



Refugee Insights

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**Promoting Access to Justice
and Governance in Turkana County**

Contents

Message from the Executive Director	2
Constitutional foundations of human rights based approach in Kenya	4
Improving access to justice in Turkana County	8
Making public participation work for the people of Turkana	11
The legal construction of public participation in Kenya	14
Gender-based violence in Turkana County	18
Let children be children	22
Can Kenya realize the two-thirds gender rule?	26

Message from the Executive Director




*Eunice Ndonga-Githinji,
Executive Director*

It is my pleasure to welcome you to this first edition of RCK's Human Rights Magazine, Issue 1. This magazine is proudly produced by the Refugee Consortium of Kenya (RCK) with financial support from Amkeni Wakenya. It documents some human rights issues observed by the organization in the process of implementing a project under the Amkeni Wakenya initiative in Turkana County, whose objective is to promote human rights based approach to county governance. It draws lessons from practical challenges and lessons in learnt while implementing the project in Turkana County. There are three themes explored in this magazine that will interest the reader.

The first theme covered is that of access to justice. This is a central pillar to the realization of human rights for individuals (nationals and foreigners) in Kenya. Access to justice requires a human rights based approach to public policy and administration. Lilian Obiye informs the reader what this means and how it can be achieved. As a follow-up, Brian Mbugua explores what access to justice means in the operational context in Turkana County. He looks into access to courts and representation and its impediments.

An attempt has been made to discuss public participation as a corner stone of democracy and good governance. Joseph Akivaga examines what this means for the people of Turkana County and what steps can be taken to improve public participation in the county. This article is bolstered by Andrew Maina's analysis of the meaning of public participation. His article answers the question: how much public participation is sufficient?

Finally, the magazine delves into the issues of protection and inclusion. This is done through an examination of child protection, gender-based violence and the two thirds gender rule in Kenya. Nyokabi Mwangi evaluates the extent to which children are protected from harmful practices in Turkana County. The article makes some sobering recommendation on improving the situation. Elydin Riziki examines the issue of gender-based violence in the area and also points to existing the gaps in protection and how to address them. In



conclusion, the RCK Dadaab team examine the implementation of the not more than two thirds gender rule as prescribed by the Constitution of Kenya, 2010.

It is my hope that you will enjoy reading this magazine. Moreover, I hope that it will enlighten you to critically examine the state of human rights in Kenya as we continue to implement the devolved system of governance

Eunice Ndonga- Githinji,

Executive Director

Constitutional foundations of human rights based approach in Kenya

By Lilian Obiye

Introduction

Human rights are recognized as an integral part of Kenya's national values and principles of governance.¹ The Bill of Rights in the Constitution of Kenya describes the various rights that individuals in Kenya enjoy. Some of these rights include right to life, right to liberty (freedom), and dignity among others. These rights bind all state and non-state actors whenever they enact, apply or interpret any law or policy.² Therefore the Constitution mandates a human rights based approach (HRBA) to public policy and administration. This article looks into the meaning of HRBA, constitutional examples of its intended implementation as well as some challenges.

What is the human rights based approach (HRBA)?

The human rights based approach is a conceptual framework for the process of human development.³ It is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.⁴ It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.⁵

What are the principles of HRBA?

This approach constitutes four salient features. These include:

1. **Participation and inclusion:** This refers to broad consultation with stakeholders including the public and legislators. The consultation can be done through forums and submission of memorandum. The participation of the public must be broad and all inclusive. Reasonable effort must be made to ensure groups that have traditionally been excluded from such forums are involved. Groups that have traditionally been excluded includes women, youth and persons with disabilities (PWDs).

1 Article 10 (2) (b), Constitution of Kenya, 2010

2 Ibid Article 10 (1) (b)

3 <http://hrbaportal.org/faq/what-is-a-human-rights-based-approach>

4 Ibid

5 Ibid

2. **Non- discrimination and equality:** The law should not discriminate on any ground listed in Article 27(4).⁶ It must also provide for affirmative action for marginalized groups to overcome impediments owing to historical and current injustices. In this regard, it may categorically place an obligation for the inclusion of women, PWDs and other marginalized communities and groups.
3. **Accountability:** The law or policy should clearly outline the role and powers of duty bearers (state and non- state actors) and provide for mechanisms for checks and accountability purposes either through administrative bodies, courts, and appeal bodies. The law or policy should provide a framework for oversight purposes and mechanisms where persons can seek redress, reparation or compensation.
4. **Empowerment:** The law should be easily accessed by the ordinary people through platforms like social media, websites, newspapers, adverts and pamphlets. The state should also seek to empower the community on the provisions of the law through trainings and forums and involvement of the people to ensure they can defend their rights where there is/or threat of violation.

What examples of HRBA does the Constitution of Kenya provide?

One of the central themes of the Constitution of Kenya is public participation. Article 2 recognizes that the people have the sovereign authority and can exercise the same directly or through elected officials. Moreover, article 10 provides that the participation of the people must be sought whenever a person enacts, interprets or applies any law or policy. There are other sections of the document that emphasise participation of the people.⁷ This demonstrates that the Constitution fully recognized the major tenets of HRBA.

Equality and non-discrimination is another important theme in the constitution. Article 27 entrenches this principle by making discrimination unconstitutional. Discrimination based on gender, age, race, ethnicity and other grounds is prohibited by the constitution.

