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1. Introduction

This diploma thesis is based on a seminar paper with the same title written by the author in 2011 in the course of an interdisciplinary project entitled “P3 - Integrated Regional Development in Developing Countries”, carried out by the Technical University of Vienna, and after a field trip to Kenya in February of that year as part of the project.

In this diploma thesis a close look is taken at the situation of women in Kenya and an analysis is made of the legal and socio-cultural framework that determines the role of women in the rural areas, their social status and the perception of women's rights. Women's rights are a controversial issue in an environment in which legal and ethnic pluralism, combined with patriarchal structures, dominate many spheres of life, and which determine the roles of both sexes already at birth.

Kenya has a new Constitution since August 2010 and it is currently in the process of being enacted. It is intended that the provisions of this Constitution should ensure that men and women are recognized and treated as equals. To this purpose these provisions contain a number of interesting paragraphs concerning women's rights which, if respected by all, would have the potential to change the lives of the women in Kenya, especially those in the rural areas. However, taking into account the short period since this Constitution has come into existence, and the existing political and religious opposition to many of the reforms it contains, it is not yet predictable whether and how these will be carried out. It is not clear yet whether the reforms will be carried out in a straightforward manner or if the relevant, and thus responsible, authorities have to be involved first. This means that the new Constitution passed in the year 2010 does not necessarily mark a new era in which the political perception of the legal courts and responsible authorities with regard to women's rights in general, and in the decision-making process in particular, changes radically.

It is not primarily intended to pass judgement on the circumstances and practices that can be found in Kenya and to offer recommendations on how to improve them, nonetheless, some suggestions have been made in the relevant passages as to what could be done to

strengthen the rights of women in order to achieve the principles that have been laid down in the Constitution and that are upheld, not only by the Government, but also by the agents of the women's rights movement, such as NGOs, lawyers and large sections of the civil society.

The diploma thesis is divided into two sections, the first, namely Chapter 3, provides a general view of how women in Kenya live, and some of the factors which contribute to their living conditions. The chapter is based solely on research in the relevant scientific literature as well as in various administrative or political sources to be found in the internet. Together with Chapter 4, where relevant international legal human rights documents are presented and discussed, it is meant to serve as a theoretical foundation for the second section, which begins with Chapter 5. The focus is on the women in Bungoma County, a rural area in the western part of Kenya, where the author carried out field work over a two week period in February 2011. The information presented in Chapter 5 derives exclusively from interviews carried out by the author with the personnel at DESECE (Development Education Services for Community Empowerment) and TinA (Together in Action), which are two NGOs, and with selected local men and women benefitting from the work of these NGOs. The arrangement of Chapter 3 is more or less maintained in Chapter 5 in order to facilitate the verification of the information in the relevant scientific literature and other sources and the empirical fieldwork carried out in Bungoma.

A selection was made of topics of especial interest, such as gender roles, family life and structure, violence, as well as land and property rights, to create a picture which provides an insight into the situation of women in the rural areas. A legal point of view, combined with a social and cultural understanding of the lives of women in rural areas of Kenya, was taken to show some of the factors that influence and shape the lives of the women in Bungoma County, and to describe the difficulties that arise because of the existence and interaction of the different legal and customary systems of the numerous and diverse ethnic groups in this region.

In Chapter 6, a connection between women's rights and economic and social development has been found, and an explanation is given as to what can be achieved as a result. Two approaches to understanding development are presented which can be found in the working

principles of DESECE. This NGO is very active in the propagation and enforcement of women's rights. This final chapter is based on data and information obtained from both the relevant literature and from interviews in Bungoma.

DESECE, which receives financial support and also technical expertise from Horizont 3000, greatly supported the author's research in Bungoma. Sophie Kibuywa, founder and director of DESECE, and all of her staff were very open and helpful in the interview process and provided a lot of professional and personal information and experience about their work and lives and contributed greatly to the development of this diploma thesis. The author is very grateful for the enthusiasm with which she was welcomed by all members of DESECE and for the insight she could gain into the actual work of the NGO in Bungoma. The author's thanks also go to Horizont 3000 whose staff in Vienna and Bungoma were very willing to share their knowledge and expertise. Without the comprehensive contribution of both organisations and especially that of Sophie Kibuywa, this diploma thesis would lack a great deal of authenticity and depth.

2. Methodology

Most of the information in this diploma thesis has been found in scientific books, articles, journals, or acquired in interviews and other relevant sources, for example, in the internet, from NGOs, international and other organizations which carry out research on women's rights, and also from other universities. An attempt was made to include the different points of view held by a variety of individuals, institutions and organizations, such as NGOs, lawyers, scientists, government officials, local or customary leaders and Kenyan women to create a representative general view of what is going on with regard to women's rights in Kenya. In the interviews differences in opinion, contradictions and interpretation of what is demanded with regard to women's rights also reveal how complex and controversial this topic is, as well as the very different attitudes toward women's rights at all levels of Kenyan society.

In Chapter 5, the results of the fieldwork in Bungoma County, situated in the west of Kenya, are presented. This part consists exclusively of interviews (the guideline questions are in the Appendix) with NGO staff, with lawyers specialized in women's rights, besides men and women of the community in which they talked about the situation of women in the Bungoma area.

3. The situation of women in Kenya

In many respects, the women in Kenya are not treated as equal to their male counterparts. For instance, on average, the women earn less than half of that which the men earn. This is partly owing to the fact that women mostly work in the informal sector. According to the Kenyan Government, in 2007, only 30% of the total number of persons employed in the formal employment sector were women. Most of the women have only informal work with no social security and a very small and unstable income. Women are grossly under-represented in senior decision-making positions within the civil service, in which 84% of the top level positions are occupied by men leaving only 16% to women. 50% of the households led by a female in the rural areas are considered poor, compared to 48.8% of those led by a male. In the urban areas the gap is bigger with 46% of the households led by a female living in poverty compared to only 30% of those led by a male.¹

This chapter provides a general view of the situation of women in Kenya. The status of women and the rights that go with that status vary in the course of their lives, i.e. already as infants, then in puberty, as married women, and ultimately as widows. Depending on which stage of their lives women find themselves, they enjoy certain rights and have certain duties. In the following, various aspects of the lives of these women will be described with regard to their childhood and education, marriage, inheritance and property, land, motherhood and widowhood, which are important factors that shape the lives of the women in this part of the world.

3.1. Gender roles and the importance of children

In Kenya, as in many other parts of the world, the roles of men and women develop within the particular cultural and socio-economic setting of the respective society. In order to understand the situation of women in legal terms, their social environment must also be considered. The Kenyan society is patriarchal, i.e. it is a male-dominated social system with

¹ Republic of Kenya: Poverty Reduction Strategy Paper: First Medium Term Plan, 2008 – 2012, p. 117.

descent through the male line, i.e. one in which it is the men who continue the family lineage, while women merely bear the heirs to continue that lineage. In order to ensure the existence and survival of male children, women mostly have many children. As a consequence the desire for sons is one factor that strongly influences the number of children a woman has.²

According to a UNDP report in 2009, the national total fertility rate is at 4.6 births per woman. The rate is lower in urban areas, such as Nairobi where it was only 2.8 births per woman, while it is higher in the rural areas in Western and North-Eastern Provinces of Kenya where it was at 5.6. and 5.9 births per woman, respectively, in the year 2009. Women aged between 20 and 24 exhibited the highest fertility rates at 238 births per 1,000 women, and women between 15 and 19 have the lowest rates at 103 births per 1,000 women.³

Another factor that contributes to the desire for many children is the possibility that some of the children might die at, or soon after, birth as a result of diseases and/or the lack of proper nutrition and/or health care. The mortality rate for newborn babies was at 33 deaths per 1,000 babies and for children under 5 at 113 deaths per 1,000 children in the year 2003 according to the WHO.⁴

The surviving sons not only continue the family lineage, they are also meant to be a sort of insurance for their parents in old age. The daughters are married off and leave their parents' home to live in the household of their respective husband or in-laws.⁵

Another reason for women to ensure the existence and survival of their sons is that they ensure by inheritance that the property of their parents will remain in the family. The Kenyan Constitution (2010) states that:

“Every person is equal before the law and has the right to equal protection and equal benefit from the law. [...] Women and men have the right to equal treatment,

² Kiriti and Tisdell 2005: 493.

³ UNDP Report 2009:33.

⁴ WHO 2006.

⁵ Kiriti and Tisdell 2005: 493.

including the right to equal opportunities in political, economic, cultural and social spheres.”⁶

Despite that norm, most women at present do not own land or other property. Traditionally they enjoy the right to use the land belonging to their respective father and, after marriage, that belonging to their respective husband and therefore the right to use the land must be secured by bringing forth male successors. Thus, the women's preference of sons is not only culturally embedded, but also a very practical way for a woman to secure her customary legal claim to land and property.⁷

The fact that sons ensure women's rights to property and continue the family line alone does not explain why the fertility rate in Kenya was, and is, rather high compared with more developed countries. It is not only the sons that are valuable to a family but daughters were, and are, also very precious. An elderly man from Nyanza stated in an interview in 1996 that “[i]f you had many children wealth could come in great numbers in your home [...] you were somebody in the community. [...] If you gave birth to girls you knew you were wealthy already.” A woman added that “[i]n the old days you got 15 or 20 cows in bride price for the girls, and that way the boys could marry. In the old days it was only through these cows that you get wealth.”⁸

High fertility does not only serve the interests of the family lineage and clan, but also that of the mother herself, since the bride price is often paid in instalments every time a child is born and the refusal or inability to have more children could lead to claims for repayment of the bride price already paid, cancellation of parts of the agreed bride price and/or divorce. In many parts of Africa, including Kenya, many people believe that children enable the ancestors to be reborn and therefore an individual cannot make the decision alone whether to have children or not, and, if children are desired, how many children. Children are often viewed as belonging to the group or clan rather than the biological parents, who do not have exclusive rights over their offspring. In this context it should be mentioned that often children do not stay at their parents' home but are sent to relatives, who care for their well-

⁶ Constitution of Kenya 2010, §27 (1) + (3).

⁷ Kiriti and Tisdell 2005: 493, 496.

⁸ Cotts Watkins 2000: 729.

being and education if the biological parents are not able to do so, or to another couple with either no children or only a small number. This practice does make perfect sense in order to ensure the maximum survival of the “clan”⁹ or “tribe”.¹⁰

Before the British rule in Kenya, having many children was seen as a way to wealth for the above mentioned reasons and it was only during, and after, the colonial period that the model of large families was challenged by the more “progressive” model of small families. Despite these new influences, and the gradual introduction of modern contraceptives and family planning methods, having many children still made sense for a large proportion of the population especially in the rural areas where agriculture is the predominant source of income and requires intensive labour.¹¹

Next to the practical side of having a cheap workforce, there is also a political side that has to be taken into consideration. Although Kenya, nowadays, is a State with a federal structure that divides the country into provinces and different political parties, the traditional influence of the clans and/or tribes was, and often still is, very strong in both the private as well as in the political spheres. A tribe with a large number of members has more influence in political and economic matters and therefore incentives to limit the number of children that are born into a tribe are often viewed as ‘foreign’ and a way to decrease the population growth of the developing countries.¹² Still in the 1970s a civil servant explained the attitude of many in the Kenyan society towards birth control was that:

“Already they are suspicious that this is a foreign idea in order to limit the population growth of developing countries so that they do not become in the future a threat to the already developed countries... [E]ven here in our own situation in this country you can see that the bigger the tribe, the stronger the tribe; the smaller the tribe, the

⁹ The terms “clan” and “tribe” can have negative connotations especially in the critical development movement in Europe, nevertheless, the terms are used by many African and other authors and researchers and the Kenyan population to describe what is a reality in their country and therefore they are also used in this diploma thesis.

¹⁰ Price 1996: 412-413.

¹¹ Cotts Watkins 2000: 727.

¹² Ibid. p. 738.

weaker the tribe. Now you expand that in the world of politics and the world of power, it is identical.”¹³

This statement reinforces the perception that the children a woman has do not belong to her alone, but to the extended family and the whole tribe, as has been mentioned above, and that the decision to limit the number of children is not a merely personal one as it is in Europe and North America, where the individual is considered to be superior over the collective. Children ensure the future of the lineage, the clan, the tribe and are therefore of common interest. By having many children, women fulfil their duty to the society in which they live. Although these structures and ideas are increasingly being challenged by Western influences, and many Kenyans, especially in urban centres, have a very different way of life, these structures cannot be completely disregarded.

3.1.1. Education

In those circumstances in which economic and financial matters are of vital importance, the preference of sons is manifested in the direct discrimination of women in many ways, for example, with regard to education. Taking into consideration that the costs of a school education in Kenya have to be borne by the parents, and the dire economic situation of many Kenyans, it is not surprising that parents calculate very carefully the costs and benefits for the expenses of each child. For the reasons mentioned above and because women are less likely to find paid employment, most parents consider the education their sons can receive at school to be more important and rewarding than it would be for their daughters. This means when a decision has to be made on which of their children should be able to attend school, parents with a very small income to live on usually send one or two of their sons accordingly.¹⁴

This is one reason why, compared with their male counterparts, the women in Kenya have, in general, a lower level of education. According to the UNDP the literacy rate of women in Kenya is 76% compared to 89% of men in 2002.¹⁵ Another reason is that many women marry and/or become pregnant at a very early age, which hinders them from continuing their

¹³ Ibid.

¹⁴ Brookman-Amissah and Banda Moyo 2004: 230.

¹⁵ UNDP Human Development Report 2002, p. 224.

school education. In 2004, the Kenyan Ministry of Education released figures which showed that 10,000 to 15,000 girls drop out of secondary school every year as a direct consequence of early and unplanned pregnancy. This can be disastrous for their personal development regarding knowledge, profession and social status and health.¹⁶

Keeping this in mind, many parents calculate that they are either not able, or are unwilling, to invest in the education of their daughters as much as in that of one or two sons, because ultimately all they invest in their daughters will benefit another household, not their own.¹⁷

Adult labour force participation also may affect investment in a boy's or a girl's education. Employment in the formal sector requires some sort of education, so if parents receive evidence, in the form of a successfully employed relative or friend, that education pays off, they are more likely to invest in their children's, and especially their daughters', education. Better education will increase the chances of the girl to obtain paid work in the formal sector and enable her to earn money which she can, in turn, invest in the education of her own daughters and sons. Moreover Cubbins (1991) found in a analysis of the Kenyan Census and employment and earnings reports of the years 1970 to 1981 that female employment does not only have an effect on the education of boys and girls, but that its effect is significantly stronger than the effect of male employment on the level of education of the children. The higher the level of female employment the more financial resources are shifted to the education of the children. This means, the greater the female participation in the formal labour market, the more confident parents become that their daughters (and sons) will find employment in the formal sector when they grow up.¹⁸ However, although, in theory, education, formal work and reinvestment in education are related, the problem arises that especially in the rural areas formal work is rare in the first place and it is even rarer for women to obtain that sort of work as will be discussed in Chapter 3.2.

The prevailing system of inheritance also plays a part in the importance of education. Cubbins (1991) argues that since inheritance involves the distribution of goods and resources it entails the recognition of some responsibility and authority by the ones who

¹⁶ Brookman-Amissah and Banda Moyo 2004: 231.

¹⁷ Kiriti and Tisdell 2005: 500- 501.

¹⁸ Cubbins 1991: 1065, 1077.

inherit and that education, through the acquisition of knowledge, enhances their chances to become a responsible person. Thus, where men and women have equal chances to inheritance, both of them have greater chances to obtain some education because girls and boys are equally taken into account by their parents and sent to school.¹⁹ The prevailing system of inheritance in Kenya, as discussed in Chapter 3.6, however, does not provide equal rights for the sexes and serves, in this case, as an obstacle to the formal education of girls.

The "Federation of Women Lawyers" (FIDA) (2007) reports that the Government has taken several steps to eliminate the discrimination of women in education. In 2003, one of these steps was to introduce free primary education but there is, nonetheless, still a high drop-out rate among the girls on account of extreme poverty, having to care for members of the family who are ill (especially those with HIV/Aids), early pregnancies and also because of certain customary attitudes and practices. FIDA makes a special reference to the statistics that show a strong relationship between the age of girls and the first sexual experiences and the educational level attained by these girls. While 25% of the girls and women between 14 to 25 years of age with no or little education had had sex by the age of 15, only 4% with at least some secondary education had any sexual experience. FIDA also claims that there was no legal framework at the time when their report was issued in 2007 to enforce the principle of non-discrimination as far as girls are concerned.²⁰ The new Constitution, now states in its Paragraph 27 (3) and (4) that:

"Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."²¹

It has yet to be seen if this will change the discriminatory behaviour with regard to girls and women. Besides discriminatory behaviour against girls and women in relation to education, there is criticism on the character of the schools and the knowledge they provide. Schools in

¹⁹ Ibid. p. 1066.

²⁰ FIDA 2007: 18- 19.

²¹ Constitution of Kenya 2010, § 27 (4).

rural areas do not offer the training that is relevant to the local economy and labour market. The curriculum addresses the needs of a modern formal employment sector that can be found almost exclusively in urban areas, rather than developing those skills that are useful in the agricultural sector, which prevails in rural areas. While achieving literacy through primary school education is useful and necessary for everyone, higher levels of education tend to produce substantial, indirect opportunity costs in the form of lost child labour, for instance. This means, while primary education is seen as a positive development, higher education would be seen as unnecessary for the work that girls are likely to perform as an adult.²²

3.1.2. Appreciation of women

The discrimination of girls and women that undoubtedly happens does not, however, necessarily mean that women are not valued in the Kenyan society at all. Lesser Blumberg (2004) puts forward three points which show that women are appreciated members of Kenyan society: The first point is the custom of the bride price, which is still prevalent throughout the country. This means that the groom's family has to pay a certain amount (often in animals or the like) to the bride's family in order to compensate them for the loss of a valuable hand in the household and the field. Women in Kenya are the primary producers of agricultural goods with which they not only can feed their children, but also sell the surplus at the local markets. For this reason they are appreciated and the family is largely dependent on their economic productivity.²³

Many researchers view the custom of the bride price or bride wealth as a manifestation of the inferior position that women have compared to men in the Kenyan society, since they are "sold" and "bought" like some sort of property. This argument is often used by those who oppose women's rights to property and inheritance, claiming that a woman has no rights (to any property) since she herself has been paid for by the family of her husband and therefore belongs to the family.²⁴

²² Cubbins 1991: 1077-1078.

