

UNIVERSITY OF NAIROBI
DEPARTMENT OF SOCIOLOGY

ACCESS TO JUSTICE FOR ALL. AN INVESTIGATION INTO THE
FUNCTIONING OF THE *KOKWET* OF THE KIPSIGIS COMMUNITY OF
LONDIANI DIVISION, KERICHO DISTRICT.

BY: AGNES CHEPTOO KIRUI
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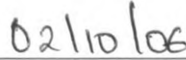
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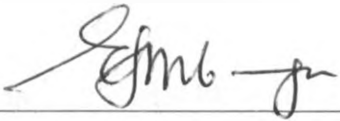
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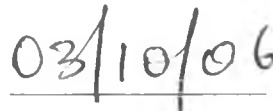
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PROF. EDWARD MBURUGU

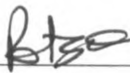
Associate Professor, Sociology Department

University of Nairobi



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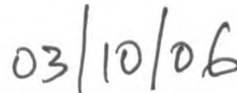
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MR. BENEAH MUTSOTSO

Lecturer, Sociology Department

University of Nairobi



DATE

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ABSTRACT

The aim of the study was to investigate the existence, persistence and functioning of Community Justice Systems (CJS) in Kenya today in the context of access to justice for all. While the focus was on CJS in general, particular reference was made to the 'kokwet' of the Kipsigis ethnic community in Southern Rift Valley Highlands of Kenya. The study was conceived and developed around the theme of finding out the CJS actors, beneficiaries, remedies and procedures. CJS has been part of African communities but were unfortunately dismantled by the British in the nascent and subsequent years of colonialism and thereafter.

The objective of this study was to identify the procedures followed by the aggrieved parties in the CJS as well as to find out the opinions /perceptions of the modern administrators, legal fraternity about the functioning/relevance of the CJS. The aim of the study was also to find out the areas in which the CJS and the modern system collaborate to enhance access to justice by many, and to investigate the perceptions of the marginalized groups (women and youth) of society about the CJS.

Of particular concern to this study was to find out how the marginalized groups of society (especially women, children, the poor and all those with various kinds of social and physical disabilities) access justice. This is an important study in the history of Kenya especially in regard to access to justice. It is conceived at a time when public trust in the court system is at its lowest ebb hence the consideration of the alternative. It is important to note that access to justice; especially affordable justice is a basic human right besides being a requirement for socio-economic development. The existence of the dual justice system is practiced in many parts of the world especially South Africa, South East Asia and India to resolve petty issues/offences and in that way decongest courts

The methodology employed in this study was; participant observation, interview guide and focus group discussions which were conducted in *Chepkongony, Chebewor, Kipkoiyo* and *Sitian* villages. The aim was to obtain collective views about the various aspects of

the *kokwet* e.g. its relevance, cost, functioning, access, affordability, fairness and convenience compared to the modern courts. The results of this study show that: - if the *kokwet* is formally recognized it might take away some of the advantages and strengths it enjoys like proximity, duration, cost, flexibility and fairness. Hence while the people would welcome its recognition by government, they still have fear that government involvement may take away their control of it.

Some of the recommendations made are that: -The *kokwet* should be recognized but not to function like a government department but as a community court to deal with petty offences. The *kokwet* rulings should be communicated to courts so that they automatically become enforceable by the formal system. There is need for all social groups to be represented in the *kokwet*. The government should compensate the *kokwet* members since it does work that are officially assigned to courts.

In conclusion the CJS is a functional system of access to justice, which enhances people's ability to be in charge of their justice without compromising quality, and there is evidence that it works successfully in other parts of the world.