The Constitution provides for empowerment for groups it refers to as marginalized. Article 54 of the Kenyan Constitution, for example, provides for the rights of persons with disabilities. Persons with disabilities should be treated with dignity and be able to access education

6 The grounds include race, ethnicity, gender, age and other such grounds.
7 See article 118, 174, 196 and 201

institutions and facilities that cater for their disability. For instance, educational institutions should have ramps, inclusion of qualified teachers for the blind and even incorporation of interpreters for the deaf in main stream media. The Persons with Disabilities Act of 2006 as amended in 2016 was enacted to achieve equalization of opportunities for persons with disabilities and thereby providing a platform for them to access opportunities. The law also provides for at least a five percent political representation in elective and appointive bodies.



RCK staff conducting a community forum where they shared legal information

What are some of the challenges that exist in implementing the HRBA in Kenya?

There are a myriad of challenges in the implantation of HRBA in Kenya. This article focuses on two of them. One of the challenges that faces the implementation of HRBA is lack of proper information. Generally, the right holders lack information about their rights. This means that they cannot demand for rights that they are unaware of. Additionally, some duty bearers are unaware of their responsibility to protect and promote human rights. This leads them to actions that violates human rights. Therefore more dissemination of human rights should be shared with the wider public to raise awareness of the public on their rights and the avenues through which to access them. The modes of dissemination should promote accessibility to this information. Dissemination of information should also be extended to duty bearers so that they consider human rights issues in their engagements.

Another challenge that plagues the implementation of HRBA is non-compliance with court orders. Alarming, the cases of court order disobedience have been on the rise. Orders issued by the courts are either not complied with or officers to whom they are addressed find creative ways of not getting served with the same. This results in unenforced rights which invariably means an inability to legally redress violations of a human rights.

Conclusion

The fundamental function of HRBA is the advancement and enjoyment of human rights. The Constitution of Kenya, 2010 as discussed above seeks to advance the development agenda through public participation, inclusion and empowerment of Kenyans. Incorporation of HRBA to laws being passed is necessary as it links development to realization and enjoyment of human rights.

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Improving access to justice in Turkana County

By Brian Mbugua

Turkana County is among the marginalized counties in Kenya.⁸ According to a survey conducted by the Commission on Revenue Allocation on marginalized areas, Turkana residents persistently face conflict, drought, and poor healthcare.⁹ The situation has been made dire due to the marked increase in population of the County. According to the 2009 census, the population of Turkana was at 855,393 this figure has increased to a population of 1,256,152 as of 2015.¹⁰

A marginalized community has a specific definition in law. It is a group of people who because of laws or practice were or are disadvantaged by discrimination on one or more grounds.¹¹ The grounds include but not limited to race, ethnicity, socio-economic class and gender. These disadvantaged groups are most vulnerable to human rights violations owing to their disadvantage. In addition human rights instruments were specifically created to protect such groups that are structurally discriminated against.¹²

Access to justice in Turkana is therefore of paramount importance for redress and prevention of any human rights violations in light of the stark statistics. Article 48 of the Constitution of Kenya has expressly stated that the State has a duty to ensure that all persons access justice. This access should be inexpensive and provide a remedy through formal or informal institutions. One of the measures of access to justice is access to courts and legal representation. In Turkana County, access to these two elements is limited.

Access to Court is an expensive affair. There are just two court stations in the largest county in Kenya by size:¹³ one in Lodwar and the other in Kakuma. Moreover, the Turkana people are primarily pastoralist and therefore travel long distances in search of pasture. This means that a Turkana resident that needs to access the courts will have to pay travel costs that many cannot afford. One also needs to take into consideration the number of times a litigant requires to go to court to conclude that the court process would be expensive. As a result, courts are out of reach to a majority of Turkana residents as the county is ranked

8 <https://www.the-star.co.ke/news/article-119374/14-marginalised-counties-get-sh34bn-equalisation-kitty>

9 CRA working paper No. 2012/03

10 Human rights watch, 'There is no time left' 15th October 2015

11 Article 260, Constitution of Kenya, 2010

12 Icelandic Human Rights Center 'The human right protection of vulnerable groups'

13 KNCHR 'Report on stakeholder consultations in Turkana'

among the poorest in Kenya.¹⁴

Moreover, there is a dearth of judicial officers to man the courts. In one case that the Refugee Consortium of Kenya handled, there was no judicial officer for at least three months at the Kakuma law courts. The magistrate in that case proceeded on leave and was not replaced. This meant that all cases reverted to the court in Lodwar, 123.3 km away and which was also not sufficiently staffed. This caused immense back log of cases that delayed access to justice for thousands of Turkana litigants seeking a remedy in the courts.

The situation is further compounded by lack of adequate advocates practicing in the area. Few legal professionals means that access to representation is also limited. Additionally, the few that practice in the area charge fees that are out of reach for a majority of the Turkana people. Development agencies have none the less stepped in to offer legal aid but a lot more needs to be done to increase access to justice in the area.

A serious effort to address this situation needs to be under taken by the national government. The effort should target four main areas: number of courts, number of judicial officers, alternative dispute resolution mechanisms and legal representation. This article addresses each in turn.