²³ Lesser Blumberg 2004: 21.

²⁴ Human Rights Watch 2003: 22.

Fox (1967) follows this argument by noting that “the payment of goods to the lineage of the bride establishes a man’s rights over the woman and particularly her children.”²⁵ The bride price was mostly paid in instalments every time a child was born, as it still is by the Kikuyu of Central Province, and it was only when the husband and his lineage considered that the wife had proved her worth by giving birth to many children that the final instalment or “childbirth payment” was made. This determined the completeness of the marriage ceremony and the husband’s full rights over his wife and children.²⁶

Orchardson, however, largely concurs with Lesser Blumberg’s thesis by stating that the payment of bride wealth is not the manifestation of a purchase, but rather a visible sign of the bond between two families, that become related through marriage. Bride price serves as a compensation for the bride’s family and as a guarantee that the wife will be treated properly by her new family. Traditionally bride wealth was in the form of cattle, which were “given away as a present” to the bride’s family and was not associated with any kind of sale. That connotation only emerged with the gradual replacement of cattle by monetary payments which actually resulted in a decrease of women’s status.²⁷

Secondly, Lesser Blumberg cites the prevalence of “general polygyny” in East Africa, which is different from “harem polygyny”, which only rich men can afford and involves women who are not productive. In East Africa, and also in Kenya, this phenomenon is found because women are seen as important generators of resources and therefore “many wives mean many powers”.²⁸

Hetherington (2001) opposes this argument by stating that polygyny and wealth are also interconnected in Africa, not only in the sense that women are a valuable addition to the workforce of the man’s household, but also that in order to be able to afford the bride price for a new wife, a man has to have sufficient (financial) means in the first place. Having more wives also means having more children, and the bride price that is paid for a daughter can be used to afford an additional wife for the head of the family or a wife for one of his sons.

²⁵ Price 1996: 418.

²⁶ Ibid.

²⁷ Von Bülow 1992: 531.

²⁸ Lesser Blumberg 2004: 21-22.

Hetherington concurs with the conception that women, because they farm, generally add value to their husbands' wealth.²⁹

The third point Lesser Blumberg gives for the appreciation of women is the sex ratio of Sub-Saharan Africa which is 102 women per 100 men in 2003, despite the fact that the maternal mortality rates belong to the highest in the world. This shows that there is no East African problem of "missing women", a term introduced by Amartya Sen, primarily for India, for girls and women who have been eliminated by feticide, infanticide and detrimental nutrition and health practices.³⁰

Lesser Blumberg's argumentation does seem, of course, to be very simplified and shortened at times and can be doubted, especially when she comes to her theory about harem polygyny, but, nevertheless, it can serve as one way, even though not comprehensive, to getting closer to understanding the appreciation of women in Kenya. To summarize, it can be said that when patriarchal traditions and difficult economic conditions are both determining factors and also effective at the same time, girls are likely to receive less education than their brothers, because parents tend to evaluate the cost and benefit of the way children are treated very carefully in order to secure the survival and well-being of the whole family, and that calculation is almost exclusively to the disadvantage of the girls. Nevertheless, this should not be interpreted as a sign of not appreciating women and their contributions to their community, but rather as a clear indication of the different and specific roles of the two genders.

3.2. Employment

In Kenya, as in many other African countries, women are largely excluded from the formal labour market and so they make up about one half of the agricultural workforce and 70 to 80 per cent of all subsistence farmers. The work in agriculture and subsistence farming makes women especially vulnerable to exploitation and impoverishment because often their work is not remunerated and working hours are long. The main reasons for the concentration of women in the agricultural sector and their exclusion from the formal sector are the lack of education, poor mobility, restrictions on reproductive choice and discrimination at their

²⁹ Hetherington 2001: 157.

³⁰ Lesser Blumberg 2004: 21-22.

place of work. Work in the informal sector, however, does not fit into most definitions of labour and therefore leads to the underestimation and undervaluation of most of the work performed by women, which is characterized by small-scale trade, domestic services and craftwork.³¹ One woman from Ethiopia expresses this dilemma as follows: “No [East African] woman is unemployed. Only a few are paid.”³²

Consequently the majority of women in Africa do not enjoy the same amount of protection and privileges in their work as people who work in the formal sector where strict labour laws and regulations are, at least formally, the norm. The Kenyan Employment Act of 2007, for example, guarantees a series of rights of the employee, such as protection from sexual harassment in the workplace, three weeks of paid annual leave and three months of paid maternity leave, which includes the right to get back their old job or one that is equivalent, after returning from maternity leave, which is especially relevant to working women:

“(1) A female employee shall be entitled to three months maternity leave with full pay. (2) On expiry of a female employee’s maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.”³³

Most women earn an income by “produc[ing] directly a proportion of their required consumption goods... between crops grown for sale and self provision.”³⁴ This small- scale farming is a combination of subsistence farming and farming for profit. Customs and the social status of women influence the kind of work women perform and how this work is valued by the society in which they live. While the agricultural work performed by men, i.e. cultivating larger plots of land primarily to produce crops for sale, has a very high value, subsistence farming, which is carried out almost exclusively by women, is valued much less. The work women carry out is often seen as the fulfilment of an obligation towards the family

³¹ Rebouché 2006: 239.

³² Ibid. p. 240.

³³ Employment Act 2007, Art. 29 (1) + (2).

³⁴ Rebouché 2006: 241.

and community and not as a value as such. Research has shown that most of the income a woman generates is for the benefit of her family, while most of the men's income is spent on themselves and also the fact that very few women own the land they cultivate, although, through their labour they make a great contribution to the development of land.³⁵

Another decisive factor, why most women earn a living in the informal sector and in agriculture, is the fear of many men that their wives' economic independence could become too great. While most men welcome their wives' income from small businesses, they do not encourage their wives to become independent on a larger scale, because they fear losing their authority over them. The men uphold their authority and prestige not only through economic and physical force, but also by applying an ideology. In many Kenyan rural societies, both the men and women have specific and fixed roles, and there are predetermined spheres in which males or females carry out the functions ascribed to them according to their sex. When women start to work in the formal sector, have large businesses and earn a lot of money, this is clearly viewed as a transgression of the boundary between the female sphere of the household and small-scale vending, and the male sphere of formal, paid work outside the house. Women who do "men's jobs" are often considered to behave in a "manly" way and that they are "trying to be bigger than men".³⁶

But it is not only the "working women" who are considered dangerous to society, but also divorced women, because they alter the strict roles that customary norms and traditions allegedly foresee for both sexes. Nowadays, the men and women in rural Kenya reinterpret the rules and customs in order to legitimate their respective rights and privileges, and as a consequence they change them. According to Von Bülow (1992) the practice that women are meant to be dependent on their husbands and unable to make decisions on their own, for instance, has emerged with the introduction of monetary trade and the ideas of Western property systems. In former times, the women used to be the unchallenged heads of households and, as such, made all the important decisions regarding that sphere without depending on their husbands' approval. Just as society is changing and imitating Western patterns and structures, so are the roles of men and women, and so conflicts become

³⁵ Ibid.

³⁶ Von Bülow 1992: 538.

inevitable when men fear losing their authority over the women, and women struggle to gain some authority and rights in the decision-making process. This means that today's interpretation of women's sub-ordination to male authority stands in stark contrast, if not in opposition, to the role of women as capable heads of households in the past. Men and women used to have different areas of responsibility and still have today but these used to be equally important and not hierarchical.³⁷

3.3. Marriage and Family

In Kenyan society it is considered inevitable that a woman marries sooner or later, but in most cases it happens sooner, and often too soon. Because of the prevalence of customary norms throughout the country, women and even young girls marry or, what is most often the case, are married off at a very early age. Although the *Children's Act* indirectly sets the minimum age for marriage at eighteen, customary law allows the marriage of adolescents who have reached puberty, mostly after circumcision, regardless of their age. This leads to early childbearing and a longer period of fertility which results in numerous and often unwanted pregnancies. The upbringing of these children involves much stress, with an increased workload and financial strain for the women, who are often enough left alone with the responsibility of raising the children.³⁸

The structure of the family determines the roles of men and women within the society. In large areas of sub-Saharan Africa, including Kenya, men often leave their home in the rural areas in search of employment in the cities while their wives stay behind caring for the house, fields and children. In countries where extended families are the norm, gender relationships are strictly defined. The women work in and around the house and/or in informal labour, and they are responsible for the growth and preparation of food, while their husbands often work in formal jobs. In this situation, it is often, if not always, the case that women help each other to look after their children and household(s). Nowadays this network of extended family support often diminishes or breaks down, while the expectations of what tasks women should perform remain the same. They are expected to work in the fields, to maintain the household, to care for the children without the help of

³⁷ Ibid. p. 538-539.

³⁸ FIDA 2007:29.

sisters, cousins and other female members of the family and sometimes they must additionally work outside the house to compensate for the lack of an income if the husband has left the family and/or has no means to support it.³⁹

Often, like among the Kikuyu tribe in Central Province, a woman and her children used to constitute a self-sufficient economic unit within the (polygynous) household and had therefore always had the almost exclusive responsibility for the upbringing and well-being of the children. The husband received assistance from his younger sons to take care of the livestock and maintenance of their dwelling and, in return, he contributed to the expenses for the school education and health care of the children. In all other respects his wife and children were economically independent.⁴⁰

Although caring for a family is a great responsibility and often even a burden for the women, early marriage was, and often still is today, encouraged by parents in order to preserve their daughters' virginity until the wedding. The longer the interval between the first menstruation and marriage, the greater is the chance that the girls engage in premarital sex and bring "dishonour" to the family. In the 1970s and 1980s, approximately 38% of East African girls between the ages of 15-19 were married, 20 years later the proportion had fallen, but not very much as it is, nonetheless, now approximately 25%. The Alan Guttmacher Institute (1995) also states that "in every society, an important consequence of prolonging the period between puberty and marriage is an increased likelihood that young women will become involved in sexual relationships before marriage".⁴¹ In a society where family planning and especially birth control and health care are not easy to obtain for everyone, premarital sex contains a risk of unwanted pregnancy and/or owing to the larger number of sexual partners a higher risk of being exposed to sexually transmitted infections, which both leads to social stigmatization. Early marriage is seen as a way to prevent all that. In a survey conducted in 2003, in Kenya 28,8% of the women aged between 20-24 reported

³⁹ Lief Palley, Marian 1991: 168-169.

⁴⁰ Price 1996: 417.

⁴¹ Mensch, Grant and Blanc 2006: 699-702.

having been married before the age of 18, and 33,7% of women aged between 40-44 years.⁴²

Price (1996), however, argues that in many cases young women enter into marriage when they are already pregnant which is one way to confirm the woman's childbearing capacity. Having children is considered to be the most important task a woman has to fulfil, and future husbands and their families want to make sure that the bride is able to live up to this duty. So in many cases the age of the mother giving birth to a child for the first time and her age when she marries coincide.⁴³

Women are mainly seen as wives and mothers and are expected to behave in a "wifely" manner. This is often the only way women can earn respect, reports a widow in her seventies:

"Marriage is the main thing for women. The married woman is more respected than the unmarried, because the latter belongs to nobody. It is through the husband that a woman obtains respect. To be respected a woman should work hard, look after the children properly, show respect towards her husband and her parents-in-law. Furthermore, she should behave "wifely", that is, she should do what her husband needs her to do, welcome everyone as her guest, not quarrel, not abuse anyone and hide her own problems."⁴⁴

Another consequence that marriage often brings with it, are the discriminatory practices within the family resulting in the women having the burden of the majority of household tasks and simultaneously enjoying little to no rights to property or to make independent decisions. This discrimination becomes most evident when marriages come to an end and then, often enough, the women are left alone with the children and thrown out of the matrimonial home with nothing but the clothes they are wearing. It is not only a customary rule that puts women in an inferior position when it comes to marital rights, but also the specific kind of statutory law that it is to the disadvantage of the women. The Kenyan Court of Appeal, which is the highest court in the country, stated in its decision in the case of *Peter*

⁴² Ibid. p. 717-718.

⁴³ Price 1996: 419.

⁴⁴ Von Bülow 1992: 537.

Mburu Echaria versus Pricilla Njeri Echaria in 2007 that “neither the status of marriage nor the performance of domestic duties would entitle a woman to a beneficial interest in matrimonial property upon dissolution of marriage.”⁴⁵ The court hereby ruled out the decision of the Superior Court which had already recognised the wife’s domestic duties as contributions to the property and had held that the property in dispute be equally divided between the spouses.⁴⁶

The Constitution now does state:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”⁴⁷

This, however, gives no information about the division of marital property if one party, - in most cases the woman, did not bring personal property into the marriage owing to the fact that she was not given any by her parents and/or denied by her husband the right to acquire any in her name.

Since marriage is considered part of the sphere of personal law, there is little interest on the part of the majority of the members of Parliament to interfere with claims or cases that are concerned with such issues. This lack of protection results in, respectively, increases violent behaviour against women not only within, but also outside, marriage. Sexual violence is a big problem in the whole of Kenya resulting in 2,867 officially reported incidents to the police in 2005, and a much higher unofficial number according to the Nairobi Women’s Hospital. According to the *Child Right Advisory Documentation and Legal Centre (CRADLE)*, 52% of 1,652 women between the ages of 17 to 77 reported in a survey that they had been sexually abused in their lifetime. In 2006, the Government enacted the *Sexual Offences Act* in order to curtail the spread of sexual violence against women, but the legislation is experiencing enforcement problems and does not include marital rape as a punishable offence.⁴⁸

At present there are seven Acts of Parliament concerning marriage that further complicate a uniform handling of marriage-related cases. The *Marriage Act of 1902*, the *African Christian*

⁴⁵ FIDA 2007: 28

⁴⁶ Kenya High Court of Appeal 2007: Peter Mburu Echaria versus Pricilla Njeri Echaria.

⁴⁷ Constitution of Kenya 2010, § 45 (3).

⁴⁸ FIDA 2007: 28-30.

Marriage and Divorce Act of 1931, the Matrimonial Causes Act of 1941, the Subordinate Courts Separation and Maintenance Act, the Mohammedan Marriage and Divorce Registration Act, the Mohammedan Marriage, Divorce and Succession Act and the Hindu Marriage and Divorce Act all postulate different rights and duties regarding marriage, divorce and property. Until now all attempts to pass just one single law which covers all ethnic groups and clans have failed because of claims that group rights would be weakened and also because it was feared that women would be granted too many rights.⁴⁹

In 2009, Kenya's Gender Affairs Minister tabled a legislation package in the cabinet that should counter the uncontrolled growth and spread of laws on marriage issues and also simplify and unify the matter. The proposed legislation broadens the legal definition of spouse, allows customary marriages, establishes equal rights to marital property, requires the consent of both spouses before property transactions, and abolishes the requirement of the bride price for customary marriages to be recognized. The OECD estimates that 60 % of unions in Kenya are unregistered customary marriages and thus, by enabling easier registration and legal recognition, this would improve the property rights situation of many women in the country. Additionally, the proposed legislation allows polygamous marriages if the couple states that at the time of the registration of the marriage, but the classification cannot be changed later. It will be very difficult though, to pass this law because of the fierce opposition to it by religious groups and the patriarchal attitudes of male politicians and community leaders.⁵⁰

3.3.1. Polygyny

One specific aspect that has to be taken into consideration when looking at marriage and family life in Kenya is the institution of polygamous marriage and the family structure arising from that form of marriage. According to the Population Reference Bureau, in the year 2002, approximately 20% of the women in Kenya lived in polygynous marriages.⁵¹ Polygyny is the form of polygamy where one man has more than one wife as opposed to polyandry where one woman has more than one husband. The former is the prevalent form of polygamous unions in Kenya, whereas the latter is almost unknown in the country, at least, not practised.

⁴⁹ Cooper 2011: 3- 4.

⁵⁰ Ibid.

⁵¹ Cook 2007: 235.

In the past, and in many rural areas still in the present, polygyny was and is a practice for a man to ensure the birth and survival of many children, who help working on the fields and added to a man's wealth. High infant and child mortality rates and dangerous male behaviour such as hunting and waging war, which sometimes caused a shortage of men, might also have contributed to the evolution of this practice. By marrying more than one woman to a man, it was ensured that every woman in the village was married and thereby given access to land and property, and that the size of the population remained at least stable or even grew.⁵²

While men in polygynous marriages have, of course, more sons and daughters than men in monogamous unions, the same cannot be said for the women. The number of children a woman has does not vary significantly between women in polygynous and monogamous marriages, although the latter tend to have slightly more. By having more than one wife, a man could increase the chance to have one or more sons, especially when the first wife was not able to have children or had only daughters. All in all, this form of marriage was introduced as a sort of safety mechanism for women, who ensured their right to land and property through marriage and thus became more respected members of the village, and for men, who were able to increase the number of their offspring and consequently their wealth, and ultimately it benefited the village or community as a whole because it enabled its survival and/or even growth through a high fertility rate.⁵³

Langley (1979) claims that the introduction of Christianity and Western laws and values contributed to the weakening of the status of women in Kenyan rural society. Polygamy, along with other customs, was condemned in favour of monogamous marriages and therefore the status of women as heads of the household and guardians of all household property was weakened. The family structure was altered from one consisting of one man with a number of wives, who usually lived each in a separate house on the compound, to one of a nuclear family with one man and one wife living in the same household, headed by the man. As a consequence, household property ceased to be the property of the wife or wives, respectively, since it was considered to be the property of the male head of the

⁵² Ibid. p. 236.

⁵³ Ibid. p. 237-238.

household anyway, together with all the other property, such as cattle and land. The lives of these women have therefore changed from being relatively independent and free to participate in making decisions to becoming more or less dependent on their husbands and having little to no decision-making power.⁵⁴

It is not only the men who favour polygynous unions. In some cases also women themselves suggest a second wife to their husband. This happens mostly when the woman is sterile, i.e. is not able to have any more children or has given birth only to girls. In order to ensure her continued use rights to land, housing and other property, she might be in favour of a new wife who will give birth to more children and, hopefully, have sons who continue her husband's lineage. A man whose wife cannot give him sons or children at all is encouraged and sometimes even pushed by his extended family to have another wife in order to contribute to the survival of the clan. The first wife and her family are not likely to oppose this, because they fear having to repay the bride price.⁵⁵

Today, more than ever, this institution of polygyny is highly debated as a result of the influence of the Western concept of family structure and women's rights and its value to society is questioned, as will be discussed in the chapter on inheritance and property rights. It is also highly contested that a polygynous family structure has any negative effects on children. Some researchers claim that children from monogamous families performed better in school than their classmates from polygynous ones, but these findings are doubted by others who do not see such a correlation. Most of the women who live in polygynous marriages, however, are not content that their husband has taken a second or third wife, because this is often related not only to a decrease of time and affection from the husband, but also of the (financial) means a woman has to support her children and herself.⁵⁶

3.3.2. Single mothers

A woman's position was, until recently, further weakened if she had children out of wedlock, because then the father bore no legal responsibility at all for the care and upbringing of these children. The High Constitutional Court reaffirmed in *Rose Moraa & Another versus*

⁵⁴ Von Bülow 1992:535.