ABBREVIATIONS AND ACRONYMS

CJS	- COMMUNITY JUSTICE SYSTEMS
DO	-DISTRICT OFFICER
IPRC	-ISIOLO PEACE AND RECONCILIATION COMMITTEE
KCE	- KIBERA COUNCIL OF ELDERS
KNCE	-KENYA NUBIAN COUNCIL OF ELDERS
NGO	-NON- GOVERNMENTAL ORGANISATION
PRSP	-POVERTY REDUCTION STRATEGY PAPER
U.N	-UNITED NATIONS
WPDC	-WAJIR PEACE AND DEVELOPMENT COMMITTEE

CHAPTER ONE: BACKGROUND AND PROBLEM STATEMENT

1.0 Background to the problem

Community Justice Systems (hereafter CJS) is rooted in the traditions of many communities. In Christian ideals it is drawn from the Sermon on the Mount Olive in which the prophet Moses clearly spelled out the procedures to be followed and in addition appointed elders to deal with emergent community problems in their midst. This was the first endorsement of CJS as we know it today. The same is expressed in Hebrew as *shalom* meaning "peace with justice." And in Islam as *salaam* meaning 'peace and justice'. Therefore CJS has a strong religious orientation and was widely practiced in the Middle East before the birth of Christ. However on Christianity and Islam spreading to Africa they functioned to discredit and delegitimize African CJS leading to the emergence of the European or Christian based courts and Islamic courts (Kadhi).

The CJS is carried out by council of elders especially in rural areas but today it is a common phenomenon being practiced in urban areas as well. Traditional courts have played a significant role in the administration of justice in the African community. To that extent, their character and importance vary greatly depending on a wide range of factors. Most of the CJS are ethnic centered but where inter-ethnic relations exist a combination acceptable to all is usually innovated as it is the case in cosmopolitan areas.

CJS refers typically to the courts of traditional elders but in some cases simply informal systems and seeks to find processes to compensate for the drastically clogged formal state system and legislation. The intention is for the cases to be processed quickly, with an emphasis on negotiated compromises. CJS are cheaper and faster than the modern courts, and closer to people's traditions and values. However, the main concern is that the traditional processes are very conservative and heavily patriarchal in character, form and functioning.

In Chile and South Africa, there exist Community courts. In Chile particularly the community court operates side by side with the formal court. Disputants are free to shop for the justice best suited to their needs. In South African townships and informal

settlements, there is no capacity yet within the state to implement and manage a formal system. Many communities are not yet ready for a formal system hence the preference for the informal structures familiar to them is still strong.

In Kenya, almost all communities have at one time practiced or still Community Justice Systems. Forms of handling disputes differ from one group to another. They may vary in combinations of family ,family and community forums or community forums alone. Matters usually settled revolve around all aspects of family or community life such as: family problems, marital conflicts, juvenile misconduct,violence,abusive behaviour,parental misconduct, interethnic feuds or property disputes.

Some of the selected community justice systems in Kenya that has been highlighted in this study is to be found among the Meru,Samburu,Pokot,Kikuyu , and Turkana.These includeWajir Peace and Development Committee(WPDC) in Wajir District. Isiolo Peace and Reconciliation Committee, which is an inter-ethnic committee of all groups living in Isiolo.Largely Somali,Samburu,Boran,Meru and Turkana.Among the Turkana the CJS that is identified is “*ngasikou ekitoe*”. This CJS resolves all types of offences/crimes/disputes that occur within their area.

Among the Samburu the CJS is *siamu*, or *enkigwana*.Among the Meru (in Meru North),the identified CJS is Njuri Ncheke. This Peace Initiative also subscribes to the Modogashe and Wamba Declarations.Among the Pokot, the identified CJS is *Poi Kokwo*.*Poi* means elders while *Kokwo* refers to a tree shade. Hence the elders who meet under a tree shade.

Among the *Kipsigis* the *kokwet* to date determine all laws and customs and decide all disciplines. Punishments are few since it is assumed laws are unbreakable. Obedience and discipline are maintained by the genius of the people and belief in the infallibility of the curse, which inevitably follows the breaking of tribal law and customs.

However there are instances when there is an area of conflict between CJS and modern justice based on State laws. For instance Government of Kenya Land Act (Cap 280) classifies all pastoral land under communal ownership whose use is governed by customary law. Customary law is not structured and all other laws supercede customary law in a court of law though evidence from it can be used in determining the outcome of a dispute.