RCK Executive Director Ms Eunice Ndonga making a point at a dialogue forum

Access to justice includes access to courts. The current number of courts are not sufficient to address the needs of the Turkana population. As mentioned earlier in this article, Turkana County has two courts serving an approximate population of 1,256,152. Furthermore, these courts owing to their number are not well distributed geographically. Therefore building of more courts in a geographically representative manner; taking into consideration population density in proposed sites, could increase court usage and contribute to increase in access to justice.

In the same breath, an increase of judicial officers is also needed for intervention. Physical buildings designated as courts are not in themselves sufficient. They require judicial officers to man them and dispense justice. As was with the case in Kakuma narrated above, a delay of access to justice owing to lack of sufficient judicial staff is an infringement of the right to access justice. The current national rate of judicial officers to the Kenyan public stands at 1:76,435. This might be worse for Turkana that only has two court stations at the moment.

Serious and genuine implementation of the Legal Aid Act, 2016 is another crucial step in increasing access to justice. The purpose of the Act is to give effect to *inter alia* article 48 of the Constitution. It provides for legal representation for individuals that cannot afford it at the state's cost. An immediate roll out replete with an awareness raising campaign ought to be launched by the Department of Justice at the Office of the Attorney General. Parliament must also ensure that the Legal Aid Fund established under section 29 of the Act is sufficiently resourced.

Lastly, the National Government in conjunction with the Turkana County Government should encourage alternative dispute resolution mechanisms. These mechanisms should be ones that have a wide acceptance among the Turkana people and that are not repugnant to justice. These mechanisms will work to reduce the number of issues that are addressed by the formal courts while at the same time dispensing justice for the population.

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Making public participation work for the people of Turkana

By Joseph Akivaga

As you walk through the villages in Turkana County you will experience first-hand the reality of decades of exclusion from the national development agenda. Drought, poor infrastructure, acute water shortages, inadequate or lack of facilities (schools and hospitals) and violent conflicts are some of the indicators of systemic marginalization in the area. This state of affairs was one of the issues the Constitution of Kenya, 2010 was promulgated to address.

The Constitution has been cited as among the most robust and progressive documents in the world. It re-introduced the devolved system of government and entrenched citizen participation among the principles of governance. If wholly implemented, the principle of citizen participation will ideally entrench locally-led, issue-driven approaches and organize citizens around common interests. This calls for a public that is informed and are able to act collectively to hold public officials accountable.

Turkana county government has increasingly been pursuing participatory mechanisms to improve governance and service delivery. Among the measures taken include enacting legal and administrative mechanisms to realize citizen participation in public decision making. The County Assembly enacted the Turkana County Public Participation Act in 2015 to provide a legal framework for implementing citizen participation. The executive branch of the county government has also established the offices of the sub-county, ward and village levels. These measures have been operationalized through citizen participation forums where the people of Turkana are allowed to air their views on public decisions.

However, the County still faces enormous challenges in full operationalization of citizen participation in governance as envisaged in Kenya's Constitution¹⁵. In recent reviews of the status of public participation in the county, it was found that the processes are still weak¹⁶, and remains inaccessible for a majority of the Turkana people. There are also low levels of awareness among the citizenry on their rights and responsibilities in the entire process.

15 AHADI (2017) Assessment and recommendations for enhancing citizen engagement in county governance

16 Institute of Economic Affairs (2018) Review of status of Public Participation, and County Information Dissemination Frameworks: A Case Study of Isiolo Kisumu Makueni and Turkana Counties

It has also been noted that the process occurs in an ad hoc manner coupled with poor/ untimely communication¹⁷ and is far from the reach of ordinary citizens of Turkana. Without addressing these challenges, the purpose of devolution – inclusion – could be undermined and funding for the citizens' priority services adversely affected.

The Turkana County Government must prioritize civic education and access to information to make citizen participation work. This will enable citizens to actively participate in public decisions at the local level. Access to timely information is a right enshrined in the constitution under the bill of rights¹⁸ so as to enable members of the public exercise and demand their rights from the duty bearers. The county may not fully realize citizen participation if many of its people do not access the right information regarding government development plans, budget allocation and utilization of funds. They will also not be able to participate in the implementation and monitoring of funds meant for development, and thereby holding the County government accountable.

Use of mass media communication tools should be prioritized by the county government. County website, public notice boards, bulk short message service (SMS), local newsletters, local or community radio, television, barazas and any other community media to disseminate crucial public information to Turkana residents should be leveraged. The information should be timely and provide sufficient notice for meetings. Information should also be packaged in a format that is accessible to a wide group of people including persons with disabilities and those with low or no literacy skills. To achieve this, the government should consider translating information to local languages where necessary for wider reach.

In addition, the county should consider setting up information centres up to the village levels. These centres should be furnished with all important government documents such as County Fiscal Strategy Papers, County budget documents including approved budget and estimates, County Budget Review and Outlook Paper and the County annual plans and the County Integrated Development Plan among others. These materials should also be in simple and understandable language.

There is also need for capacity building of communities so as to promote their involvement in policy formulation and project implementation in the county. The county government needs to enlist resource persons to conduct community profiling and a comprehensive

17 The Institute for Social Accountability (2015) JIHUSISHE: Lessons in Participation in County Budget

18 Article 35, Constitution of Kenya, 2010

needs assessment, organize seminars and short courses for the community on devolution and public participation. A majority of the population are not well informed about the duties and responsibilities of the county government as well as their rights and civic duties. Civic education needs to be rolled out throughout the county in a consistent and continuous manner. Training should be done in the Turkana language so as to enhance understanding. These capacity building initiatives can also be co-driven by the available civil society organizations.

