

**// THE EFFECTS OF STATUTORY JUSTICE APPROACHES ON  
TRADITIONAL CONFLICT MANAGEMENT MECHANISMS:  
THE CASE OF BORANA COMMUNITY IN UPPER EASTERN KENYA  
BETWEEN 1963-2011 //**

**BY:**

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## DECLARATION

This research project is my original work and has not been presented for an award of degree in any other University.

Signature  ..... Date..... 31<sup>st</sup> October 2012

**Yusuf Ali Lakicha**

This research project has been submitted with my approval as a University supervisor.

Signature  ..... Date..... 1/11/2012

**Dr Farah Ibrahim**

## **DEDICATION**

To the elders and traditional leaders who have dedicated their time and wisdom in trying to secure peaceful co-existence among pastoral communities by managing the scarce and diminishing resources in North Eastern Kenya and to my mother Halima Guyo Duba, my mentor and role model who not only instilled in me acceptable societal norms but also demonstrated that moral uprightness is the most treasured legacy one must perpetuate to the next generation.

## **ACKNOWLEDGEMENTS**

First of all I thank the almighty God for giving me the strength and ability to undertake this great academic pursuit and the courage to undertake this research work as well as keeping me safe from any difficulties that could have hindered the successful completion of this course.

I sincerely appreciate Dr Farah Ibrahim, my supervisor for the untiring guidance through out the project. His research expertise and guidance played a major role enhancing my overall understanding and made my work what it is.

I appreciate my family for the moral support. I appreciate my children Wife Khadijah, and my children who always prayed for me to get excellent grades. Indeed your support was handsomely rewarded.

I also extend my deep gratitude to the entire university academic staff in particular those working in the school of Diplomacy and International Studies. I thank the staff of Jomo Kenyatta Memorial Library for the assistance they gave me while using the library resources.

**Yusuf Ali Lakicha**

**Nairobi.**

## **LIST OF ACRONYMS**

<b>ACHPR</b>	<b>African Charter on Human and Peoples' Rights</b>
<b>ADR</b>	<b>Alternative Dispute Resolution</b>
<b>APRM</b>	<b>African Peer Review Mechanisms</b>
<b>AU</b>	<b>African Union</b>
<b>ASAL</b>	<b>Arid Semi-Arid Lands</b>
<b>CEMRIDE</b>	<b>Centre for Minority Rights Development</b>
<b>CSO</b>	<b>Civil Society Organisation</b>
<b>FGD</b>	<b>Focus Group Discussions</b>
<b>IK</b>	<b>Indigenous Knowledge</b>
<b>ILO</b>	<b>International Labour Organisation</b>
<b>KHRC</b>	<b>Kenya Human Rights Commission</b>
<b>KNCHR</b>	<b>Kenya National Commission on Human Rights</b>
<b>NRM</b>	<b>Natural Resources Management</b>
<b>SADC</b>	<b>Swiss Agency for Development and Co-operation</b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>UN</b>	<b>United Nations</b>
<b>UNAFEI</b>	<b>United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders</b>
<b>UNDRIP</b>	<b>United Nations Declaration on the Rights of Indigenous Peoples</b>
<b>UNSC</b>	<b>United Nations Security Council</b>

**VOM**                      **Victim Offender Mediation**

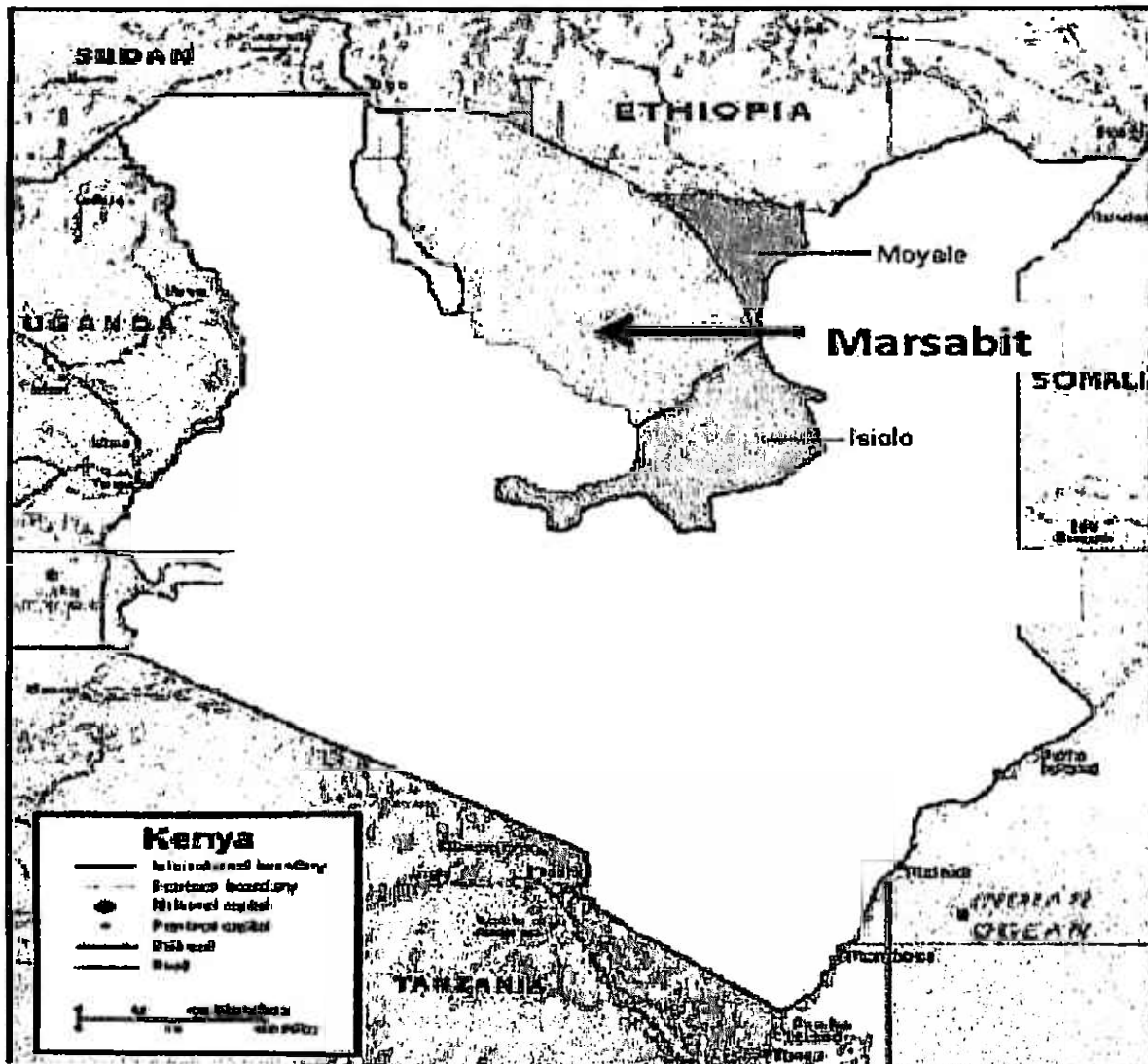
**WHO**                     **World Health Organization**

## ABSTRACT

Northern Kenya is an arid part of Kenya, inhabited by the pastoralists who traverse the vast region on seasonal migrations as they seek sufficient pasture and water for their livestock. The harsh weather conditions and the shrinking range resources base has made pastoralists inhabitants of the region go through severe hardships in their survival manoeuvres to protect their lives and that of their livestock from the threats of the drought. This survival manoeuvres has occasionally resulted in conflicts among the communities. The conflicts of late have had numerous casualties, due to proliferation of small arms and weapons from the neighbouring unstable countries like Somalia. Due to the regions marginalization most state institutions are not adequately equipped, staffed or facilitated to handle their respective service delivery to the people. In particular the judiciary is among the least developed state institutions in the region. The courts only exist at district headquarters and are poorly staffed, with cases of one magistrate being shared by two or more districts being common. Hence the judiciary has little effect as deterrence to the perpetrators of conflict. The study sought to establish historical and contemporary factors that has contributed to conflicts among the pastoral communities in North Eastern Kenya and assess how these communities realise justice under customary laws and evaluate the effectiveness of this traditional justice system and how it should be formally included in the national policy to provide for a legal pluralism to ease pressure on the formal justice system and enhance access to justice. This study against all this odds facing the Northern Kenya region shows how the indigenous Borana community has alleviated these conflicts over the range resources through their institutions of range resources conflict management. These institutions which have checks and balances and defined division of roles have been preserved by the community and are active to this day. This is what has made their pastoralism livelihood viable and feasible despite the numerous challenges. The study further demonstrates how the justice regimes of the indigenous community appeals to their socio- political organization and demographic dynamics. Their justice system is restorative and seeks at all times to restore and repair the broken victim, offender and community relationships. The formal justice systems on the other hand is seen as alien to their value systems and does not take into account how the local pastoralist's communities understand and define crime and resolve disputes or conflicts. The study uses the restorative justice theory which builds reconciliation and reintegration and restoration of offender back into the society as opposed to the formal justice system which is retributive, punitive and aims to make offenders suffer as much as the victim if not more. This study demonstrates analytically the socio-political and socio-legal aspects that characterize the customary and formal justice institutions and shows the existence of tension between them that needs to be addressed through a legal framework that accommodates the two in one that is legal pluralism. This is to allow the effective operations of customary justice systems without fear of contradicting the formal systems, and to have the customary restorative justice systems decisions of conflict resolutions and range resources management as binding upon the state.



## THE THREE DISTRICTS OF UPPER EASTERN, KENYA



Survey of Kenya: 2010

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## **CHAPTER ONE**

### **INTRODUCTION OF THE STUDY**

#### **1.1 Background of the study**

Upper Eastern, the subject of this study falls in the category of the region classified as Arid and Semi- Arid Lands (ASAL) lands of Kenya. Hence, the region receives mean annual rainfall of between 200-450mm. Due to this depressed rainfall the region experiences drought at higher frequencies which disrupts the pastoralist's livelihood. The depleted livelihoods lead to various mitigation measures such as intense competition for the scarce resources. The intense competition then leads to conflicts as communities fight it out to control the grazing land or water points when the times gets tougher.

<sup>1</sup>The region is dominated by Borana Community, who are part of the larger Oromo ethnic migrants who moved south of the Ethiopian highlands in the 1500s. Borana constitute about 4 to 5 million persons of whom approximately 500,000 live in the largely barren upper eastern part of Kenya in Isiolo, Marsabit and Moyale districts with the remainder in Ethiopia. The greater Marsabit district has a total population of about 140,000 persons sixty percent of whom are Borana. The rest are Gabra, Burji and Rendille.

<sup>2</sup>The pastoral communities of Upper Eastern have a long history of violent conflict that has contributed to significant loss of life and property, increased levels of poverty and has adversely affected social and economic activities of the over 140,000 people in the district.

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<sup>1</sup>G.D. Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform in Kenya with special focus on Land Rights of the Masaai and the Borana Pastoralists, LLM Dissertation .Perth: Murdoch University.(2009)pp.28.

<sup>2</sup>National Security Council Secretariat. Marsabit Conflict Assessment Report,'*The Turbi Massacre*' Nairobi, Dalyn Enterprise,2009. Pp 8-9

Traditional conflict resolution mechanisms in Africa are generally closely bound with socio-political and economic realities of the lifestyles of the communities. These mechanisms are rooted in the culture and history of the African people and are in one way or another unique to each community. Rabar and Karimi(2004)<sup>3</sup>The customary courts rely on goodwill of the society to adhere to its ruling.

As a part of African socio-political setting, the major conflict resolution mechanism in the Borana community of upper eastern, similar to those living in Ethiopia, is the Gada systems of administrations which is the political, judicial, legal and ritual administrations.

Therefore the research problem I want to address in this study refers to the ways and means of addressing natural resource related conflicts among the Borana of Upper Eastern through an indigenous justice systems- Gada system, the waning powers of the system, the tension between customary and formal administrative and statutory justice systems and how this will be overcome to have a legal plural framework that will accommodate both customary and formal systems to serve the community as effective conflict management mechanisms.

### **1.2 Statement of the research problem**

Traditional societies in Africa and elsewhere are reputed to hold secrets of peacemaking, locked in their ways, formed from centuries of customs before the disruption of colonization.

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<sup>3</sup> B. Rabar, and M. Karimi. *Indigenous democracy, Traditional conflict resolution Mechanisms in Pokot, Turkana, Samburu and Marakvet*, Intermediate Technology Development Group-Eastern Africa(2004)

However, Zartman (1995)<sup>4</sup> states that with the end of the systems of world order that colonialism and the cold war provided, Africa is experiencing a greater degree of conflict than it has seen in a long while, and these conflicts are noted to be primarily internal in nature.

African conflict in 1990s is not only more prevalent than in earlier periods; but is more violent and destructive because its implications lie within the state and the region.

More disturbing is the fact that though their management involve the activities of seasoned provincial administrators or judicial authorities, who are using the best of personal skills and recently developed knowledge about ways of managing and resolving conflicts, the modern mechanisms have not been particularly effective or efficient in overcoming the disasters that conflict has brought to the traditional remote under developed society.

Before conflicts rise to an intensity that justifies state, or administrative attention, domestic indigenous measures would be expected to come into play but under the modern administrative structure they have not. This is occasioned by internal contest of authority between traditional elders and administrative mechanisms, and failure by the contemporary structure to recognize the indigenous mechanisms.

The modern statutory and administrative mechanisms are faulted for their foreignness and non African in nature and for ignoring the wisdom of traditional indigenous

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<sup>4</sup>E. Osanghae. *'Applying Traditional methods to modern Conflict: Possibilities and Limits'* in Zartman LW(ed), *Traditional cures for Modern conflicts: African Conflict medicine* Boulders, Colorado, Lynne Reinner Publishers,(2000)pp. 46

conflict management mechanisms which are crucial role in shaping community identity, values and norms. Institutions are not only organizations within a society, but also rules, regulations and positions that determine who gets 'what, when and how'. To determine if community systems are effective it is good starting point to determine the organizations around the institutions that shape the community.

There is need therefore to increasingly appreciate the role of the indigenous institutions instead of relegating them to the backyard as retrogressive and of insignificant contributions to the modern development practises or processes including the judicial systems. Policy makers must appreciate their role and integrate them with the state conflict management mechanisms.

The Borana Gadaa remains a legitimate institution in the eyes of the Borana society. However, the multiple legal systems in the modern state system has made the Gadaa system less effective, less accountable, and less equipped to deal with the complex modern society, with multiple legal and administrative structures, under the current context of multiple stakeholders in resource management.

### **1.3 Objectives of the study**

This study aims to make a contribution to the existing literature on indigenous Borana Gada knowledge, focusing especially on the justice aspects of the Gada system of natural resource management regimes and resolutions of disputes or conflicts around the same. To realize this, the study was guided by the following Objectives:

1. Establish historical and contemporary factors that have contributed to conflicts among communities in upper eastern?
2. Assess how the Borana of upper eastern realize justice under customary laws through Gada indigenous institutions in resolutions of conflicts?



3. Evaluate the effectiveness of the traditional justice system in managing the conflicts?
4. Investigate the tension that may be there between customary and formal justice systems and how they can be overcome?

## **1.4 Literature Review**

### **1.4.1 Introduction**

This chapter discusses the literature on the role of indigenous tradition elders in conflict management. It particularly focuses on the causes of conflicts among communities in upper eastern, how indigenous institutions have been used to address the conflict, and how the multi-legal modern legal structure is waning the powers and roles of the traditional elders.

The review is designed to map the state of knowledge, to identify important gaps in understanding, and to suggest promising avenues for future practical work to integrate the multiple legal mechanisms.

### **1.4.2 Causes of conflict in Upper Eastern**

Conflict has grown rapidly in Africa in the last three decades, and pastoral areas in upper eastern are among the most vulnerable.

Conflict in pastoral areas is often associated with their marginal location. Pastoralists are seen as not only geographically marginal, but also politically and culturally marginal. Their presumed distance from modern institutions and from the controlling action of the state is often accepted as a self-evident explanation for widespread violence.

In parts of northern Kenya the state is technically present, for example through the army and the chief system, but is ineffective, for example the few police and provincial administrations at the local posts are either posted to those stations on disciplinary grounds, poorly equipped and subsequently not motivated to provide the much needed security in the conflict prone region which is characterized with harsh terrain and poor road and telecommunication infrastructure.

This inaction of the state is dangerous in various ways. From a local point of view, the state is absent and so they have to arm themselves, have an armed militia to provide with the much needed security and protection for their livestock from the marauding war-like neighbors who are constantly on restocking mission. The inaction of the state is more likely to be perceived as intentional, deliberate discrimination rather than objective weakness. The state's inaction therefore can contribute directly to escalation of conflict.

Gellner expresses the instrumentalist view of artificiality of the nationalism with his famous quotations, "nationalism....invents nation", and "Nationalism is not the awakening of nations to self-consciousness: it invents nations where they do not exist". Geller also claimed nationalists as the constructors, builders of nationalism aiming to improve their own position while they argue they are working for their group interests.

Like nationalism, ethnicity in upper eastern is propagated and manipulated by elites, pro-elites, aiming at either material advantages or power, or both. As explained by instrumental theory, modernization, economic factors and elite ambitions has escalated conflicts among the pastoral communities.