⁵⁵ Price 1996: 421.

⁵⁶ Ibid. p. 240.

Attorney General in 2002 that “parental responsibility of a child born out of wedlock is solely the mother’s.”⁵⁷ In 2010 the Constitution erased that discriminatory practice, at least on paper, and established equality between all children independent of the marital status of their parents.

“Every child has the right [...] (e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.”⁵⁸

To sum up, women are usually married at a very early age and they often have next to no rights in that union. They have to take care of the children and the household but are not entitled to hold property of any kind. The variety of marriage laws that currently exist makes it very difficult to gain a clear and comprehensive view of the legal norms in force, and complicates judgment when it comes to the dissolution of a marriage. The proposed reforms to harmonize the laws, which would lead to equality of the spouses, face serious opposition from many groups, and it has to be observed, if the position of women within marriages in which they often do not even have control over their own bodies is to be improved in any way.

3.4. Family planning and abortion

In many Sub-Saharan countries the practice of family planning is uncommon, even though most of the women have at least heard of one or another method of contraception. The situation in Kenya is an exception in this respect, as there has been an increase in the use of contraceptives over the past years. The knowledge of different methods of family planning is almost universal in the Kenya. Lasee and Becker (1997) conducted a study in which 86% of all interviewed couples stated they knew about at least one modern method of contraception, and in 98% of the cases at least one partner had such knowledge. In 85% of the couples, approval of the use of such methods was reported. The study also shows that the great majority of couples had discussed at some point in their relationship the number of children they wanted to have and the use of one or another form of contraceptive to limit their offspring to that number. Around half of the couples stated that they wanted four children

⁵⁷ FIDA 2007: 29.

⁵⁸ Constitution of Kenya 2010, § 53 (1) (e).

or less. The number of children a couple wanted to have was influenced by the actual number of children that survived and by the degree of education of the couple. Couples in which the wife had some sort of higher education, were 4.3 times more likely to use contraceptives than those couples in which neither had had much education or any at all. Lasee and Becker explain this by arguing that more educated women have a greater say in the household when decisions are to be made. It was also shown that the approval or assumed approval of contraceptive use by the male partner plays a big role whether a woman makes use of such means or not. This approval, or assumed approval, was claimed to be the most powerful factor with regard to the actual use of contraceptives and therefore it is considered to be of great importance to target not only women but also their partners in family planning education efforts.⁵⁹

Some women use family planning methods secretly because they know that their husbands would not approve of them, as stated by a participant in a female focus group of a study conducted by Watkins, Rutenberg and Green in 1994:

“Some women want to tell their husbands, rather than ask first, but the husband might refuse. But, you see, it is the women who feel the burden, like when she is sick with the pregnancy, she is the one suffering, when the children disturb her, she is the one suffering. And when you tell the husband about “family” [planning] he cannot agree - this forces women to go and do “family” [planning] secretly because she is the one feeling the burden.”⁶⁰

Some see the considerable infant mortality rate as a reason why family planning in the Western sense does not make sense at all in Kenya, but that in order to ensure the survival of some children, a couple has to have many, as explained by a male participant of the study:

“The reason why we can't have few is the medical side. You have many and a few will die, so eventually you have few. It is the *wazungus* [i.e. white people] who

⁵⁹ Lasee and Becker (1997): 15-19.

⁶⁰ Cotts Watkins 2000: 745.

introduced family planning. This is because their children don't die. But ours keep on dying..."⁶¹

The fact that modern contraceptives and family planning is a controversial issue does not mean that Kenyan women do not practice fertility control of any kind. Women have always used different indigenous methods to maximize (not limit) their reproductive capacity. Many women practiced postpartum abstinence and coitus interruptus during breast-feeding, which lasted about two or three years in order to prolong the period between the births (this practice is also called *spacing*). This should ensure the maximum survival and wellbeing of the mother and her baby.⁶²

With a life expectancy at birth of 58 years for men and 62 years for women in the year 2009, pregnancy related deaths are the leading cause of premature death and disability among women of reproductive age in Kenya. The maternal mortality rate was 414 deaths per 100,000 live births per year in 2003. About 14,700 women die each year from a pregnancy related complication, while between 294,000 and 441,000 females suffer from disabilities caused by complications during pregnancy and childbirth.⁶³ Insufficient medical care, with regard to abortion, is not only highly risky for women and their babies but is also an additional burden for the health care system, which itself, is struggling to survive financially. Hessini (2005) cites a model of costs for abortion care which indicates that treating incomplete abortions in tertiary facilities costs ten times more than providing elective abortion in a primary health centre.⁶⁴

According to FIDA, the health care service for women in Kenya is in a bad state, as it leaves many thousands to die from sexually transmitted diseases, such as AIDS, and as a consequence of unsafe abortions that are the result of sexual violence and poor reproductive and sexual health information and options. The problem of unwanted pregnancies is made worse by the lack of social support of the women who need help, the lack of contraceptives, and a social environment in which sexual violence is a serious problem. Especially Kenya's highly restrictive abortion laws, which have not undergone any

⁶¹ Ibid. p. 743.

⁶² Price 1996: 425.

⁶³ UNDP Report 2009:32; WHO 2009.

⁶⁴ Hessini 2005: 90.

change in the new Constitution, despite a fierce controversy between women's rights organizations and lawyers, and conservative fractions supported by religious groups and churches, make it almost impossible for women to take control over their own bodies.⁶⁵

The Constitution stipulates that

“The life of a person begins at conception. [...] Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”⁶⁶

This leads not only to the criminalization of women who undergo abortions in other situations, but also of those doctors who perform such procedures, as can be observed in a recent case where Doctor Nyamu was even charged with murder in 2004, rather than illegal abortion and therefore threatened by the death penalty. The forces behind that charge represent a growing fundamentalist movement that condemns abortion as such, and intimidates women and medical personnel alike. A climate of conservatism, together with the ignorance of the reproductive health needs of women, leads to an increase in clandestine and unsafe abortions throughout the country. According to the *National Assessment of the Magnitude and Consequences of Unsafe Abortion in Kenya*, which was carried out in 2003, nearly 300,000 women undergo unsafe abortions every year, leaving 20,000 with complications admitted to public hospitals, of which around 2,000 women die. Other studies show that over 33 % of all maternal deaths are caused by unsafe abortions and their aftermath.⁶⁷ UNDP additionally states that 48 % of abortion cases occur among women aged 14 to 24, and that 30 to 50 % of all maternal deaths are directly attributed to unsafe abortions.⁶⁸

Reproductive health is a highly neglected issue, while abortion is a highly contested issue in Kenya. The fact that so many actors are involved in the matter make it very difficult to reach any compromise through which the physical and psychological health of the women is given

⁶⁵ FIDA 2007: 22.

⁶⁶ Constitution of Kenya 2010, §26 (2), (4).

⁶⁷ Brookman-Amissah and Banda Moyo 2004: 230-231.

⁶⁸ UNDP Report 2009:32.

priority. Although the law does allow abortion, if the mother's life is endangered by the pregnancy, it criminalizes women and doctors who perform abortion after rape, if the upbringing of a baby is financially impossible, or simply because the pregnant person is much too young. This illustrates the large number of persons and organizations that come into play in Kenya, such as the statutory and customary authorities, religious groups and human rights organizations, when the attempt is made to create a law which is well-disposed towards women.

3.5. Legal dualism

The dichotomy of two legal systems, namely customary and statutory law, is an essential feature of the Kenyan legal system that affects all the branches of law-making still today. On the one hand, colonization has left a complex legal arena in which customary and statutory laws co-existed and, often enough, conflicted. Additionally, to be exact, there is not only one customary law but many that all have different norms. However, since it is not the primary aim of this paper to describe the different customary systems in detail, the term customary law is used in the singular, although this is a simplification. In the preceding chapters, it has been shown that, still today, different aspects of life are affected by this dualism, making it very difficult for statutory norms to infiltrate into the respective spheres of life especially in the regions of the country that are far from the urban and political centres. Be it women's rights, marriage, inheritance, or the like, both customary and statutory law offer norms for the solutions of these issues that, in many cases, are incompatible.⁶⁹

Customary law is recognized by the courts and exists as a second body of law next to statutory law. In some regions customary law pre-dated statutory law, but in others it developed concomitant with colonization in order to facilitate the process of the respective domination. The logic of customary law focuses on the well-being of the community rather than that of the individual person, therefore its decisions tend to be more in the form of compromises than clear decisions in favour of one party. Nevertheless, such compromises are mostly one-sided and to the detriment of the women, since their concerns are either

⁶⁹ Henrysson and Joireman 2009: 40.

considered less important or they simply lack proper representation, which is most evident in the field of land and property rights, which will be discussed in the following chapter.⁷⁰

One of the characteristics of customary law is that it is mostly unwritten and flexible and therefore prone to subjective interpretation. Dr. Patricia Kameri-Mbote, a legal expert, explains that “most customary law is unwritten. Those interpreting it bring their own biases and women-unfriendly notions.”⁷¹ This subjective notion was confirmed by one senior chief who said “customary law is what I describe.”⁷² This might not only lead to discrimination against women, but also to legal insecurity for everybody invoking customary law.

The “Women Action Forum for Networking” (WAFNET) (2011) comments on the relationships between the two legal systems that, especially in the rural areas, the statutory law is just on paper unless the people in the community are aware of it and understand its purpose. Women's rights might be enshrined in the law, but if the women concerned do not raise their voices and claim those rights, nobody can help them. This is why awareness raising is so important in order to strengthen women and their rights. This awareness raising is not only necessary among the men, but also first and foremost, among the women, who in their majority support discriminatory practices, such as wife-beating, owing to a lack of self-esteem and also because of their cultural socialization.⁷³

Apart from this dualism between statutory and customary laws, a diversity of sources can be found within the Kenyan statutory law. Be it land rights, inheritance or family law, in all these fields a large number of different laws and acts in force, which cause a great deal of inconsistency in court decisions and, consequently, legal insecurity. This further complicates the pursuit and enforcement of women's rights, because there is no clear reference on which there can be any reliance. Additionally the Constitution's approval of customary law is often referred to as a “claw back clause” because it allows exceptions to the principle of

⁷⁰ Ibid. p. 40-41.

⁷¹ Human Rights Watch 2003: 11, interview with Dr. Patricia Kameri-Mbote, director of African Center for Technology Studies, Nairobi, October 17, 2002.

⁷² Ibid. interview with Wilson Tulito Molill, senior chief in Ngong, October 25, 2002.

⁷³ Interview 7.

non-discrimination and it is therefore currently under discussion whether it should be removed or not.⁷⁴

It is noteworthy that, despite the different laws that exist simultaneously, most, if not all of them, seem to be designed to the detriment of women, either openly in their wording or in a more indirect manner, as in the case of the Constitution, which does, at one point, establish the equality of all Kenyans just to recognize in another part the use of customary systems, which are known to have a negative effect on the empowerment of women. This can be observed most strikingly with reference to land rights.

3.6. Land, inheritance and property rights

A 1980 report of the United Nations noted that “[w]omen constitute half of the world’s population, perform nearly two-thirds of its work hours, receive one-tenth of the world’s income, and own less than one-hundredth of the world’s property”.⁷⁵ Kenya is no exception to this statement. In this respect, the importance of land in Kenya cannot be overestimated where it is required that each son of a family receives an equal share of his father’s land, and therefore the available land per person decreases from generation to generation. Land is the primary asset on which a livelihood can be based and consequently possession of the rights to that asset can ensure the economic well-being and social status of a person. In this matter, women have a very difficult stand considering the fact that under customary rule they are allowed only to use the land in accordance with the rights of their father over a piece of land, or otherwise with that of their respective husbands’ land, but they do not possess the right to ownership. These rights of land use are always tied to the ownership rights of a male relative.⁷⁶

According to the Human Rights Watch (2003) the western part of Kenya is notorious for its discriminatory customary practices related to property and, indeed, women from all over the country have their rights abused. This is not only a phenomenon of poverty, but also in middle-class, educated families, women often have a problem when they try to exercise their property rights. “Men are too adamant. It’s a tug of war and women let go,” says the

⁷⁴ Cooper 2011: 2-3.

⁷⁵ Lief Palley 1991: 169.

⁷⁶ Henrysson and Joireman 2009: 43.

head of the Government's Women's Bureau. The only notable difference is that educated, wealthier women are more likely to hire an attorney to assert their rights.⁷⁷

3.6.1. Unmarried women

Unmarried daughters without children have the right to remain in their father's compound where they can cultivate a piece of land either together with their mother or on their own. It is assumed that these young women will eventually marry and therefore there is no need to give them an equal share of their father's land equivalent to that which their brothers receive. When a woman has children and is unmarried, separated or cannot stay in her husband's compound for whatever reason, she finds herself in a very precarious situation. Her family might allow her to stay at their home where she helps to cultivate the land of her mother or is given her own parcel of land, nevertheless, her parents will usually try to keep their daughter in her husband's household, because both land and money are scarce and insufficient to support the daughter and her children. This is an especially delicate situation when it comes to domestic violence and the women cannot go back to their parental homes.⁷⁸

Although statutory law never explicitly prohibited women from inheriting land and property, the relevant rules, as stated in the Law of Succession Act of 1981, were never really applied or even generally known, and customary law as mentioned above did not recognize them at all. Despite much controversy, the Constitution passed in 2010 clearly states that

“Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles - [...] (f) elimination of gender discrimination in law, customs and practices related to land and property in land [...].”⁷⁹

Although equality between women and men is now explicitly provided for in the Constitution, the practice of favouring only sons to be heirs to land and property rights continues because it is assumed that daughters will eventually marry and will be able to use

⁷⁷ Human Rights Watch 2003: 6; interview with Mary Wambua, head of Women's Bureau, Nairobi, November 6, 2002.

⁷⁸ Davison 1988: 169-170.

⁷⁹ Constitution of Kenya 2010, § 60 (1) (f).

the land belonging to their respective husbands. Additionally, the Constitution weakens the principle of non-discrimination by stating at another point that:

“There shall be established the National Land Commission. The functions of the National Land Commission are [...] (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts [...].”⁸⁰

3.6.2. Married women with co-wives

The shortage of land in Kenya, as a result of the growth of the population and the continuous subdivision of the land that belongs to each family, has even worse consequences when the land that a man inherited from his father has to be further subdivided amongst his wives for cultivation. Polygamous marriages are possible under customary rule, and are recognized by the Constitution stating that

“[...] Parliament shall enact legislation that recognizes (a) marriages concluded under any tradition, or system of religious, personal or family law [...] to the extent that such marriages or systems of law are consistent with this constitution”.⁸¹

According to the Demographic and Health Survey of 2008, on average 13% of women countrywide live in polygynous unions. Older women are more likely to live in polygynous unions than younger ones, and those unions are more common in rural than urban areas. In some regions, such as the North Eastern Province, the proportion is as high as 36%, while in Nyanza, Rift Valley, Western and Coast provinces the percentage is between 15 % and 23 %, and in Nairobi Province it is 2%. Women with no, or only low, levels of education, and those who are amongst the poorest are most likely to live in polygynous unions.⁸²

It is the custom that a woman is allotted a piece of her husband's land for cultivation and if there is more than one wife, that share becomes smaller. This makes it very difficult for the women to feed their children, and leads to conflicts within the family. Additionally, it means that less land is put aside for food production, since most husbands cultivate the largest plot

⁸⁰ Constitution of Kenya 2010, § 67 (1) + (2) (f).

⁸¹ Ibid. § 45 (4) (a).

⁸² Demographic and Health Survey 2008: 80.

for a cash-crop. The resources in a polygamous household are thus, in most cases, even more limited than in a monogamous household.⁸³

The only statute to govern married women's rights to property in Kenya is the *Married Women's Property Act* of 1882, a relic from British colonial rule, which applies to all types of marriage, including marriages under customary or Muslim Law. Under this act, married women have the claim to separate property (presumably registered in their name) which was acquired before or during the marriage. Their claim to matrimonial property, however, is completely left out in the statute and there is also no clear definition of what is to be considered matrimonial property and there are no guidelines as how to divide such property. Non-monetary contributions are not recognized, which means that women often have no proof of having made any contribution, for instance, to the development of the land belonging to the family. This legal vacuum has led to decisions that undervalue and dismiss the contribution of women to their families and households, as can be seen in *Echaria vs. Echaria*.⁸⁴

In polygynous marriages the chance to invoke even this minimal protection is further reduced because women tend to have next to no say what their husbands do with the matrimonial property, let alone that little property which the women might have. They usually have no influence on their husbands' decision to take a second or third wife, and have consequently no control over what happens to the property. In polygynous marriages it is not unusual that a woman's property goes to the benefit of another wife and her children. Another problem is to prove the legitimacy of a (polygynous) marriage that was concluded under customary law, since it is unlikely that there will be any documents attesting the validity of the marriage. Therefore it is very hard for any woman who wishes to divorce her husband, or to prove her right to claim what is actually her property.⁸⁵

3.6.3. Widows

Since a woman's rights to land and other property are tied to her husband, a widow may find her claims at risk after her husband's death. It is in the complete absence of male children,

⁸³ Davison 1988: 171-172.

⁸⁴ FIDA 2008: 16.