In conclusion, the County Government of Turkana has the responsibility to establish mechanisms to promote civic education, public participation and access to information as required by the County Governments Act 2012. The County government should put in place and strengthen frameworks required by the Constitution and the laws on devolution that will enable citizens participate in governance and meaningfully do so in the exercise of the powers of the State and in making decisions affecting them. The citizens, being the ones with sovereign power, should play their role in monitoring the State organs they have delegated power to and the officer whom they have entrusted authority to. All stakeholders should strive to create an enlightened and empowered citizenry who are able to engage effectively in local development affairs to influence local development outcomes in the best interest of the community and for posterity.

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The legal construction of public participation in Kenya

By Andrew Maina

Introduction

Public participation is a golden thread¹⁹ that runs through Kenya's constitutional order. Article 10(2) (b) of the Constitution of Kenya, 2010 enunciates 'participation of the people' as a key feature in governance. It must be applied whenever any person 'interprets, applies or enacts'²⁰ a law or policy. The principle of public participation is mentioned severally in other areas addressed by the Constitution such as legislation,²¹ public finance²² and devolution.²³ Curiously, the Constitution does not provide a clear definition of the concept that it provides as integral for good governance. Moreover, there is no codified guide that provides a construction of public participation that is binding on both levels of government. This leaves the question on what public participation actually means and how we would know that it is sufficient.

This article addresses the question of the definition and sufficiency of public participation. It draws its evidence from an analysis of 37 court decisions made by the High Court and Court of Appeal between 2015 and 2017. These decisions were sourced from the Kenya Law Reports online platform. This article acknowledges that the decisions on the online platform may not be representative of the body of case law on the issue of public participation. However, this limitation has little impact on the validity of the results presented herein. This is because all these cases are decisions of the superior courts of record and all of the decisions reviewed have been consistent from the High Court to the Court of Appeal. Therefore it is unlikely that there are cases that significantly go against the grain of the decisions made in the cases reviewed.

Definition of public participation

The courts do not provide a clear definition of public participation. They define public participation as the involvement of the public in decision making.²⁴ However, the definition

19 Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County Government of Nairobi and 3 others, 2013 eKLR

20 Article 10, Constitution of Kenya, 2010

21 See Article 118, Constitution of Kenya, 2010

22 See Article 203, Constitution of Kenya, 2010

23 See Article 174, Constitution of Kenya, 2010

24 Robert N. Gakuru and Others v. Governor of Kiambu County and 3 others, 2014 eKLR

does little to provide clarity on the meaning of public participation for two reasons. One, the use of the term 'involvement' is undefined. Therefore leaves the question of what involvement means or what it entails. Second, there is no indication of the extent the public is to be involved. Is mere information sharing sufficient? Does it include some form of dialogue between the information seeker and the intended public audience? How much interaction is necessary to support a conclusion of sufficient public participation? A clear response to these questions requires an analysis of how the courts have constructed the elements of public participation in their judicial decisions.

Essential elements of public participation

There are various means to achieve public participation. Therefore there is no one-size-fits-all approach to achieve it. The courts emphasize reasonableness of public inclusion in public decision making.²⁵ Inclusion of the public must be reasonable quantitatively and qualitatively.²⁶ To evaluate the reasonableness of this inclusion the courts look at the extent of information shared as well as the extent of discourse allowed.²⁷ These two elements are guided by the nature, importance, urgency and impact the proposed decision might have.

Access to information has been identified by the courts as a crucial element in achieving public participation. The general rule is that the information must reach as many members of the public as possible. This is the quantitative aspect of access to information. In this regard, the courts have decided that the use of radio shows, loud speakers, newspapers and other public spaces are useful tools to disseminate information. This quantitative aspect must be accompanied by a qualitative aspect.

Information sharing to a wide audience for public participation purposes by itself is not sufficient. The audience must be able to understand the information provided and be encouraged to provide their views regarding a decision that is to be made. Therefore, the information shared must in a language understood by the targeted audience. It must also contain as much detail as possible to enable the audience to fully understand the essence of the decision that is to be made.

Freedom of expression is the second element that the courts have held is crucial for the successful realization of public participation. This allows for the members of the public to

25 Ibid

26 Ibid

27 Coalition for Reform and Democracy and 2 others v. Republic of Kenya and 10 others, 2015 eKLR

present their views to the decision maker for consideration. The views can be presented orally or in writing. Quantitatively, the decision maker must make every effort to ensure as many of the members of the public provide their views on a proposed decision. However, it is not a must that all members of the public be heard at the end of the day.²⁸ Moreover, the decision maker is not under any obligation to change his/her decision based on the presentations made by the members of the public.²⁹ He/she need only keep an open mind when approaching them for comments.



RCK Executive Director and Speaker of The Turkana County Assembly signing a partnership Letter of Agreement.

The requirement for freedom of expression has a qualitative aspect to it as well. The courts have reduced this aspect into two principles. The first is the principle of inclusion and diversity and the other is the subsidiarity principle. The first refers to representativeness of an audience. This means that the decision maker must endeavour to engage an audience that is representative of ethnicity, age, gender and such other category. The second principle enunciated by the courts is the subsidiarity principle. It holds that those that are more likely to be impacted by the decision should have more say in it. These two principles will determine the nature of representation of member of the public at public participation forums.