Fratkin (1994a)<sup>5</sup> posits that politicians facilitate conflict by not intervening or they may directly promote conflict by propaganda or even as a form of political competition before elections. Goldsmith (1997)<sup>6</sup> emphasizes this assertion and reports cases of administratively appointed chiefs and elected member of local county councils inciting people to conflict. A politician may sometime enhance his reputation by initiating a raid. The instrumental use of raiding for politics is not a recent phenomenon.

In his classic monograph on the northern Somali, Lewis (1961)<sup>7</sup> says that the Administration succeeded in lowering the rate of conflicts by fining local political authorities who in any way incited raiding.

According to Smith (1991),

“A nation is a named human population sharing a historic territory, common myths and historical memories, a mass, public culture, a common economic and common legal rights and duties for all members”

Ethno-symbolists argue that once formed, ethnic identity is strongly path-dependent, indicating a continuity between pre-modern and modern forms of social cohesion. The symbolic theory argues that emotional grievances, such as hostile feelings toward other ethnic groups or an existential fear that group members feel, are the major sources of an ethnic conflict as experienced in Moyale early this year, where Gabra

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<sup>5</sup>E. Fratkin. *Resurgence of Inter Pastoralist warfare in Kenya, Paper presented to Panel on Resurgence of Ethnic Conflict and Tribalism in Africa*, Atlanta GA, American Anthropological Association annual meetings,(1994)PP. 246

<sup>6</sup>P. Goldsmith. *Cattle, Khat and Guns: Trade, Conflict and Security on Northern Kenya 's Highland-lowland interface*. A case study, A paper prepared for the USAID Conference in *Conflict Resolution in the Great Horn of Africa*, (1997).

<sup>7</sup>I. Lewis. *A Pastoral Democracy, A study of Pastoralism and Politics among the Northern Somali of the Horn of Africa*, London, Oxford University Press, New York, Toronto

ethnic group revolted and went into violent conflict with the majority Borana ethnic group to protest perceived denial of their rights, and demanded for recognition of their identity. The Gabras felt they were denied access to available job opportunities and access to resources and electoral rights.

Oba (1992)<sup>8</sup> says Conflicts among or between pastoral communities are highly attributable to control and ownership of resources and wealth, which are scarce in pastoral areas. Restriction of access to grazing and water resources, clashing production strategies and resource use regulations, demographic growth and encroaching farmers are among the popular causes of conflict in these communities.

Administrative boundaries cutting across traditional migratory routes and pasture zones and wars in neighbouring countries continually bring increased problems in accessing traditional grazing resources. Weapons entering Kenya from neighbouring war-torn countries (Sudan, Somalia and Ethiopia) are making raids increasingly dangerous and sophisticated. In addition to the traditional raiding, conflicts in the region have now taken an economic and political perspective.

It is being alleged that the economically powerful people are funding livestock thefts and politicians are encouraging conflicts to flush out the would- be supporters of political opponents from their political turfs.

According to a research by Swiss Agency for Development and Cooperation (SADC), livestock remains the principle drivers of conflict in pastoral areas. It is a fundamental form of pastoral capital. It is the pastoralist's means for production, storage, transport and transfer of food, wealth and other services. Any threat to livestock – such as lack

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<sup>8</sup> G. Oba. *Ecological factors in Land Use Conflicts, Land Administration Insecurity in Turkana, Kenya, Pastoral Development Network* ,Papers 25(3-4) (1992),pp 146-160

of fodder or water, raiding, price variation, and disease is a direct threat to pastoral livelihoods.

The research further argues that some conflicts within and between pastoralist communities, such as raiding and cattle rustling have a long history and have to some extent become an aspect of traditional pastoralist culture. However, such traditional conflicts have become increasingly destructive and less manageable compared to the traditional raids.

#### **1.4.3 Indigenous conflict Resolution, Gada system among Borana**

Former Secretary General of the United Nations, Kofi Annan, (2004)<sup>9</sup> acknowledged officially in 2004, in his report on *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, that “due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition.”

Traditional mechanisms for conflict resolution refers to persistent social practices, rooted in local cultural settings, aiming at resolving conflicts, reducing tension, and rebuilding social relationships.

Culture affects the way that people understand conflict and shapes their views about how best to intervene. Answers to questions surrounding how parties name and identify conflict, how to approach conflict, and whether members of the community or extended families should be involved in conflict resolution are rooted in culture and shaped by context and experience. There are also deeply shared meanings about

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<sup>9</sup> Koffi , Anan. *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, New York, United Nations Security Council(2004) pp. 12

how to understand and interpret the way in which conflict emerges, escalates and is resolved. Beyond the knowledge gleaned from books and articles, there is also the knowledge that people have in their heads already, as a result of being situated in a particular society and culture.

What Baron refers to as "cultural messages" are what everyone in a group knows that outsiders do not know. These lenses orient people to the world in a particular way and govern how they perceive and interpret the world. Thus, conflict should be understood partly in terms of culture. These mechanisms are rooted in the culture and history of the people, and are in one way or another unique to each community.

Rabar and Karimi (2004)<sup>10</sup> say Indigenous conflict management and resolution mechanisms use local actors and traditional community-based judicial and legal decision-making mechanisms to manage and resolve conflicts within or between communities. Traditional conflict resolution mechanisms in Africa are generally closely bound with socio-political and economic realities of the lifestyles of the communities. The customary courts rely on goodwill of the society to adhere to its ruling.

Indigenous institutions play a crucial role in shaping community identity, values and norms. Institutions are not only organizations within a society, but also rules, regulations and positions that determine who gets 'what, when and how'. To determine if community systems are effective it is good starting point to determine the

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<sup>10</sup> B. Rabar, and M. Karimi. *Indigenous democracy, Traditional conflict resolution Mechanisms in Pokot, Turkana, Samburu and Marakwet*, Intermediate Technology Development Group-Eastern Africa(2004)

organizations around the institutions that shape the community.

According to Leach and Scoones (1997) <sup>11</sup> traditional conflict institutions are broadly defined as practises and all structures that “influence who has access to and control over what resources, and arbitrate contested resource claims”.

Further Watson (2003) <sup>12</sup> argues that indigenous institutions include “organizations, conventional knowledge, ‘regularized practises’, customary rules and practises”

There is increasing appreciation of the role of the indigenous institutions previously seen as retrogressive and of insignificant contributions to the ‘modern’ development practices or processes including the judicial systems.

Development practitioners and policy makers are coming to make sense of what Critchley (2008) called ‘Indigenous Knowledge’ (IK), which according to (Chambers, 1997), is <sup>13</sup>“risk minimizing, sustainable and adapted to precarious micro –environments.” Customary rules have been effective in ensuring equity for the society at all levels including those who are perceived as vulnerable in the society unlike the modern day structures where power relations determines who gets ‘what, when and how’.

Indigenous institutions that include the Gada Borana, continue to be popular among especially the communities that consider themselves as being marginalized due to their small populations or attachments to their traditional systems. These institutions have served the community well and given them identity and ability to overcome and

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<sup>11</sup>M. Leach. R. Mearns. and I. Scoones. ‘*Environmental Entitlements: A framework for understanding the institutional Dynamics of Environmental change*’ IDS Discussion Paper (1997) pp. 359

<sup>12</sup>E. Watson. ‘*Examining the potential of Indigenous institutions for Development: A perspective from Borana*, Ethiopia Development and Change 34(2) (2003) pp. 287-309

<sup>13</sup>R. Chambers. *Whose reality counts? Putting the Last First*, London, IT Publications(1997)

manage their socio – economic, cultural, ritual and political challenges. These are the reasons why Warren (1995), sees these indigenous organizations as; “a ready- made set of power structures that enable a group of people to organize themselves to take decisions, to enforce regulations and to resolve conflicts”.

Tuso, H. (2000) <sup>14</sup>argues that the Gada system may be the most studied Indigenous African institution. The first writer on the Gada system on record is a sixteenth-century Abyssinian by the name Bahrey. Atsime Giorgis another Abyssinian writer at the end of the nineteenth century, wrote that the Gada system unites and mobilizes all members of Oromo society into a formidable and invincible force.

Asmarom Legesse, (1973)<sup>15</sup> an Eritrean anthropologist who is considered to have written the most definitive interpretation of the Gada system, observed:

The Gada system is an institution that appears so exaggerated that it is readily dismissed by laymen and scholars alike as a sociological anomaly. Anomalous though it may lie, it is one of the most astonishing and instructive turns the evolution of human society has taken.....Gada seems to be one of the universals that binds the entire nation into a coherent system and gives people a common political basis for understanding each other. It constitutes a shared political idiom.

The Borana of Northern Kenya and Southern Ethiopia have common institutions that govern them as a nation. The difference of the two government’s political systems

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<sup>14</sup>H. Tuso. “ *Indigenous processes of Conflict Resolution in Oromo Society*’ in Zartman 1w(ed) *Traditional cures for Modern Conflicts: Africa Conflict Medicine*, Boulders, Colorado; Lynne Rienner Publishers,( 2000)pp 275

<sup>15</sup>A. Legesse. *GADA, Three approaches for the study of African Society*. London, The Free Press(1973)



seems to have very little effect on the way they have organized themselves at least on the management of their natural resources and conflict resolutions structures. Gada institutions provides for the Borana what Uphoff (1996) summarizes as “a universe of experience that could provide many valuable lessons for mobilizing and sustaining collective action for self –help and self – management in the modern world.”

#### **1.4.4 Effectiveness of traditional system in conflict management**

Ali (2008)<sup>16</sup> says the term “traditional” with its Eurocentric connotations tends to suggest the existence of profoundly internalized normative structures. It also refers to patterns that are seemingly embedded in historical as well as static political, economic and social circumstances. But it must be noted that African institutions, whether political, economic or social have never been static. They respond to changes resulting from several factors and forces.

These institutions and justice mechanisms have been effective as they are accessible to rural people, their proceedings are carried out in the local language and often the venue is within walking distance.

The methods are often highly participatory, they give the victim, offender and the community as a whole, a commonly known voice in finding a lasting solution to the conflict.

Traditional mechanisms are key in a reconciliatory process, whose goal is healing of wounds of victims and survivors and restoring broken relationships between members

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<sup>16</sup>J.A.D Ali. *Reconciliation and Traditional Justice: Traditional-based Practices of the Kpaa Mende in Sierra Leone in Husye, L. & SALTER, M (Eds) Traditional Justice and Reconciliation after Violent Conflict: Learning from African experiences-* Stockholm, International Institute for Democracy and Electoral Assistance IDEA.PP 45

of a group and between communities, with the sole aim being to prevent recurrence of conflict. Village elders, religious leaders and other 'traditional' justice actors are based in the village, speak the same language, are known to the community and highly accessible. By contrast state police and courts are often only accessible after a long journey to a distant district or provincial capital. 'Traditional' justice decisions can be delivered more promptly than those of bureaucratic state justice systems. Moreover, there are no hefty fees involved and the financial costs for litigants, the community and the state are minimal.

Traditional justice is focused on maintaining social cohesion or community harmony. Such cohesion is highly valued in close-knit communities and is very effective for dealing quickly and peacefully with minor cases that occur on a daily basis in these communities. Formal state justice approaches are generally less well suited for these purposes. The emphasis in traditional justice is often on bringing closure to disputes and using restorative justice to promote reconciliation between parties who have to continue living in the same community.

Traditional justice is inherently flexible and can accommodate to changing circumstances more easily than cumbersome bureaucratic state justice systems. As norms, processes and sanctions are usually unwritten, actors can forge solutions and provide remedies that are socially appropriate and tailored to the context of each case.

People seek assistance from village, traditional and religious leaders precisely because they possess social and cultural legitimacy in the village. They are not disinterested independent actors as judges are supposed to be. They are directly involved in the day-to-day workings of the village and are familiar with the historical, social and political background of disputes. The separation of justice from wider spheres of politics and social relations, as occurs in the paradigm of state justice, is

absent in traditional approaches where everything is interconnected and where disputes and conflict tend to be approached more holistically.

#### **1.4.5 Tensions between Indigenous traditional justice systems and formal statutory system of Justice**

The rules of natural resource management are now characterized by an overlap between customary tenure systems, and formal systems enacted by the state. In addition, the spread of the market economy, and development interventions in tenure and resource control, have created a situation where there is no longer one unambiguous set of rules about natural resource use. Instead, individuals can pick and choose which set of rules they will base their actions on, and appeal to, in case of conflict. Thus a herder who wishes to control a water source or dry season pasture can try to obtain it under customary tenure rules using ethnic or clan links, and if that fails can appeal to the local authority or the courts using formal law. If both of these fail, bribery of local officials may achieve the same result. As a result, there are fewer clear attributions of responsibility about natural resource use, and a much greater potential for conflict over disputed use.

Some scholars have pointed out that the ambiguity of overlapping sets of rules can be used as an advantage by the state, and not only by individual actors. Ambiguous tenure systems provide the state with formal and informal revenue from the arbitration of conflict. Meanwhile, the process gives the elite within state structures a gateway to formerly inaccessible pastoral resources. The imposition of formal administrative and legal framework enables people who have better access to the state to claim new property rights to resources, to the disadvantage of those who do not have the same connections. On the other hand, the government may use these

new claims to give a juridical face to political interventions against nomadic pastoralists.

Lenaola (1996)<sup>17</sup> states that the confusion over land tenure is not only a matter of ambiguity between formal and customary law. There are five land registration laws in Kenya. Non private land, falls into two broad categories of Government Land and Trust Land. The latter, which forms most of the pastoral areas, is enshrined in the Constitution and governed by four different Acts.

The Constitution (Section 115) gives trust land to county councils to hold in trust for the benefit of the people ordinarily resident on it and in recognition of their rights according to 'African customary law'. However, a clause in the same section allows for the legal manipulation of customary law by stating that 'no right, interest, or other benefit under African customary law shall have effect, so far as it is repugnant to any written law'.

Even without legislative action, customary rights over trust land can be extinguished through the procedure of "setting apart" certain areas (Section 113). This can be done by Parliament or government for the purpose of prospecting for or extracting minerals or oil - directly or in favour of public or semi-public corporations — and by county councils, for any purpose that 'in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of trust land vested in that county council' (Section 117).

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<sup>17</sup> I. Lenaola. H.H Jenner and T. Wichert. Land tenure in pastoral lands. In: Juma C. and Ojwang J.B. (eds) *In Land We Trust. Environment, Private Property and Constitutional Change*, Nairobi and London, Initiatives Publishers and Zed Books, (1996)

Government land, under which many important pastoral grazing lands fall, is controlled by the Commissioner of Lands office and the President. Government land can be, and is regularly given to farmers as freehold land, but not to pastoralists.

Bromley,(1991)<sup>18</sup> states that in Northern Kenya, large areas of trust land are lost to irrigation schemes and game reserves. Overlapping and contradictory rights of exclusion legitimised by the parallel Acts and tenure systems, lead to lack of respect for the law, often leading in turn to open conflict.

The recent Legal Framework on Pastoral Land Tenure and Legislation for the Arid Lands of Kenya finds that 'county councils have abused the trust placed in them by the law' and recommends the transfer of such trust land to a different legislative framework (RANTCO, 1998: 23-24). The Legal Framework also recommends several amendments to current legislation (included Chapter IX of the Constitution), in order to enable the recognition of pastoral communities as legal entities and to give legal credence to their traditional authority in the matter of land tenure.

Traditional justice systems are found in many post-colonial countries where the legacies of small self-regulating stateless societies have survived and adapted to the cumulative impacts of colonialism and modernisation and, specifically, the establishment of the modern state and its national legal system.

The impact of globalisation and neo-liberal policies on the restructuring of Africa's political economic, and social cultural realities is no doubt very powerful. There is growing consensus that nation state is in crisis and that its decline as the main

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<sup>18</sup>D.W Bromley. & M.M. Cernea. *The management of Common Property Natural Resources: Some conceptual fallacies*. The World Bank Discussion Paper 57, The World Bank, Washington.(1989).

transcendent centre of social organisation is part of a larger crisis, that of modernity. African governments had been under immense pressure for globalisation to comply with what proponents consider to be prudent policies. These pluralism and multiple policies have created confusion, and tension between the traditional structures and the formal state justice mechanism.

In many post-colonial countries, state laws and institutions such as courts, lawyers, justice ministries, police and prisons operate alongside customary' or traditional justice mechanisms that have been integral parts of indigenous social orders since long before the arrival of the modern state. These older traditional approaches have not disappeared under the cumulative weight of modernity, statehood and globalisation. On the contrary, they have proven to be remarkably resilient and have continued to adapt to the local and external dynamics of social change.

However, Governments throughout the post-colonial world have long struggled with how best to deal with high levels of legal pluralism. Should justice approaches operating beyond the control of the state such as customary or traditional approaches be simply ignored or should some attempt be made to incorporate them or otherwise improve their alignment with the workings and aims of state justice?

Traditionally the ability of the elder age-set to act as an effective conflict management institution relied on three main sources of authority. These include control of access to resources/marriage; being part of a large cross-clan, cross-ethnic, cross-generation network; supernatural legitimacy.

