 The Similarities in Alternative Dispute Resolution in Kenya, Thailand and Cambodia

Country	Set of Offenses	Tradition	Some relevant laws & Institutions
Cambodia	-gang violence, land/property disputes, divorce , domestic conflicts, inheritance, petty crimes, neighborhood conflicts, defamation	-Use of mediation, conciliation, arbitration, negotiation. -Use of traditional institutions such as commune councils, monks, village chiefs, neighbors	-Commercial Arbitration law of the Kingdom of Cambodia (2006) -Sub-Decree on Organization and functioning of the Cadastral Commission (2002) - traditional institutions & practices linked to national commissions, ministry of labor, national administration
Thailand	- breach of agreements; violation of other person's right to life, freedom, property, health or other rights; property ownership, divorce, inheritance,	-Use of traditional dispute resolution practices that are non-aggressive / non-confrontational such as conciliation & arbitration -village committees used to settle disputes	-Interior Ministry Regulation pertaining to civil dispute settlement under the authority of the Chief District Officer B.E. 2528 (1975) -Interior Ministry Regulation pertaining

Table 5.1 (Continued)

Country	Set of Offenses	Tradition	Some relevant laws & Institutions
	marriage, child legitimacy or custody & petty crimes		to conciliation of the village committee of B.E. 2530 (1987) -Alternative dispute resolution institutions linked to the Judiciary, department of justice & ministry of interior
Kenya	-land & property disputes, marriage, inheritance, petty crimes, domestic violence - murder, rape, adultery (In case of indigenous /Minority communities)	-use of traditional institutions such as council of elders, neighbors, peers, extended family & religious organizations in dispute resolution -these practices are still strong among indigenous/minority communities	-Article 159 of the Constitution of Kenya (2010) recognizes use of traditional dispute resolution & judicial tribunals -Arbitration Act 1995

The demand for alternative dispute resolution mechanisms emerge from common multiple circumstances as indicated in the previous sections for example: 1) overwhelmed justice system; 2) remote areas with limited access to courts; 3) inequality and high levels of poverty making it difficult for the poor to pursue cases in court. Use of alternative dispute resolution has been successful in Thailand and Cambodia partly because of factors such as: 1) existence of traditional practices and mechanisms to settle disputes outside of the mainstream justice systems; 2) the legal

framework that supports, facilitates, and provides legitimacy and authority to the alternative dispute resolution; 3) institutionalization of alternative dispute resolution process and mechanisms. Since these basic elements are available in Kenya, they can be re-organized, enhanced, supported and utilized in order to promote access to justice in marginalized areas.

5.3.4 Relationship of the Study to the Earlier Studies

This study brings to the global discourse, another international experience where the universal application of the constitution to address public problems does not always solve all contextual problems (Lejano, 2012, pp. 17-31). Roskin et.al (2006, p. 62) drawing from the American experience of the right to bear arms observes that as the context changes, the constitution may not provide the right answer to all the needs of the modern society. Like in the US experience, Kenya's national context, the context of Northern Kenya, and the Indigenous people's contexts had more negative factors that hindered access to justice than those factors that promoted access to justice. Therefore, the study adds to the existing cases which tend to suggest that there is need to pay adequate focus on the contextual issues when designing policies that aim to address public problems.

While borrowing best practices from other countries remain vital to reforms and development, this study suggests that the context of the indigenous communities in which the policy was implemented was more or less ignored in the design and implementation of the policy. The implementation approach that was used was more mechanical and universal rather than it was responsive to people's needs. Therefore, this experience provides an opportunity to rethink need based policies which can be put in place in order to supplement the implementation of the Bill of rights in the region.

This study also realized two more issues concerning use of the constitution to address public problems: 1) A country may take long to adopt and implement the Bill of rights for instance the case of the US civil rights (Dye, 2011, pp. 234-246); and 2) Countries write constitutions but do not always practice them for instance the case of France, Brazil, and Yugoslavia. In Russia, the constitution had a long list of democratic rights, but the executive controlled nearly everything including individual rights (Roskin et.al, 2006, pp. 56-58).

This study shows that while the Judiciary in Kenya put the constitution into practice, there were considerable cases that show the executive did not. It has taken the executive much longer to learn to put the constitution into practice than the Judiciary. To think of rights as democratic values beyond mere majority rule is to look beyond populist democratic rhetoric (Jowell, 2007:3). It also means to look at rights not as merely what has been written in the constitution, but what is actually practiced in public life.