²⁸ In the Matter of the Mui Coal Basin Local Community, 2015 eKLR

²⁹ Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v. County Government of Nairobi and 3 others, 2013 eKLR

Conclusion

A firm definition of public participation does not exist in Kenyan law. However, the courts have made a number of decision from which one can infer the essential elements of the process. Public participation must include access to information as well as freedom of expression. The decision maker must provide information to as many members of the public. This information needs to be in a form that is readily understood by its audience. Moreover, the audience – members of the public – must also be provided an opportunity to express themselves on the decision to be made. Without these elements public participation cannot be deemed to have occurred.

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Gender-based violence in Turkana County

By Elydin Riziki

Gender based violence (GBV) is the general term used to capture violence that occurs as a result of the normative role expectations associated with each gender; along with the unequal power relationships between men and women, within the context of a specific society.³⁰ "...gender-based violence is violence that is directed against a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty...While women, men, boys and girls can be victims of gender based violence, women and girls are the main victims."³¹ But, this does not mean that all GBV victims are female and that men are not affected. It is only more focused on violence against women since it disproportionately affects members of one sex more than the other. It is estimated that worldwide one in three women will experience physical or sexual abuse in their lifetime.³² GBV undermines the victim's dignity, health, security and autonomy. Victims may suffer from forced or unwanted pregnancies, unsafe abortions, trauma, sexually transmitted diseases and even death in extreme circumstances.

SGBV in its various forms is endemic in communities around the world, cutting across, race, age, religion, and national boundaries. It is unfortunately accepted or silently allowed to take place as an integral part of gender relations. This article analyses SGBV in Turkana and makes suggestions on how it can be curbed or reduced.

The root cause of SGBV is the historical unequal power relations between men and women and the abuse of this power by men thus resulting in the domination over; discrimination against and abuse of women.³³ The most common forms of SGBV in Turkana are: Early/forced marriage, defilement, domestic violence and wife inheritance. In Turkana, poverty, traditional gender norms that support male superiority and entitlement, social norms that tolerate or justify violence against women, weak community sanctions against perpetrators, civil unrest, high levels of crime, conflict in society and displacement are some contributing factors which increase the risk or severity of SGBV for girls and women. Other contributing factors in Turkana include but not limited to;

30 Bloom 2008, p14

31 UN General Assembly Declaration on the Elimination of Violence against Women [1993].

32 Baseline Survey Report on Knowledge, Attitude & Practices of SGBV State Duty Bearers in Kasarani District, 2013 by Kenya Women and Children's Wellness Centre

33 Krug et al ,2002

i. Traditional dispute resolution systems

Traditional criminal justice system is noted for providing some compensation to survivors of SGBV. An example is the Turkana traditional criminal system of dealing with SGBV which has a special compensation mechanism for survivors. When a man impregnates a woman out of wedlock, he is fined 30 animals (10 head of cattle, 20 goats and sheep) which are given to the girl's family as compensation. This system does not therefore give proper redress to the offence committed. The victim remains with the trauma while her family benefits from the compensation given by the offender.

The traditional justice has deficiencies because: the compensation awards do not match the offence and the system discriminates against women, for they are not allowed to sit in the 'trial/ court' process neither are the women/girls views sought.

ii. Lack of women empowerment

The Turkana being a pastoralist community mainly depends on livestock for a living. Such wealth is male dominated thus most women depend on men for their sustenance, exposing them to male aggression. Men use their considerably higher economic status to impose unreasonable demands on women and enforce these demands through SGBV. Paradoxically, most women have taken it as their fate to remain dependent on men. They loathe fellow women who attempt to make a living of their own in an attempt to extricate themselves from abusive relationships.

iii. Poverty and hunger

Poverty contributes to SGBV; a self-perpetuating cycle of poverty leaves the girl child in Turkana in the condition of economic dependency. This unfortunately leads them to risky and exploitative relationships in order to ensure access to food, shelter and schooling.³⁴ Even where cases of SGBV have been filed against perpetrators the survivors sometimes have to choose between withdrawing the charges to secure a means of livelihood and having the perpetrator incarcerated while bringing economic ruin upon themselves.

iv. Lack of SGBV awareness amongst community members

Despite steps being taken to address the problem of SGBV through legal provisions such

³⁴ Poverty and Hunger Fleishman 2003

as: the Constitution, Sexual Offences Act, the Penal Code, and Matrimonial Causes Act; there still remains gaps in this endeavour. Studies have found that the formal justice system has many gaps in service provision and the duty bearers to a large extent, lacking in some areas of knowledge and positive attitude in order to provide essential services for SGBV victims.³⁵ The investigating agencies, including the police, remain indifferent, incompetent and inept in dealing with sexual and gender based violence cases.³⁶ The police are reported to carry out arm chair investigations. In areas characterized by lack of confidence in the law enforcement or judiciary, survivors of SGBV are likely to seek medical care and not seek other services such as from the police.³⁷

Conclusion

Strengthening the link between the legal system, hospitals and clinics where survivors seek medical care can increase the number of SGBV matters that are ultimately filed in court. These linkages establish an entry point into the legal system for survivors who decide to pursue a claim. After seeking medical attention, they can also help ensure that case-related information is transferred properly between the medical sector and the legal sector.

In Turkana County many survivors indicate that they cannot access the justice system due to lack of knowledge or information. Therefore, unless they first obtain information about their rights, how to report cases to the police and/ or how to find legal aid services, then majority of the survivors will not access legal redress.