However since the advent of colonialism and modernization, customary institutions for conflict management are breaking down as the position of the elders has been undermined by modern changes.

According to Duffield (1997),<sup>19</sup> the elders' authority has been undermined by the introduction of a market economy and the increasing polarization of rich and poor, that resulted in labour migration. The youth have found new sources of influence and wealth including the flourishing armed militias of young men and the new income available through banditry.

Odhiambo (1996)<sup>20</sup> says that traditional authority is being eroded by the progressive replacement of elders' councils and tribunals with government-appointed agencies and functionaries. Meanwhile, urbanization and increasingly frequent migrations to own of young people, especially men, expose them to other cultures and make them question traditional values and elders' authority.

Another way in which elders may have lost their authority is through increasing distrust from the communities, particularly from the warrior age sets. This may have various causes. One may be the association with an increasingly distrusted administration. The elders may increase their influence and prestige by providing an interface between their communities and local government. When the authority and recognition of the public sector is reduced, so is role of the elders. In a study of pastoral institutions in Somaliland, Hashi (1996) points out that traditional leaders, having been absorbed by urban political machinery, are rapidly losing the trust of the herders. The same happens when the association with administrative power is used for personal advantage through land speculation or bribery.

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<sup>19</sup> M. Duffield. *Ethnic War and International Humanitarian Intervention: A Broad Perspective*. In: Turton D. (ed.) *War and Ethnicity. Global Connections and Local Violence*, University of Rochester Press, Woodbridge (1997).

<sup>20</sup> M.O Odhiambo. 1996. *Addressing Natural Resource Conflicts Through Community Forestry: the Case of Eastern Africa*. Paper for E-conference on Addressing natural resource conflicts through community forestry, FAO, Rome, January-March( 1996)

Ibrahim and Jenner (1996)<sup>21</sup> on the other hand say explanation that “weakened elders” explain the rise in conflicts and explanation for failure in customary conflict management institutions seem to be inconsistent with the numerous examples of recent conflicts which are promoted, funded and organized by the elders, as in the case of the Wajir clashes. In 1992-1995. Among the Turkana the elders still make war as well as peace and often bless the warriors before they go on a raid.

Moreover, we should perhaps distinguish between authority and power, or maybe just between different kinds of authority. The elders may have lost authority because of gaining new powers, for example, having exclusive forms of access rights, connections with state structures, possibility of cumulative differentiation through new forms of capital which are more permanent than cattle, and assuming political or administrative positions such as being members of the district or provincial peace committees a plural role which creates more confusion among the locals and one which wanes the trust they originally had in these elders.

## **1.5 Justification of the study**

### **1.5.1 Academic justification**

While the Borana Gada systems has been studied and some literature on the same are available such Legesse, 1973, and 2000 G. Dahl, 1979, Bassi, 2005 and Leus, 2006, all this are anthropological records of the Gada, that generally dwell on either the judicial, legal, ritual or administrative aspects of the Borana Gada. This study approaches the aspect of the Gada that has not received much academic attention from

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<sup>21</sup>D. Ibrahim. & J. Jennifer. Wajir Community Conflict Management, Paper presented to USAID Conference on *Conflict Resolution in the Great Horn of Africa*, June,(1997).



the point of view that the Gada justice management system can effectively be applied to pastoral and natural resource related conflicts prevention and resolution mechanisms. Though some studies have done expositions on the Gada range resources governance institutions, no attempt has been made to argue for its relevance, particularly in relation to modern formal or statutory disputes resolutions regime.

### **1.5.2 Policy justification**

Kenya like most African states has been unable or unwilling to guarantee the existence of and access to mechanisms of justice. States bear the basic obligation to guarantee the existence, availability and effectiveness of the infrastructure of justice delivery. However, lack of resources has made it impossible for state to provide mechanisms of formal or statutory justice delivery such as the police, bureaucracies of administrative justice, courts, lawyers and judges forcing majority not to have any access to these formal mechanisms or having to travel long distance, incur huge costs in search of justice. The study will seek to justify the is need for integration and recognition of indigenous traditional justice mechanisms by empowering them to not only speed justice delivery but also expand access to justice, given the overwhelming demand for the justice delivery service, which the government is unable to cope.

### **1.6 Research questions**

This study was formulated to critically look at the effectiveness of traditional justice mechanisms in conflict management among pastoral communities of upper eastern, Kenya

The following are the questions which guided the study:

1. What causes conflict in the study area?

2. What was the justice mechanism used, and how effective were the elders in conflict resolution and management?
3. How have multiple legal systems affected the effectiveness of traditional justice mechanisms?

### **1.7 Theoretical Framework**

Amstutz (2005)<sup>22</sup> developed the theory of political forgiveness by using two major theories of our political society: political liberalism and communitarianism. Liberalism emphasizes retributive justice and the promotion and protection of human rights through the rule of law, which formal statutory justice mechanisms advocate for. On the other hand, communitarianism emphasizes restorative justice, the healing of victims and the renewal of social and political relationships.

Since some offences cannot be repaired through legal retribution, the communitarianism perspective promotes the renewal and healing of divided societies through the moral rehabilitations of social and political relationships. Communitarianism can thus be translated to mean belongingness. This means there is a strong sense of belonging and family ties that links the community, a clan tribe or ethnic group to a nation or a state. Linking communitarianism to the African perspective, Dr. Alex Nkabahona, the coordinator for the Peace and Conflict studies at the University of Kampala notes that the African society was and is organized around the family and community.

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<sup>22</sup> M.R Amstuz. *The Healings of Nations – The Promise and Limits of Political Forgiveness*, Rowman & Littlefield Publishers,(2005). pp 14

Nkahabona( 2007)<sup>23</sup> says “The community was and to a great extent still is even today, the organic institution that shapes or moulds the way of life of individuals who belong to that community

Wormer (2004)<sup>24</sup> argues that Restorative justice is a concept that has captivated the imagination of the world in settling disputes. Derived from indigenous and religious forms of justice, restorative justice is a concept for all time and for all nations. The values of restorative justice are consistent with the teachings of Buddhism, Christianity and other religions. It is driven by altruism and compassion toward wrongdoers rather than vengeance.

According to Clear and Karp(1999)<sup>25</sup> Restorative justice theory can also be viewed as “an overarching paradigm of public problem solving, citizen participation and collective responsibilities for building stronger communities”. Restorative justice generally, though having varied conceptualization depending on the cultures and traditions has a common meeting point, which is how people think about crime and respond differently to it, against the conventional formal court systems.

In describing the focus of restorative justice, Zehr (1990)<sup>26</sup> state that: Restorative justice focuses on harm caused by offenders by seeking to repair harm to victims and communities and reducing future harm by preventing crime. Restorative justice requires offenders to take responsibility for their actions and for the harm those actions have caused. It seeks redress for victims, reparation by offenders, and

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<sup>23</sup> D.A. Nkahabona. Healing the Wounds of Conflict through Reconciliation: The African Paradigm. Paper delivered on the 4<sup>th</sup> 11PT African Conference on Peace Through Tourism( 2008)

<sup>24</sup> K. Wormer. Restorative Justice: *An International Model of Empowerment*, *Journal of Societal & Social Policy*, Vol. 3/2: University of Northern Iowa, USA, Casa Verde Publishing ( 2004) pp. 3-16

<sup>25</sup> T.R Clear. & D.R Karp. *The Community justice ideal: Preventing crime and achieving justice*, Boulder, CO: Westview.(1999)

<sup>26</sup> H.Zehr.*Changing Lenses: A new focus for Peace and Justice*.ScottsDale.PA:Herald.(1990)pp.

reintegration of both within the community as communities and government achieve restorative justice through a cooperative effort.

Thus restorative justice allows for direct participation of offenders in the process of justice and holding them accountable so as to guide them to take responsibility for their actions that will lead to the repair of harm done to the community and victim. As such the focus of restorative justice is on 'communities and victims needs' and 'offender's obligations'.

The process of restorative justice is obviously participatory and as Lemley (2001)<sup>27</sup>, puts it, "Seeks to maximize information, dialogues and mutual agreement between victims, offenders and communities".

Further restorative justice looks at the greater good of the society through an orientation that is future focused – the offenders harm is balanced with "making things right" (Zehr, 1990), and through reconciliation and reintegration, the offender is restored back to the society.

The formal justice through the courts, on the other hand is popularly seen to be of retributive justice, it is punitive and its aim is to make offenders suffer as much as the victim if not more. The offender's accountability is to the state and not to the offended –victim or the larger community as is the case with restorative justice. Ada Melton(2004)<sup>28</sup> in emphasizing this difference between restorative indigenous and retributive formal justice points out that: The retributive philosophy holds that

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<sup>27</sup> E.C. Lemley. 'Implementing Restorative Justice: An evaluation of program design and effectiveness in decentralization efforts'.(2001) pp. 46.

<sup>28</sup> A. Melton. '*Indigenous Justice Systems and Tribal Society*' Accessed 29<sup>th</sup> April 2011(2004)  
<[http://aidainc.net/Publications/ij\\_systems.htm](http://aidainc.net/Publications/ij_systems.htm)>p 126

because the victim has suffered, the criminal should suffer as well. It is premised on the notion that criminals are wicked people who are responsible for their actions and deserve to be punished. Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society. It does not offer a reduction in future crime or reparation to victims.

Melton(2004)<sup>29</sup> On the other hand indigenous restorative justice working model is for problems to be addressed in its entirety. In case conflicts come up, under restorative justice there is no fragmentation or compartmentalizing of the case into “pre – adjudication, pre-trial, adjudication and sentencing stages”

Restorative justice sees this as hindrance to conflict resolutions and restoration of offenders, victim, community harmony and relationships. The justice process considers all factors that brought about the problem and the solutions to the problem to ensure justice becomes participatory as everyone affected is involved. “This distributive aspect generalizes individual misconduct or criminal behaviour to the offender’s wider kin group; hence it is a wider sharing of blame and guilt. The offender along with his or her kinsmen are held accountable and responsible for correcting behaviour and repairing relationships”

### **1.8 Research methodology**

The study will analyze the indigenous justice regime from the restorative justice perspectives, how it holds the community together and how it is experienced in the community as they manage conflicts compared to the punitive retributive, liberalism which leaves bad taste and grudge in the mouth of the offender.

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<sup>29</sup> Ibid

This is a qualitative study that makes extensive use of primary data. It is premised on Social - legal concept on how the indigenous justice system was being used to effectively manage conflict and how legal pluralism and formal/statutory justice system has waned their effectiveness in creating equitable access and use of resources among the pastoral communities in upper eastern

The study will be carried out in the Borana region of upper eastern which formerly covers three districts namely; Isiolo, Marsabit and Moyale, that has since the promulgation of the new constitution divided into two counties of Isiolo County and Marsabit County.

The study focuses mainly on the ethnic Borana people Gada systems as basis for the study, however it should be noted that other pastoralists group also live in this region.

#### **1.8.1: Data collection procedures**

The study would employ snowballing sampling to get the views from the younger elders to senior elders. Purposive sampling will also be used to get views from those living in towns and those residing in villages, where there is little government, modern governance structures. Semi structured interviews will be conducted with Elders especially four to five members of the Borana Council of Elders, other clan elders and community elders will also be covered as they are considered to be full of wisdom, and custodians of customary ways of life due to their experience of cycles of the communities' socio-political, economical and ritual phases.

Semi structured interviews would also be conducted with two focus groups one composed of 10 women and another comprising 10 men. The separation in the group is done on purpose as due to cultural limitations Women cannot be very expressive in

the presence of men, so a separate forum will be ideal to enable them express themselves freely and articulate the issues.

In gathering data the researcher would administer questionnaires to respondents, given that the population is scattered. This would save time and elicit standardized response. The use of questionnaires would further be reinforced by conducting Semi-structured interviews especially with elders, village elders owing to low level of literacy, and the fact most may be illiterate. With interviews, the researcher is assured of sufficient data to shed light on the area of study. As a form on interviewing, semi-structured interview will be most preferred as it is flexible and will give more room to ask questions that may arise during the process.

It would also include an interview with district authorities, the District Commissioners, district water officer, peace committee, Non governmental workers who have within the region, and who hold contrary views or support the indigenous justice systems of the Borana in the region. The interviews will bring out attitude and perceptions that would help establish whether traditional systems are still vibrant, viable in the community, and whether or not it should be practised alongside with the formal justice system.

The study will also employ extensive literature study to trace marginalisation policy adopted by authorities, and both colonial and post-colonial governments that made the community loose trust in modern formal systems of government and instead rely heavily on their traditional systems.

### **1.8.2 Difficulties and limitations**

Most interviews will be conducted in local Borana language and it is natural that original richer and deeper expressions could be lost in the translation, as much as I speak the language, it will be tricky to bring out the original intention of the speaker.

### **1.9 Chapter outline**

The paper is organized into five chapters; the first chapter provides an overview and background to the research problem, Chapter provides a conceptual lens through which indigenous traditional justice systems used in conflict management can be analyzed. Chapter three provides brief history of Borana community, their history, social political organization, and their resource management mechanisms. Chapter four, based on the primary and secondary data gathered, begins in depth analysis of the research findings with detailed narratives around the main arguments of indigenous justice dispensation and the tensions between formal and customary justice systems. Chapter five answers the research question, highlighting the main argument in reference to the research question.



## **CHAPTER TWO**

### **TRADITIONAL JUSTICE SYSTEM AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM: A CONCEPTUALISATION**

#### **2.1 Introduction**

The research seeks to understand how indigenous justice system is applied to ensure just and equitable distribution and management of resources through timely resolution of conflicts around them. The study will also examine how the community frames, claims and realizes justice through the indigenous traditional set up. To do this, it is therefore critical to have a framework for analysis that serves as a lens through which indigenous justice systems processes and procedures can be viewed and analyzed. The following theoretical concepts are discussed; various definition and concepts of being indigenous, the concept of traditional conflict management, the theorization of institutions, restorative justice and legal pluralism all in relation to resources management and how conflict around them are resolved.

#### **2.2 Indigenous or Traditional people defined**

The current Indigenous People's discourses mostly fronted by UN according to Sally Merry(1996) frames them as nothing more than "Noble primitive close to the nature" These however, are people group or communities who identify themselves as indigenous and "demand recognition and protection of their fundamental rights in accordance with their culture, traditions and way of life" (ILO 169: 1989). So far there is no universal consensus on the definition of the term 'indigenous peoples', however there are general criteria or special dynamics that can be used to determine or identify indigenous peoples, in order to 'isolate' them for the purposes of helping them frame, claim and realize their human rights within their realities. Since there is

no generally agreed definition of the indigenous people, some consensus on what constitutes indigenous people have received some form of agreement among human rights groups. For example, the Kenya National Commission on Human Rights (KNCHR) and an organization called Centre for Minority Rights Development (CEMIRIDE), through popular consultative forums among the indigenous communities of Kenya developed the following criteria that was purposed to help the indigenous communities in framing of their human rights discourse.

According to the definition by these two organization, <sup>30</sup>“Indigenous people are those people who have a sense of collectivity, solidarity, belonging, claiming rights to ancestral land in collectivity, common originality, practicing and retaining cultural lifestyle. They are those people retaining traditional institutions and social organizations, depending on natural resources in their respective territories, Suffering exclusion and discrimination from and by mainstream systems, possessing unique or common religion and spirituality and utilizing unique means of livelihood and traditional occupation.

Indigenous people world over also lack adequate recognition before the law like other dominant community, as a result of which they continuously suffer from extreme forms of subjugation, marginalization and discrimination. This unequal treatment and discrimination suffered by the indigenous peoples according to the UN Rapporteur on indigenous peoples to Kenya, exacerbated by the fact that they are seen as “reluctant to assimilate and adopt modernity” These are people with special attachment to their traditions and cultures, though more often than not, the dominant groups have

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<sup>30</sup> Kenya National Commission on Human Rights, The State of Human Rights report 2004-2006.pp.4

negatively stereotyped this attachment and used it as an avenue for discriminations against them. Although the ILO convention 169, preamble calls for the indigenous peoples to be able to “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, language and religions within the framework of the states in which they live”, there is little evidence that shows the states have been keen to promote the indigenous peoples rights to exercise their self –determinations to their ways of life including traditions and customs.

However, as Gaventa ( 2002:5) pointed out the realities of differential power relations among communities to claim their rights will always disadvantage the less powerful, like the indigenous people as a report by African Peer Review Mechanisms pointed out, Most state laws does not or is doing very little to gear their respective laws, state directives and policies to correct the historical and prevailing marginalization, <sup>31</sup>“against certain geographically and ethnically aligned communities that were left out of the mainstream development processes.

By their resilience and sheer will power, indigenous people continued to influence the world agenda which climaxed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted in the year 2007. Article 11 of the declaration – affirms <sup>32</sup>“the rights of indigenous peoples to be free to realize and live their cultural traditions, which includes their rights to protect, develop and maintain “past, present and future manifestations of their cultures”.

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<sup>31</sup> African Peer Review Mechanisms (APRM) (2006) Country Review Report of the Republic of Kenya, *African socialism and its application in Kenya*, Sessional paper no. 10 Government Printer,pp.47

<sup>32</sup> United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP,2007).Article 11

It is still too early to say whether this declaration has improved the social, economic and political welfare of the indigenous peoples around the world, however understanding who the indigenous people are, how they perceive themselves and the challenges they face is a very important concept that will inform this study.