Another lesson to learn from this study regarding use of constitutional measures to address public problems is that Kenya's political culture and governance culture were largely detrimental to the implementation of the Bill of rights. This study presents to us a series of experiences, where the application of the political process and the legal processes in Kenya has failed to help women move from marginalized position to freedom. This occurred even when Kenya had adopted the Bill of rights from the South African constitution and had restructured the entire system government structure under comprehensive constitutional reforms. This experience is similar to the experiences in Sweden and Italy which have similar constitutions but have different political cultures hence they function differently (Roskin et.al, 2006, p. 58).

This study has also shown that the socio-cultural, economic, religious, and political condition of women partly hinder their ability to access justice. Cases like lack of moral support from the family or community, family and conflicting priorities, lack of resources, denial, inter-dependency, and trivialized investigations; are similar to the experiences of women seeking justice in South Africa. In South Africa, socio-economic conditions like poverty, cultural diversity, and the legal systems may make it difficult to attain justice (Cornwall and Molyneux, 2006, pp. 1175-1191). In this case keeping the protection of the women's freedom and rights as priority is difficult as well (Marle, 2003, pp. 255-278).

5.3.5 Theoretical Implications

While this study was not aimed at proving any theory, theories were used in this study as interpretive lens through which data was analyzed. Therefore, there are a number of theoretical insights that can be drawn from the study. In this case, what we will do is to show how these theoretical insights resonate with the data. As indicated

earlier in chapter 1, this study falls within the wider context of the study of the relationship between the context and implementation. While there are no theories of implementation, there are several models that explain policy implementation success and failure. Contextual Model of policy implementation, assumes that the context of implementation bears factors that can positively or negatively influence policy outcomes (Dye, 2011, p. 105).

This study indicates that the contextual factors negatively influenced policy failure than policy success. In this case, this study brings to the discourse another set of evidence which suggests that the context influences policy success or failure.

Another model to examine is the political model of policy implementation which assumes that policy implementation can be positively or negatively influenced by the politics of the time (Pressman and Wildavsky, 1973). As part of implementation games, governments are reluctant to implement policy if it does not resonate with their interests (Bardach, 1980). From this study, there is evidence to suggest that Kenyan political culture and politics have played a more negative role than a positive role in realizing access to justice.

Management model assumes those factors such as rules, stakeholder conflicts, unclear or no communication, resources, and misdirection (Denhardt, 2011, p. 75), structures, processes, and behaviors exhibited in the implementation process can influence implementation (Christensen et al., 2007, p. 15). This study shows that one of the reasons for implementation failure was that management ignored providing basic amenities like bathrooms. As a result, some individuals meet court hearings or mentions while seeking such amenities. This undermined the very human dignity the Bill or rights seek to address by providing access to justice. Therefore, this study resonates with the argument that management factors can influence policy failure.

Human rights theory assumes that to achieve the desired potential, one requires freedom. However, there are environmental factors that limit the individual to realize the desired potential because environmental factors act as forces that (Mensch, 2010, p. 1). This study indicates that socio-economic and political conditions like prejudice, lack of moral support from the family or community, denial, interdependency, safety, trivialized investigations, lack of resources, and conflicting family priorities, and patriarchal politics hinder women to access justice. Therefore,

this data supports the view that environmental conditions within which an individual exists produce factors that limit the extent such an individual can realize freedom or to a large extent justice.

5.3.6 Explanation of Unanticipated Findings

The findings I consider in this section as unanticipated are those findings I found surprising. The first case is the study of the life of police officers in Northern Kenya. The tragic incident where bandits killed about 42 police officers in an area I was to collect data exposed exceptional information about the life and working conditions of police officers. Contrary to my initial knowledge and view that the police enjoyed their work and were inconsiderate in their work, I later learned that the police like the people of Northern Kenya largely belonged to the low class, were alienated and marginalized, were living and working under extremely difficult conditions, were underequipped and under resourced such that they found it difficult to carry out basic police functions like investigations, arrests, and transfer of suspects.

The second case is the case of a Turkana woman who was frustrated by the judicial process and turned to the customary law and customary court for justice. The customary court delivered justice in a day. It was efficient, friendly, convenient, probably fair and reasonable if you looked at it from the cultural perspective given that that is how they do it. Witnesses who were unable to testify in the court of law testified in the customary court. While this case is an outlier case based on exceptional participants, it suggests that indigenous people out of alienation and marginalization find alternative in consolidating legitimacy and loyalty to their traditional customary law and judicial process. They adhere to it because it works for them, even though it may not deliver justice in the sense of a modernized judicial process would do. Therefore, this case represents one of the vital though silent critiques of Kenya's justice system. It is a silent protest against the partially reformed judicial process that does not work for ordinary marginalized people it was supposed to.