⁸⁵ Ibid. p. 17.

when a widow's position is the weakest, since only if a woman has sons is she in the position to inherit the land in their name until they are old enough to take possession, and meanwhile she can make use of that land to support herself and her children. Customary law provided, and very often still provides today, an institution to protect the widow's interests and guarantees her continued right to use the family land, the so-called "wife inheritance". According to this practice the widow is married to one of her husband's younger brothers so that she and the deceased's land stay within the family. While "wife inheritance" was once meant to be a measure to safeguard a widow's interests against her in-laws, who often tried to drive her away from the house and land, it is simultaneously often connected with force, namely, when the widow is remarried against her will.⁸⁶

FIDA reports even the existence of professional "agents" within the Luo community, who look for new husbands who, in some cases, might be complete strangers to the women concerned. The FIDA lawyers, however, also claim that the elders of the village or clan often have a negative attitude toward those who try to chase away widows from their home and land since it is not only against the law, but also against their cultural practices. This is why the elders have sometimes gone so far as to become involved in the resettlement of women who have been chased away by their in-laws.⁸⁷

In this context there is another practice that is common in many parts of Kenya, where widows are "ritually cleansed" by having sex with a man, called "jater", who is paid by the widow's in-laws and who is often a social outcast. This ritual is believed to be necessary in order to cleanse the woman of her deceased husband's spirits. The woman can then be inherited by another member of the family or clan. Dr. Patricia Kameri-Mbote observed that "wife inheritance is a very common way to access property. If women resist they are sent out of the household."⁸⁸

Kenya's *Law of Succession Act* of 1981 does theoretically ensure that men and women, boys and girls should have all some sort of, though not equal, rights to inheritance if the deceased does not leave enough to reasonably support his dependants.

⁸⁶ Davison 1988: 170-171.

⁸⁷ Interview 6.

⁸⁸ Human Rights Watch 2003; interview with Dr. Patricia Kameri-Mbote, October 17, 2002.

“Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to - (a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”⁸⁹

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”⁹⁰

This means if there is no testament, the male and female children should inherit equally from their parents. If there is one surviving spouse and children, the spouse is entitled to an absolute interest in the personal and household effects of the deceased and to a life-long interest in his house and land. Nevertheless, when the surviving spouse is a woman her rights are invalidated if and when she remarries, while a man keeps his rights also upon remarriage. This shows clearly that equality between men and women in respect of inheritance is not achieved.⁹¹ Additionally many rural areas are exempt from the application of the act in the first place as stated in paragraph 32:

“The provisions of this Part shall not apply to - (a) agricultural land and crops thereon; or (b) livestock, in various Districts set out in the Schedule.

Schedule: West Pokot, Wajir, Turkana, Garissa, Marsabit, Tana River, Samburu, Lamu, Isiolo, Kajiado, Mandera, Narok.”⁹²

Even though the act is far from establishing equality between men and women, there is considerable opposition to its application, especially in rural areas where poverty prevails

⁸⁹ Law of Succession Act 1981, §35 (1).

⁹⁰ Ibid. §38.

⁹¹ Cooper 2011: 3.

⁹² Law of Succession Act 1091, § 32.

and land is often the only resource offering the possibility of a livelihood. One justice from the Court of Appeal in Nairobi put it this way:

“It’s idiotic to say that women can’t get land in Luo land [western Kenya]. If a woman says she’s having difficulty getting land, it’s crap. She ought to know that clan land can’t be inherited by a woman. It has been this way since time began. If a [husband] dies, the widow has a life interest. It has nothing to do with women’s human rights... Brothers-in-law don’t interfere. There is no room for interference... A daughter would not inherit [rural land] under any circumstances... Suppose I give [land] to my daughter and son, and then [my daughter] marries a Nigerian?... The Law of Succession Act can’t apply [to rural land] because women are supposed to be married and go away... Clan land must stay where it is. Urban property [can be inherited by women], but not rural land... If you don’t control the transmission of clan land, you’ll bring in strangers from other cultures that undermine the culture protected by customary law... The Law of Succession Act is useful because it covers people like us. Rural communities must be protected. It’s in the interest of everyone that rural communities are governed by their rules.”⁹³

Odongo et al. (2008) list various examples of how women’s rights are violated in the treatment of widows in Kenya. These include inter alia property grabbing by in-laws, the forced eviction of widows and their children, psychological torture and sexual violence following forced marriage to a brother-in-law. In addition to mistreatment by their in-laws, widows also often suffer from structural and legal injustice and violation of their rights. Not only are there no measures by which widows can be protected, their situation is made worse through the ineffective provisions of land policy, the expensive legal procedure before the courts and a detrimental customary dispute resolution system of the chiefs. Not only is there a lack of information, the poor widows are not in a position to represent their own interests, and the lawyers and chiefs alike are often corrupt. All this leads to precarious situations in which widows find their livelihood and that of their children at stake.⁹⁴

⁹³ Human Rights Watch 2003: 40, interview with Justice Richard Otieno Kwach, Court of Appeal Nairobi, November 7, 2002.

⁹⁴ Odongo et al. 2008: 32-35.

Ong'wen Okuro (2008) identifies the chiefs and their assistants as possible accomplices in the violation of widows' and orphans' rights when they agree to, or supervise, semi-legal land sales. When the seller and buyer agree on the transaction, the most commonly applied mode of payment is in instalments, and the chief or assistant chief is not informed about the sale until the final instalment is paid. In order to make the sale legitimate, the chief is needed as a witness and is often paid for his inconvenience considering the illegality of such a procedure. In the case of a dispute, the chief will either refer the matter to the Land Tribunal or informally decide on the matter himself. It is in the latter case in which the outcome might be especially negative for widows. When a dispute is treated by a chief outside the law, it is very probable that bribes will be paid by the purchaser and threats will be made by the chiefs. In very many cases it is the widow who loses after the chief and the purchaser have come to an arrangement, or after the chief has taken the last instalment "on the widow's behalf". Because a great majority of land sales are carried out informally and without the knowledge of the chiefs or village elders, it is difficult for them to arbitrate in disputes even if they have the best intentions.⁹⁵

3.6.4. Formalization of land rights

What has been described earlier in this diploma thesis shows clearly that the rights to land vary according to the sex and social status of the person who makes a claim. Traditionally this distinction with regard to land rights has developed in the general interest of the family and clan to hold together a system of provision and support. Meinzen-Dick and Mwangi (2008) speak of so-called "bundles of rights" that are tied to property. These include the right to use land, such as exploitation and control rights, such as the right to ownership, management, exclusion of others and alienation of the resource. While formal legal systems focus on the latter rights, which define de facto ownership of a resource, customary systems regard land as inalienable and belonging to more than just one individual. Land is not regarded as belonging only to an individual person, but to the community, the group or family, in the past, the present and the future. Therefore the formalization of property

⁹⁵ Ong'wen Okuro 2008: 128-131.

rights, which was introduced under the *Swynnerton Plan* in the 1950s in Kenya, and which is still often cited as the way to end legal uncertainty and injustice, is very problematic.⁹⁶

Initially, a title deed to land, especially farmland, was expected to bring about many advantages, such as to provide security of tenure and to protect investment, to enable farmers to borrow against a new form of collateral, to allow land to pass into the hands of the most able farmers, to quell and prevent disputes, to improve husbandry through the consolidation of holdings, to promote political stability and to provide a clear public record of ownership, among other things.⁹⁷ This formalization process was introduced by the British and continued by the Kenyan Government after the Declaration of Independence, also under the incentives of the international donor community that promoted it as the way to (agricultural) development. The Kenyan Development Plan of 1974-1978 stated:

“The land adjudication and registration programme is now larger than ever before and this expansion has been regarded as a prerequisite for faster agricultural development. The security of title which it provides makes farmers more willing to undertake long-term farm improvements, while it enables them to obtain agricultural credit more easily through pledging their land as security.”⁹⁸

But the programme that has been going on ever since, has produced many unexpected results, among which that the position of women has been weakened in certain aspects. In this respect, the FAO notes that:

“Ironically, attempts to increase the legal security of some may result in others losing their rights. For example, titling and registration projects, if poorly designed, can reduce security of many rural residents by failing to recognize certain rights, often held by women and the poor, and allowing them to be merged into simplistically conceived “ownership” rights. The rights to important uses of the land, for example, to gather minor forest products or to obtain water, may not be recognized by the legal system and may be effectively destroyed as a result.”⁹⁹

⁹⁶ Meinzen-Dick and Mwangi 2008: 36-38.

⁹⁷ Shipton 1992: 357.

⁹⁸ Ibid. p. 358.

⁹⁹ FAO cited in Meinzen-Dick and Mwangi 2008: 38.

This means that the formalization of the ownership of property without taking into consideration the existence of different use and control rights leads indirectly to an aggravation of women's land rights. This tendency can be observed in the case of the *Registered Land Act* of 1963 which encourages the formal registration of land in the name of an individual owner without taking into account traditionally existing use rights of others.

“Subject to this Act – (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”¹⁰⁰

In actual fact, it is very unlikely that this person will be a woman, and thus this makes it very difficult for widows or women in general to claim part of the land as their property, or at least to the right to use it, against the will of their in-laws. And under the *Land Disputes Tribunal Act* of 1993 disputes in relation to agricultural land are heard and decided upon by a panel of elders, who are almost exclusively male and who apply customary law, which is claimed to be biased against women.

“The Tribunal shall adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wish to call and their submissions, if any, and each party shall be afforded an opportunity to question the other party's witness or witnesses.”¹⁰¹

An appeal against a decision of the Tribunal is only possible before the Appeals Committee, which also uses customary law and, in theory, before the High Court, but only for cases in which a provision of law, other than customary, is concerned.

“The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any court. (9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of: Provided that no

¹⁰⁰ Registered Land Act 1963, Art. 27 (a).

¹⁰¹ Land Disputes Tribunals Act 1993, Art. 3 (7).

appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved.”¹⁰²

Additionally the Act prohibits representation by a lawyer for any of the parties involved, which makes it close to impossible for women to stand up for their rights since nobody speaks on their behalf.¹⁰³

“No party to or other person interested therein shall be entitled to appear by or to be represented by an advocate in any proceedings unless a Tribunal or an Appeals Committee directs otherwise.”¹⁰⁴

Also, although the so-called *Land Control Boards* are supposed to supervise and approve transactions of agricultural land, they do not require the consent of all spouses. In the case *Kamau vs. Kamau* of 2006, for instance, the Court of Appeal upheld the legal correctness of a sale of matrimonial land that a husband had undertaken without his wife's consent. The judge stated that “[u]ntil recently it has never been the practice and certainly not a legal requirement that before the legal proprietor of a piece of land disposes of it he or she should consult any third party be it his/her husband or wife.”¹⁰⁵ In the 1980s the President released a decree which directs the Land Control Boards to take the interest of all adult family members into consideration when undertaking a land sale but, since the decree is not binding, it may be ignored. Additionally, it has been observed that some men bring “fake” wives to give consent before the Boards.¹⁰⁶

Contrary to the impression that the application of customary law is primarily to blame for the delicate position of women in this respect, Shipton (1992) cites voices of opposition to the introduction of the titling system by customary authorities way back in 1951. A Provincial Commissioner's circular, for instance, stated that:

“[...] their reactions were, I am afraid, entirely negative. They realised that the introduction of a system of land titles would be the thin end of the wedge which

¹⁰² Ibid. Art. 8 (8) + (9).

¹⁰³ FIDA 2008: 14.

¹⁰⁴ Land Disputes Tribunals Act 1993, Cap. Subsidiary Legislation, Art. 19.

¹⁰⁵ Kenya High Court of Appeal 2006: Jacinta Wanjiku Kamau vs Isaac Kamau Mungai.

¹⁰⁶ FIDA 2008: 14.

would eventually break up the existing system of land tenure under customary law and also break down the existing system of inheritance under native law... the Africans in the District would strongly oppose any move to introduce a system that made commerce in land a possibility... they were all directed against the system and not for it... In the event of a title holder taking a loan on the security of his land, and defaulting on the repayment, the sympathy of members was not the title holder, but with his wife and children. The wife would be shambaless [without a plot] and the children would lose their inheritance..."¹⁰⁷

This shows that customary authorities were aware of the possible consequences that the titling system would have on the members of their community and that they sensed the need to protect the interests of each of them. It seems that, in this case, the ignorance of law-makers, rather than the use of customary law, may have led to a weakening of the rights of women to land since then.

One senior state counsel at the Kenyan Law Reform Commission explains that:

"It's a big problem because women give money to husbands and then he registers land in his name and sells it without telling the woman and she has no say... We tried to do this in cases to transfer so that before family land is transferred you would have to get consent of the wife and children but [the] system has been abused. People have... bribed their way or in alternative, they say, "Look here I'm the registered owner. I'm free to do what I like..."¹⁰⁸

Many women are not only deprived of their rights to land, but also of the possibility to receive loans, since many banks require land titles as collateral. So even if a woman intends to become financially independent through other means than land, she remains dependent on her husband or father, as the case may be, to giving his consent, since either the one or the other holds the title to the land in question.¹⁰⁹

¹⁰⁷ Shipton 1992: 364.

¹⁰⁸ Ibid. p. 13, interview with Johnson Okoth Okello, Senior State Counsel at Kenya Law Reform Commission in Nairobi, April 2, 2008.

¹⁰⁹ Ibid. p. 13.

To prevent the exclusion of women's rights and claims to land, it is indispensable that their customary relations be taken into account and not simply be replaced by a formal system ignoring this requirement. In order to protect secondary rights to land, such as use rights, and to tackle the variety of laws which are currently in force, namely the Constitution's chapter on land, the *Land Adjudication Act*, the *Land Consolidation Act* and the *Land Disputes Tribunals Act*, the *National Land Policy* was passed in 2009. The National Land Policy states that the primary rights holder, i.e. the owner, of a piece of land must receive written and informed consent from all of the secondary rights holders, i.e. those holding the rights to use the land, before he can undertake any land transaction. This replaces a provision allowing the primary rights holder to act without informing secondary rights holders since he has absolute ownership which ignores the use rights of women and the rights of his children to land. Recommended reforms in the National Land Policy address also the equal rights of men and women to land and its resources both during and upon dissolution of marriage and after the death of a spouse. The administration of all land is claimed to be supervised by the National Land Commission. Since land rights remain a highly sensitive and contested matter, it has yet to be seen if the reforms will actually be put into practice.¹¹⁰

3.6.5. The relationship of HIV/AIDS and women's land and property rights

As described above, women's property rights may come under attack by individuals, including their own in-laws and government officials, and are further weakened by the structural shortcomings of the protection measures. Another important factor that needs to be considered, in this context, is the consequence of HIV/AIDS on women's property rights. The connection between HIV/AIDS and the lack of property rights seems to be reciprocal in many cases, first of all, according to a report made by UNAIDS, the negligence of women's property rights can lead to an increasing risk of HIV contraction among women and girls resulting from the practice of "wife inheritance", "ritual cleansing" or other sexual violence that poor women without rights are subject to.¹¹¹

¹¹⁰ Cooper 2011: 4.

¹¹¹ Odongo et al. 2008: 32-33.

These practices are common in western Kenya, where the poorest province Nyanza, with an absolute poverty rate of 63%, and the most heavily AIDS-affected district, Kisumu with a prevalence of 35% in the year 2000, are located.¹¹² It is estimated that one in three widows is forced to undergo the “cleansing ritual”. The use of a condom is almost non-existent because the ritual is not considered complete unless the “jater’s” semen enters the woman’s body, and because women have no possibility to demand condom use.¹¹³ One “jater”, who claims to have “cleansed” at least 75 widows in the two years since he started this work, said that he is paid in cash (approximately KSH 5000 or 41 €) or in livestock (cows, goats, hens) by the widow’s in-laws, and that he does not use condoms:

“I don’t use condoms with the women. It must be body to body. I must put sperm in her... If no sperm comes out, she is not inherited... I don’t do anything to stop pregnancy. Two widows have had my children. I don’t act as the father or give assistance, but I’m considered the father... I’ve heard about how you get AIDS. I’m getting scared. You get it by having sex, and you must use a condom to prevent it. But the widows don’t want to hear about it. They want skin to skin. There are inheritors who are infected with HIV. They don’t use condoms.”¹¹⁴

Kenya’s HIV/AIDS rates are highest in the areas where “wife inheritance” and “cleansing” are most common and the Government admits the link between the two in a report to the CEDAW (Convention on the Elimination of all Forms of Discriminations against Women) Committee stating that “[w]ife inheritance is still practiced in Kenya by some communities. This has led to the infringement of women’s rights to choose who to marry and has also consequently led to the spread of HIV/AIDS.”¹¹⁵

Additionally, women’s property rights are compromised when parcels of land are sold off in order to cover the medical and funeral expenses of sick husbands, and the women are often left with nothing to support themselves and their children. They do not only lose land and shelter, but also the assets they could use to pay for their own medical treatment if they have been infected by their husbands. Another form of land sales in this context is exercised

¹¹² Human Rights Watch 2003: 13.

¹¹³ Ibid.

¹¹⁴ Human Rights Watch 2003: 13; interview with Guy Udoyi from Siaya district, November 3, 2002.

¹¹⁵ CEDAW Committee Report 2006, Art. 193.

by widows themselves who need to generate a financial income in order to buy clothes or send the children to school. Although many widows enjoy a remarkable degree of freedom concerning these transactions, they usually find themselves in conflict with their in-laws, who try to prevent them from selling any of “their” land. After the death of their respective husbands, many women are left to the mercy of their in-laws, who do not take into consideration the interests of the widows or their children.¹¹⁶

In response to the prevalence of HIV/AIDS throughout the country, the Government enacted the *HIV and AIDS Prevention and Control Act* in 2006, which states that:

“(1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying the HIV virus shall- (a) Take all reasonable measures and precautions to prevent the transmission of HIV to others; and (b) Inform, in advance, any sexual contact or person with whom needles are shared of that fact.”¹¹⁷

According to FIDA this Act is indirectly discriminatory against women because more women than men get tested for their HIV/AIDS status, in the course of prenatal and maternal care. This means that more women than men are aware if they are infected and therefore bear the burden to tell their partners. Since many women live in a violent home it is not realistic to expect them to inform their husbands about their status because they must assume that their partners will beat them or accuse them of having another man. Another reason for the thesis that this act affects women more than men is that by criminalizing the transmission of HIV/AIDS and blaming more women than men for it, the common notion that women are the primary carriers of epidemic and disease will be supported. This might not only lead to an increased prosecution of HIV positive women, but also to stigmatization within their families and community and hence to the possibility that they are expelled from their homes and lose everything. It is also possible that a mother who infects her unborn baby is criminalized even when, in many cases, she cannot make use of adequate health care facilities to prevent this from happening. Criminalizing those infected with HIV/AIDS is not

¹¹⁶ Ong'wen Okuro 2008: 125-128.