### **2.3 Traditional Conflict Management defined**

African traditional scholars have reviewed indigenous peacemaking traditions in the overall context of African religious and belief systems. They explain that the concept of peace and reconciliation is embedded in indigenous value systems. In this study, the conflict phase and the reconciliation phase can be conceptualized as shown above. Nature is provided by God to each community and therefore it is the role of the community to protect and manage what has been provided by the Supreme Being. Other communities will always attempt to expand their access to nature and the youth have a duty to protect their territory/nature. Women will provide the motivation by providing love and praise for the heroes who protect their territory/land. Elders interact with their youth by way of providing words of wisdom and blessings from the one above. Their proximity to God empowers elders to control the youth and offer blessings to nature as well. The elders meetings cannot be complete without offertory sacrifices to the Supreme Being as this binds them to their decisions. Women though are known to catalyze the youth to conflict, are never consulted in the peace process. Both Youth and women indeed do not play any significant role in resolution process yet they play active role in conflict. While women and youth collude to cause conflict and the elders to cause reconciliation, the two groups don't interact in a way to bring peace. The state and the CSO processes which plays active role on reconciliation does not have much linkage with the youth and women since the focus is mainly on the elders. Both the state and CSO also play a key role in resource provision and service

delivery in the district but these services are not linked to conflict processes yet conflict in this area is mostly about access and control of resources.

#### **2.4 Theorizing Indigenous Institutions for resource Conflict Management**

In communities prone to conflict, especially over the basic common resources in this case water, pasture and land, there are institutions that play critical role in managing these common resources as well as dispensing of justice where necessary for sustainable development and livelihoods.

Watson, (2001)<sup>33</sup> argues that “Institutions are organizations, but they also include the rules and regulations that determine access to natural resources. They define the access that a group has to natural resources and they also define who has the rights within the group.”

Institutions are not static; hence they change to both societal and environmental changes. As such institutions are dynamic and have the ability and potential to act upon and change or shape behaviour, while on the same breath individual actions and behaviour does shape the institutions within socially and mutually accepted or agreeable limits. As pointed out by Leach (1997)<sup>34</sup>“the institutions into which a person is born and through which he or she lives and understands the world constitute that person, but at the same time the person is able to work and change the nature of these institutions”.

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<sup>33</sup> E. Watson, 'Examining the Potential of Indigenous Institutions for Development: A Perspective for Borana, Ethiopia' *Development and Change* 34(2)(2003)pp. 287-309.

<sup>34</sup> M. Leach. R. Mearns. and I. Scoones. 'Environmental Entitlements: A Framework for Understanding Institutional Dynamics of Environmental Change' *IDS Discussion Paper*,(1997)pp, 359.

Monique Nuijten(2005)<sup>35</sup> in her discussions of the concept of power relations in the institutions introduces a concept she refers to as ‘force field’, according to her this “refers to a more structural forms of power relations which are shaped around the access to and use of specific resources. To clarify further her argument of this ‘force field’ concept Nuijten goes deeper and suggests a thorough scrutiny of the existing structures within the socio–political context for informed decision making on ways and means of improving the same.

In order to analyse power relations in natural resources management, one should first of all come to grips with existing forms of organizing around the use and distribution of the resources, whether these be informal or formal, or ‘well organized’ or a ‘mess’. The ultimate aim of such a study is to understand the logics of these forms of organizing in the specific socio –political context and to examine existing power relations. Only when we understand the logic of existing situations, can we think about ways to improve the management around natural resources

However, power in reality is a complex issue for any institution as it breeds elements of what Barume (2001)<sup>36</sup> calls ‘hegemony’ or domination unless proper checks and balances are put in place to ensure that the relational aspect of power is not in favour of particular people group. May be the solution to this ‘hegemony’ that power will eventually breed can be found in the work of Maarten Bavinck(2008), who in one of his studies of concepts of institutional governance talks of ‘Interactive governance’ (- as the term suggests, this concept places emphasis on interaction where governance

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<sup>35</sup>M. Nuijten. ‘Power in Practise: A Force Field Approach to Natural Resources Management’, *The Journal of Trans Disciplinary Environmental Studies* 4(2) (2005) PP. 1-4.

<sup>36</sup>A. Barume. *Heading towards Extinction? Indigenous Rights in Africa: The Case of the Twa of the Kahuzi Biega National Park, Democratic Republic of Congo* (2001).

become interactive and engages all facets of the governed. These interactions engage the actors – who Bavinck defines as “any social unit possessing agency or power of action” and structures “frameworks within which these actors operate”

Understanding and operationalization of indigenous institutions actors and structures of natural resources management can bring about local community empowerment and development that is sustainable. The study will analyse the justice institutions involved in conflict prevention and resolutions in range resources management from the actors and structures perspectives.

## **2.5 Restorative Justice Perspective in Traditional Conflict Management**

Braithwaite, (1996)<sup>37</sup> Restorative justice is a more victim centered justice system that seeks to restore victims as well as restoring offenders and restoring community. In recent times there have been growing scholarly movements that is advocating for the Alternative Dispute Resolutions, this includes Bazemore (1998)<sup>38</sup>, includes the Victim Offender Mediation (VOM) and the increased interest in informal disputes resolution and neighborhood justice.

Clear and Karp(1999)<sup>39</sup> state that restorative justice theory can also be viewed as “an overarching paradigm of public problem solving, citizen participation and collective responsibilities for building stronger communities”. Restorative justice generally, though having varied conceptualization depending on the cultures and traditions has a

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<sup>37</sup> J. Braithwaite. 'Restorative Justice and a Better Future' (1996).

<sup>38</sup> G. Bazemore. ' Restorative Justice and earned Redemption : Communities, victims and offenders reintegration.' *American behavioural scientist*, 41(6) (1998)pp. 768-813.

<sup>39</sup> T.R Clear. & D.R Karp. *The Community justice ideal: Preventing crime and achieving justice*. Boulder, CO: Westview (1999).

common meeting point, which is how people think about crime and respond differently to it, against the conventional formal court systems. In describing the focus of restorative justice, Zehr(1990)<sup>40</sup> state that:

Restorative justice focuses on harm caused by offenders by seeking to repair harm to victims and communities and reducing future harm by preventing crime. Restorative justice requires offenders to take responsibility for their actions and for the harm those actions have caused. It seeks redress for victims, reparation by offenders, and reintegration of both within the community as communities and government achieve restorative justice through a cooperative effort. (1990: 48).

Thus restorative justice allows for direct participation of offenders in the process of justice and holding them accountable so as to guide them to take responsibility for their actions that will lead to the repair of harm done to the community and victim. As such the focus of restorative justice is on 'communities and victims needs' and 'offender's obligations'. The process of restorative justice is obviously participatory and as Lemley, puts it, "Seeks to maximize information, dialogues and mutual agreement between victims, offenders and communities" (2001:46). Further restorative justice looks at the greater good of the society through an orientation that is future focussed – the offenders harm is balanced with "making things right" and through reconciliation and reintegration, the offender is restored back to the society. The formal justice through the courts, on the other hand is popularly seen to be of 'retributive' justice, it is punitive and its aim is to make offenders suffer as much as the victim if not more. The offender's accountability is to the state and not to the

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<sup>40</sup>H. Zehr. *Changing lenses a new focus for crime and justice*. Scottsdale, PA: Herald (1990)pp.46.



offended –victim or the larger community as is the case with restorative justice. Melton(2004)<sup>41</sup> in emphasizing this difference between ‘restorative’ indigenous and ‘retributive’ formal justice points out that:

<sup>42</sup>The retributive philosophy holds that because the victim has suffered, the criminal should suffer as well. It is premised on the notion that criminals are wicked people who are responsible for their actions and deserve to be punished. Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society. It does not offer a reduction in future crime or reparation to victims.

On the other hand indigenous restorative justice working model is for problems to be addressed in its entirety. In case conflicts come up, under restorative justice there is no fragmentation or compartmentalizing of the case into “pre-adjudication, pre-trial, adjudication and sentencing stages”<sup>43</sup>

Restorative justice sees this as hindrance to conflict resolutions and restoration of offenders, victim, community harmony and relationships. The justice process considers all factors that brought about the problem and the solutions to the problem to ensure justice becomes participatory as everyone affected is involved. “This distributive aspect generalizes individual misconduct or criminal behaviour to the offender’s wider kin group; hence it is a wider sharing of blame and guilt. The offender along with his or her kinsmen are held accountable and responsible for correcting behaviour and repairing relationships”

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<sup>41</sup>A. Melton. 'Indigenous Justice Systems and Tribunal Society'(2004)pp.126.

<sup>42</sup> Ibid

<sup>43</sup> Ibid

The conceptual foundation of the Restorative justice is made up of three principles: identify and taking steps to repair harm, inviting all stakeholders and seeking transformation. McElrea's 2004 paper entitled, *The Key Values of Restorative Justice* puts out key values which distinguish restorative justice from other, more adversarial approaches to justice and conflict resolution these are: Participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope.

Africa, being the origin of humanity and other worldly phenomena, is considered by a good number of researchers, as the emerging place of restorative justice (informal) and critical analysis of literatures by *De Birhan Media* suggest that restorative justice can work in the African context. The Ghanaian/African philosopher Kwame (1995)<sup>44</sup> describes a concept of "moderate communitarianism" within African societies that understands the development of a self as a moral process in which the individual is shaped by the community in which he or she grows up. The virtues and values of *moderate communitarianism* suggest an approach to "justice" that is community rather than rule-driven. Kwame contrasts the communitarian worldview with Western views of justice as "rights."

Similar themes regarding an African notion of "justice" have emerged from the South African experience with the Truth and Reconciliation Commission (TRC), which attempted to purge the legacy of suffering by confrontation, acknowledgement and admission rather than forced confessions and punishment. Notable among these neo-traditional community-based responses to promoting reconciliation are the *Gacaca* system in Rwanda and the *Acholi* culture, values and institutions, known as *Mato*

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<sup>44</sup> G.Kwame. *Aspect of African Communitarian Thought, The Responsive Community : Rights and Responsibilities*(1995).

*Oput* in Northern Uganda (Oduro, 2007). Desmond Tutu's South African Ubuntu is the other. The Ethiopian Oromo ethnic Gadaa System and highlanders tree-round court systems have been commended for their restorative justice characteristics as well. For example, the reconciliation process of *mato oput*, an Acholi tradition in northern Uganda, and the *Ubushingantahe* in Burundi, uniquely achieve justice and healing of the concerned parties in a way that a formal justice system cannot.

According to a recent working paper of the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) restorative justice can enliven rights as active cultural accomplishments when rights talk cascades down from the law into community justice. A peaceful, reconciled, safe country can enjoy the fruits of its economic development sooner than a country of the vice versa nature.

The study will analyse the indigenous justice regime from the restorative justice perspectives and how it is experienced in the community as they manage conflicts over their resources.

## **2.6 Legal Plurality: The Upper Eastern Experience**

A situation where different legal systems work or co –exist in the same geographical area is referred to as 'Legal Pluralism' (Pimentel, 2010). Other legal scholars <sup>45</sup> (Merry 1988, Von Benda – Beckmann et al, 1997; Spiertz, 2000; Griffith, 1986) see legal pluralism as a legal alternative that “explicitly recognizes that multiple and normative frameworks co-exists”.

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<sup>45</sup>S.E Merry.(1996) 'Legal Vernacularization and Ho'onokolokolonui Kanaka Maoli, The Peoples' International Tribunal, Hawai'i 1993' *Polar: Political and Legal Anthropology Review* 19(1):(1996) pp. 67-82.

Legal pluralism recognizes several legislations including “National legislation, religious and customary laws, development project rules, and unwritten local norms that may all address who should get a resource from which sources and for what purposes”. From this statement we appreciate the fact that legal pluralism accommodates a set of legal frameworks within which resources can be accessed and claimed proportionately.

In Northern Kenya, and especially in Upper Eastern, the state apparatus has been, in most cases, weak and largely unable to prevent, respond or resolve conflicts. Judicial institutions in particular lack capacity to try perpetrators and the presence of courts has little if any deterrent effect. The impact of the state, government and judiciary is thus at a nascent stage, leaving informal or customary traditional structures of conflict resolution to exist in a largely adulterated form in the region.

Legal pluralism which presupposes the amicable co-existence of different legal regimes provides a welcome alternative that would enable communities living within a modern state environment regulate themselves notwithstanding the existence of formal law that is considered modern.

Under the Constitution, the Judiciary is charged with the duty to arbitrate disputes between individuals and resolve conflicts among communities and between the state and citizens. To this end, the Constitution provides that the courts shall be guided by a number of principles including the use of alternative forms of dispute resolution like reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as

long as these are not inconsistent with human rights and any written law in Kenya.<sup>46</sup> This provision recognizes the importance of alternative dispute resolution in averting conflict and dispensing cases expeditiously.

By insisting on following formal law, the country may be at risk of destroying important and effective traditional systems of dispute resolution and restorative justice in the quest for modernity. On the other hand, even though in cases such as the northern Kenya experience, the effects of formal system are hardly felt it is impossible to completely ignore the operation of the formal law. There is therefore need to introduce pluralism as a suitable balance.

## **2.7 Conclusion**

From the above analysis there is lively scholarly debate that is seeking to understand and appreciate the significant roles of the indigenous justice institutions in managing the range resources and conflicts that may arise around them. Extensive theorizations of legal plural framework that seeks to recognize the restorative justice of the customary ways in determining access and equitable resources utilizations has been expounded by prominent range resources and various legal scholars.

This paper applies in its analysis these theorizations of legal plural concepts of resources management and conflicts resolutions around them through the customary indigenous justice systems. These include among others: Oomen's<sup>47</sup>(2005) "the myth of the mirror" that the law of the state needs to reflect the diversity of the culture and alternative existence of cultural laws, Merry, 1988; Von Benda – Beckman, 1997 and

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<sup>46</sup>Article 159 (2c) of the Constitution of Kenya.

<sup>47</sup>B. Oomen. *Governing the Commons: The evolution of institutions for collective action*. Cambridge: Cambridge University Press(1990).pp. 21

<sup>48</sup>Pimentel( 2010) ‘Legal Pluralisms’ that different legal systems in this case ( formal state and informal customary) “can work or co–exist in the same geographical area, hence customary courts and customary laws can be effective guardians of traditions and rule of law and human rights in an atmosphere of mutual respect and recognitions of one another”. Restorative Justice taken positively supports the state and civil society initiatives to have harmonious society and sustainable resources management.

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<sup>48</sup> D.Pimentel. Can Indigenous Justice Survive? The Komani San Land Claim and the Cultural Politics of 'Community' and 'development' in Kalahari' *Journal of Southern Africa Studies* 15 (1): (2010) pp.23-24.

## **CHAPTER THREE**

### **THE EFFECTS OF STATUTORY JUSTICE APPROACHES ON TRADITION CONFLICT MANAGEMENT MECHANISMS: THE CASE OF BORANA COMMUNITY IN UPPER EASTERN, KENYA BETWEEN 1963-2011**

#### **3.1 Introduction**

This chapter discusses the general introduction of the Borana and their ways of operationalizing their institutions. The chapter forms a basis for the analysis of the research findings. Upper Eastern Kenya conflict over resources has a historical dimension which has largely remained uncorrected to this day by successive governments of Kenya. Besides, there are also emerging challenges from local entrepreneurs and rich western aristocrats who are being allocated huge swathes of pastoralist's lands for private development, where wild animals are fenced in and used for sports and tourism against the pastoralist's wishes. The chapter also underscores how an indigenous community has resorted to their age old justice institutions to ensure that in the absence of effective formal justice regimes that regulates rule of law in their region, they uphold and revitalize their systems to have justice in equitable allocations and use of the scarce resources, by resolutions of conflicts over the same through their indigenous justice systems.

#### **3.2 The Borana**

The Borana are part of the larger Oromo speaking people of Ethiopia. Oromo is one of the most populous language groups in Africa. (Legesse(2000)<sup>49</sup> says the Oromo

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<sup>49</sup> A. Legesse. *Oromo Democracy, An Indigenous African Political System. Asmara, The Red Sea Press, Inc.(2000)*

community who inhabit Ethiopia predominantly are considered among the largest and the most widespread “ethnic groups in Africa and are estimated to number between 25 -30 million people”. Doyo, (2009)<sup>50</sup> observes that the Borana live to the South of the main ‘Oromia’ land in Ethiopia as well as in the Northern part of Kenya, ‘straddling the borders between the two countries’. In Southern Ethiopia, the Borana number over 500,000 while in Kenya they are over 300,000 people. Borana have two general Clan division known as Sabbo and Gonna, where Sabbo has three sub clans and Gonna has 14 sub clans. While the Borana generally co-exist as a unit irrespective of whether you are a Sabbo or Gonna, the only restriction is inter marriage from the same moiety is not allowed. Hence, Sabbo marries from Gonna and vice versa. The general community unity and pattern of life is ordered along the rules and regulations of the Gada system of administration, which has a structured chain of command with *Aba Gada* – literally father of the Gada at the top.