1.1 Problem Statement

The aim of the study is to investigate the existence, persistence and functioning of Community Justice Systems in Kenya today in the context of access to justice. While the focus is on CJS in general, particular reference is made to the '*kokwet*' of the Kipsigis ethnic community in Southern Rift Highlands. The study is conceived around the theme of finding out the CJS actors, beneficiaries and remedies.

Further, the study focuses on procedures and enforcement mechanisms arrived at in the CJS processes. While the procedures are clearly known in modern courts and other organs of modern administration, the same cannot be said of the CJS. Since the pioneering works by Mwanzi (1976) about the Kipsigis and his general focus on its culture, special emphasis needs to be put on one cultural outfit of the Kipsigis-the '*kokwet*' for a better understanding of its dynamics and persistence in the face of many modern challenges. The Gala system (Legesse, 1973)² of the Boran is well documented but the same cannot be said of the '*kokwet*'. This study is intended to find out the challenges faced by the '*kokwet*' in the modern times and how it has persisted in spite of the many challenges.

Of particular concern to this study is to find out how the marginalized groups of society (especially women, children, the poor and all those with various kinds of social and

¹ Mwanzi, H.A (1976) A History of the Kipsigis (1700-1940) Historical Texts, Nairobi

² Legesse, A. (1973) Gada: Three Approaches to the study of an African Society. Free Press. New York

physical disabilities) access justice besides the difficulties they encounter. It is common knowledge and no longer a subject of controversy that justice in the modern courts and administrative systems is more accessed and/or enjoyed by the affluent and often at great cost. This realization led to the government of Kenya instituting an investigation into the conduct of judges and magistrates in 2003. The investigation confirmed the people's complaints, long held suspicion and concerns that justice was for sale, and for big money. Justice was for the influential and the powerful in society.

There's a dearth of information about the conduct, and the expectations and cost in the CJS hence the aim of the study. There exist, a host of human rights instruments in the world to which Kenya is a signatory especially those touching on the basics e.g. the United Nations Bill of Human Rights (1948)³; The Universal Declaration of the Rights of the Child (2001)⁴, The Children's Act (2003)⁵. The aim of this study is therefore to find out the extent to which the CJS in general and *kokwet* in particular respect or conform to these human rights instruments.

The existence of the CJS and modern administration since the colonial period to the present has been an uneasy tension, sometimes resulting into declarations and directives aimed at curtailing the functioning of the CJS. Of particular concern is the fact that modern administrators have often viewed the CJS as irrelevant and run by ignorant and illiterate people who have no knowledge and/or ability to dispense justice. However, of late there appears to be a changing attitude especially in the face of legal reforms aimed at ensuring that all people have access to fair justice.

Besides, the justice and administrative system have been accused of many misdeeds besides sending too many people to jails. Today, Kenyan jails have far exceeded their capacity especially by petty offenders who could be best "imprisoned" in their natural environment. It is in the context of decongesting jails and courts that CJS is being looked at afresh as the avenue to addressing the problems of accessing justice in the modern courts. Therefore this study is focused on investigating the relationship, functioning and

³ United Nations Bill of Human Rights (1948)

⁴ The Universal Declaration of the Rights of the Child (2001)

⁵ The Children's Act (2003)

opinion of the modern system versus the CJS. Is the relationship conflictual, suspicious or collaborative? The relationship of the CJS and modern justice system is best captured by Bromley(1991)⁶ as follows:

“First rapacious Kings and Princesses, then alien colonial and imperial administrators, and finally often inept national governments have conspired to subvert or to destroy regimes at the local level.”

In the Poverty Reduction Strategy Paper (2001-2004)⁷ The Government of Kenya Recognized reform of the administration of Justice as critical in the fight against poverty. High costs and lack of affordable legal services were identified as critical factors in enhancing poverty.

1.2 Research Questions

1. What is the Role of Women in CJS?
2. What is the opinion of modern administrators in as far as CJS is concerned?
3. Does the CJS need some strengthening and if so in what aspects, and how?
4. What difficulties does the CJS face in the modern times?
5. How does the CJS arrive at compensation and how do they enforce their awards?
6. What is the opinion of the legal fraternity of the CJS?
7. What is the opinion of the youth about it?