¹¹⁷ HIV and AIDS Prevention and Control Act 2006, §24 (1).

going to stop the spread of the disease, but it will negatively affect the social status of the women and, as a consequence, their rights to health and property.¹¹⁸

The possession of property, especially in the form of land, is of vital importance in Kenya because it influences many aspects of life. Without land, the people have few other sources of income. Against this background it is very important that women receive an equal share in this precious resource in order to care for themselves and their children. Land rights are a very important asset that can greatly increase the autonomy and dignity of women, and they are therefore highly contested. It is especially in the rural areas, where the majority of the population lives, that the opposition to these reforms is very strong, as will be seen in Chapter 5.

3.6.6. The connection between lacking property rights and domestic violence

According to a Government report to the CEDAW Committee, about 60,9% of Kenyan women are victims of physical abuse during their lifetime and about 40,6% experience sexual abuse.¹¹⁹ The cultural surroundings and the absence of adequate legal protection make it impossible for most women to do anything else but to endure the violent relationships in which they have to live. The existing laws and practices force them to choose between their rights to life, dignity and equality or their rights to property and an adequate standard of living, including health and housing. According to Rev. Dr. Judy Mbungua, head of the Pan-African Christian Women Alliance, domestic violence and disputes on property are closely connected in many cases. When men have absolute control over the matrimonial property, sometimes including even what their wives purchase themselves, the women often face domestic violence from which they cannot escape.¹²⁰ Lanoi Parmuat, a Masai community activist reports that:

““[W]ife battering is the order of the day” and elderly Masai women tell brides on the night before they marry that they cannot leave if their spouses are abusive: “The very night before you go,... the elderly women come in and tell you. They use a

¹¹⁸ FIDA 2008: 24, 25.

¹¹⁹ FIDA 2008: 22.

¹²⁰ Ibid.

proverb: Whatever pain the situation will bring there is no going back... there is no going back.””¹²¹

The most common form of domestic violence between adults is that between husbands and wives. Violence against women is not only perceived as justified by men but also by a significant percentage of the women. According to the Demographic and Health Survey of 2008, 53% of the women and 44% of the men agree that wife beating is in order in at least one of the following situations: if the woman burns the food, if she argues with her husband, if she goes out without telling him, if she neglects the children, if she refuses to have sexual relations with him. Women are socialized to accept and tolerate domestic violence, even to rationalize it and to remain silent about it.¹²²

Sexual violence is also a big problem in Kenya and cannot be separated from “mere” physical violence. The Demographic and Health Survey states that 21% of the women in Kenya have experienced sexual violence and that 12% of the women who had their first sexual experience before the age of 15 were forced to do so. An analysis across the provinces shows that in the two provinces where women are most likely to experience physical violence, namely Nyanza and Western Provinces, the rates of sexual abuse are also the highest.¹²³

In 2006, the Government enacted the *Sexual Offences Act*, which prohibits rape and sexual assault and requires a minimum sentence of five years in prison for such offences. But it does not apply to married couples:

“An act is intentional and unlawful if it is committed - (a) in any coercive circumstance; (b) under false pretences or by fraudulent means; or (c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence. [...] (5) This section shall not apply in respect of persons who are lawfully married to each other.”¹²⁴

¹²¹ Ibid. interview with Lanoi Parmuat, FGM Project Leader, Free Pentecostal Fellowship in Kenya, Nairobi, April 3, 2008.

¹²² Demographic and Health Survey 2008: xxiii + 245.

¹²³ Ibid. p. 250.

¹²⁴ Sexual Offences Act 2006; § 43 (1) + (5).

This means that sexual abuse within a marriage and marital rape are largely unreported and unpunished. Even if abused women want to leave their violent partners, they face the possibility of losing everything they have, and therefore prefer to stay and to put up with the situation.

3.7. Female Genital Mutilation (FGM)

Male and female circumcision have a long tradition among all ethnic groups in Kenya, but some more than others have nowadays abandoned, reduced or altered the ritual that is meant to be the physical manifestation of an initiation rite that introduces a child into adulthood. In some parts of Kenya FGM has even been replaced by “circumcision with words”, celebrating a young girl's entry into womanhood with words rather than genital cutting.¹²⁵ Both boys and girls underwent, and still undergo, ceremonies that convert them into adults and of equal, if not greater, importance than the mere act of circumcision, was and is the knowledge that is being given to the initiates by their elders in that ceremony. It includes traditions, laws, manners, the duties of an adult in the group, ideas of what is appropriate behaviour with regard to sexual intercourse, child rearing and general information on how to function as an adult within the respective group. Having sex with an uncircumcised person was, and sometimes still is, regarded as polluting, requiring a purification rite in order to expunge the pollution.¹²⁶

This procedure is carried out as an initiation rite and as an act symbolizing purification and thus partly explains why most ethnic groups in Kenya continue to practice circumcision, which especially in the case of girls, is nowadays more and more perceived as “genital mutilation” not only by many outsiders but also by many members of Kenyan society. This perception is strengthened by the many cases of extreme violent and brutal kinds of circumcision, so called infibulations or Type III FGM¹²⁷, that have come to public knowledge,

¹²⁵ OMCT Report 2003: 18.

¹²⁶ Robertson 1996: 620-621.

¹²⁷ The WHO classifies FGM Types I-IV corresponding to the gravity of the mutilation: Type I: Partial or total removal of the clitoris and/or the prepuce (clitoridectomy).

Type II: Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision).

Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation).

where the clitoris and inner labia are cut and the walls of the outer labia are sewn together afterwards. This requires later (multiple) reopening of the vagina before sexual intercourse and childbirth, which is often performed by the husband or a female relative with a simple knife or piece of broken glass and causes great pain and often infection and extends the women's suffering for as long as they are sexually active, and possibly for as long as they live, since this practice can also lead to problems connected with urinating and other bodily functions.¹²⁸

Kenya has signed several international treaties, such as the "Convention on the Rights of the Child" African Charter on the Rights and the Welfare of the Child" (1990) and the "Protocol on the Rights of Women in Africa" (2003), that mark the circumcision of girls (and children overall) as mutilation and therefore prohibit it and the Kenyan Parliament also enacted the Children Act of 2001 which banned the circumcision of girls under the age of 18 by stating that:

"No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development. [...] "[F]emale circumcision" means the cutting and removal of part or all of the female genitalia and includes the practices of clitoridectomy, excision, infibulation or other practice involving the removal of part, or of the entire clitoris or labia minora of a female person."¹²⁹

However, many ethnic groups and communities continue to practice female circumcision especially in the rural areas of the country, where customs and traditions are often stronger than in urban areas. According to the 2003 Kenyan Demographic Health Survey, 32% of all Kenyan women between the ages of 15 and 49 have undergone some sort of circumcision. In 1998 the figure was at 38%, which shows that there has been a decline. In the rural areas the figures show that 36% of the women are circumcised versus 21% of urban women. The type of FGM has also changed over the time, with 62% of women over 50, who had undergone Type II FGM, while 39% of women between 15-19 years had done so and the remainder

Type IV: All other harmful procedures to the female genitalia for non-medical purposes, for example: pricking, piercing, incising, scraping and cauterization. Cit. in Ogodo 2005.

¹²⁸ WHO cited in Ogodo 2005: n.p.

¹²⁹ Children Act 2001, §14 + 2.

undergoing the less invasive Type I. This means that both the frequency and gravity of FGM have declined over the last few years but, nevertheless, many communities continue to practice it according to their respective traditions, because parents want to improve their daughters' marriage prospects, in order to curb women's sexual desire and because of the need to mark the passage between childhood and adulthood.¹³⁰

3.8. Post-election gender based violence

Another form of violence against women, referred to as "gender based violence", must be mentioned in this context. Kenya has a history of violent uprisings following elections, and the presidential and parliamentary elections of 2007 were no exception. The reasons for this post-election violence are very complex and will not be analyzed in detail in this diploma thesis. They include (but are not limited to) corruption of the political leaders and parties, nepotism, frustration of the population with the lack of proper representation, ethnic conflicts etc. The pre-election campaigns of the presidential candidates faced no significant difficulties and were carried out relatively smoothly, although they were characterized by ethnic stereotypes and prejudices, leaving at the end two candidates competing for the post of president, namely Mwai Kibaki, belonging to the Kikuyu from the Party of National Unity, and Raila Odinga, Luo from the Orange Democratic Movement. The race between the two candidates was predicted to be a very close one and problems arose when the Electoral Commission delayed the announcement of the results, opening the door for speculation on possible manipulation and alteration of the results. Ultimately, Kibaki was declared as the new President and almost immediately celebrations by his followers and demonstrations by his opponents began across the country. In the course of these violent uprisings all over Kenya, hundreds of thousands of people fled their homes and became victims of physical and psychological violence. In the end, over 1,000 people were killed and about 350,000 were internally displaced, including many girls and women.¹³¹

The levels of violence rose in all its forms and concerned the whole of Kenyan society, i.e. both men and women, boys and girls. It was, however, the female population that were most exposed, especially when it came to sexual violence. The Nairobi Women's Hospital,

¹³⁰ GTZ 2007: n.p.

¹³¹ Muthoni Wanyeki: 2008: 91-94.

for example, reported an upsurge in the cases of sexual violence, with the number of such cases being three times higher than usual, with 322 cases between December 2007 and February 2008. However, it is difficult to come up with exact numbers of victims of sexual violence in the post-election violent period across the country given the reluctance of many women to report rape or other forms of sexual violence, and the difficulty there is to distinguish between these cases and those of the sexual violence that takes place daily independently of that specific situation of national conflict. It seems that most of the cases of sexual and gender-based violence were “opportunistic”, owing to the chaotic circumstances, rather than being used as a systematic tool to target specific victims on account of their political allegiance or ethnic background.¹³²

Another form of sexual violence that occurred during that period resulted because many girls and women who were forced to flee from their unsafe home or region, engaged in prostitution in exchange for money, food or shelter, since they often had no belongings and thus no other possibility to survive. Sexual assaults were not only committed by random individuals, but also by groups of men and staff of the camps that were built to assist internally displaced persons, which is why the Government decided to place two female officers at each camp site in order to encourage women to report such incidents. Apart from rape, defilement of young girls (and boys) and the like, there were also some cases of ethnically motivated forced circumcision of men belonging to the Luo and Luhya communities. These, however, seem to have been individual cases rather than systematic ones.¹³³

The Kenyan Government also appointed a commission to investigate the facts and the conduct of State security agencies, since there had been signs that they were involved in cases of sexual and gender-based violence. The Commission of Inquiry on the Post Election Violence (CIPEV) heard reports from victims and organizations that worked with those victims and formulated recommendations for the Government. The Commission itself, a quasi-judicial body, did not persecute perpetrators but referred the cases to the Government for prosecution. The key recommendation was to set up a Special Tribunal

¹³² OHCHR 2008: 13-14.

¹³³ Ibid.

which should investigate these cases. In the event that the Government would not take action, the cases should be referred to the International Criminal Court, as crimes against humanity. The Commission received reports on sexual and gender-based violence against men, women and children consisting mainly of rape, gang rape, defilement, genital mutilation, sodomy, forced circumcision, insertion of objects and sexual exploitation.¹³⁴

According to the Rome Statute of the International Criminal Court, rape and other sexual violence can be seen as crimes against humanity or war crime, and therefore fall under its jurisdiction, in the following circumstances:

“ For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:[...] (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;”¹³⁵

“For the purpose of this Statute, "war crimes" means:[...] (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...] (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; [...] (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:[...] (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;”¹³⁶

¹³⁴ FIDA 2011: 52-53.

¹³⁵ Rome Statute Art. 7 (1) (g).

¹³⁶ Ibid. Art. 8 (2).

The UN High Commissioner for Human Rights undertook a mission to Kenya in order to investigate the matter and came to the conclusion that although there undoubtedly occurred many cases of gender-based violence that must be prosecuted, there was little to no evidence that its use was widespread and systematic in order to intimidate certain members of different ethnic groups, and therefore these acts of violence did not qualify as crimes against humanity or as war crimes.¹³⁷

¹³⁷ OHCHR 2008: 14.

4. Relevant international legal standards

The Kenyan Government acceded to various international human rights documents relating to women's rights. Especially if it is taken into consideration that the Constitution which now provides for the equal rights of men and women has come into force only in 2010, it is important to mention that the Kenyan Government committed itself to upholding women's rights already much earlier on by acceding to relevant international human and women's rights documents, of which three will be discussed here. This means that the violation of women's rights is not only a breach of Kenyan law but also of international legal standards. In this chapter, an analysis is made, based on a number of relevant paragraphs, in how far Kenya fulfils the obligations which it agreed to by acceding to international human rights documents.

4.1. Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

In 1984 Kenya Government acceded to the articles set down by CEDAW, which is the core international treaty on women's rights and entered into force in 1981, and thereby agreed to fulfil and act by its standards. In Article 1 the Convention defines discrimination as:

“[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”¹³⁸

Article 2 states that the states parties are obliged to “refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation”¹³⁹ and to “take all appropriate

¹³⁸ CEDAW 1981, Art.1.

¹³⁹ Ibid. Art.2.

measures to eliminate discrimination against women by any person, organisation or enterprise.”¹⁴⁰ The Convention also requires that states parties “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”¹⁴¹ De facto and even de jure, however, women in Kenya enjoy fewer rights when it comes to owning, using and inheriting land and other property under the Law of Succession Act and customary law. Paragraph 27 in the Constitution of 2010 closed the door for discrimination against women in every respect, as has been shown earlier, but at the same time left a big window open for unequal treatment through § 67 in which the new Constitution recognized and even encouraged the continued validity of customary law, which, it is known, disregards the principle of non-discrimination.¹⁴²

CEDAW also states that many cases of violation of women's rights do not simply emanate from legislation, but from the society and culture that shaped that legislation, and therefore this requires Governments in Article 5:

“[...] to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”¹⁴³

In the almost three decades after the accession to the articles set down by CEDAW, the Kenyan Government has done little to comply with these requirements. With regard to women's property rights, most of the legislation in force is discriminatory, partially ignored or misinterpreted by judges and officials whose attitudes towards women are biased.¹⁴⁴

With respect to the family and marriage laws under CEDAW states parties must:

“[...] take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Constitution of Kenya § 27 + 67.

¹⁴³ CEDAW 1981, Art. 5 (a).

¹⁴⁴ Human Rights Watch 2003: 40, 45.

basis of equality of men and women: [...] (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; [...] (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for valuable consideration.”¹⁴⁵

The CEDAW Committee noted also that the violation of women's rights to equality in marriage and in the family is not only discriminatory, but also detrimental to their development.

“Any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family, and to live in dignity as an independent person.”¹⁴⁶

As has been shown in the previous chapters, the day to day reality of life in Kenya, mainly in the rural regions and communities, is characterized by the prevalence of customs and practices that violate women's rights, as in the case of “wife inheritance”, where widows have no choice but to marry a new partner that has been chosen by their deceased husband's family or clan in order to maintain their rights to their land, house and other property. Especially under customary law, men and women have very different rights to property during marriage and after the dissolution of the marriage or death of the husband. It is very difficult for a woman to obtain a share of the property even if she herself bought it as a married woman with the money she had earned herself. This often leads to extreme poverty because the women are forced out of their house and off their land. Many of them cannot go back to their parents, and so they end up in one of the slums of the big cities where they live in shacks and their children cannot go to school. This violates their right to adequate living conditions, especially in relation to housing, which CEDAW provides for in Article 14 (2) (h):

¹⁴⁵ CEDAW 1981, Art. 16.

¹⁴⁶ CEDAW Committee 1992, § 28.

“States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: [...] To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”¹⁴⁷

4.2. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Kenya acceded to the ICESCR in 1972, i.e. four years before the covenant finally entered into force in the year 1976, and it is obliged to fulfil the standards laid down in it. Nevertheless, according to FIDA, the Kenyan Government has done little to live up to those standards. Especially in the fields of adequate housing, marriage and health, the women are still not treated as equal to their male counterparts and suffer as a result of discrimination in Kenya. The covenant states that:

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.”¹⁴⁸

The practice of “wife inheritance”, as has been shown earlier, goes directly against the provision as does the practice of polygamous marriages. In such unions women are often denied their right to “free consent” and have mostly no choice as to accept the fact that their husband is taking another wife, since they are dependent on their spouse. The Human Rights Committee stated, in 2005 after reviewing Kenya’s compliance with the ICESCR, that “... the continued application of some customary laws, including the permissibility of

¹⁴⁷ CEDAW 1982, Art. 14 (2) (h).

¹⁴⁸ ICESCR 1976, Art. 10 (1).

polygamous marriages, undermines the scope of the non-discrimination provisions of the Constitution and other legislative texts".¹⁴⁹

The practice of "wife inheritance" is closely related to eviction of the widow should she try to resist being inherited. The in-laws will often chase the woman away if she refuses to be inherited by another member of the family or clan.¹⁵⁰ The continuity of this practice, and the failure of the State to protect the interests of women's in such a situation go against the covenant that states:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."¹⁵¹

In relation to "wife inheritance" and "ritual cleansing" it also important to mention that by this practice the spread of HIV/AIDS is facilitated. Women who were infected by their deceased husbands and who are forced to engage in sexual relations with their new husbands might pass on the virus to them, who might then infect their other wives if they live in polygamous marriages, or even other women. Or they might become infected by their new husbands in the first place.¹⁵² This means that women are deprived of their right to health which is laid down in Article. 12 of the Covenant: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."¹⁵³

The Kenyan Government recognizes in its report to the ICESCR Committee that "[t]he discriminatory nature of African Customary Law is reflected in women's inheritance and property rights," just to add that it "suffice[s] to note that the courts have been very proactive in declaring the rights of women as far as property is concerned whether in

¹⁴⁹ Human Rights Committee 2005: n.p.

¹⁵⁰ Ibid.

¹⁵¹ ICESCR 1976, Art. 11 (1).

¹⁵² Human Rights Committee 2005: n.p.