Every Gada remains in office for a formal eight years after which they are to hand over to the incoming Gada officials through a formal handing over ritual ceremony.

<sup>51</sup>“The scholars of Oromo history and ethnography have placed a great premium on the Borana as the repository of the ‘gada’ system’ In contemporary Oromo, political, social and cultural dispensation, the concept of the Gada plays the central role as an indigenous and egalitarian form of democracy”

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<sup>50</sup> G.D Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform with Special focus on Land Rights of the Maasai and Borana Communities', LLB Dessertation: Perth, Murdoch University.(2009).pp.40.

<sup>51</sup> Ibid (2)



The Borana community has also an established institution of the elders (*Jaroole*) which is very much in use even today but somewhat weakened as the elders are unable to enforce the punishment meted out.

The traditional mechanisms of resolving conflicts and managing natural resources (like water, land and forests) among the Borana zone is derived from the Oromo institutions of *gadaa* (era) and the associated cultural administrative structure. One major economic function of *Gadaa* is the distribution of resources, by establishing who had to help whom, when and why, by settling conflicts between families over goods and by making laws. It is the system that governs the Boran's use of natural resources and enables the various groups to coordinate their use of important resources like water. According to *gadaa*, those people who have entered the *luba* grade (individuals in the expected age range of 40–48) are considered to be elders. Therefore, the *lubas* (elders) settle disputes among groups and individuals and apply the laws dealing with the distribution of resources, criminal fines and punishment, protection of property, theft, etc. Thus the elders in the community form a dominant component of the customary mechanisms of conflict management and natural resource management.

The authority held by the elders is derived from their position in the “*Gadaa*” system. While the rules and regulations laid down by the “*Gadaa*” tradition must be respected by all community, any problem regarding resources use which could not be solved by these elders would be handled by the higher “*Gadaa*” leaders.

The structure is headed by *Abbaa Gadaa* (*President of the era*) – who presides over all meetings at the highest level assisted by other appointed leaders called *Hayyu*

(equivalent to the ministers in the modern state). The *Abbaa Gadaa* is seen as the figurehead of the whole of Borana and is often described as the president. *Abbaa gadaa* is responsible for dealing with matters of concern to the entire Borana society wellbeing and their coexistence with neighbours. Apart from performing rituals, matters are referred to him and his council of ministers when a decision cannot be reached at a lower level. When conflict breaks out between *ollaas* (villages) or *arddaas* (regions), then the local elders called *Jallaab* will deliberate and make a ruling. If there is conflict between the elders from different ethnic groups, then *Abbaa Gadaa* will delegate the decision through the structures to ensure that issues affecting the community's social coexistence are attended to appropriately.

According to Helland (1996)<sup>52</sup>, conflicts between Borana should be solved peacefully and that the maintenance of internal peace is strongly expressed ideal in public life. Public meetings often called by "*Abba Qaee*" (village elder) form the usual mechanism of upholding peace in the villages. Virtually any topic of concern are discussed here openly. Such public meetings are well suited to solve conflicts in that they are able to reach collective agreements easily. If consensus cannot be reached, the meeting is postponed to another day or is referred to a higher hierarchy of elders like the "*Hayu*". Only cases of extraordinary complexity and importance will be passed on to the ultimate high court of the Borana society – The "*Gumi Gayo*" (Borana assembly) which sits every eight years under the chairmanship of *Abbaa Gadaa* is the supreme law making organ and marks the leadership transition to the next president.

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<sup>52</sup> J. Helland. Development Interventions and Pastoral Dynamics in Southern Ethiopia. In Hogg, R (ed.) Pastoralists, Ethnicity and the State in Ethiopia. Haaan Publishing, London(1996)

Legesse (2000)<sup>53</sup> The manner in which Borana deliberations commence and progress contrasts with the winner-takes-it-all approach so closely associated with modern democratic practices. Borana deliberations begin with the presiding elders instructing participants to avoid argumentative and confrontational speech. The advise will usually go: *“Do not look for the worst in what others have said in order to undermine their position and win an argument; look for the best they have to offer, so as to find a common ground”*. Finding a common ground in order to achieve peace is thus the ultimate purpose and not the winning of the debate.

The elders (*Jaroolle*) in traditional Borana society form a dominant component of the customary mechanisms of conflict management. The elders have three sources of authority that make them effective in maintaining peaceful relationships and community way of life. They control access to resources and marital rights; they have access to networks that go beyond the clan boundaries, ethnic identity and generations; and possess supernatural powers reinforced by superstitions and witchcraft.

The elders function as a court with broad and flexible powers to interpret evidence, impose judgments’ and manage the process of reconciliation. The elders use their judgment and position of moral ascendancy to find an acceptable solution. Decisions may be based on consensus within the elders’ and may be rendered on the spot. Resolution may involve forgiveness and if necessary, the arrangement of restitution.

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<sup>53</sup> A.Legesse. *Oromo Democracy: An Indigenous African Political System*.Asmara:The Red Sea Press, Inc(2000) pp. 214

Conflicting parties are more likely to accept guidance from these elders than from other sources because an elder's decision does not entail any loss of face and is backed by social pressure. The end result is, ideally, a sense of unity, shared involvement and responsibility and dialogue among groups otherwise in conflict.

### **3.3 The historical challenges that inform the present**

During the scramble for Africa by the colonialists in the 1890's, the Borana land was divided between the British East African Protectorate (later Kenya) and the Abyssinian Empire (later Ethiopia) The Kenya Borana currently occupy the upper part of the Eastern Province to the North of the country and occupy three districts namely; Isiolo, Marsabit and Moyale. This partition of course did not come or happen without consequences to the unity, harmony, polity, and psych of the Borana nation.

There was evidence that Borana rose to have some dominance in the South of Ethiopia and Northern Kenya, which by early 19th Century was a borderless land, where the pastoralists roamed freely, Leys(1924)<sup>54</sup> To this rise to power beginning of 19<sup>th</sup> Century,Bassi (2005)<sup>55</sup> states that; "They created a network of alliances with other pastoral groups – the Gabra, Sakuye, Garii, Ajjuran and Wardaha – over which the Borana held a position of hegemony" This hegemony was not to last long as at the second half of the 19th century, three colonial powers came on the scene of Borana land. The Italians from the East, the British from the South, and the Abyssinians from the North. As Schlee points out;

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<sup>54</sup> N. Leys. London(1924).pp.103

<sup>55</sup> M.Bassi. *Decisions in the Shade, Political and Judicial Processes among Oromo-Borana*. Asmara, The Red Sea Publishing, Inc.(2005)pp.6

In Northern Kenya the domination of the Borana who had been under pressure from the westward advance of Somali groups from the second half of the 19th Century, ended with British colonization which was roughly contemporary with the military annexation of Borana territory by Ethiopia. The imposition of colonial order made possible in both Kenya and in Ethiopia by the use of fire arms and the consequent division of the Borana of Kenya and those of Ethiopia made it impossible for the Borana to resist and defend their territories." (Schlee 1989:47)

According to Huxley(1935)<sup>56</sup> further observation was made by an American traveller, who was among the first non-British to traverse Borana region - Dr. Donaldson Smith, who made a scathing remarks against the British "For allowing Ethiopians and Italians to unleash havoc in the Borana land", the British directives that the Borana should not use mounted horses in war fare to check the encroachment of their land resources really put Borana at a disadvantage against their expanding enemies.

When the British and Ethiopians (Abyssinians) signed the partition agreement between themselves, the now weakened Borana were not even consulted, but there was a guarantee that Borana on both sides of the borders should have unfettered access to either side of the border to access the range resources as need may arise. Oba (1996)<sup>57</sup> says this agreement was not to live long as the Ethiopians "flouted the spirit of the agreement by stopping Borana from the British side to access pasture and water on the opposite side". These restrictions of course had a devastating

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<sup>56</sup>E. Huxley. *White Man's Country: Lord Delamere and the Making of Kenya*, ( Vol. 1). London: Macmillan.(1935).pp. 39

<sup>57</sup>G. Oba. ' Shifting Identities along Resource Borders: Becoming and Continuing to be Boorana-Oromo', in Baxter, P.T.W., Hultin, J., Triulzi, A. (Eds.) *Being and Becoming Oromo: Historical and Anthropological Inquiries*. (1996) pp.42

impact on the perpetually held communal social networks and shared resources among the Borana.

Doyo(2009)<sup>58</sup> in commenting on this scenario states that:

Access to resources was the bedrock of their livestock based economy, which in turn was the source of livelihoods. The partition of the community under the Ethiopia and British territorial superstructure altered their resource governing system, as the decision no longer resided with them. The acclaimed territorial powers affected the local institutions and governance systems, especially weakening the responses to such issues as conflict between antagonistic ethnic groups.

The advent of colonialist in the Borana region led to proliferation of arms, which began to play a critical role in determining who controls what in the region. The Borana were not able to get access to 'modern' weaponry until much later due to the skewed colonial policies against them. However, from the quote above we realize that this situation set in motion a kind of 'armed race', as every community in the Northern region realized the power of the 'modern weaponry', to determine who gets the best or most of the 'commons' resource, that is the range resource of the Borana land.

This sad historical precedent planted the seed of discord among the pastoralist of Northern Kenya, who ever since have come to be identified with war fare and conflict

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<sup>58</sup> G.D Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform with Special focus on Land Rights of the Maasai and Borana Communities', LLB Dessertation: Perch, Murdoch University.(2009).pp. 42

over access to range land resources – land, pasture, saltlicks and water instead of the harmonious dialogue based mutual co-existence that was in place before the advent of the colonialists – Abyssinians in Ethiopia side, Italians on Somali side and

British in the Kenya side. This rather unfortunate policy choice by the colonialist for the pastoralist communities of Northern Kenya is what made the American writer Farson(1950)<sup>59</sup> quoted James Negley Farson, who made a maiden journey through the Northern Kenya region to stating that the region is “One half of Kenya about which the other half knows nothing and seems to care even less”.

### **3.4 Contemporary challenges that perpetuates the past**

Pastoralists are generally defined as people who rely heavily on production of domestic herds, whose sustainability is based on mobility and the availability of pasture and water. Oyo (2009)<sup>60</sup> argues that though the pastoralists lands exhibit such main features, that is; receives little rains, has high evapo transpirations, vegetation is sparse and soils are shallow – nevertheless it is suited for livestock production, which includes cows, shoats, camels, donkeys and supports huge wildlife populations.

A geographer who carried out pastoral areas survey, points out the obvious, by stating that this harsh climatic conditions have not stopped those keen to exploit the resources of the pastoralists dry lands. He comments that;

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<sup>59</sup>J.N Farson, *Last Chance in Africa*, ( 1950). pp.260.

<sup>60</sup>G.D Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform with Special focus on Land Rights of the Maasai and Borana Communities', LLB Dessertation: Perch, Murdoch University.(2009).pp. 42.

Frank (1995)<sup>61</sup> says “In spite of the harshness and ecological limitations, this drylands are now the destination of substantial stream of migration”.

In Northern Kenya, this phenomenon has already been witnessed in Isiolo and Marsabit area where the remnants of former colonial settlers rich and powerful western and European aristocrats are hiving off huge chunks of pastoralists lands and turning them into private ranches or the so called ‘conservancy’-where wildlife is fenced in for sports and tourism. These lands once given out are formalized through registrations, while the pastoral lands are left without any form of identifications or regulations as it ‘does not belong’ to ‘anyone’.

Doyo (2009)<sup>62</sup> states that the taking of these pastoralists’ lands is in connivance between the aristocrats, the state or local authorities. Hence as the pastoralists lands shrinks so is the already limited resources of pasture and water. So, this uncontrolled ‘taking over’ of the pastoralists lands has a very negative impact on the mainstay of the pastoralists as it seriously jeopardizes the production systems of the community, as livestock depends on the ‘extensive grazing of native pasture’ and range water sources.

<sup>63</sup>Elliot Fratkin, in describing the prevailing circumstances in pastoral regions of the world state that; “Pastoralists societies face more threats to their way of life now more than any previous time. Population growth , loss of herding lands to private farms,

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<sup>61</sup> F.E. Bernard F. E ' Planning and Environmental risks in Kenya Drylands', *Geographical review*, 75(1): (1985)pp. 58-70

<sup>62</sup>G.D Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform with Special focus on Land Rights of the Maasai and Borana Communities', LLB Dessertation: Perch, Murdoch University.(2009).pp. 62

<sup>63</sup>E. Fratkin. 'Pastoralism: Governance and Development Issues', *Annual Review of Anthropology*, 12 (26):(1997)pp. 246



ranches, game parks and urban areas, increased commoditization of livestock economy, outmigration by poor pastoralists , and period dislocation brought about by drought, famine and civil war are increasing in pastoralists region of the world”.

However what Fratkin(1997)<sup>64</sup> did not point out or over looked is the fact that these threats he mentioned will obviously have an impact on the social cohesion of the pastoralists community, their way of life, their way of interacting, the kinship and above all their way of dispensing justice and handling of emerging issues. These challenges are very real; hence a strong indigenous institution is required to manage the shrinking resource base if pastoralism is to remain a viable enterprise. Hence the Borana of Northern Kenya and Southern Ethiopia have preserved their Gada resource management institutions which as Doyo observed is “ a long history of preservation of cultural and social systems within which communal resources were governed”.

Cross-border political movements such as Oromo nationalism and the growing pan-Oromo identity are changing the way some pastoral societies represent themselves and their relationship with their neighbours and with the Kenyan state. Until a few years ago the term “Oromo” was unknown to ordinary Boran in Kenya. Today, on the contrary, Boran by and large perceive themselves as part of a pan-Oromo identity. On the other hand, the *gada* generation-set system, ‘by no means an Oromo invention but distributed in independent forms throughout the cultures of Lowland Eastern Cushitic speakers’ has been constructed within pan-Oromo ideology as the mark of authentic Oromo identity.

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<sup>64</sup> E. Fratkin. 'Pastoralism: Governance and Development Issues', *Annual Review of Anthropology*, 12 (26):(1997)pp. 246

Baxter(1994)<sup>65</sup> argues that since Oromo nationalism has taken up *gada* symbolism, the Kenyan Boran, amongst whom the *gada* system is still in use, are seen as a stronghold of authentic Oromo values. To the Kenyan Boran such an evolution of their ethnic identity means, in practice, favourable new channels to livestock markets in Ethiopia and the weapons trade — a long-standing difficulty in a central district like Isiolo — as well as an increasing involvement in the political activities of the Oromo Liberation Front (OLF). Kenyan Boran, who are loosing out in Kenya, are becoming involved in south and west Ethiopia. In a geo-political context in which the state has collapsed in Somalia and Eritrea is using the OLF to destabilise southern Ethiopia, some north Kenyan pastoral conflicts should rather be seen as part of an Ethiopian proxy conflict. Zitelmann(1997)<sup>66</sup> states that through the use of Boran traditional symbolism as “mythomoteurs” to mobilize and legitimize political action, Oromo nationalism generates a peculiar merging between local inter-clan or inter-ethnic conflicts in northeastern Kenyan districts (for example between Boran and Somali or Boran and Garre), a confrontation with the Ethiopian state and competition for state power.

In parts of north Kenya the state is technically present (for example through the army and the chief system), but is ineffective, for example the soldiers have no ammunition or fuel for their vehicles. This inaction of the state is dangerous in various ways. From a local point of view the state is never innocuous or absent. The inaction of the state is more likely to be perceived as intentional, deliberate discrimination rather than objective weakness. The state’s inaction therefore can contribute directly to escalation of conflict. Furthermore, the presence of an inactive state destroys local initiatives. As the state monopolizes the role of arbiter and

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<sup>65</sup> P.T.W Baxter. The Creation & Constitution of Oromo Nationality. In: Fukui K. and Markakis J. (eds) *Ethnicity and Conflict in the Horn of Africa*, James Currey, London.(1994).

<sup>66</sup> T. Zitelmann.Oromo National Liberation, Ethnicity and Political Mythomoteurs in the Horn of Africa. In:Turton D. (ed.), *War and Ethnicity. Global Connections and Local Violence*, Centre for Interdisciplinary Research on Social Stress and University of Rochester Press, San Marino and New York.(1997).

administrator of justice, in the case of violent conflict its functionaries fill the space that may be available for peaceful management of the situation. When their promises are not fulfilled, or when they appear to support one party to the disadvantage of the other, then it is usually too late to seek alternative forms of mediation, and violence is likely to escalate. The authority of the elders, who could provide an alternative forum for justice, is usually associated with the authority of the administration, although not entirely dependent on it. In this way, when the administration loses face with young men impatient to obtain justice, the authority of the elders is also jeopardized and is no longer perceived as a viable alternative.

Ibrahim and Jenner(1996)<sup>67</sup> says the imposition of majority onto pastoralists' cultural tradition of consensus decision-making, particularly within a context of clan based politics, is a primary cause of political disputes, leading to increased conflict between ethnic groups or clans.

According to Rugege(1995)<sup>68</sup> to a large extent, consensus is also the criterion for customary patterns of justice administration and conflict resolution, which are focused on reconciling the disputants and maintaining peace, rather than on the punishment of the wrongdoer. A "give-a-little, take-a-little" principle is preferred within customary institutions to "winner-takes-all" judgments.