Other barriers observed in Turkana in seeking legal justice include lack of awareness among survivors of the content and availability of medical and legal services; lack of trust in the legal enforcement and judicial agencies, absence of clear guidelines and protocols relating to SGBV for members of the police and judiciary; lack of training and sensitization among the police and judiciary on SGBV; high dismissal rates of cases by the police and prosecutors; high withdrawal rates of complaints by victims; low prosecution and conviction rates; failure to courts to apply uniform criteria, particularly in measures to protect victims; lack of legal aid and high costs of legal representation in courts.

Preventive and responsive ways that can be used to curbing SGBV in Turkana County

35 Supra note 3

36 Ibid

37 Ibid

1. Strengthening the **judicial system** in Turkana West: The government should invest in building enough courts rooms and deploying more judicial officers i.e. magistrates and prosecutors to expedite SGBV cases in court.
2. **Creating awareness** on issues of SGBV, eradication of solving SGBV cases using traditional justice system and instead adopt the Kenya criminal justice system.
3. **Empowering women and girls** through mentorship programs and going to school, educating the community on the different forms of SGBV and their penalties according to the laws and finally creating awareness on the referral pathway of reporting SGBV cases.
4. **Advocacy** with government entities like law making the County Assembly to come up with stronger laws and procedures to ensure implementation is carried out in a just manner.
5. Lobbying for **creation of safe shelters and hospitals (medical centres)** with special wings dealing with SGBV survivors.
6. Establishing **multi-sectoral initiatives** and services such as telephone hotlines, emergency shelters, police intervention, legal assistance, psychological counselling/ care, support groups, income-generation programs, and programs for perpetrators and child welfare services.

Elydin is a former Assistant Programme Officer in the Legal and Social Justice Programme. She was working at the Kakuma refugee camp. _

Let children be children

By Nyokabi Mwangi

Introduction

The Constitution of Kenya 2010 recognizes children's right and their need for protection. It provides that every child has a right to name, nationality of birth, free and compulsory basic education, basic nutrition, shelter and health care. Further; every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhumane treatment and punishment, and hazardous or exploitative labour.³⁸ The Children's Act of 2010 further expounds on specific children's right and their need for protection. It affirms that children have basic rights, including the right to education, nutrition, shelter, health care and parental care. These two laws have realigned themselves with international laws; Convention on the Rights of the Child and the Africa Charter on the Rights and Welfare of the Child, to which Kenya is a signatory.³⁹

This article discusses and delves into the most glaring child protection issues in Turkana County vis a vis applicable National Laws: early/forced marriages and child labour.⁴⁰

Early/forced Marriages

While early/forced marriages might be perceived as a fading culture by the Turkana people living in the urban set ups, such practises are still alive in Turkana West. Young girls are beaded as soon as they reach puberty. Beading means that a girl is fit for marriage. The beading is done by old women in the community after a spouse has been identified for the girl. The motivation behind this practise is economic gain for the families.⁴¹ The economic gain of marriage is indivisible from social or political benefits.

When a girl is married off, her family is given dowry which is seen as compensation for the 'loss' of their daughter. This builds kinship ties, which are created to enhance protective social and political networks. Kinship ties are highly valued by the community. It is also

38 Article 53, Constitution of Kenya, 2010

39 Article 2 (5), Article 2 (6) of the Kenyan Constitution 2010

40 Information received by the Refugee Consortium of Kenya in 2017 at the legal aid clinic. Other child protection issues in Turkana are child neglect, child maintenance and SGBV.

41 www.unicef.org/kenya/Family_Assets_-_Understanding_and_Addressing_Child_Marriage_in_Turkana.pdf

perceived by the community that marriage offers a woman protection, respect from other women and a voice within the community.

According to the Turkana culture, marriage is generally initiated by the male suitor and his family. If an agreement is reached between the girl's father and male relatives, negotiations are undertaken until bride wealth is agreed, payment completed (either in instalments or all at once).

Child Marriage is a critical child protection issue among the Turkana community that heavily contributes to violations of the rights of the girl child. Most girls are considered fit for marriage based on physical attributes (e.g. when they reach puberty) and emotional maturity. Because of this, many girls are married off at a tender age. Despite early/forced marriage being a criminal offence which attracts the offence of defilement or sexual assault, the community does not consider it as such. Further, the community is also ignorant of the punishment that this practice attracts legally. It is only discovered that those girls are children when such matters proceed before court and age assessments are conducted.

Child labour⁴²

In Kenya, there are various laws⁴³ reprobating child labour. However, most communities especially the Turkana community still practise child labour. In Turkana West Sub-County for instance, many parents are obliged to make choices between taking their children to school or to stay at home to support in taking care of the family. As such, many families choose the latter due to competing economic needs and the laws requiring that they educate their children.

Advocating for the right to education has been received but its benefits are yet to be appreciated. Schools are only established in major towns in the county and student's turn out is extremely low.⁴⁴ Moreover, school-going girls are often alienated from their communities and abandoned by their families. Many a times they are derisively called "*children of the government*" or worse, prostitutes.