¹⁵³ Ibid. Art. 12 (1).

matrimonial, succession or other suits".¹⁵⁴ In reality, courts and other tribunals, as has been discussed above, especially those handling land allocation and disputes, continue to curtail women's rights to land, property and housing, despite considerable efforts that have been made by the Kenya Law Reform Commission.¹⁵⁵

4.3. Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa

African nations drew up the African Charter, which is their primary human rights document, in 1981 to protect state sovereignty. This is one reason why women do not receive much attention in the document, except in a clause formulated in a very general way on non-discrimination and in combination with the rights of the child, which concurs with the overall perception of women as child bearers. So finally the African Commission, together with some NGO representatives drafted the Protocol of the Rights of Women, which was adopted by the African Union in 2003. The Government of Kenya has signed but not ratified the Protocol, although its provisions are relevant to the country as a whole since it is committed to include and enforce women's rights in its Constitution, and international documents, and since it is the only international document in this field which arose out of an African context.¹⁵⁶ Article 5 of the Protocol requires that:

"States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including: [...] b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices, in order to eradicate them; [...]d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance."¹⁵⁷

Article 17 adds:

¹⁵⁴ FIDA 2008: 10.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Protocol on the Rights of Women 2003, Art. 5.

“(1) Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies. (2) States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.”¹⁵⁸

For Kenya this would mean that the Government does not only have to review legislation that is discriminatory against women, such as the *Law of Succession Act*, to name but one law, but also to pass legislation which prohibits customs that curtail women's rights with regard to inheritance, property, economic rights etc.

Article 13 is very interesting because it addresses the need to recognize women's (unpaid) contributions in the household and the fact that most women in Kenya, as in East Africa as a whole, work in the informal sector, where common labour laws do not apply.

“States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall: [...] (e) create conditions to promote and support the occupations and economic activities of women, in particular, within the informal sector; f) establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it; [...] h) take the necessary measures to recognise the economic value of the work of women in the home;”¹⁵⁹

This is very important against the background that in Kenya until now, household and subsistence farm work, which are primarily performed by women, are not considered a contribution to the marital household and property, since it lacks the financial aspect, and therefore women are prevented from their right to property upon the death of the husband, or in the case of divorce, as has been discussed earlier in *Echaria vs. Echaria*.

¹⁵⁸ Ibid. Art. 17.

¹⁵⁹ Ibid. Art. 13 (e), (f), (h).

Article 19 (c) ensures that women have a right to sustainable development and encourages states to “promote women’s access to and control over productive resources such as land and guarantee their right to property”¹⁶⁰ and Article 21 states that:

“(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable shares, their parents' properties.”¹⁶¹

These articles ensure that men and women have equal inheritance and property rights whereas most Kenyan women’s rights are curtailed by the provisions of the *Law of Succession Act*, and also under customary law.

The Protocol, although taking CEDAW and other international documents as a reference, takes into account the specific circumstances in which African women live, and has the chance to better the legal and social standing of African women. Since it is a document which was elaborated in, and specifically for, an African context it has the potential to reach women all over the African continent and consequently in Kenya, to a greater extent than documents that were drafted for a much bigger, if not worldwide, application. Especially the reference to informal and unpaid work is much more relevant in Africa than in Europe or North America. Also, the significance of a regional legal binding framework of standards cannot be underestimated, since it makes it possible to take into account, and to respond to, the specific needs of women in Africa.

¹⁶⁰ Ibid. Art. 19 (c).

¹⁶¹ Ibid. Art. 21.

5. A field study conducted in Bungoma County

The empirical information of this chapter was obtained in five interviews with NGO staff and from the cases they take care of, as well as on visits by the author together with DESECE staff to one women's and two men's groups in Bungoma County during a stay in February 2011, which provided insights into the current situation in Bungoma with regard to legal and social questions. DESECE has its office in the village of Misikhu but its activities reach out to the surrounding villages and towns in the County. The information was very valuable as it added a practical side to the theoretical information gained from research in the relevant literature. All of the persons and groups interviewed are in one way or another connected to DESECE, either working for or with the organization itself or participating in training courses or workshops. Therefore, with regard to their level of education, as well as their number, they are not truly representative of the great majority of the population in Bungoma. Nevertheless, they give an idea of how life is like in this region. The information given by the NGO staff derives directly from their work with the local people and can therefore be seen as more representative for the whole area than the case studies of one women's and two men's groups can be. In this documentation it is shown how DESECE deals with the local circumstances and how this NGO interacts as a link between the State authorities, the local authorities and the people in the community.

5.1. Methodology

Prior to the field trip to Bungoma, three sets of guideline questions (see 11. Appendix) were prepared on the topic of women's rights, each of which differed slightly in their content and composition according to the type of persons that were interviewed, their level of education and background. The people in the research area were divided into three groups, those in the first group were members of the DESECE and TinA staff, the members of the men's and women's groups that work with DESECE formed the second group, and the lawyers concerned with women's rights were in the third group. Since the latter could not be

reached from Bungoma by the author, the questions were passed on to her colleague Anna Schinwald, who then included them in her own interview with a lawyer from FIDA in Kisumu, so that the information could be made available for this study.

The interviews did not always strictly follow the outlined questions, but often developed into more open conversations on and about the topic. Especially in the interviews with the local men and women, it was not possible to stick to the questions that had been planned beforehand, since the people were keen to share their personal experiences which they wanted to tell in their own words and in their own way. Questions were asked by the author only if some important information for the paper was not provided by the interviewees on their own initiative. The results of these conversations are the three case studies that are presented in this chapter. Although the interviews with the NGO staff were more formal and answers were given to all the prepared questions, much additional information was also provided by the interviewees.

All of the interviews and conversations were either recorded on audiotape and/or were written down in a detailed protocol during and after the meetings, if the interviewees felt uncomfortable about having their contributions recorded on tape. The information obtained in these interviews is presented on the following pages and represents the personal opinions and experiences of individuals with different backgrounds, as compare to the professional opinions and experiences of trained NGO staff and lawyers. The content and wording of the information in this Chapter 5 are to be attributed entirely to the interviewees and do not represent the opinion of the author.

5.2. The role of women in Bungoma County

Traditionally the woman bears the greater part of the workload in the household, which is entirely her domain. She cooks, fetches water, washes clothes, cleans the house, plants food crops, collects fire wood and raises the children. Starting from a very early age, that is when they are still in school, young girls are brought up to help their mothers and to look after their siblings. The man is seen as the head of the family and household, supervising and giving orders. In many cases his labour is allotted primarily to cash-crop production on the parcel of land he either owns or is entitled to use or to work on as a day labourer. Women

are not only responsible for the house, but also 75 % of the agricultural labour in Kenya is carried out by women, and so they are almost the sole providers of food for their families. Women do most of the work, but still have next to no right to make decisions within their own families and communities.¹⁶²

5.3. Education

Primary education in Kenya is free of charge but a certain amount still has to be paid for registration, text and exercise books, the school uniform and the teachers' welfare which makes it an expensive matter to send a child to school. The high cost and the fact that girls are needed to do the chores or to work on the fields, is the reason why so many girls drop out of school in Bungoma. The number of girls who actually get to the stage to qualify for entry to, and also to graduate from, a secondary school is significantly lower than that of boys. Girls are born into a vicious cycle of poverty, dependence and cultural restraints which are detrimental to their development. Without an adequate school education girls are unlikely to grow up to become self-confident women who have the courage and strength to stand up for their rights. Many women are illiterate and have no idea what rights they have, let alone how to use them. Another reason for dropping out of school is when schoolgirls become pregnant. Statutory law stipulates that girls can go back to school after giving birth to their child, but usually this does not happen because instead they often get married, or they are ashamed or because their family will not allow them to return. Some secondary schools require that girls be checked for pregnancy before allowing them to attend, and have a nurse come in to check the girls every three months. Schools also often discourage young mothers from returning because they would set a bad example for their fellow students.¹⁶³

DESECE handles many cases of violation of educational rights and the neglect of children's welfare. It is mostly women who come and complain about their husbands, who refuse to pay school fees for their children. Most complaints are about the neglect of girls who cannot go to school because of the expense involved. In many cases the children concerned are born out of wedlock and therefore the father feels no responsibility whatsoever to care for

¹⁶² Interviews 1 + 3.

¹⁶³ Interviews 4 + 5.

the children. DESECE brings the two parties together and tries to reach a consensus in favour of the children. The men are made aware of their responsibility to participate in the upbringing of the children and if they refuse to contribute, the matter is forwarded to the children's department of the court.¹⁶⁴

Another matter of concern for DESECE is child labour. Children, especially girls, disappear from school and work on farms or sometimes hotels in order to contribute to their family's income, or they work without the permission of their parents because they are offered jobs by persons who are interested in cheap labour. Girls dropping out of school, owing to pregnancy, is another matter that the organization takes very seriously. They bring the girls and their parents together, explain to them the importance of education and encourage the girls to go back to school. If the girl has eloped with the father of the child, the man is also invited and the organization will work out a way, together with the whole family, to enable the girl to return to school.¹⁶⁵

5.4. Marriage and family planning

Many girls become pregnant at a very early age and then they drop out of school and get married. In many cases the girls become the second or third wife of a man because polygyny is widespread in the Bungoma area and hardly any man there is monogamous. It is possible for a man to have many wives because customary norms allow this. So men marry a woman officially, and the other women i.e. the co-wives under customary rule. So the situation these girls marry into is often characterized by very limited financial means and a social environment of hostility among the wives. In order to marry, the man must pay the girl's parents an agreed price for their daughter, i.e. the bride price, which is a further financial burden to be borne by his household and means there are even less resources for the other wives and their children than before.¹⁶⁶

There is not only a lack of the basic resources required for the needs of the family, but also the amount of space to live in becomes less every time a man marries and children are born.

¹⁶⁴ Ibid.

¹⁶⁵ Interview 5.

¹⁶⁶ Ibid.

In former times each woman would establish her own household on the vast land that belonged to her husband, but, nowadays, they often live all together on one compound which causes conflicts. Usually the husband will shift his resources and attention to his newest wife and her offspring, which means the other wives and their children are neglected. That is when women contact DESECE and complain about the lack of support for their child/children. In difficult times, i.e. when there are economic problems, the men tend to focus all their attention and activities on the well-being of the newest members of the family and leave the rest more or less to themselves.¹⁶⁷

Family planning and reducing the number of children is a delicate matter in Bungoma. Family planning does not come into question for the traditionally-minded members of the community, so many women do not know what family planning is, or if they have been informed, their husbands would most probably not allow anything that would reduce the number of children they can father and, anyway, the women cannot afford contraceptives, even if these are at all available. This is because birth control is contrary to the traditional concepts of a man in this society. A woman has no option but to do what is expected of her, and that is to bear children, and as many as Nature endows, because birth and death are natural phenomena and to be accepted as such.¹⁶⁸

Because the women usually have next to no possibility to afford or to acquire reliable contraceptives, abortion often appears as the only feasible option for many. The law, however, does not permit abortion unless the life of the mother is in danger. Apart from the law, pregnant women are usually put under great family and social pressure not to think of abortion, and they also do not have the financial means or medical facilities to carry out an abortion, and have to fear stigmatization. The Church has also a great influence on the political decision and is sharply contesting even the slightest attempt of liberalization in this field.¹⁶⁹

DESECE offers information on family planning and birth control to encourage women to take the initiative. Many families are not able to feed their children or send them to school. Some

¹⁶⁷ Interview 5.

¹⁶⁸ Interview 1.

¹⁶⁹ Ibid.

women go to the doctor without their husbands' knowledge because those are not very concerned about the situation, since they are not primarily responsible for the upbringing of the children and the more children a man has fathered, the more he is respected in the community in which he lives. So gradually women are being informed about the possibilities they have and some of them do use the pill or injections to prevent pregnancy, or at least to allow longer intervals between each pregnancy. In general, birth control and family planning are considered to be private matters that are to be decided on within the family circle and not discussed with outsiders.¹⁷⁰

5.5. Domestic and sexual violence

Violence against girls and women is a serious concern in Bungoma and it takes many forms. Traditionally women were, and still are, perceived as the property of their fathers and husbands, respectively, and could be punished if they had made a mistake or if they had behaved in a way the man did not like. This practice is so deeply rooted in the people that even the women themselves consider it appropriate that they are beaten if they do something considered to be wrong. Marriages are often arranged when a girl is still very young, usually at the age when they used to be circumcised in the past, but this practice is not exercised anymore in the Bungoma area since it is considered harmful. It is their youth and the lack of a school education and support in their family that force women to stay in a violent environment, and to accept it as their destiny. Besides traditional practices, poverty also contributes to violent behaviour against women. When there is no sugar or food in the house and a woman asks her husband for some money to buy something that he cannot give, things may get out of control and she may be beaten as a result.¹⁷¹

Another form of violence against women is sexual violence. Having to live with violent husbands in poverty, with no land or other property and no support from the rest of the family, many women are forced into prostitution in order to make a living and to feed their children. Joan (N.N.) from *Together in Action (TinA)* has dedicated her organization to the help of women and girls who work in the sex business. She claims that everybody knows what these women are doing in order to support their families, but nobody wants to talk

¹⁷⁰ Interview 2.

¹⁷¹ Interviews 2 + 3.

about it, let alone help them. The family appreciates the money these women give them, but nobody cares where they got it from. What happens is that the trucks that pass through Bungoma stop to do their overnight loading and meanwhile their drivers look for women. The women go with them and when they ask the men for money they often get beaten or raped. Many women have little self-esteem and no trained skills, therefore they cannot find any other kind of work.¹⁷²

Even their own families violate them when they try to come back to the house. Their parents want them to return to a violent husband and their brothers do not want them in the house either because there is not enough land to support them all. Even if they fall ill, and HIV/AIDS is widespread in Kenya, their families blame the women who “have become too bold”. If children result from sexual abuse, they are discriminated against by the mother's family and often also forced to work as prostitutes. Often mother and daughter share the same man, when the man finds the mother not there he goes with the daughter. This means that a new generation is raised in this vicious cycle of poverty, exploitation and abuse.¹⁷³

DESECE also deals with a great number of domestic and sexual violence cases. Women come and report their tragic stories of beating, psychological, emotional and sexual abuse. The organization counsels the women and their partners and if both sides are willing to reconcile they sign a reconciliation agreement, and if not, or if the case is too serious, it is forwarded to the court. In the case of sexual harassment, rape and sexual abuse of children, DESECE has the police arrest the perpetrator and takes the victim to the hospital to be treated. Before the NGO offered counselling, families would deal with such matters privately and would arrange with the offender, while now the matters go straight to court. In this context, one of DESECE's cases will be presented which was both outstanding for its brutality, yet not unique in Kenya, and because it unites many of the aspects that are covered in this study.¹⁷⁴

A girl of seven and her younger brother lived at their father's house with his new wife after he had separated from the children's mother. According to Sophie Kibuywa, founder of DESECE, it is not unusual that the children remain with the father because the mother's new

¹⁷² Interview 4.

¹⁷³ Ibid.

¹⁷⁴ Interview 5.

partner will not accept the children of another man. This information stands in contrast with what was argued in the above chapters according to which it is mostly the mothers who are in charge of the children. One day the girl's teacher noticed that she was not able to write and sit down properly, and found out that the girl was being beaten on a regular basis by her stepmother. As the teacher brought the girl to DESECE it was found out that the child was not only being beaten but also raped by the stepmother's son for years. Her inner parts were hurt so much that she could not sit or walk properly. The girl was immediately taken to hospital to be treated and her parents were called to report to the office. The stepmother refused to show up and was arrested together with her son. The father of the girl tried to bribe the member of staff but because that was not successful, he threatened DESECE staff if they refused to drop the case, because he didn't want his wife to go to jail and the people in the community to know about what had happened. Nevertheless, DESECE filed a report at the police and the stepson was sentenced to go to prison. The child's family also wanted to end the case as soon as possible because they could not afford to follow it through owing to their poor financial situation, and also fearing the bad reputation that would haunt the family after the incident was made public. The girl moved in with her grandparents and she went back to school.¹⁷⁵

5.6. The prevalence of customary rule

According to DESECE the customary stages of appeal are involved in the enforcement of statutory law. That means all legal personnel, from the heads of villages, assistant chiefs, chiefs, district officers, the provincial commissioner up to the national level, are supposed to rule conform with statutory norms. This, however, does not happen since these institutions tend to apply what is more like customary rule or a mix of both systems which leads to legal uncertainty and arbitrariness. When a husband beats his wife and she accuses him before the court, her husband does not understand why he should be punished for something that customary rule deems to be in order. The problem is that most of the cases do not ever reach a court, because the victims cannot afford the costs that such a process brings with it, which leaves the customary system as the only alternative for those seeking justice. Even in this system, which is supposed to work free of charge, people are known to take fees for

¹⁷⁵ Ibid.

certain services or in order to influence the outcome of the dispute in favour of a particular party.¹⁷⁶

DESECE carries out a series of important tasks in the community. First, since only the customary system is available for most of the people in Bungoma, DESECE actively involves the chiefs and their assistants in their counselling and mediation work. Second, the NGO trains the heads of the villages and chiefs, in the same way as they train other clients in human rights issues, and, third, the NGO also keeps track of the cases that have been referred to it. If two parties in a conflict are not prepared to be reconciled in the DESECE office, the case can be referred to the chief, who is then in charge of the hearing, in which the arguments are put forward by both sides, and it is he who has to decide on the matter. DESECE, as a respected human rights organization in the region, can supervise the chiefs to a certain degree so that these do not allow themselves to be influenced by financial incentives by either the one or both parties involved in the case. Nevertheless, such practices do happen and make it even more hopeless for the most vulnerable, which are in most cases the women, that justice will be done.¹⁷⁷

5.7. The rights to land and the right to property

Bungoma is a rural area and therefore land is the most important and often the only asset that people have to dispose of when their financial means make it necessary. Traditionally land and all other property are in the hands of the men, while women enjoy only their right to use the land. Most families have just 1-2 acres, and the poor condition of the soil, which is often leached, contributes to the unwillingness of the men to share the land with their womenfolk as the law demands. The tradition of only considering sons as heirs to their fathers' property still prevails, although the people are aware of the fact that statutory law stipulates otherwise.¹⁷⁸

Having no right to property makes women completely dependent on their husbands, who often use the money their wives have earned, from their agricultural work, for themselves or other women. There is no need for men to share the ownership of land with their wives or

¹⁷⁶ Interviews 2 + 3 + 5.

¹⁷⁷ Ibid.