In traditional societies' set up, all the representatives of disputing parties are allowed to speak, earlier precedents and details relevant to the dispute are discussed by the council of elders and the process of deliberation is repeated if consensus is not reached.

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<sup>67</sup> D. Ibrahim. and J. Jenner. Wajir Community Based Conflict Management, Paper presented to the USAID Conference on *Conflict Resolution in the Great Horn of Africa*, June 1997.

<sup>68</sup> S.Rugege. Conflict resolution in Africa customary law. *Africa Notes* October (1995).

Goldsmith(1997)<sup>69</sup> says the council rarely acts as a ruling third party. Rather, it usually plays a facilitating role, cooling the parties in conflict and manipulating the length of the procedure until the disputants settle affairs among themselves. State justice, supposedly rapid and based on precise evidence bearing on the case, has no room for the long proceedings required to reach consensus.

Lederech(1998)<sup>70</sup> says furthermore, a third party ruling within a context where the state enjoys little trust, always gives rise to the suspicion that the decision has been manipulated. In any case, the legitimacy and authority of customary conflict mediation is not based on independence from the opposite parties and neutrality, but on affinity and inside knowledge of the context.

After this introductory chapter to the Borana, their polity and institutions for resources and conflict management, the next chapter continues to expound on the analysis of the field data on how the Borana manage the conflicts over their resources through their indigenous justice institutions.

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<sup>69</sup> P. Goldsmith. Cattle, Khat, and Guns: Trade, Conflict, and Security on northern Kenya's Highland- Lowland Interface. A Case Study, A paper prepared for the USAID Conference *on Conflict Resolution in the Great Horn of Africa*, June 1997, draft

<sup>70</sup> J.P Lederach. Conflict transformation: the case for peace advocacy. In: Wiebe M. (ed.) *NGOs and Peacemaking: A Prospect for the Horn of Africa Project*, Institute of Peace and Conflict Studies, Conrad Grebel College, Ontario, Canada.(1989).

## **CHAPTER FOUR**

### **THE EFFECTS OF STATUTORY JUSTICE APPROACHES ON TRADITIONAL CONFLICT MANAGEMENT MECHANISMS: A CRITICAL ANALYSIS**

#### **4.0 Introduction**

This chapter focuses on study findings and analysis by extensively expounding on the conceptualizations and realization of justice among the Borana. The study through focused group discussion (FGD) and interviews with senior elders and other informants formed a narrative from their narrated experiences on how justice is dispensed, regulated and what factors make the community to rely on their indigenous justice over the formal judiciary. The chapter also analyses the policy and legal tensions that are there between state and customary systems. It seeks to show that customary restorative justice contrary to conventional thinking is actually a support to state authority and civil society in conflict resolutions and management of the pastoralists range resources, once proper decentralization of justice systems is done.

#### **4.1 Emerging Issues**

##### **4.1.1 Relevance of Indigenous Traditional institutions for resources management and conflict resolutions**

Adan and Pkalya (2006)<sup>71</sup> argue that a range of traditional mechanisms has been utilized in conflict management in Kenya. These include Council of Elders, Inter ethnic peace pacts and traditional marriages.

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<sup>71</sup> Adan, M & Pkalya, R (2006) Conflict Management in Kenya: Towards Policy and Strategy Formulation. Practical Action, (July 2006) pg. 6

Most traditional societies have a council of elders, which is the premier institution charged with the responsibility of managing and resolving conflicts. The institution of elders is greatly respected. Elders are seen as trustworthy and knowledgeable people in the community affairs thus enabling them to make informed and rational decisions. Within the pastoral communities, these institutions are largely effective mechanisms for conflict resolution.

Indigenous institutions play a crucial role in shaping community identity, values and norms. Institutions are not only organizations within a society, but also rules, regulations and positions that determine who gets 'what, when and how'. To determine if community systems are effective it is good starting point to determine the organizations around the institutions that shape the community. According to Leach(1999)<sup>72</sup> institutions are broadly defined as practises and all structures that "influence who has access to and control over what resources, and arbitrate contested resource claims".

Further Watson(2003)<sup>73</sup> argues that indigenous institutions include "organizations, conventional knowledge, 'regularized practices', customary rules and Practices"

Traditionally the ability of the elder age-set to act as an effective conflict management institution relied on three main sources of authority: control of access to resources/marriage; being part of a large cross-clan, cross-ethnic, cross-generation network; supernatural legitimacy Gulliver( 1951)<sup>74</sup> says the elders control access to

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<sup>72</sup> M. Leach,. R. Mearns. and I. Scoones. 'Environmental Entitlements: A Framework for Understanding the Institutional Dynamics of Environmental Change' IDS Discussion Paper.(1999).226

<sup>73</sup> E. Watson.' Examining the potential of Indigenous Institutions for Development: A Perspective from Borana, Ethiopia' Development and Change 34 (2) (2003)pp.289.

<sup>74</sup> P.H Gulliver. 'The Age-set organization of the Jie Tribe'. Journal of the Royal Anthropological Institute LXXXIII (2) : (1953).pp.147-168

resources and marital rights; they have access to networks that go beyond the clan boundaries, ethnic identity and generations; and possess supernatural powers reinforced by superstitions and witchcraft.

The elders function as a court with broad and flexible powers to interpret evidence, impose judgments' and manage the process of reconciliation. The elders use their judgment and position of moral ascendancy to find an acceptable solution. Decisions may be based on consensus within the elders' and may be rendered on the spot. Resolution may involve forgiveness and if necessary, the arrangement of restitution.

Conflicting parties are more likely to accept guidance from these elders than from other sources because an elder's decision does not entail any loss of face and is backed by social pressure. The end result is, ideally, a sense of unity, shared involvement and responsibility and dialogue among groups otherwise in conflict.

Indigenous institutions that include the Gada Borana, continue to be popular among especially the communities that consider themselves as being marginalized due to their small populations or attachments to their traditional systems.

These institutions have served the community well and given them identity and ability to overcome and manage their socio – economic, cultural, ritual and political challenges. These are the reasons why most scholars see these indigenous organizations as; “a ready- made set of power structures that enable a group of people to organize themselves to take decisions, to enforce regulations and to resolve conflicts”. The Borana of Northern Kenya and Southern Ethiopia have common institutions that govern them as a nation. The difference of the two government's political systems seems to have very little effect on the way they have organized themselves at least on the management of their natural resources and conflict

resolutions structures.

Gada institutions provides for the Borana a universe of experience that could provide many valuable lessons for mobilizing and sustaining collective action for self-help and self – management in the modern world”

Subsequently, there is increasing appreciation of the role of the indigenous institutions previously seen as retrogressive and of insignificant contributions to the modern - development practices or processes including the judicial systems. Development practitioners and policy makers are coming to make sense of what Critchley (2008)<sup>75</sup> called ‘Indigenous Knowledge’ (IK), which according to (Chambers, 1997), is “risk minimizing, sustainable and adapted to precarious micro environments.” Customary rules have been effective in ensuring equity for the society at all levels including those who are perceived as vulnerable in the society unlike the modern day structures where power relations determines who gets ‘what, when and how’.

#### **4.1.2. Administrative and social units institutions of the Borana**

The Borana have defined distinct administrative and social units. These units help the community to assign important communal roles like, resources governance, security, ritual performances and disputes and conflict resolutions. The institutions are structured in such a way that they are represented from the lowest social unit – *Olla* (village) to the highest pan Borana assembly – *The Gummi Gayyo*. Generally as Doyo(2009)<sup>76</sup> sums it “The defining features of Borana resource *management* institutions are indigenous knowledge, equitable access, and decentralization of

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<sup>75</sup> W. Critchley. ‘ Local Innovation in ‘Green Water’ management’ in Bassio, D and Karimi, G. (eds) *Conserving Land, Protecting Water*. CAB International,UK(2008).

<sup>76</sup> G.D Adhi. 'Fixation with the Past or Vision for the Future: Challenges of Land Tenure Reform with Special focus on Land Rights of the Maasai and Borana Communities', LLB Dessertation: Perch, Murdoch University.(2009).pp. 33



governance, principles of subsidiary, distributive and redistributive mechanisms and environmental sustainability”.

Watson(2001)<sup>77</sup> in summarizing the role of key administrative and social institutions or units in range resources management and conflict resolutions observes that:

The *abbaa Gadaa* is seen as the figurehead of the whole of Borana, and is often described as the President. As well as performing rituals, matters are referred to him and his council when a decision cannot be reached at a lower level. When conflict breaks out between *olla's* (the smallest unit of settlement consisting of 30 to 100 *warraas* households) or *arddaas* (small group of *ollaas*, usually two or three only, who may cooperate together on their grazing pattern), or *maddaas* (area surrounding one water source), then the *abbaa Gadaa* will rule on the case. If there is conflict between ethnic groups, then he will be called in to help make peace. As the *abbaa Gadaa* is responsible for dealing with matters of concern to the Borana, and as matters of concern are often related to access to the resources (water, land, and forests), the *abbaa Gadaa* is the highest level of institution of natural resources management in Borana.

The other highest institution of Borana in all aspects of social, political, economic and ritual affairs is the *Gummi Gayyoo*. This is a Pan Borana 8 year cycle assembly that has the mandate to amend and make new rules and laws that become binding upon all Borana. The *Aba Gadaa* himself is subject to *Gummi Gayyoo* as the assembly has authority to subject his leadership to scrutiny and hand down verdict as necessary. As

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<sup>77</sup> E. Watson. 'Inter Institutional alliances and conflicts in natural resource management': Preliminary findings from Borana, Oromiya region, Ethiopia. Marena Research project, working paper number 4(2001)pp.13.

<sup>78</sup>Wako who is Borana himself and literature professor at a Kenyan University pointed out in elaborating on the role of Gummi Gayyo:

This assembly of multitudes *Gummi Gayo* is vested with the powers of legislature, undertakes law reforms, reiterates old laws and enacts new ones. Convened by high – ranking gada officials, the assembly serves as a dominant authority uniting the Borana into a political and social entity. Noted for its freedom of expression and attendance, the assembly tends to curb the excesses of all members, be they high and mighty or lowly and ordinary. Persistent disputes, which were unsettled for their gravity or complexity, are brought before an open air court for the community to contribute their wisdom towards its solution.

However as Arsano(1997)<sup>79</sup> pointed out in most cases, the Borana handle the issue of justice at various levels. Issues may also vary from breach of smallest taboo to serious offences. Cases are usually settled by clan elders at two levels; *Qae Millo* (lineage level court) and *Qae goossa* (clan level court). With the exception of a few, most cases are not taken beyond clan level courts. This administrative and social institutions are linked from the lowest to the highest through an elaborate inter clan and *Gonna/ Sabbo* Moiety relationship and mutual inter dependence systems.

Borana do regulate their justice institutions to ensure that at all times credible elders are the ones adjudicating over the cases that may arise. Also all Borana are equal before the Gada laws irrespective of once position in the community, as Bassi

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<sup>78</sup> F. Wako. 'Ethiopia in Broader Perspectives', Papers of the 13<sup>th</sup> International Conference of Ethiopian studies, Katsuyoshi, F, et al (eds.), (1997).pp.646-651

<sup>79</sup> Y. Arson. ' The Impact of State Intervention on Land and Traditional Leadership in Borana' A Research Report Submitted to the Institute of Social Studies of the Hague, The Netherlands.(1997)pp. 45.

(2005)<sup>80</sup> reports “The *Aba Gada* himself is subject to the same punishment as all other Borana if he violates the laws; same laws, same punishments. This is evidence, that shows us that the law is above everybody including the *Aba Gada*”. For the elders who engage in forms of malpractices that compromises the resolutions of cases, they face a form of punishment referred to as *Murra Harka Fuudhani* or *Buqissu*. This is like impeaching and once this punishment is declared on someone he will no longer adjudicate over any case.

According to Wako(1997)<sup>81</sup> the term *Buqisu* is not without serious imports. In Borana not only is the culprit concerned impeached and barred from holding any public office but this punishment is extended to his offspring. For this reason, leaders desist from any form of immorality as conventionally deemed by the culture; corruption in public office, unorthodox marriages, un procedural wife inheritance of dead relatives, defiance to elders and sex related misconducts.

An example of how *Murra Harkafuudhani* or *Buqissu* is declared or decreed on errant public official or elder as recorded by Basii (2005) is as follows:

<i>Eella hinmurin</i>	Make no decision about well
<i>Haara hinmurin</i>	Make no decision about dams. (Pans)
<i>Biyya wandubattan</i>	Call no meetings of communities.
<i>Daaba ilma –niti hinmurin</i>	Make no decision about welfare of women and Children
<i>Daaba buusa gonofa hinmurin</i>	Make no decision about the welfare and protection of clansmen

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<sup>80</sup> M.Bassi. *Decisions in the Shade, Political and Judicial Processes among Oromo-Borana*. Asmara, The Red Sea Publishing, Inc.(2005).pp.200

<sup>81</sup> F. Wako. 'Ethiopia in Broader Perspectives', Papers of the 13<sup>th</sup> International Conference of Ethiopia Studies, Katsuyoshi, F, et al (eds.)(1997).pp. 650

This severe punishment for errant officials is to ensure that morally upright elders and officials are the ones who adjudicate cases as they set a good example and represent the ideals of virtue that uphold the aspirations of all Borana to be at peace in a just and secure environment. The importance of the community, family, clan and water as a resources and by extension pasture and land can be discerned from this decree, as to be denied any decision making power or judicial authority over this social units and resources is to be completely cut off from the affairs of the community.

#### **4.1.3 The Restorative Aspect of the Indigenous Justice**

According to Lemley and Russell( 2002)<sup>82</sup>, “Restorative justice is a relatively new paradigm that is gaining increasing support from criminal justice practioners and the attention of researchers” while as a ‘policy paradigm’ it be new, especially to the states, that are rediscovering the significance of the restorative justice, in some cases mostly to ‘decongest the prisons due to costs of keeping misdemeanour offenders in prison’, restorative justice has been a way of life for traditional and indigenous societies around the world for centuries, in resolving conflicts and crime in their midst to maintain communal cohesion and harmony.

The retributive systems usually associated with the formal justice systems sees crime as offence against the state and “the state has an active role in ameliorating the effects of crime and its causes through incapacitation, deterrence and retribution. Offenders have a passive, defensive role, with victims and communities generally playing no

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<sup>82</sup> E.C Lemley. S. MacLachlan. & G.D. Russell. ‘ Implementing restorative justice: An evaluation of programme design and effectiveness in decentralization efforts’. Paper Presented at the annual meeting of the Academy of Criminal Justice Sciences, Albuquerque, NM.( March)(1998).

direct or active role". Zehr(1990)<sup>83</sup> on the other hand, "Restorative justice, views crime as an offense against people and relationships and an offence creates an obligation to make things right".

Restorative justice engages actively the offender, the victim and the community to have participatory solutions to the crime and have joint – communal understanding of the obligations of the crime. This participatory approach is meant to address "reparations for victims from offenders and reintegration of both within the community" Van Ness(1996)<sup>84</sup> through mediation that helps foment reconciliation between the victim, offenders and the community. "The community had an interests in and responsibility for addressing wrongs and punishing offenders.

Lemley and Russell(2002)<sup>85</sup> say Offenders and their families were required to settle accounts with victims and their families. As such the overall purpose of seeking restorative justice in the community is through "vindication and reparations to restore a disunited community".

The Borana as a community value the structure of their relationships and continued cohesion of the wider community, hence any form of threat to the *Nagaa Borana* is dealt with amicably and jointly as a community through a reparative and restorative justice, which according to Bazemore and Walgrave(1998)<sup>86</sup> is "an overarching paradigm of public problem solving, citizen participation and a collective

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<sup>83</sup> H.Zehr.*Changing lenses a new focus for crime and justice*. Scottsdale, PA: Herald.(1990)

<sup>84</sup> D. Van Ness. (1996). 'Restorative Justice and International human rights', In B. Galawy & J.Hudson (Eds.),*Restorative justices : International Perspectives*,Mansey, NY: Criminal Justice Press. (1996) pp.36

<sup>85</sup> E.C Lemley. S. MacLachlan. & G.D. Russell.' Implementing restorative justice: An evaluation of programme design and effectiveness in decentralization efforts'. Paper Presented at the annual meeting of the Academy of Criminal Justice Sciences, Albuquerque, NM.( March)(1998).

<sup>86</sup> G. Bazemore.' Restorative Justice and earned Redemption : Communities, victims and offenders reintegration.' *American behavioural scientist*, 41(6),(1998)pp. 768-813.

responsibility for building stronger communities”. According to the formal justice systems, the verdict of imposing a monetary fine or committing to jail sentence of the guilty serves only to remove the criminal from the society for a while or the fine imposed will be deterrence for future criminal activities. However this may “appease the victim, but it is not clear how it benefits and heals the victim or the community... retribution whether it is monetary or otherwise, lacks a rehabilitative quality and fails to address the pain and suffering of the victim that was inflicted on them by the perpetrators”. It is interesting that some western countries are also beginning to see some value in the restorative justice systems as the formal retributive systems which are deemed to be ‘correctional’ may in fact not actually be yielding these desired corrections of the offenders. Thus some scholars are calling for considerations of these customary indigenous justice systems:

In American society, there is no remorse. Remorse appears to be left to the victims and their families. A civil judgment is paid and business goes on; a punishment is meted and the remorseless criminal ferments his hatred in prison for years. How the remorselessness and the victimization collectively affect America is something worthy of exploration. Emphasis is on group unity, reconciliation of individuals or groups, and peaceful reintegration into the community.