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1.3 Broad Objective of the Study

To investigate the existence, persistence and functioning of Community Justice Systems (CJS) in Kenya today in the context of access to justice for all.

1.3.1 Specific Objectives of the study

1. To identify the procedures followed by the aggrieved parties in the CJS.
2. To find out the opinions /perceptions of the modern administrators, legal fraternity about the functioning/relevance of the CJS

⁶ Bromley, D.W. (1991) Environment and Economy: Property and Public Policy. Blackwell. Oxford.

⁷ Poverty Reduction Strategy Paper (2001-2004)

3. To find out the areas in which the CJS and the modern system collaborate to enhance access to justice by many.

4. To investigate the perceptions of the marginalized groups(women and youth) of society about the CJS.

1.4 Scope of the Study

Generally this study is national and international in outlook since the researcher has reviewed literature on studies conducted in Kenya and other parts of the world especially in Uganda, South Africa, East Timor, USA and India. Some of these are: Mutsotso and Ocharo;(2003)⁸; Mburugu and Mohammed, (2001,2002)⁹; Rosiers(2001)¹⁰;Tshehla,(2001)¹¹;Bromley,(1991)¹²;Gusmao,(2003)¹³ and Somjee(n.d)¹⁴ and Pravis (1997)¹⁵ among others. The literature review served to conceptualize the study but it will be limited in focus to the Kokwet of the Kipsigis ethnic community in

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⁹ Mburugu, K.and Mohammed. (2001)Customary Institutions of conflict management among pastoralist communities in Kenya: The case of the Turkana, Borana and Somali communities. Oxfam G.B.Nairobi.

Mburugu, K.and Mohammed. (2002) Enhancing Better Natural Resource use to prevent conflict among pastoralist communities in Kenya. Oxfam GB- Nairobi.

¹⁰ Rosiers,N.(2001) Restorative Justice: Its promises, Its challenges and Its place in a Democratic Society. Ottawa Ontario.

¹¹ Tshehla, B.J.(2001) Non –State Ordering in the Post apartheid South Africa. A study of some structures of non –state ordering the Western Cape Province. Master of Laws of dissertation. Department of Criminal Justice. Institute of Criminology University of Cape Town,South Africa.

¹² Bromley, D.W. (1991) Environment and Economy: Property and Public Policy.Blackwell.Oxford.

Kericho district. The Study is intended to establish the nature and functioning of the *kokwet* in the face of many aspect of modernity especially the over dominant administrative and legal system. The study shall find out how justice is dispensed, procedures, remedies, enforcement mechanisms, rights of the marginalized sections of society and perception of modern administrators and legal fraternity about the functioning of the *kokwet* in particular and other CJS's in general. In this context, the perceptions of the CJS beneficiaries and its critics will be sought after.

1.5 Justification

This is an important study in the history of Kenya especially in regard to access to justice. It is conceived at a time when public trust in the court system is at its lowest ebb hence the consideration of the alternative. It is important to note that access to justice; especially affordable justice is a basic human right besides being a requirement for socio-economic development. A healthy justice system is important in order for people to actively participate in the development of their country. This study is therefore long overdue. Poverty is one of the challenges to the achievement of sustainable development in Kenya. The PRSP (2001-2004) identified inaccess to justice as one of the impediments to poverty reduction. Having been conceived at that high level this study intends to find out the possibility of alternative justice system and its contribution to poverty reduction.

The current disenchantment with the court and prison systems is a reflection of a problem of inaccess to justice or a miscarriage of the same. The present legal and prison reforms, and the urgent need to rid prisons and police cells with petty offenders attests to the fact that there is something not socially functional and in need of urgent redress. In other countries especially South Africa, East Timor and India, CJS is a recognized alternative. The study therefore intends to find out the extent to which this noble idea and practice could be applicable in Kenya.