¹⁷⁸ Interviews 1 + 3 + 4.

to ask them for permission to do anything, since everything is in their name. If women only rarely, if at all, decide to walk away from discrimination, and often violence, it is because they are literally left with nothing but their clothes on and they have no place to go. Their parents will not welcome them back home because they do not have the money to support another person in the household, and also because it is socially unacceptable that women rebel against their husbands. In this situation the only possibility that women have, who are homeless and without land, and additionally probably have to care for their children as well as to make a living, is prostitution.¹⁷⁹

The informality of land transactions and inheritance is another issue that further complicates the enforcement of women's claims. Although many people in Bungoma have started to register their land officially, it is often the case that, as long as they are still alive, they are not inclined to pass on the document which would entitle their sons to the land, for fear that their sons will take full control and they will lose everything and have nothing to live on in old age. This leads to a very unclear situation with regard to the tenure and to conflicts over boundaries and the size of the land parcels each is entitled to. In an environment where there is not even enough land for the men to make enough to live on, the women have next to no possibility to claim their rights. In order to mediate and to resolve these conflicts, the men and women can appeal to the Land Tribunal to help when there is some conflict over land rights.¹⁸⁰

As a result of the work carried out by DESECE to make both men and women aware of their rights, and the revised paragraphs on equal rights with regard to inheritance in the new Constitution, stating that women should also inherit land and have the right to property has become a matter for serious debate in Bungoma. As a consequence, the matter is gradually being taken into consideration, most noticeably in the interest of widows. While traditionally the land of a deceased man then becomes the property of his family, widows are now, according to the Law of Succession Act (see Chapter 3.6.3.), considered to be the next of kin and therefore the primary beneficiary of an inheritance. That is, if a widow has children and especially sons, she inherits in their name and has sole use until the children are old enough

¹⁷⁹ Ibid.

¹⁸⁰ Interview 5.

for the inheritance to be passed on to them. The widow does, however, retain her own plot when it comes to subdivision of the land. Her plot will usually be smaller than that of the children, and it is only the sons amongst whom the land is divided. So although the customary practices with regard to the inheritance of land and property are, in actual fact, changing to the benefit of women, this process is only gradual. At present it is only when a woman is widowed that she can inherit her deceased husband's land, but she cannot inherit her father's land as his daughter.¹⁸¹

DESECE handles many cases in which there is conflict over land rights. It is often the men who come to the DESECE office to claim legal ownership and the title-deeds to the land which they have acquired or inherited. Sometimes, however, there are widows who claim their rights as the next of kin in cases of succession or transfer of title-deeds. DESECE's major task is to inform clients about their rights and to settle the argument. If the parties agree to work out their differences, they sign an agreement and carry on with the transactions, but if they refuse, the case is taken to the district land registrar or the court.¹⁸²

5.8. Case Studies of one women's group and two men's groups

In the following, three case studies are presented: the Yetana Women's Group, and Taratibu Men's Group and the Baraka Smart Group whose members are also men only. These three groups have been participating in training sessions and workshops organized by DESECE over a period of some years, and the groups have been formed against different backgrounds in order to improve the economic situation and assertiveness of the individuals involved and their families. At the same time, everything about the three groups summarizes all the topics analyzed above and provides an insight into the daily lives and challenges women face in Bungoma County.

5.8.1. Yetana Women's Group

The group consists of 22 women and is headed by a chairwoman, a treasurer and a secretary. It has been working for 2 years already with DESECE. This NGO came to the community to tell the local people about their work and to identify future beneficiaries. Some women then approached the organization. They gather usually once a week to

¹⁸¹ Ibid.

¹⁸² Ibid.

participate in DESECE workshops on various topics ranging from keeping poultry to human rights, or to discuss internal matters such as crops or investments. The main reason why the group formed was because the members wanted to learn how they could improve their agricultural production, and consequently their economic situation. It is in connection with their agricultural activities, that they are also informed and advised on legal and financial matters.¹⁸³

The group owns land in common. Each member cultivates her own individual plot of land. Different crops are grown and include different kinds of fruit, such as bananas, passion-fruit, as well as beans, carrots, sunflowers and pumpkins. The women also keep chickens and cows to have more diversity in their diets. Each of these women were farming on their own before they formed a group. Since they started to work together on land which they own in common they have been able to increase their profits and consequently have more financial security. The group also has a social fund to which they make contributions to be used when an emergency or other unexpected event arises, such as a funeral that has to be paid for or if one of them or their family fall ill. Each member contributes to the income of the group, and the surplus goes into the so-called "table banking" which allows the members to have some credit to buy supplies for their families, or to invest in their fields.¹⁸⁴

The women are either married or widowed and have around eight children each. Each of them has received some sort of education, but sooner or later, most of them dropped out of school because they became pregnant and were not allowed to return to school, or their parents were prepared to invest only in the education of their brothers, or their polygamous fathers shifted the (financial) resources to a new wife and her children. The women's main expenses, besides food, clothing and housing, are the school fees for their children.¹⁸⁵

To have an idea of the routine daily life of these women, they were asked to describe a typical day in their lives, and a typical day in that of their respective husbands. Most of the women get up at around 5 a. m. They then milk the cow(s), fetch water, sweep the house, prepare tea and take it to those working on the farm. Then they do some farm work

¹⁸³ Case Study 2.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

themselves, look after the animals and prepare lunch for the family. Then it is time to water the farm, to fetch water, firewood, vegetables and milk, and some go the local market to sell goods. Then they cook supper, do the washing up and the laundry, pray and go to bed between 9 p. m. and 10 p. m. On Wednesdays they usually attend a church service. On Tuesdays they have group meetings and, every now and then, they weave baskets which they sell at the market place. The women explained that they have little or no free time at all, and therefore always feel tired.¹⁸⁶

Their husbands' day, on the other hand, was described by the women as follows: in general, the men get up in the morning an hour or two later than their wives or daughters and do farm work until noon when they come back to take a shower and have lunch. A minority return to continue their farm work, and if they are also pastors they pray for the people, but the majority just idle around and "do other business" which usually means they go to have drinks, as the women explained with a smile.¹⁸⁷

Through the training sessions and workshops with DESECE, the women are very well informed about their rights and also about the new Constitution which came into force in August 2010. All of them are aware of their legal rights, which the State is supposed to guarantee that they will be respected, but they all stated that only very little has changed in their legal situation, especially as far as land ownership and use is concerned. Only three of the 22 members owned land in their own name at the time of the interview, one being the chairlady, the second a widow who owns her deceased husband's land, and the third woman had acquired land on her own account. Nonetheless, the women claimed that they have gained more self-confidence and a certain degree of (financial) independence from their husbands by being members of the group, and through the crops they grow and sell on the land which they possess in common. In this respect their situation has improved not so much by asserting their legal rights as through their success to become economically independent.¹⁸⁸

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

5.8.2. Baraka Smart Group

The members of the second group were all men and it was their chairman who answered almost all of the author's questions. He was the one who had the idea to form the group because he had a vision for his community. As a short-term project they began by growing sweet potatoes and amaranth, and as a long-term concept he wanted to keep poultry, to have bees and to build a library and a cafeteria. The chairman is married and has seven children, all of whom, i.e. both his sons and daughters, have their own little projects on the farm. He stressed the fact that he treats his sons and daughters equally and that the children hand over the money, which each is able to make from his or her project, to him and, if there is a necessity, he will redistribute that money.¹⁸⁹

The chairman mentioned also the issue of formal title-deeds for land, when he stated that most of the older men, if they had formal title-deeds at all, did not want to transfer them yet to their sons for fear that they could sell the deeds and leave them with nothing to live on. According to him, it is the women who do most of the farm work, but the land they work on still belongs to the men. All of the group members were well aware of the fact that the law states that men and women have equal inheritance and property rights. But they ignore this. When asked why that is so, the chairman answered that "daughters don't inherit land because they are seduced easily by a man who might convince them to give him the land and then the woman's family loses the land". He also added that "husband and wife are one, so there's no need for the woman to have her own land".¹⁹⁰

When the question of unmarried women was brought up, one of the members, who was also the chairman of another group called Ambana Sirende CBO, explained that "a normal girl should get married... why would a woman not want to get married?" and that "a woman who is working and earning money will be making decisions... and is therefore said to be sitting on the man". Everyone smiled, no one disagreed.¹⁹¹

¹⁸⁹ Case Study 3.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

5.8.3. Taratibu Men's Group

Another group who were prepared to state their views was the Taratibu Men's Group, whose members worked for a Matatu¹⁹² company. They had joined together in order to increase their income which had been earned mainly by agricultural production. They worked in shifts in the Matatu company every second day, and every other day they worked on their farms. Most of the group members had a piece of land with their families, but some who were not married or too poor stayed on their parents' land.¹⁹³

The chairman is married and has five children, and his wife works at home in the house and on the family's land. Sometimes she sells her crops at the market. His wife does not own a piece of land in her name because "she is one with her husband" and therefore they share the land, additionally he cited the Bible and stated that God had not designed women to own land. Girls are meant to be living with their parents until they get married and then they live and work on their husbands' land.¹⁹⁴

5.9. Analysis of the interviews and case studies

It has been shown in Chapter 3.5. that Kenya is characterized by the existence of a legal dualism of statutory and customary law and how it developed. Bungoma County, which is a rural area far from the largest cities in Kenya, is dominated by customary rule and, at all levels, from the State to the community level, there has been little success to establish statutory law over customary rule. In the past few years organizations, such as DESECE, have carried out campaigns to raise an awareness of what is going on at State level. They tell people what their rights are, inform them about the new Constitution and that State laws are superior to customary rule, which means that jurisdiction according to State laws overrules that passed according to statutory rule. In other words, when there is conflict between the two legal systems, State law represents the final instance. The conversations and interviews with the people revealed that they are very well informed about the processes and changes that are going on with regard to human rights in general, and

¹⁹² A Matatu is a sort of taxi, mostly in the form of a van, which runs fixed routes between towns. It takes in passengers until it reaches capacity and often beyond and is one of the main means of transport in Kenya.

¹⁹³ Case Study 1.

¹⁹⁴ Ibid.

women's rights in particular, and yet they do not seem prepared to do anything about ensuring these rights are respected. They are aware of the legal situation, but they do not respond accordingly, which makes the work of NGOs such as DESECE that much more important.

The case described in Chapter 5.5. is a good example of how poverty, polygamous family constellations and a negative attitude towards girls and women contribute to a climate of violence against both. It also shows how women's rights are violated and their own family does not deem it necessary to protect them. Another form of violence against women, namely FGM, which has been discussed in Chapter 3.7., is however not prevalent in the Bungoma area. According to Sophie Kibuywa, in the generation of her mother many women had still undergone circumcision while she herself and most of her generation already did not do it anymore. The tradition of seeing women as inferior to men and as objects that one can dispose of is so strong that it is very difficult for human rights activists and organizations, such as DESECE or TinA, as mentioned above, to make the people aware of what is right and wrong, and thus to change the negative attitude of men (as well as some women) towards girls and women. Additionally, there is the custom of bribing certain influential persons in order to get away with issues that are considered to be of minor importance anyway. There is an attitude of hostility and violence towards people who try to enforce the law if it goes against the interests and customs of certain groups. Finally the problem also lies in the lack of sufficient financial resources to provide for psychological counselling that these women need to be able to recover from their horrible experiences.

Finally, the information from the three groups was summarized and compared with an analysis of the roles of men and women, which was made by DESECE in 2007¹⁹⁵, as part of an organic farming project. All in all, men and women who were asked, reported that the bulk of the work, whether agricultural or in the household, is done by the women. From a very early age on girls are brought up to help their mothers at home and on the fields, and that it is their destiny to become wives. The women get up earlier than the men, sometimes as early as 4 a. m., in order to milk the cows and to prepare breakfast. Even their daughters get up earlier than their sons and have more tasks to fulfil. According to the DESECE report, the

¹⁹⁵ DESECE 2007.

three groups participating in the project came to the conclusion that women work between 12 to 20 hours a day, while their husbands work from 1 to 8 hours only.¹⁹⁶ This great discrepancy is supported by the statements of the Yetana Women's Group.

The men control almost exclusively every aspect of the daily life in Bungoma. The report shows that both sexes have certain rights regarding land, housing, good meals, cash and sex, while control over these categories lies in the exclusive sphere of the men. This was partly confirmed in the three case studies concerned with land rights, that the men stated firmly that they do not want their wives and daughters to own land since it is enough for them to be allowed by the husband as the owner to make use of it. It is because the men have more or less absolute control over their womenfolk, and also over women in general, especially in sexual matters, that family planning is, in most cases, taboo, and that rape and diseases such as HIV/AIDS are widespread.¹⁹⁷

All in all, there is a great awareness among the members of both sexes of the needs of the women when asked explicitly, but that does not alter the fact that most show very little inclination, if at all, to change their attitude towards their wives and daughters, let alone to behave differently towards women in general, in order to achieve equality between the sexes. They usually unanimously agree that beating women, leaving them to do all the work and denying them the right to own land and other property, and thus to determine their own lives is, at least theoretically, a problem. When it comes to their own families, however, these issues seem far less important. There is a wide gap between what they know should be done and what they actually do. The only way theory and practice can be brought (closer) together is by convincing certain members of the community, who are respected persons and open to new ideas and conventions, to act in accordance with the statutory laws as laid down in the new Constitution. If a number of such persons can be so convinced that they actually do change their attitudes and behaviour toward females, whether young or old, gradually others will follow their example, especially the younger generations which are now aware that there other ways of living than that of their forefathers. The unrelenting activities of the NGOs, the global situation and environmental changes will all, sooner or later,

¹⁹⁶ Ibid. p. 14-17.

¹⁹⁷ Ibid.

necessitate a change in the social status quo between men and women in such societies as those still in existence in Kenya.

6. Women's rights for development

To be fully aware of women's rights is not only necessary for their personal development, it is also indispensable for the development of their children, the community and the country as a whole. Since the term 'development' is very comprehensive in meaning, and therefore not easy to define, some of the facets associated with the concept of development as it is understood in the eight Millennium Development Goals of the United Nations are listed below – and have been selected because of their relevance to women's rights.

These aims are to:

- eradicate extreme poverty and hunger
- achieve universal primary education
- promote gender equality and to empower women
- reduce child mortality
- improve maternal health
- combat HIV/AIDS, malaria and other diseases
- ensure environmental sustainability
- develop a global partnership for development¹⁹⁸

The Government of Kenya has agreed to undertake everything possible in order to achieve these goals. To reach the set targets, these goals should be seen as guidelines for steady and sustainable improvements towards the achievement of a life in which all individuals are treated justly and with respect. Especially for the fulfilment of the first six goals, developing a greater awareness of women's rights, is a key factor and now the question is how to bring this about. It is here that the term 'empowerment' comes into play and, like the term 'development', it needs to be defined carefully. Empowerment has been internalized by almost every actor involved in the field of development (co-operation), nevertheless, it is used in different ways and sometimes even seems to lose its original meaning. In the course

¹⁹⁸ <http://www.un.org/millenniumgoals/> (15.07.2011)

of this diploma thesis it has been shown that the Kenyan State and NGOs all intend to empower women in order to pave the way to development. However, there are different ways in which the concept of empowerment can be understood, as Krenceyova (2008) notes in her observation and interviews with participants of the *Miss Koch Initiative*, an organisation which was founded by young people in Korogocho, a slum area in Nairobi. For example, empowerment can be understood as an action by someone who gives power to someone else, which means that the State or an NGO or individual men enable women to make use of the rights that they give them. In this sense, empowerment is something that women receive from an external authority. One young man expresses this by saying "You know, there is a problem with girls. Leave girls alone together, they wouldn't do anything. They would just be there. Because of their small differences and enmities. (sic!)"¹⁹⁹ The young man sees empowerment as something that he as a man has to give to girls and women in order to enable them to better their situation. In this situation one can observe clearly two different levels of power, where the powerful is giving power to the powerless. This is also made clear by the statement of another male member of the Miss Koch Initiative: "Men are- some are aggressive they want to learn quickly and also they are eager to know. But you know, with girls, at some point, they go slowly. (...) What we normally do is, we encourage them. (...)"²⁰⁰ This means that women need men in order to act.

Another understanding of empowerment is as a process that is taking place within a person as opposed to coming from outside. Women build up confidence through education and knowledge and empower themselves as a consequence. These women then can serve as role models for other girls and women and trigger off the collective empowerment of a whole group of women.

"Girls could not speak so much, so I was the only one speaking. So I had to train myself to speak on behalf of the girls. And it gave me an opportunity to come and sit down and think, how will I be presenting my issues? Yes I want to be equal, but not

¹⁹⁹ Male participant of Miss Koch Initiative cit. in Krenceyova 2008: 20.

²⁰⁰ Male participant of Miss Koch Initiative cit. in Krenceyova 2008: 21.

just quiet, I have to talk. I have to share, what is in my mind. And it gave me eloquence and that courage to stand even in front of people and speak.”²⁰¹

In whatever way empowerment is understood, it is important to realize that the empowerment of women is not possible without the empowerment of men, since men have a major role to play in the lives of women. This means that men must be included not just because they might be possible offenders of women's empowerment, but also because they can be agents of change and co-operation. “If you give girls education, or if you give girls information you don't give boys, these boys will be a great obstacle towards what these girls want to do.”²⁰²

The most common understanding of empowerment, which is also used by DESECE, combines outer and inner empowerment which means to give men and women the tools to better their situation themselves. DESECE involves both men and women in their workshops and counselling in order to strengthen the rights of women and consequently enable the women to help themselves.

In the following, two possible approaches are presented by which the empowerment of women can be realized and which are also used by DESECE. Both possess some very promising possibilities, but also some weaknesses, which show that women's rights cannot be simply created because there are many factors that have to be taken into consideration.

6.1. An economic approach

Lesser Blumberg (2004) follows the argument that women in East Africa are valued and appreciated not only as housewives, but also as producers in the agricultural sector where they are in fact responsible for 75-80 % of the labour that is carried out. This is significant especially in rural areas, such as Bungoma County, where agriculture is the predominant source of income for the people. Although women do most of the work, they have no say when it comes to making decisions, let alone any political power, since they cannot freely dispose of the land they work on or the income they generate. Lesser Blumberg now states that trying to enforce those women's rights that have been laid down as law in the new

²⁰¹ Female participant of Miss Koch Initiative cit. in Krenceyova 2008: 12.

²⁰² Male participant of Miss Koch Initiative cit. in *ibid.* p. 23.