The return to ‘social harmony’ Shinn refers to is what the indigenous institutions have sought to maintain through their restorative justice system, which sought to reintegrate and restore the offender back into the community, through consensus, admission of guilt and apology. The restorative justice ensured that the offender, the victim and community are all engaged so that the mutual cohesion is restored, while at the same time the offender has been made to accept guilt. Restorative justice also

ensured that the burden of shame and guilt is shared among the community and the victim suffering and pain also becomes a communal pain:

In contrast to the one – dimensional focus on punishment or treatment, restorative justice is best served when there is a balanced response to the needs of citizens, offenders and victims. It is based on the assumption that basic multiple community expectations - to feel safe and secure, to ensure that crime is sanctioned and to allow for offenders to be reintegrated – cannot be effectively achieved by an insular focus on the needs and risk presented by offenders.

Zehr(1990)<sup>87</sup> says to meet these needs and repair the harm crime causes, victim, community and offender must be viewed as clients of the justice systems and must be involved meaningfully as co participants in a holistic justice process.

Finally the customary indigenous justice as a communal system that seeks to maintain mutual coexistence in the society does not just let the offender free after his apologies or payment of imposed fines. But checks and balances are put in place to ensure that the offender is integrated and as much as possible desists from committing the crime again.

Bazemore(1996)<sup>88</sup> says “For the offender, restorative justice requires accountability in the form of obligations to repair the harm to individual victims and victimized communities and it provides opportunities for the offender to develop new competencies, social skills and the capacity to avoid future crime” ( Bazemore, 1996). Every adult man and woman of the community is expected to at least have knowledge

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<sup>87</sup> H.Zehr.*Changing lenses a new focus for crime and justice*. Scottsdale, PA: Herald.(1990)

<sup>88</sup> G. Bazemore ‘ The Community to Community Justice: Issues, themes and questions for the new neighbourhood sanctioning models’. *Justice System Journal*, 19(2),(1997)pp.193

of what has potential to disrupt *Nagaa Borana* and desist from the same or seek amicable redress before engaging in acts that violates the customary norms. As one tribal judge recounts, “we would involve different elements of our society—the chief, the warrior societies, the families, the clan, the medicine man, and so on—in the resolution of the problem. Laws were not made by an institution such as a legislative body but by the normative power of the entire society. Each individual knew what was prohibited.

According to a Borana Council of Elder member, the checks and balances of the customary justice include the fact that repeated offences can lead one to be banished from the Borana. This is to be cut off from society if one has proved to be deviant and is not working towards promotion of *Nagaa Borana* . The consequences of the banishment can be very severe in that, this deviance trait in one person will affect the entire clan lineage of the offender as they have to live with the embarrassment, shame and guilt of the deviant, hence compromising integrity of so many people related to or close to him/her. Thus it becomes the responsibility of every responsible Borana to make sure that at all times the offender does not get back to the crime again.

#### **4.1.4 Tensions between customary justice systems and formal statutory systems of justice**

This section continues the study analysis and will focus on the tensions that are apparent between the customary justice and formal statutory conceptions of justice and how these conceptions have affected policy choices of the states towards the indigenous people.



The analysis is also on the basis of secondary data and interviews with the study respondent's analyzes what middle ground or a balance between the two justice institutions can be there that can be navigated to promote a 'legal pluralism' that serves to promote the interests and aspirations of the indigenous people while at the same time meeting the state's constitutional thresholds of rule of law that applies to all citizens of the state.

Conflict management systems designed, set up, and run by the Government of Kenya are the predominant form of conflict management in the country. At its heart of such government activity sits the Kenyan legal system. The legal system, based on the British common law system, uses adjudication and arbitration as the primary means of tackling conflict management. While the legal system is fairly well distributed throughout the country, it has not proved to be the panacea for violence. In part, this is due to facets external to the legal system.

<sup>89</sup>Mohamud Adan and Ruto Pkalya highlight some of these issues, noting:

*"Conflict resolution through the judicial system is made difficult by a population poorly informed of its legal rights and responsibilities, high costs and complex procedures, inadequate staffing of the judiciary, sometimes strong links between the executive and judiciary, manipulation and selective application of the law in certain instances."*<sup>90</sup>

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<sup>89</sup> A. Mohamud and R. Pkalya. "Conflict Management in Kenya: Towards Policy and Strategy Formulation", Practical Action, (July 2006), Pg. 6

<sup>90</sup> ibid

However, <sup>91</sup>Adan and Pkalya also highlight the institutional impediment preventing the Kenyan legal system from playing an optimal role in conflict management. The Kenyan legal system is based on the British commonwealth legal system, a legacy of British colonialism which:

*"Does not accurately and adequately reflect Kenya's demographic dynamics, social values, and socio-political organization. These circumstances add to the burden of legal complications in the ever-increasing land and resource conflicts."* <sup>92</sup>

As communities unaccustomed to a system which seems ill-designed to meet their needs, fail to gain the needed (or expected redress) additional bitterness and mistrust between the populace and the legal system accrues, diminishing the legal system's utility further.<sup>93</sup>

Thus, despite the promise of the formal legal system, the actual impact on conflict management has been at best minimal, while at worst it has "escalated instability in conflict situations."<sup>94</sup>

Half-hearted measures have however been made in the past to retain informal or customary law, and even then, under very stringent conditions. The courts have also been largely adversarial in nature where each party to the dispute is expected to present its case to the court with the presiding officer acting as an arbiter who would then declare a winning litigant. A judgment is delivered to be enforced in due course. Disobeying a court judgment leads to punishment. The process is by its very nature highly formal and technical and therein lies its shortcomings. In addition, the time it takes to obtain a judgment may be too long for the conflicting parties. A period of a

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<sup>91</sup> Adan and Pkalya, Pg. 6

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<sup>93</sup> Adan and Pkalya, Pg. 6

<sup>94</sup> Adan and Pkalya, Pg. 6

few weeks may always encourage the victims to prepare for revenge actions, as the conflict remains unresolved in the eyes of the parties involved. Further, the local concepts that define what is just and fair, how a conflict should be ended, how a perpetrator should be punished and the authorities to solve a conflict differ paradigmatically from the official or formal law.

Chopra(2008)<sup>95</sup> says in traditional set up, underlying local approach and understanding is that the entire kin group to the individual perpetrator is responsible for a crime, and that a conflict resulting from a crime is resolved through payment of compensation, in which the lost values of the victim's group are reinstalled. Only then is peace restored between the conflicting parties. As such in many cases, official laws and judgments or the formal institutions are considered not to be logical or fair in the eyes of the victim and the perpetrator, and consequentially prove incapable of pacifying communities.

As such the impact of the formal conflict institutions in Northern Kenya is thus marginal as it has proved inadequate in responding not only to outbreak of violence but in addressing the underlying causes and facilitating peace building and reconciliation of communities. The result has been seen in the growth of mistrust by the communities to these structures and their rejection of their applications, which further escalates instability in the region.

Kenya does not have a comprehensive and holistic legislation that focuses on conflict management. The impact of this gap is that some conflict management initiatives such

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<sup>95</sup> T. Chopra. "Reconciling Society and the Judiciary in Northern Kenya", Justice for the Poor and Legal resources Foundation Trust, Research paper, Nairobi.(2008)

as traditional justice and conflict management have no legal framework and operate independent of each other in an uncoordinated manner. This more often, causes confusion and lead to the ineffective administration of justice and dampen peace building efforts.

How the state conceives the indigenous people has direct correlation to the policy choices they make to improve their welfare and provide legal framework that guarantees them the entitlements of being citizen within their particular realities. Morgan (2007)<sup>96</sup> however says the reality is that all the conventions and treaties at international, regional and national levels as concerning the indigenous people may just be ‘the paradox of empty promises’.

Though the approach may be changing of late, the government and even some development organizations have been working to change the ways of the indigenous lifestyle, their socio –economic dynamics to conform to what has been considered a ‘progressive modern’ culture. The enforcers of this ‘modern’ culture see the indigenous ways as not being in tandem with the times, hence there is not adequate legal frameworks that identifies who this indigenous people are and what legal frameworks will serve there circumstances better.

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<sup>96</sup> B. Morgan. (ed).*The Intersection of Rights and Regulation: New direction in socio legal scholarship.* Burlington: Ashgate Publishing Limited.(2007)pp.109.

## **4.2 Conclusion**

Among the Borana of Northern Kenya, there is still active reliance on the customary means of conflict resolutions and preventions. The customary justice regime enjoys much support and trust of the community than the formal justice systems. This is because the formal courts process is alien to them, is not easily accessible, they don't understand the language and ways of the courts, it is time consuming and very expensive, it is subject to corruption and justice can be compromised by the highest bidder. The Borana community feel they have their elders who resolve cases hence going to court is undermining their institutions. The locals feel the courts don't help to restore the broken relationships, the jailing of the offender make situation even worse as it can cause more suffering to the family of the jailed person.

From these explanation, we see a community who will look up to their traditional justice institutions for a long while to come as the view of the traditional and formal justice systems are radically different.

Given the strong conviction with which the locals hold the traditional justice system, there is need for both systems to accommodate one another and co exist for necessity. There is need to put in place policies that appreciate and recognize legal pluralism that accommodates both of this to help realizations of justice and management of resources.

## **CHAPTER FIVE**

### **CONCLUSION**

#### **5.1 Summary of Key Findings**

This study sought to answer the question; the effects of the modern statutory conflict management system on the traditional conflict management system and how the two justice system could complement each other in conflict resolution among the Borana Community.

The study has shown that conflicts over resources among the pastoralists have historical and contemporary dimensions of policies that have contributed to shrinking in resource base. This has led to conflicts becoming more frequent as competitions among the communities intensify. In the absence of efficient government services including the judicial services the communities have continued to rely on the traditional conflict management systems in resolving conflicts.

Traditional institution ensures restorative justice is dispensed timely and in ways that are acceptable and understandable to the community. The justice institutions have checks and balances where disputes can go from lower level lineage or clan courts to the highest possible level of the *Gummi Gayyo* where the highest official, the *Aba Gada* and his senior councilors adjudicates over the case.

The community choose to continue to rely on their indigenous justice regime is because it is reparative, is obligated to be holistic to include victim, offender and the community to restore relationships through acknowledgement of the guilt, forgiveness, restitution and compensation as necessary to restore the broken

relationships as the idea is that the value of healing is the key because the crucial dynamic to foster is healing that begets healing.

To the community the formal justice system is seen as adversarial, focused on the individual, is punitive, retributive and does not uphold collective consensus justice based on written statutes which is completely out of synch with the community used to be guided by customary traditional justice dispensation regimes.

The study has established that different conceptualization of justice between customary and state institutions have led to some tension which needs a form of legal framework that supports these different conceptualizations. The concept of communal resource ownership is also not supported in the Kenya constitution which has led to continuous appropriation of pastoral lands without their consents.

The declarations, practices and quasi-formal structures in Northern Kenya are an interesting example of bottom-up approach law making. They point to the need for legal regimes to respond more adequately to local values and social realities.

To overcome this tension the study findings indicate that the government needs to consider the legal pluralism framework legislations that will legitimize and uphold customary conflict resolutions. Justice sector institutions and laws must begin to reflect peoples' actual perceptions and everyday realities. The official justice sector may need to better tailor its interactions with communities to provide judgments that truly do foster peace in communities, and that people believe to be fair.

There is also need for concerted institutional support for customary dispute resolution mechanisms and recognition rather than eroding their authority. The recognition and grounding will forestall clash.

The legal pluralism framework from the study findings will hopefully be made possible through decentralization where the indigenous restorative justice institution, the state authority and other stakeholders will work together for a just, sustainable and conflict free utilizations of scarce resources.

Effectiveness depends on achieving this balance in adopting both tradition and modernity. Modern institutions like the police and the judiciary should help enforce the rulings and verdicts of the traditional courts. Traditional peace structures of elders should work hand in hand and a legal framework be established to legitimize the indigenous conflict resolution structures.

The changes in the administrative boundaries now being enhanced through creation of Government administrative boundaries, which are slowly taking a tribal dimension is a major contributor to the ongoing conflicts in the study area. These are communities who lived together amicably and share same language, culture and grazing fields but are now hardened enemies because of conflict over boundaries and resource access and management. The failure to consult local community in creation of these boundaries has remained a major cause of conflict in Northern Kenya especially among the pastoral communities.

The study noted that a top-down approach to conflict resolution may not give lasting solution. On the other hand, a participatory approach may bring about lasting solution to ever-deepening conflicts. There is a need to listen to what elder's say, what practitioners suggest, and to what experienced researchers say. There is a need to learn from experiences of NGOs and local peace actors. Otherwise, the fire that is



coercively put off today may resurface one day and engulf more areas as the cycle of revenge and counter revenge escalates.

Traditionally council of elders were historically involved in negotiation of grazing areas but that is now weakened by the Government Administrative structures, boundaries and policies which in some cases have made some people to over look the need for such negotiations in that they see themselves as Kenyan and can graze anywhere. This has caused retaliatory attacks since the affected community feel like they are being trodden on. Both the traditional and modern state structures and traditional institutions have to work in concert as each cannot be effective without the other. This balancing of the modern and traditional enables the states to connect with communities. Peace actors should hence reject that the choice is between either the modern or the traditional system. Instead they should tap into and employ the positive and applicable aspects of both.

Currently the Modogashe declaration which seemed to have worked fairly well initially and which the communities have been relying on to contain the conflicts appear to have collapsed because of teething problems in the implementation touching on compensation modalities and handling of the culprits. Apparently there is a conflict between traditional restitution mechanisms and the laws of the country that require the culprits to be taken before a court of law. Traditional system of conflict resolution is seen by many as being the best in resolving pastoralist to pastoralist conflicts in that it can give rapid results at little cost though of late it has been challenged by the youth who do not seem to recognize and respect such systems. Some respondents suggested that punishing the whole clan for a crime committed by an individual should be reversed. Individuals should bear the penalty of their

wayward actions. This collective punishment though illogical in the modern law has its merit in communal conflict deterrent mechanisms.

## **5.2 Recommendations**

Any sustainable pastoral development program needs to be based on the particular people's history, culture, and environment, economic and political realities. We propose that there should be increased collaboration and networking between the statutory and customary institutions of governance. In particular, the state should recognize and support the customary courts and enforce their rulings. The customary laws are often more important than statutory laws and are relied upon in deciding access rights to natural resources and in resolving conflicts.

Neglect of these norms and laws may have negative consequences for development policy of the nation in general and for the local community who rely on them in particular. A 'systematic combination' of customary and statutory institutions in the development and management of natural resources may facilitate cross-cultural understanding, thereby improving the socio-economic development of the country. However, enforcing the statutory rules on the local community without due consideration for their indigenous norms and values should be avoided on the side of the state. Access to what resource and by who should be established through customary institutions.

There is need for mutual co-operation and understanding to create linkages between the statutory and customary institutions that will create a synergy between the state institutions and local populations. This synergy will eventually lead to improved effectiveness of the natural resources management.

Borana of Northern Kenya have continued to depend on their customary systems for dispensation of justice and it has served them well. The formal justice system, need to engage this customary justice institution constructively, to provide a formal recognition framework for it, so that its decisions on resource management tenure and conflict resolutions are binding upon the state or any other party.

The ideal engagement of two justice systems through legal pluralism is to offer great promise for the preservation of cultures, values and institutions, and ultimately for the establishment of the rule law, but only if the indigenous legal systems can be engaged in a spirit of mutual respect. This will foster a working relationship between the two legal systems.

Menen (2007)<sup>97</sup> says it is crucial to allow for a general process through which society and the judiciary or the official law can approach each other. Legal pluralism which presupposes the amicable coexistence of two different legal regimes provides a welcome alternative to such impasse as evident in the Northern Kenya communities. Studies have shown that communities living within a pastoral region regulate themselves notwithstanding the existence of formal law that is considered modern.

By insisting on following formal law, the country may be at risk of destroying important and effective traditional systems of dispute resolution and restorative justice in the quest for modernity. On the other hand, even though in cases such as the northern Kenya experience, the effects of formal system are hardly felt it is impossible to completely ignore the operation of the formal law. There is therefore need to introduce legal pluralism as a suitable

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<sup>97</sup> T. Menen. "Towards legal Pluralism in Southern Sudan: Can the Rest of Africa show the way? In Africa Policy Journal, Vol. 3 Spring 2007

balance. Questions nevertheless arise as to whether legal pluralism would enhance governance, security and economic development or whether it will create inter-tribal conflicts and legal complexities that can only further destabilize the people.

In spite of these concerns, it is evident that legal pluralism has taken root in dispute resolution amongst the pastoral communities in Northern Kenya. The adoption of foreign legal systems seems to have disenfranchised the rural, poor and less educated communities in the broader Kenyan society. Amongst the pastoralist communities in Northern Kenya, it is difficult to discuss a legal system that does not include major contributions from customary or informal law. Notwithstanding the deficiencies of the formal law, it still impacts on the communities albeit marginally. The two systems thus co-exist side by side. The challenge is to create a legal system that embraces the cultural identity enshrined in the customary law while providing the stability required reducing ethnic tensions and foster investment, growth and development.