The ideal thinking about the judiciary is that the Judiciary is an independent, neutral, and non-political entity, while the executive is a political entity and should always be. That is why we turn to the Judiciary when we have disputes, because we

believe that the Judiciary is free from political bias, or even if it is not, we expect it not to be influenced by political strings, when running the justice system. Before the constitutional reforms, the Judiciary had been largely influenced by the executive. Cases where judges ruled cases that clearly reflected what the president had said in a political rally some days before the ruling were common.

In an attempt to address this, constitutional reforms introduced the doctrine of separation of powers, supremacy of the constitution, sovereignty of the people, and public accountability of all branches of government to the people and the constitution. As a result, the executive practices accountability to the people by seeking political support through policies that attract votes. The Judiciary practices accountability to the people by making fair rulings, enforcing the Bill of rights, and asserting justice in exchange of public confidence in the Judiciary. While this is more of a professional affair, the doctrine of public confidence in the judiciary has political externalities. When the court makes a ruling that is against interests of the executive, it is criticized and to an extent frustrated by the executive when it requires the executive to carry out functions that will see justice realized, for instance implementing court orders. At this time, the opposition celebrates the Judiciary and pretends to speak on behalf of the Judiciary in the political arena.

On the other hand, when the Judiciary makes a ruling that is against the opposition, the opposition criticizes it of being on the side of the government. When people don't find answers from the executive, they turn even political questions into legal issues and take them to the court for ruling. Hence over the recent past, the court appears to be playing a more effective role and finding a strong place in Kenya's politics. This is because it is always the place people run to when they can find answers from the executive. The doctrine of public accountability appears to create rivalry and competition between the Judiciary and the executive.

The Judiciary and the executive have policies that benefit the people. Like in the market, they offer these policies to the public in exchange of something. The executive wants votes and political support in return. The Judiciary wants public confidence and public support in return. Even though this is not what was intended in the constitutional and judicial reforms, that is what it has come to be in practice. While the former judiciary was vulnerable to manipulation from the executive, it

appears the reformed Judiciary is likely to be vulnerable to the politics of the nation. This is because the heart of the Judiciary is public confidence and that confidence is in the hands of the public, a public that signs deals with various political partners and plays politics with them.

The whole reason for introducing mobile court policy was to take the courts close to the people. The thinking was that if people found the courts closer to them, then they would use them to settle disputes. However this study shows that the nomadic life which indigenous communities live makes it impossible for the courts to reduce the distance between the courts and the people, because people move to new places in search of pastures as the courts try to move closer to them. Court dynamics do not resonate with the dynamics of nomadic life. It also shows that taking the courts closer to the people does not necessarily mean people will have access to justice because there are several visible and invisible forces that stand in between the courts and the individual. These forces hinder the individual to access the courts and seek justice.

The gap realized between the police and government, the high levels of marginalization of the police service brought into perspective the idea that marginalization of the Northern Kenya is not just something the marginalized communities experienced, but it was an experience even government agencies in the justice system like the police also experienced. Finally, failure to consider providing basic amenities like bathrooms undermined the very human dignity and access to justice the courts wanted to implement.

5.3.7 Implications for Practice

One of the roles of the Judiciary Transformation Framework 2012-16 is to enhance access to justice through among other things administration of justice. This means that administration of justice involves tasks such as transforming both physical and social infrastructure in order to realize people focused justice delivery. This includes: increasing physical infrastructure; change in culture and attitude; and improving inter-agency cooperation (Judiciary, 2013). In light of this framework, and based on this study, the following general and need based policy recommendations can help realize better access to justice.

General Policy Recommendations

1) Gains that have been made so far as a result of implementing the constitutional reforms should be maintained to avoid fall back for instance, protecting the doctrine of separation of powers in principle and practice, the financial and administrative autonomy of the Judiciary, transitioning from a centralized government to a devolved government system, and strengthening the county governments and the senate.

2) Government should continue to devolve police services and the services of the office of the Director of Public Prosecution to marginalized areas in order to strengthen the justice system

3) Both national and county governments should invest more in physical infrastructure that is necessary to make services of the justice system easier to run and access

4) The Judiciary should expand its programs for instance free legal aid programs; education and awareness programs; judiciary public engagement programs; and the devolution of justice services to more effective local tribunals

Need based Policy Recommendations

1) The judiciary should work with communities to create a more inclusive community oriented paralegal programs that can help provide support services to the justice system

2) The Judiciary and non-governmental organization should invest more in educating Kenyans so that they can adopt a rights based civic culture

3) More resources should be invested in de-ethnicizing nationhood so that externalities created as a result of ethnic politics and ethnic based exclusion in public police and public service can be minimized

4) The Judiciary and non-governmental organizations should invest more in value and culture change programs for the Judiciary, the police, and the society

5) The judiciary should create mechanisms to that will utilize indigenous knowledge and judicial procedures to enhance the justice system

6) Creation of alternative to mainstream justice systems to supplement the mainstream justice system.