Constitution, despite some Parliamentary opposition (mostly male), is a difficult and tedious process that is not likely to bring about noticeable changes and improvements for women within the immediate future, and therefore must be assisted by the guarantee of a certain degree of economic independence and consequently power, rather than fighting against century-old traditions that prevent women from attaining the same respect and rights as the men.²⁰³

She claims that increased control of income leads to

- increased self-confidence and greater willingness to bargain for one's priorities in household decisions
- more actual say in matters concerning fertility, and the welfare of the family and children, i.e. in economic and community decisions
- a say in political matters, especially if individuals with increased income join forces, i.e. organize themselves.²⁰⁴

She also states that

- women with the responsibility to provide for all the family's needs tend to invest more of their income in adequate nutrition for their children, followed by their education and health; women also spend also their money to improve the chances of their children surviving to become healthy and independent adults.
- women also tend to contribute a higher portion of their income to household/family support, holding back less for themselves.
- men with responsibilities to provide for the family tend to spend on a wider array of expenditures, and
- they also tend to devote a higher proportion of their income to personal consumption, including alcohol, tobacco, etc.²⁰⁵

This means that, if the decision on how to use the family income were made by the women, it would not only increase in amount and be positive for their own development and status

²⁰³ Lesser Blumberg 2004: 25.

²⁰⁴ Ibid.

²⁰⁵ Ibid. p. 26.

as individuals who should be treated as equals by their male counterparts, it would also directly benefit the children, the community and the nation as a whole. In order to increase the income and reduce dependence of women, it is necessary to create income-generating opportunities that are especially suited to the women and which fit in with their daily activities.²⁰⁶

To return to the Yetana Women's Group: this group of women are able to increase and improve their agricultural production on the land that belongs to the group collectively, and they can sell their products at the local market. The income generated in this way can be reinvested in the land, used to cover household expenses and for the children's school materials etc. or given as a loan to members in need. All this strengthens the women's confidence and independence and leads to an overall improvement of the situation of their respective families.

6.2. A rights-based approach

Irene Khan, former Secretary General of Amnesty International, is a strong advocate of an approach based on human rights to make an end to poverty, which she sees as most important to improve the level of development, whether of a single person or a whole country. Although her studies are based mostly on Bangladesh, her assumptions may be valid for every developing country and can therefore also serve for Kenya. She argues that material benefits alone do not guarantee political power, end discrimination or improve security for poor people simply because they have increased their income. Investments to support poor farmers may boost their production but it will not automatically protect them against tenure insecurity owing to unscrupulous landlords or uncertain ownership. Building new schools does not guarantee that girls have the same chances of attending them as their brothers, and an increased income does not automatically guarantee greater security for women.²⁰⁷

Khan pleads that one must look beyond economics, at deprivation, insecurity, exclusion and the lack of a voice on relevant issues, and to recognize these issues as human rights problems. She shows that the degree to which women have control over their own lives is a

²⁰⁶ Lesser Blumberg 2004: 26.

²⁰⁷ Kahn 2009:5-43.

key element to overcoming poverty, which affects women all over the world disproportionately. Only when people have a voice, when they are able to organize, speak up and take part in decision-making that directly concerns them, can they tackle exclusion, insecurity and deprivation. The right to information is crucial in this context because without information it is impossible to participate.²⁰⁸

All this cannot be achieved without the State taking action and responsibility in the protection of its most vulnerable citizens which, in most cases, are women and children. Khan criticizes the way how the Millennium Development Goals have been translated into action because they virtually exempt States from any requirement to address discrimination, to protect the rights of the poor or to let them take part in the development process. She claims that States must be held accountable for the pursuit and enforcement of human rights and that this cannot be left solely to the responsibility of civil society.²⁰⁹

In its *Draft Guidelines for a Human Rights Approach to Poverty Reduction Strategies* the Office of the UN High Commissioner for Human Rights also expresses the importance of responsibility and accountability based on legal obligations as opposed to mere charitable intentions:

“Perhaps the most important source of added value in the human rights approach is the emphasis it places on the accountability of policy-makers and other actors whose actions have an impact on the rights of people. Rights imply duties, and duties demand accountability.”²¹⁰

The UNDP rectifies the human rights based approach to development as follows:

“The central goal of Development has and will be the promotion of human well-being. Given that human rights define and defend human well-being, a rights based

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ UN OHCHR 2002, Art. 8.

approach to development provides both the conceptual and practical framework for the realization of human rights through the development process.”²¹¹

At the same time it is important to bear in mind the cultural and social background of the country. When talking about women's rights and the role of women within Kenyan society, it is indispensable to consider the fact that many women do not welcome change that comes from outside and converts their societies into mere reflections of Western societies. This brings the universality of human rights standards and the way men and women are perceived into question.²¹²

Kenya, and especially Bungoma County, are good examples of how the State fails, to a great extent, to protect its citizens from violation of their rights and that especially poor people in rural areas, far from proper political and legal services, are dependent on the existence of non-governmental agents to provide for the services and responsibilities that the State should offer.

It can be seen as a weakness of the human rights approach that it depends on invoking distant national and international human rights standards because especially poor people far away from the urban centres often lack access to institutions that could enforce their rights, and the interface between different legal systems governing their access to entitlements makes the process of recognising and claiming rights rather complex. Simultaneously it is exactly this interaction and consensus of different international actors that make the human rights approach potentially very powerful because it is hard to justify taking action against standards that have been agreed by a great variety of national and international actors.²¹³

In response to the urgent need of legal advice and the lack of opportunities to use the official legal system of the State, DESECE introduced a special service for the population of the Bungoma area through which they can report injustices and get help. Every Wednesday the organization opens its office to give advice and to mediate when there are complaints and conflicts and reports on all kinds of human rights violation that the people suffer from daily. Since most of the people concerned have no financial support, it is almost impossible

²¹¹ Cornwall and Nyamu-Musembi 2004: 1426.

²¹² Lief Palley 1991: 169.

²¹³ Cornwall and Nyamu-Musembi 2004: 1418.

for them to approach a lawyer who could bring their cases before the court. Their only alternative is to seek advice from DESECE, who work on a pro bono basis. A visit on just one Wednesday was sufficient to give an impression of the number and variety of problems as well as the frequency of offences and violation of human rights in Bungoma.

On February 9th 2011, DESECE recorded 17 cases reported by women, men and sometimes entire families. People lined up in the morning and waited their turn in order to bring forward their problems. In six cases women reported incidents of domestic violence which they had endured over a period of several years before they dared to speak out. Another six cases were concerned with the neglect of children, also all reported by women, who are either the mothers of the neglected children or, as in one case, the grandmother. The remaining five cases of that day had to do with land disputes in the wider sense. In most of these cases, the claimants reported that their parents had not given them the title-deeds to their land, which made it difficult for the claimants to establish and to secure their legal right to own land. Moreover, this also contributed to some uncertainty with regard to the conditions and length of tenure and to the exact boundaries of the property. Such cases are a common concern of the people who come to DESECE for help.²¹⁴

In another case, an assault followed after a dispute between two men over land. Three of the cases on land rights were the only ones which were presented by men. The other 14 complaints (of the total 17 that were heard on that day) were brought by women, and were on domestic violence, neglect of the children and land disputes.²¹⁵

Although this is only a sample and cannot be seen as representative of all the cases handled by DESECE, it does provide an interesting insight into the kind of problems and their frequency, besides the gender which most often has a complaint to be resolved with DESECE's help. The human rights officers need, on average, about 30 minutes, or occasionally an hour or so, to hear the cases and to take notes, and after that they invite all the parties concerned to a mediation meeting in which an attempt is made to find a way to end the conflict.

²¹⁴ DESECE 2011: Case List.

²¹⁵ Ibid.

People are notified by letters and are asked not to miss the meeting. DESECE handles all kinds of civil cases in this way, whereas penal cases, such as assaults are transferred directly to the police and court. When all the parties concerned arrive at the office, an attempt is made to arrive at a general agreement to end the dispute, which is concluded by signing a written agreement. If one or both parties, for whatever reason, refuse to co-operate or cannot agree to the terms negotiated, the case will be forwarded to the heads of the villages and/or the chiefs who then must come to a decision. DESECE does follow up the cases, together with the customary authorities, by either a phone call or in a letter to ascertain that there is no further dispute. DESECE works in close co-operation with the FIDA lawyers, who also give legal advice in especially complicated cases. By providing the service of free legal advice, those who are most vulnerable, notably women and girls, are given the chance to find out what their rights are and how these can be claimed.²¹⁶

DESECE (and on a smaller scale TinA) confirms with its work that neither of the two approaches alone is as efficient as a combination of human rights education and an economic approach when it comes to empowering women. DESECE enforces human rights and supports women's rights against all opposition. In workshops and training sessions, they help the women to become aware of their rights and possibilities for personal development. Legal counselling and mediation are also offered to increase the level of legal correctness and justice in the Bungoma area. Furthermore, DESECE encourages the women by giving them incentives to start projects through which they can increase their income and thus become less dependent on their menfolk. This also contributes significantly to the welfare of their family. It is this combination of an approach based on economic and human rights to enable that development which can better the lives of the women and their families already within a short period of time and, in the long run, through income-generating projects which will benefit the whole family. This would certainly contribute greatly to increased support and respect for human rights in the area.

²¹⁶ DESECE 09.02.2011

7. Conclusion

The rights of women in Kenya are defined by the cultural setting that surrounds them and these rights fit into a complex web of family and clan structures and the interdependencies of their respective members. Women are caught in a complex legal context where different norms of statutory and customary law compete, conflict with, contradict, recognize and refer to each other and women have no clear authority or instance that exclusively defines their actual rights and that enforces them. The situation of women's rights in Kenya reflects the diversity and complexity of a state that was under foreign rule and yet kept its own traditional systems of law and order. Women are one key factor that paves the road to development, since they tend to spend more of their income on the household and wellbeing of their family and especially children (including nutrition, health services, education etc.) than men. By providing an adequate legal framework women can better take control over their lives and have greater knowledge and therefore influence in decision-making regarding work, household, family planning etc. and therefore overcome discrimination and poverty.

8. Summary

It is been shown in this diploma thesis that the Government of Kenya is determined to propagate women's rights and to bring about equality between the sexes through a new Constitution which should end the unfair discrimination against women and improve the status of women in general. Nevertheless women's rights in Kenya are a highly contested and highly complex issue, which does not experience the unreserved support of all the members of society. A conglomerate of statutory and customary legal systems, which are influenced by politicians, lawyers, religious groups, human rights and women's organizations on the one hand, and pressurized by the patriarchal structure of the Kenyan society, on the other hand, hold back efforts to achieve the standards set down in the new Constitution, which makes the recognition of women's rights a very demanding mission. The levels, on which women are yet to be empowered, range from that of the family to the highest national level. The levels between include the village, the community and the province – and each of these stages, represents a hurdle that needs to be overcome in order to fulfil the tasks that the Government of Kenya has set itself.

The multitude of actors and interests involved make it very difficult to make clear decisions in favour of women since many, more or less exclusively male, have the feeling they are likely to lose power and control over the women, and indeed they are not exactly mistaken. Although the State claims it has the right to the last word that is to be said on the matter, i.e. the State's decisions are final and binding, it must also ensure that they are fully implemented throughout all levels down to the community and family level, and cannot allow a watering down of its rules by customary systems. Although it is a noble cause to respect traditional and indigenous institutions and customs, a clear distinction must be made here between the terms traditional and customary. From the above, it is clearly evident that most customary rules and systems have little to do with tradition in an original sense, since they developed along with British colonization. While traditions can be upheld to the extent that they do not discriminate anyone, the customary legal system represents a body of rules that is often misused to undermine the efforts of the State to enforce equal

rights for both men and women. Despite all opposition and difficulties in the legal systems, the Government, and especially NGOs and the various other actors within the women's rights movement make great efforts to put into practice their concept of a society in which there is equality and justice for all of its citizens. Already a promising start has been made with the new Constitution and through the engagement of many organizations, institutions and individuals.

9. Zusammenfassung

In dieser Diplomarbeit wird gezeigt, dass die Regierung von Kenia bestrebt ist, die Rechte von Frauen zu fördern und die Gleichheit der Geschlechter durch die neue Verfassung zu garantieren, welche die Diskriminierung von Frauen beendet und den Status derselben im ganzen Land verbessern soll. Trotz dieser positiven Entwicklung ist die Stärkung von Frauenrechten ein viel diskutiertes und umstrittenes Thema, das nicht von allen gleichermaßen begrüßt wird. Ein Konglomerat von staatlich gesetztem und Gewohnheitsrecht, welches einerseits von Politikern, Juristen, religiösen Gruppen, Menschen- und Frauenrechtsrechtsorganisationen beeinflusst und andererseits von den patriarchalen Strukturen der kenianischen Gesellschaft mit geformt wird, verzögert die Durchsetzung der Standards, die in der neuen Verfassung festgesetzt wurden und machen die Anerkennung und Realisierung von Frauenrechten zu einer Herausforderung. Die Ebenen auf denen Empowerment von Frauen zu verwirklichen ist, reichen von der Familie bis zur obersten nationalen Ebene. Dazwischen befinden sich noch die Dorf-, Gemeinschafts- und Provinzebene und jede von ihnen stellt eine Hürde auf dem Weg zur Erreichung der Ziele dar, die sich die kenianische Regierung gesetzt hat.

Die Vielzahl von Akteuren²¹⁷ und Interessen die hier involviert sind, machen es schwierig klare Entscheidungen zu Gunsten der Frauen zu fällen, weil viele, vor allem Männer, befürchten Macht und Kontrolle über die Frauen einzubüßen, was auch nicht ganz von der Hand zu weisen ist. Obwohl der Staat das letzte Wort in dieser Angelegenheit für sich beansprucht, i.e. die Entscheidungen und Gesetze unter staatlichem Recht für alle bindend sind, muss doch sichergestellt werden, dass diese auch auf allen Ebenen umgesetzt und nicht durch gewohnheitsrechtliche Normen verwässert werden. Obwohl es durchaus positiv ist Traditionen, indigene Institutionen und gewohnheitsrechtliche Normen zu respektieren, muss hier eine klare Unterscheidung zwischen den Begriffen traditionell und

²¹⁷ Der Plural wird von der Autorin als geschlechtsneutral und die weibliche Form inkludierend betrachtet, es wird daher von der Verwendung der Endung „Innen“ abgesehen.

gewohnheitsrechtlich getroffen werden. In der Arbeit wird erkennbar, dass die meisten gewohnheitsrechtlichen Normen und Systeme nicht traditionell im eigentlichen Sinne sind, da sie sich Großteils im Zuge der britischen Kolonisierung (weiter)entwickelten. Während Traditionen bewahrt werden sollten, solange sie niemanden diskriminieren, repräsentiert das Gewohnheitsrecht ein System von Regeln, das oft eingesetzt wird um die Bemühungen des Staates zu unterminieren, Gleichberechtigung zwischen Frauen und Männern herzustellen. Trotz aller Opposition und Schwierigkeiten in den Rechtssystemen, gibt es Anstrengungen seitens der Regierung und vor allem seitens der NGOs und der vielen Akteuren der Frauenrechtsbewegung ihr Konzept von einer Gesellschaft der Gleichberechtigung der Geschlechter in die Realität umzusetzen. Ein guter Anfang ist bereits durch das in Kraft treten der neuen Verfassung und durch den Einsatz von vielen Organisationen, Institutionen und individueller Aktivisten gemacht.

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Interview 2: Alice Walukana from DESECE 03.02.2011 (Board Member).

Interview 3: Sophie E. Kibuywa from DESECE 07.02.2011 (Founder and Director).

Interview 4: Joan (N.N.) from "Together in Action" (TinA) 10.02.2011.

Interview 5: Sophie Kibuywa from DESECE 23.06.2011 (Founder and Director).

Interview 6: Maryframes Lukera (senior legal counsel) and Jacqueline Ingutiah (Legal Counsel) from FIDA (n.d.), interview held by Anna Schinwald.

Interview 7: Dedan Orieny from "Women Action Forum for Networking" (WAFNET) 10.02.2011, interview held by Anna Schinwald.

11. Appendix

11.1. Guideline questions for lawyers on women's rights

1. Can you please describe the work you are doing?
2. What is the relation between State law and customary law in Kenya? How dominant are traditions and customs in the lives of the people? How far does State law penetrate into people's lives especially in rural areas?
3. What changes with regard to women's rights did the new Constitution bring in comparison to the old one? How do you perceive these changes?
4. How far is the process of implementation with regard to women's rights?
5. What are the biggest challenges with regard to women's rights (land rights, inheritance rights, property rights, family planning)?
6. What is done on the State and community levels to inform women what their rights are?
7. What does a woman usually do when her rights are violated? Does she report it or go to court?
8. Is it a fact that women are driven away from their land after their husband's death or divorce? Is "wife inheritance" (= the widow marries one of her deceased husband's relatives) an issue?

11.2. Guideline questions for NGO staff

1. Can you please describe the work you are doing at DESECE/NGO?
2. How did the idea come up to offer legal education, how does it work exactly? Do you work specifically with women?
3. How does the population perceive your work? Are there problems within the community when women come to you for help?
4. What are the traditional roles of men and women here in the community?

11.3. Guideline questions for the women's groups

1. How old are you?
2. Would you like to describe your family? How do you live together?
3. Can you please describe a typical day in your life?
4. Do you have a piece of land? Who gave it to you? Do you own it?
5. What happens if problems within the family/community arise with regard to land?
Where do you go to resolve the issues?

CV

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- Oct. 2003 – June 2005: **University of Vienna, Austria**
Law School
- Sept. 2002 – May 2003: **EF International School of Spanish, Quito, Ecuador**
Language classes; classes at the Central University of Quito in the Faculty of Philosophy, Literature and Educational Sciences; volunteer at local kindergarten.
- Sept. 1994 – June 2002: **Gymnasium Neusiedl am See, Austria**
Bilingual classes in English and German, specialised in Classical and Modern Languages.
- Sept. 1990 – June 1994: **Elementary School St. Andrä am Zicksee, Austria**

Working Experience:

- Since Dec. 2011: **Refugee Project Ute Bock, Vienna**
- May 2010 – Okt. 2010: **Ludwig Boltzmann Institute for Human Rights, Vienna**
- June 2010: **UN Committee on the Peaceful Use of Outer Space, Vienna**
- June 2009 – Sept. 2009: **Kindernothilfe Österreich, Vienna**
- Dec. 2008 – Jan. 2008: **Austrian Development Agency (ADA), Vienna**
- May 2008 – June 2008: **UEFA Euro 08, Vienna**
- Aug. – Sept. 2006: **International Student Volunteers, Dominican Republic**
- Since 2000: **Dr. Judith and Dr. Arnold Heider, St.Andrä**