42 Section 10(1) of the Children Act 2001 'Every child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'

43 Children's Act 2001, Employment Act 2007 and Penal Code

44 Information received from RCK legal aid clinics in Kakuma Refugee Camp

Parents may accept that schooling is inevitable, but rarely see its tangible benefits. This choice is also enabled by the fact that many Turkana parents have seen little or no evidence that education is a social or economic good. In Kenya where the unemployment rate stands at 7.4% (as of March 2018),⁴⁵ employment and income opportunities that come from schooling go unfulfilled fuelling the need for parents to keep their children at home to help fend for their families instead of going to school.

Child protection bodies

There are several bodies under the child protection umbrella both Governmental and non-Governmental, established under the Children Act 2001. The Act vests the National Council for Children's Services⁴⁶ with powers to exercise general supervision and control over planning, financing and coordination of child rights activities and to advise the government on all matters relating to children.⁴⁷ The Department of Children Services is tasked with coordinating and supervising child protection services for children and their families.

In many respects, the National Council for Children's Services and the Department of Children Services are duplicative in terms of their child protection mandates. The Department of Children Services serves as the prime government agency by focusing on implementation and enhancing its supervisory role for child protection service standards by other non-governmental actors. The Department of Children Services no longer has a mandate in policy and legislative development, which is under the remit of the National Council for Children's Services.⁴⁸

All other non-governmental organisation with operations in Kenya, operate in conformity with regulations and guideline given by the National Council for Children's Service. The department of children service falls under the Ministry of East Africa Community (EAC) Labour and Social Protection.

This department has satellite offices in all 47 countries with the aim of bringing child protection services to the interiors. However, in Turkana West, the department has only one

45 According to a survey by the Kenya National Bureau of Statistics (KNBS), seven million Kenyans are unemployed. Out of these, 1.4 million have been desperately looking for work. The largest unemployment rate was recorded in the age cohort 20–24 at 19.2 per cent
Read more at: <https://www.standardmedia.co.ke/business/article/2001274158/the-shame-of-jobless-kenyans>

46 Section 30(1) of Children's Act 2001

47 Section 32 of the Children's Act 2001

48 *ibid*

staff- district children's office (DCO). The staffing is a glaring challenge in implementation of its mandate in a County with a population of over 1 million people. During the Kenya Population and Housing Census of 2009 the population stood at 855,399. The county population average growth rate is 6.4% per annum. This puts the total county population in 2012 at 1,036,586 and the figure is projected to increase to 1,256,152 people in 2015 and to 1,427,797 by 2017 assuming constant mortality and fertility rates. The DCO who also has one vehicle ought to cover the County which is 68,680.3 Km².⁴⁹ Due to these limited resources, most children cases either go unreported or do not get the attention they deserve.

Conclusion

In conclusion, child protection in Turkana West is an area that requires steady attention from both the government and Non-Governmental Organisations. Whereas there are prevention and response structures put in place to address the above highlighted child protection issues, there is need for more to be done. Such as: Strengthening Child Protection Systems to protect children from violence and exploitation; expanding and promoting programs that address safe and violence free family environment for children; strengthening support for alternative care arrangements and children rescue centres and enhancing funding support for agencies working towards promoting children welfare.

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49 <http://www.turkana.go.ke/wp-content/uploads/2016/10/Annual-Development-Plan-2015-2016.pdf>

Can Kenya realize the two-thirds gender rule?

By RCK Dadaab team

The Constitution of Kenya 2010 recognizes women, youth, and persons with disability, minorities and marginalized special groups of having the right to be represented across political, economic and social spheres. It advocates for equality of all persons before the law including the enjoyment of all rights and fundamental freedoms. *Article 81(b)* of the Constitution stipulates that; not more than two thirds of elective public bodies shall be of the same gender. *Article 27(8)* gives the government the onus to develop and pass policies and laws including affirmative action programs to address the past discrimination that women have faced to enhance equality.

Attempts made to ensure Article 81(b) has been achieved have been presented severally. The Ekuru Aukot proposed bill is one of those instances where he came up with a formula for reducing the number of members of parliament while increasing the number of women. The formula involves a man and woman being elected from each of the 47 counties which will amount to 94 members in the national assembly.⁵⁰ He stated that the same formula be applied in electing members of the senate. This will reduce the members of parliament in the Senate and National Assembly. Aukot further proposes that the 12 nomination slots be reduced to six and be limited only to National Assembly. This will facilitate equal representation of gender in the parliament.



Thirdway Alliance party leader Ekuru Aukot in a press meeting on the two-thirds gender rule. Source: [Kenyans.co.ke](https://www.kenyans.co.ke)

50 The referendum Ekuru Aukot wants Kenyans to participate in <https://www.kenyans.co.ke/news/27098-referendum-ekuru-aukot-wants-kenyans-participate>

Lessons from Rwanda to Kenya

Aukot's Bill if implemented would make Kenya move a long stride towards gender equality. Its outcome is most likely to give results similar to or even better than the Rwandan quota system. Quota systems for women aim to ensure that women constitute a certain number or percentage of the members of a body, committee or a government, so women are not isolated from the political and public life. It is a form of affirmative action designed to help women overcome the obstacles that prevent them from entering politics in the same way as their male colleagues...⁵¹ Quota systems generally aim to ensure that women exceed a predefined share of a political body. In some countries, political quotas are applied as a temporary measure until the barriers for women's entry into politics have been removed.⁵²

Rwanda is the only country in the world where more women serve as elected officials than men.⁵³ In 2003, the Rwandan government approved a new constitution that included a quota system for women at all levels of government. The legislation mandated that thirty percent of all representatives, including those in parliament, be women. Rwanda's quota is different than many other systems in that it's not a quota solely on candidates, but rather reserves a minimum number of *seats* for women. Only women are eligible to vote for the women-only seats.