7) Political reforms aimed at value change and building nationhood. This should include educational programs.

8) Creation of collaborative framework that will enable government agencies, civil society and international actors to work together on reforms especially in areas that are often left behind for instance gender and justice, minority issues and ethnic politics.

9) Civil society groups should work with donors to analyze, propose and support reforms in the justice system especially areas where marginalized groups are unable to access justice.

5.3.8 Recommendations for Further Research

This study focused on the implementation of the right to administrative action through the mobile court policy among the Turkana and Samburu indigenous communities which were marginalized. However, we have more than 14 marginalized indigenous communities in Kenya. There are also about 21 mobile courts working in marginalized areas. Therefore, there is need to do more studies on how the implementation of the right to administrative action has been implemented in other areas that were formerly marginalized.

There is need to do further research with a focus on the interface between:

- 1) Indigenous knowledge of rights and constitutional knowledge of rights
- 2) Inter-agency collaboration between the police and the courts for better justice delivery
- 3) The state- citizen relationship and access to justice

5.3.9 Contribution of this Study

This study adds voice to the existing literature that use of the constitution to solve public problems does not always solve all contextual problems. Furthermore, this study has demonstrated the influence of the context on policy implementation by showing from the Kenyan experience that, the context largely had a negative than a positive influence on implementation when constitutional measures were used to address access to justice as a redistributive policy to address historical inequalities and

injustices. These findings resonate with the core argument of the contextual model of policy implementation which suggests that the context influences policy success or failure.

Based on the Kenyan experience, this study also adds voice to the argument that access to justice particularly as a challenge facing marginalized persons for instance women remains a problem, even when reasonable legal measures are put in place to address the problem. Women experiences from this study show that both visible and invisible barriers stand between women and the courts. To a considerable extent, cultural values permeate even the way policy implementers carry out their work, and tend to bear more influence on them than the law. This resonates with human rights theory which assumes that socio-cultural, environmental, economic, and political conditions within which an individual exists can limit the extent that individual can realize freedom which is necessary for achieving one's desired potential. Therefore, failure for indigenous women to access justice can partly be attributed to the conditions within which they live and strive to access justice.

One of the main reasons why reforms in the judiciary and the entire constitution was to redistribute resources, opportunities and other public policy benefits, so that marginalized communities like indigenous communities and women can have access to justice which they did not have before. However, experiences from this study shows that this agenda is yet to be realized. It appears the implementation design did not capture details of specific issues indigenous marginalized women face, and the respective policy mechanisms to respond to these issues. This experience reflects constitutional implementation failures realized in other countries.

Experiences from this study have also shown that Kenyan politics have largely impaired implementation. This is because of challenges such as ethnicity, exclusion, and a legacy of marginalizing minority indigenous communities and women. This adds voice to the political model of implementation which assumes that politics influences policy success or failure.

This study has further shown that in the absence of infrastructure and equality in public policy, marginalized individuals use traditional mechanisms to settle disputes. They use their judicial procedures and edicts to try all cases even murder.

What historical marginalization entrenched in public policy has done to Kenya is to create “two-tire state” under one republic made up of many ethnic nations. One law and constitution works well in areas that have infrastructure and where individuals have resources to compete for the benefits of the provisions of the law. This law and constitution does not apply in the marginalized context, because individuals living in this context don’t have the resources to compete for the benefits of the law. Therefore, they have decided to use their traditional laws to address their problems of justice. This problem exhibits a crisis of nation building.

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APPENDICES

APPENDIX A

EMAIL INTERVIEW LETTER

Dear Carra,

I hope you are fine. First, I would like to thank you for accepting to participate in this research, following our earlier Skype conversation. As I indicated earlier, data collection will take up to 4 months. In this regard, I hope you will find enough time to respond to my research questions within your convenient time. I will be grateful if I will be able to get responses within this period, so that I can be able to proceed with analysis. While receiving responses from you, I may also request for clarifications, or send a reminder either by phone or email. This will enable me to get enough details and understand your responses better. May also re-assure you that participation in this study is voluntary. Therefore, if you find yourself constrained and as a result decide to withdraw, please let me and I will greatly appreciate your contribution. You are also welcome to let me know anything you would like to discuss further about this research at any time during this process. Please find the attached are the interview questions.