Legal pluralism is not without problems. The operation of two legal regimes which may often be at variance with each other cannot fail to raise many problems. For legal pluralism to function in the multi-ethnic region of Northern Kenya there has to be a built-in flexibility that allows discussion and ways of reaching a compromise between different cultures. Presently the legal tenets that need to be applied in a pluralist regime are not clearly spelt out or written down.

In order to develop a pluralist system, there is need to begin documentation of all customary law and create a legal clearing house for community judicial decisions. This documentation would build up the jurisprudence within each community and create a structure for continued recording of judgments. Legal pluralism should not create power dynamics

between the difference communities but should stabilize the status quo that has governed community relationships for decades.

Furthermore, a process of harmonizing customary law and formal or official law needs to be developed. Harmonization needs to be a systematic process of evolution of customary law to abide by constitutional provisions, especially the Bill of Rights. Care should however be taken to ensure that in the process of harmonizing and in a sense modernizing the customary law, we do not lose sight of basic precepts within the law that had made it acceptable and palatable to the local communities. But as shown by Madogashe Declaration,<sup>98</sup> there is risk that while harmonizing the customary law with the official law, it may cease to appeal to the very community that it is expected to serve and in so doing alienate the very people it should apply to.

The traditional authority is being eroded by the progressive replacement of elders' councils and tribunals with government-appointed agencies and functionaries. Urbanization and increasingly frequent migrations to town of young people, especially men, expose them to other cultures and make them question traditional values.

Another way in which elders may have lost their authority is through increasing distrust from the communities, particularly from the warrior age sets and association with an increasingly distrusted administration. The elders may increase their influence and prestige by providing an interface between their communities and local government.

The ongoing effort by the Chief Justice Willy Mutunga to formalize the recognition and authority of the Traditional and Customary justice system, by reviving the waning

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<sup>98</sup> Modogashe Declaration

powers of Council of Elders will go along way in expanding access to justice, restoring trust and expediting dispute resettlement. Under the Initiative, petty cases from villages should not be taken to the courts for the judicial officers to resolve. Instead, petty crimes should be left for the elders to resolve and they are only allowed to proceed to court when the elders hit a deadlock.

The recommendations can benefit from further research by undertaking a review of the ongoing initiatives by Judiciary, led by the Chief Justice aimed at harmonization traditional and modern conflict management Mechanism and its effects on expiditing provision of justice and resolving conflict. It will also be key to review the frequent military operations and disarmament operations undertaken by the provincial administration among pastoral communities and assess its impact on conflict resolution among pastoral communities.

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## APPENDIX: MARSABIT DISTRICT INCIDENCES OF CONFLICT

The following are the incidences of banditry attacks by Ethiopia Bandits, (Amarkokhe) from the Month of July 2004 to December 2005.

Dates	Place and action taken
8/7/2004	Bandits from Ethiopia attacked at a place called Sulsumude Manyatta and stole 70 heads of cattle. Nobody was injured during the incident. Security personnel persuade the bandits and managed to recover all the stolen stock
26/8/2004	Amarkokhe from Ethiopia and attacked a Manyatta at a place called sabarel and made away with 25 Donkeys. No injury reported. Officers from sabarel police post pursued the bandits and recovered 2 Donkeys. The rest were crossed over to the border.
24/9/2004	Bandits from Ethiopia attacked Kala Jarso Manyatta and made away with unknown number of stock. Security personnel persuade the bandits, killed one, injured another and managed to recover all the stolen animals.
27/9/2004	Amarkokhe from Ethiopia attacked El-Bora Manyatta along Turbi-Forole road and stole 15 heads of cattle and abducted two boys. Officers managed to rescue one boy. The stolen stocks were crossed over to Ethiopia
3/10/2004	Bandits from Ethiopia attacked Arab-Tiris Manyatta and made away with 31 heads of cattle. No injuries reported. Security personnel tracked down the bandits and managed to recover all the stolen animals
12/10/2004	Amarkokhe from Ethiopia attacked Arab-Tiris area and killed herdsmen who were looking after animals. During the attack two Borana men aged 27 years called Dulach Boru was shot dead and one Galgallo Abane was injured. The bandits also made away with 46 heads of cattle. Officers persuade the bandits and managed to recover all the stolen animals.
31/10/2004	About 10 bandits believed to be from Ethiopia attacked Manyatta Dosasham in

	Buluk. The area KPRs managed to repulse the bandits hence nothing was stolen
19/11/2004	Bandits believed to be from Ethiopia short Police officers on duty from Sabarel police post. Others Police Officers responded swiftly and the bandits fled towards Ethiopia. No injuries reported
29/12/2004	Bandits from Ethiopia attacked Arano Manyatta of Maikona in North Horr constituency and shot dead one Ali Sharamo and injured Fakana Ali seriously. Nothing was stolen. security personnel was deployed to the areas until calm prevailed
8/4/2005	Bandits from Ethiopia attacked Sul-mude area but the KPRs responded quickly, nothing was stolen. The bandits escaped to Ethiopia after exchange of fire with the KPRs.
15/4/2005	Bandits believed to be Amarkokhe from Ethiopia attacked Arab- Tiris area, killed two herdsmen and stole 200 sheep and goats. The bandits abducted one Guracha Guyo. Security personnel were dispatched to track down the bandits. No recovery was made.
9/5/2005	Bandits from Ethiopia attacked Gabra-Buti Manyatta and made away with 40 Donkeys. Officers persuade the bandits but no recovery was made as the stolen animals had already crossed over to Ethiopia.

Dates	Incidence
January 2005	One man was shot dead in Balesa Bor and another one in Bismiq the following day. Latter 3 people were killed in Moite, 2 bandits and two women were killed and one child injured in Oltorot, 3 people from Kargi injured and One KPR was shot dead in Balesa Borr.
12/1/05	Two Gabbra were killed in Qarsa gate
21/2/05	3 Turkanas were killed in Chari Gollo and 7,000 goats stolen
3/2/05	13 cattle stolen from karantina

	<p>7 cattle stolen from karantina</p> <p>7 cattle belonging to Liban Jarso were stolen</p> <p>17 cattle stolen from karantina</p> <p>9 cattle stolen from karantina belonging to Ginda village.</p>
18/4/05	3 students were killed on the way to Songa
19/4/05	A seven year old girl shot dead in Songa
19/4/05	Travelers taken hostage in Karare and road barricaded.
27/4/05	20 heads of cattle stolen from Badasa
2/5/05	Hindalas herdsman was shot dead in Badasa
30/5/05	Livestock raided in Forole. 3people injured and four killed
1/6/05	Goats raided in Horonderi ( Man es illage) 2 people injured- non recovered
2/6/05	Livestock raided in Horonderi-non recovered
5/6/05	Livestock raided in Badasa-2 people injured- none recovered
6/6/05	Leyai attacked -one person injured
6/6/05	Gas raid- 2 Turkana and one Gabbra were killed
6/6/05	Livestock raided in Dida Galgalu belonging to CII. Chukulisa-non recovered.
8/6/05	Bus shot at in Malgis
10/6/05	Badasa raid- two people_were injured- non- recovered
10/6/05	Cereals board livestock raid-non- recovered
11/6/05	Dololo sirba raid- two Rendille and one Borana was killed
12/6/05	Dololo sirba raid-two livestock injured.
15/6/05	180 Borana livestock raided from Gofchoba.

16/6/05	Chief Boru wako and kpr Nyencho Shedo killed tracking stolen livestock near Buhisa.
17/6/05	A Gabbra kpr was removed from a 'vehicle and killed near menial Jillo
17/6/05	A Gabbra kpr was shot dead in Gar –qarsa
18/6/05	Dub Soras shoats were stolen from Goro-rukesa
19/6/05	Dub Guyos 13 cattle were stolen from Badasa
20/6/05	Livestock stolen and five people killed in Forole
22/6/05	Livestock stolen from Goto Gardi and one man killed- all livestock recovered
26/6/05	Livestock raided by cereals board police barrier- all recovered latter
28/6/05	Isack Gollos vehicle was attacked at Borr at laros village- no injuries
2/7/05	Livestock raid in Badasa - All recovered latter
12/7/05	85 people massacred at Torbi_inudhigl5bandds
13/7/05	10 passengers dragged out of a mission vehicle and slaughtered
14/7/05	One person killed and another injured in Maikona
16/7/05	A vehicle was shot at in Malgis
25/7/05	Four people were killed in Dukana by the Merilles
25/7/05	2,700 Livestock raided in Loyangalani
<b>CONFLICT INCIDENCE REPORT FOR THE YEAR 2006</b>	
<b>Dates</b>	<b>Incidences</b>
2/2/06	Gabra was killed and shoats stolen by Shangila in Sibilo
20/2/06	One Rendille was shot and wounded in Songa, in retaliation a Borana was shot and wounded in Badasa
Jan 2006	9 highway banditry incidences took place on Mbt/Isiolo highway



21/2/06	One man was shot and injured in Songa in Badasa
28/2/06	Six people killed and eight people injured in cattle raid in Moite. Camels and goats were stolen.
Conflict Incidences between Borana and Gabra as from December 2006	
8/10/06	Gabra bandits attacked Manyatta Kubi-Panya at Dakabaricha location and stole 68 cattle belonging to Galgalo Dida borana. During the incidence Gollo Yattani, Borana aged 50 years and Dida Garbole Borana aged 10 years were shot dead. Action taken The security team under the command of OCPD Marsabit Mr. Francis Sang tracked down the stolen stocks and managed to recover all the 23 cattle.

9/12/06	Gabra bandits attacked Manyatta Kubi Ongolo of Qilta Korma location in attempt to steal animals belonging to Yattani Wario but they were overpowered by the KPRs and nothing was stolen. Action taken: The OCS Marsabit intensified the patrol within the affected area and its environs.
8/1/07	A group of about 40 armed bandits believed to be Gabra raided Mlanda Fora Manyatta belonging to one Gilla Baji (Borana). The bandits were over powered by the KPRS after exchange of fire killing two bandits, one Halkano Huka Adi a Borana KPR aged 35 year sustained bullet wound on his right rib while Wario Boru Tito Galgalo a Borana aged 46 year sustained multiple injuries on both legs. Both were rushed to Marsabit district hospital and later airlifted to Nairobi for medication. Action taken: A combined team of both regular and administration and ASTU unit pursued the bandits and they fled away. Case P.U.I
6/2/07	One Dera Qarbicha, a Borana (KPR), aged 60 years from Jaldesa location was shot on his left thigh by unknown people. He was rushed to Marsabit district hospital. Action taken: Scene was visited and investigations launched. Case P.U.I
27/2/07	Borana and Gabre tribes clashed over watering point at Haro Gumi dam. The Borana had chased the Gabra away alleging that the Gabra had gone to fetch water at the said dam without the consent of the management. At the same time the KPRs of both sides

	fought at Girime Scheme. Action taken: Police visited the scene. At the scene the KPRs stopped exchange of fire and went away. One house belonging to Dima Kusu a KPR of Borana tribe aged 48 years was found destroyed by bullets. Police have intensified patrols within the affected areas. Case P.U.I.
27/2/07	Gabra and Borana fought over unknown reasons at Boru Haro Scheme of Saku constituency. The security personnel visited the scene immediately and found the scheme deserted. One person was found with multiple deep cuts on his head and was rushed to the hospital where he was pronounced dead on arrival. One hut believed to be of a Gabra was torched. Action taken: Police patrolled the area and found one Halkano Duba Borana aged 28 years with serious bullet injury on his right leg ankle and rushed him to Marsabit district hospital while in stable condition. Inquest file no. 3/2007 opened. Case P.U.I
2/3/07	Shooting incident reported at Haro Halake Yaya dam where two people and a cow were shot dead (One Guyo Fugicha Kulise, Borana aged 52 years old was shot dead in his head and stomach while Sora Boru, Borana aged 60 years old in the head and right side of the chest) Action taken: A contingent of Police G.S.U and Administration Police under the command of D/OCPD Marsabit Mr Aphiod Mwaniki rushed to the scene. The bandits were over powered but lit fire and burnt all the grass before fleeing a way. When the police were extinguishing the fire they were attacked by about heavy armed bandits but they managed to arrest one Arero Galgalo Dida a Borana aged 55 years and recover a firearm carbine S/No.OB868 with 19rds of 7.6 mm special and one porch from him. Another rifle AK 47 S/No. 66 h1275 with 5rds of 7.62 mm special was also recovered after it was dropped by unknown person. The Police have since been deployed to the affected areas. Case P.U.I

A chronology of incidents of inter ethnic violence that occurred in Marsabit since January 2007

Dates	Incidences
18 <sup>th</sup> January 2007	Heavy fight took place between Borana and Gabra at Oronderi hill between Bubisa and Marsabit. Two people were injured
20 <sup>th</sup> February 2007	Tension between Gabra and Rendille Herders reported in Balesa Bobor areas. There were incidents of shooting but there was no casualty.

27 <sup>th</sup> February 2007	Tension erupted between Gabra and Borana over the use Qilta Korma Dam. Heavy exchange of gun fire was reported at the scene. One person was killed on the same day in a separate incident at a Gabra IDP settlement near Boru Haro village. One person was injured during the incident.
2 <sup>nd</sup> March 2007	Two herders from Borana community were killed at the dam of Halakhe Yaya near Manyatta Jillo in Gadamoji division. The deceased names are; Mr. Guvo Fugicha and Mr. Sora Boru.
20 <sup>th</sup> March 2007	A Gabra Police reservist was killed in Marsabit forest while taking the cows to the stream wells. The name of deceased is Mzee Isako Dadacha Guyo
21 <sup>st</sup> March 2007	A Borana police reservist was killed at Shuura area in another fight between Borana and Gabra. The name of the deceased is Mr. Ali Adan Sora.
9 <sup>th</sup> May 2007	Raiders from Gabra community attacked Turkana fora near Moite and killed eleven people including women and children. A large number of shoats were stolen from the Turkana during the same incident.

29 <sup>th</sup> May 2007	Two Gabra herders were killed near Sibiloi National Park by raiders from Daasnatch community. The attackers drove away about sixty cows
14 <sup>th</sup> June 2007	A police patrol vehicle was ambushed between Turbi and Forole by unknown attackers. A police officer was seriously injured.
16 <sup>th</sup> June 2007	Raiders from Turkana Community attacked Gas trading centre in North Horr division and took away large number herds including shoats, cows and donkeys. Three Gabra herders were killed during the incident
17 <sup>th</sup> July 2007	Gabra raiders attacked Daasnatch for a near Koobi fora and steal unknown number of goats and sixty cows. No casualty was reported. Turkana raiders killed 6 Gabra herders at Waano.
October 2007	4 Gabra killed at Ch'ari Gollo and a large number of livestock taken.

November 2007	Borana herder <i>was</i> killed at Kubi Qallo. Livestock raided near Rawana in Sololo.
December 2007	Turkana raiders attacked a Gabra herd at Koromto. 2 people were injured  1 Rendille KPR killed near Kubi Qallo  There were 3 incidents of attack on the vehicles along Marsabit and Moyale road.

A chronology of incidents of inter ethnic violence that occurred in Marsabit and morale since January 2007	
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20 <sup>th</sup> March 2007	A Gabra Police reservist was killed in Marsabit forest while taking the cows to the water wells. The name of deceased is Mzee Isako Dadacha Guyo.
21 <sup>st</sup> March 2007:	A Borana police reservist was killed at Shuura area in another fight between Borana and Gabra. The name of the deceased is Mr. Ali Adan Sora.

9 <sup>th</sup> May 2007	Raiders from Gabra community attacked Turkana fora near Moite and killed eleven people including women and children. A large number of shoats were stolen from the Turkana during the same incident.
29 <sup>th</sup> May 2007	Two Gabra herders were killed near Sibilo National Park by raiders from Daasanatch community. The attackers drove away about sixty cows.
14 <sup>th</sup> June 2007	A police patrol vehicle was ambushed between Turbi and Forole by unknown attackers. A police officer was seriously injured.
16 <sup>th</sup> June 2007	Raiders from Turkana Community attacked Gas trading centre in North Horr division and took away large number herds including shoats, cows and donkeys. Three Gabra herders were killed during the incident.
17 <sup>th</sup> July 2007	Gabra raiders attacked Daasanatch fora near Koobi fora and steal unknown number of goats and sixty cows. No casualty was reported. Turkana raiders killed 6 Gabra herders at Waano.
October:2007	4 Gabra killed at Ch'ari Gollo and a large number of livestock taken
November 007	Borana herder was killed at Kubi Qallo. Livestock raided near Rawana in Sololo.
December 2007	Turkana raiders attacked a Gabra herd at Koromto. 2 people were injured, 1 Rendille KPR killed near Kubi Qallo  There were 3 incidents of attack on vehicles along Marsabit and Moyale road.

This information was collected from Marsabit Police Station in Jan 2008 and Marsabit Conflict Report July 2005 on "The Turbi Massacre.