In Kenya, there is a new Bill sponsored by Majority leader Aden Duale, which proposes an increase in the number of MPs and proposes to give special seats to women to top up their number in the bicameral parliament. This is unlike in Rwanda where in 2003 elections women increased their presence in the lower house of parliament from twenty three percent to forty nine percent. When the next round of elections came in 2008, the women's caucus made a brilliant strategic move. Women who gained prominence in their women-reserved seats decided to use their reputation and experience to run for the non-reserved seats, opening up the women-only positions for a new crop of female leaders. Of those elected to the House of Deputies in 2008, fifty six percent were women. And in 2013, women's representation rose even further to sixty four percent.

51 Implementing the Constitutional Two-Thirds Gender Principle The Cost of Representation by The National Women's Steering Committee In partnership with Institute of Economic Affairs May 2015

52 Ibid

53 Women hold 64 percent of seats in the lower house of Rwanda's national legislature, the largest share of any country. Accessed from <https://www.npr.org/sections/goatsandsoda/2016/07/29/487360094/invisibilia-no-one-thought-this-all-womans-debate-team-could-crush-it>



*Majority leader Aden Duale (left) and Hon Githu Muigai during talks on the two-thirds gender rule.
Source: Kenyanewsagency.go.ke*

If women representation in parliament has been achieved in other jurisdictions, why does Kenya need affirmative actions and women nominations to attain the two thirds gender rule?

Kenya has failed to achieve the two thirds gender rule embedded in the Constitution in the 12th Parliament composition. In the National Assembly, there are a total of 76 women (23 who are elected, 47 women representatives and 6 nominated). It falls short of the one third Constitutional requirement by 41 women to make 117, of the total 349 MPs. In the senate, there are 21 women (3 elected and 18 nominated) bringing the short fall to 12. This means that Kenya requires 53 more women to be nominated or voted to parliament to meet the Constitutional requirement.

Affirmative action in the Kenyan parliament has recently taken a firm stance in seeking equal gender representation. According to Ronald Dworkin, affirmative action includes specially and specifically launched programmes for the disadvantaged, disabled and minority groups, to increase their capabilities and allow them to participate in a greater way in development activities.⁵⁴ Despite the Constitutional provisions mandating women's inclusion in parliament, the performance has fallen short. The techniques such as quotas and reservation of seats for women have proven to be insufficient. Women still do not

⁵⁴ <http://www.nybooks.com/articles/1977/11/10/why-bakke-has-no-case/>

hold enough influential positions in parliament. On the upside, in the 2017 election, women modified the narrative from getting appointed and nominated to fill basic correctness in Parliament to garnering six more top elective seats of three governors and three senators, besides the 47 slated seats of Women Representatives.



Parliament in session on two-thirds gender rule. Source: The Star, Kenya

What makes implementation/achievement of the one third gender rule in Kenya untenable?

Kenya lacks adequate mechanisms, for the implementation of the not more than two-thirds gender rule. As outlined in preceding chapters, the provisions in the Constitution 2010 are clearly outlined however there have been no consequent steps taken in order to implement these crucial provisions.

The main challenge in the implementation of this gender rule is lack of political will to ensure that the two-thirds gender rule comes to fruition. This has been attributed by different scholars to Kenya's patriarchal culture and electoral system. Following the Attorney General's request for an advisory opinion on the minimum one-third requirement in the national Assembly and the Senate, the Supreme Court of Kenya on 11th Dec 2012 held that gender equity as an affirmative action for women is progressive in nature and not an

immediate realization. It was then that the court gave parliament up to August 27th 2015 to come up with the legislation on how the one third gender rule would be realised in the 2017 elections. Considering that this was not achieved, it portrays lack of appropriate implementation regulations by parliament.

To achieve this:

- i. There should be active enactment of legislations that enhance gender parity and laws that ensure women actively take part in decision making processes.
- ii. Active measures to recruit and prepare women for leadership should be in place. An example of an organization carrying out the same work is Early Money is Like Yeast (EMILY's list) in the United States. This organization takes up the role of recruiting women and taking them through training that will equip them to become good leaders. In Kenya this can be taken up by organizations or even the political parties.⁵⁵
- iii. Women have continuously been side-lined from positions of leadership due to stereotypes that have been constantly perpetuated. This can be done through civic education as well as party – driven campaigns. Political parties during their campaigns can incorporate messages that attempt to undo the stereotypes and promote the idea of women in leadership.⁵⁶

In conclusion, Mr Aukot's proposal has a lot of weight considering the fact that it reduces the number of members of parliament by advocating for equal elective positions for both men and women. It would be important that the two-thirds gender rule be achieved first in a swift way through elective posts before any special seats are created in parliament for whatever reasons. This would portray the true spirit of Constitutionalism in action and not only in talk. It is important to note that more effort and political will is needed to ensure that the intent of the gender provisions are realized. Civil Society Organizations, political parties, the media and the public should work together towards the realization of the two thirds gender rule.

55 'Implementation of the two-thirds gender rule in Kenya: The Implication for women in parliament'
Lisa Akinyi Ogutu January 2017

56 Ibid

Notes

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