Thanks again for your kind participation,

Kind regards,

Oscar Mmbali

Ph.D. Candidate, Development Administration (Policy and Management)

GSPA, National Institute of Development Administration (NIDA).

APPENDIX B

INFORMATION FOR INTERVIEW PARTICIPANTS

1. The purpose of this research

- This study seeks to analyze contextual factors limiting indigenous women to access justice in Kenya,

2. Why I have chosen this study

- I would like to recommend policy strategies to improve the implementation of the Bill of Rights.

3. Participating in this study

- Is voluntary
- Choosing not to participate does not have any consequences
- You have the right to withdraw your participation anytime you would like to
- You don't need to answer every question or clarification. Answer only questions and clarifications you would like to

4. What to do

- Read the attached interview questions and respond to them in your convenient time
- Contact me if you have any further questions or if you need clarification
- The study takes up to 4 months
- During this period, I may send a reminder or seek clarification regarding responses given in the interview

5. What happens to information given in this interview

- I will not use your real names when referring to the information you have given
- I will not share this information with someone else. I will only use it for the study

6. What will happen to the results of the study

- The results of this study will be written in my PhD dissertation report

7. Who has approved the study

- PhD Dissertation Committee, GSPA, NIDA

8. Contact for further information

- Oscar Siema Mmbali Phone +66900163742, Email:-
mmbali76@gmail.com, Skype:- oscar.siema.mmbali

APPENDIX C

INFORMED CONSENT FORM FOR PHD DISSERTATION PROJECT

Title: “Implementation of the Bill of Rights: Improving Access to Justice for Indigenous Women in Kenya”

Dear Participant,

I am a PhD candidate in the Graduate School of Public Administration, National Institute of Development Administration. I would like to invite you to participate in my PhD dissertation project I am undertaking as part of my studies. The research has been approved by the PhD dissertation Committee. This study seeks to analyze contextual factors limiting indigenous women to access justice in Kenya, with a view to recommend policy strategies to improve the implementation of the Bill of Rights.

If you agree to participate, this will involve responding to interview questions sent by email. In case I need some clarifications, I may contact you by email or phone. My study takes up to 4 months, therefore I hope that you will find enough and convenient time to participate. The information you provide will be used in the dissertation which will be available in the library. Your real names will not be used in reference to the information given. In case you would like to withdraw your participation, you are free to do so. Please let me know and I will greatly appreciate.

I appreciate you for giving your time to this study. If you have further inquiries, please contact me using any of the following contacts: Phone +66900163742, Email:- mmbali76@gmail.com, Skype:- oscar.siema.mmbali

Thanks again
Oscar Mmbali

If you are willing to participate in my PhD dissertation project outlined above, please sign below.

Signature _____

Name _____

Date _____

APPENDIX D

GENERAL INTERVIEW GUIDE

1. Introduction

The purpose of this interview is to find out how the mobile court is working. We would like to know the successes and the failures of the court, and whether indigenous women are able to get justice. If they are not able to, we would like to know what factors hinder them to access justice.

2. Mobile Court Procedure

1. You have a case; you want to take to a mobile court, where do you begin?
2. How do you proceed?
3. What happens during the process?

3. The Mobile Court

1. What are the benefits of this court?
2. What are the successes of this court?
3. What are the failures of this court?
4. What challenges do indigenous women faces when seeking mobile court services?
5. What should be improved?

BIOGRAPHY

NAME Mr. Oscar Siema Mmbali

ACADEMIC BACKGROUND Licentiate in Theology (St. Paul's), 2009
Bachelor of Divinity (St. Paul's), 2009
Master of Development Studies (St. Paul's), 2011

EXPERIENCES 2004- 2017: Priest, Religious Society of Friends (Quakers)
2011-2012: Missionary, Religious Society of Friends (Quakers)
2012-2015: Secretary, Kenyan Diaspora Organization for South East Asia (Elective Position)
2013-2016: Research Intern (Part time, Center for Philanthropy and Civil Society, NIDA)

PUBLISHING/JOURNALS

Baah-Enumh, T. Y., Forson, J. A. & Mmbali, O. S. (2017). Sustainable livelihoods in artisanal small-scale mining communities: A case study of Tarkwa-Nsuaem Municipality of Ghana. *Global Social Welfare* (pp.1-15). Springer, First Online: 23 June 2017. doi: 10.1007/s40609-017-0093-5

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