CHAPTER 2. LITERATURE REVIEW

2.0 The Kipsigis of the Southern Rift Valley Highlands

The Kipsigis are the largest tribe of the Kalenjin Nilo-Hamitic group. They are a rural population in Southwestern Kenya. The recent history of the Kipsigis is merely from the outcome of ordinary conversations with old men. The Kipsigis settled in East Africa's Rift Valley and in the forests of the neighboring escarpments during the first millennium after Christ. They are found in the Southern Rift Valley escarpment of Kenya. The Kipsigis clusters of peoples of today are descendants of migrants from the Nile River area of the Sudan or the Western Ethiopian highlands. One of their myths says they came originally from Misri, a name for Egypt. This name is common in the traditions of many peoples, including some Bantu peoples in East Africa.

The ancestors of the Kalenjin were established in approximately their current areas by about A.D. 500. The Kalenjin are called Highland Nilotes because they live in the Highlands of the Rift Valley and are related to the people in the Nile area of Sudan and Uganda. The Kalenjin are sometimes considered as a tribe made up of many clans. The different clans are the Nandi, Terik, Tugen, Keiyo, Marakwet, Pokot, Sabaot and the Kipsigis.

The Kalenjin arrived in Kenya from the Nile River, possibly the Blue Nile, as it appears they came into Kenya from the Ethiopian highlands. The Kalenjin are related to the Datooga in north central Tanzania, the southernmost group of the Highland Nilotes migration. The Kalenjin are agro-pastoralists. They grow millet, maize and now tea and sorghum. Traditionally Kalenjins built round homes of sticks and mud plaster, with pointed thatch roofs with a pole out the center. Nowadays homes are commonly wood and stone with modern facilities, though traditional homes are still common as well.

The children of Kalenjin were taught to respect elders. Even now respect is very important in the Kalenjin culture. Manners are important and men are the head of the household. Girls were taught to kneel in front of men and weren't allowed to speak to men until they have been circumcised. Girls were taught how to make gourds and pots for carrying water. They learned to carry firewood and look for wild vegetables. Boys were taught to care for the cattle and the boma. Boys were not allowed to sleep in the same house with their mother after the age of 5 years.

The Kalenjin worship the sun. The word for god and sun are one and the same: *Asiis*. This is the name of an ancient Egyptian (Cushite) god. They would go to the mountain and worship at 5:00 a.m. and pray until the sun would rise. They worshipped the sun because it gave life. The Kalenjin are very responsive to the Gospel and are very religious people, traditionally monotheistic.

According to Taita Towett (1960)¹⁶, '*Kiruogik*' is a council of elders and one became a member by virtue of his reputation for strength of character, justice, wisdom and power of oratory. The '*kiruogik*' means, discuss, take counsel.; Their duties are to , 'arrange, settle, adjudicate' or give their counsel only when they are asked. *Kiruogik* is equivalent to a lawyer. They took lead in discussions. Decisions made were absolutely binding. They have no other authority than the respect accorded voluntarily to them by public opinion, which, in its turn, sees that their pronouncements are upheld. The judgment called '*kimagutit*' is binding on both parties. There is a silent agreement that laws are unbreakable. The laws of the Kipsigis are to them like the laws of nature, which have developed gradually with the requirements of the people and have not been laid down as a code by some tribal authority. Anyone who breaks one of laws is said to '*sogorge*', or do something unnatural.

¹⁶ Towett, Taita, (1960) The Kipsigis, East African Literature Bureau, Nairobi.

In the history of the Kipsigis, Mwanzi, (1976)¹⁷ reported that there existed a special council of elders to judge and declare what to do if any of the social rules were broken. Kipkorir (1978)¹⁸, says that the Kipsigis society was governed by a set of orders. There were taboos and proscriptions, which governed individual and community behaviour. They were binding. All important matters whether private, family, clan, were dealt with at 'kok'/'kokwet' which is an institution equivalent to the people's court. It is a local group of neighbors who interact on a daily basis, share common responsibilities in settling disputes. Examples of offences dealt with by 'kok' or 'kokwet' are a bad debt, marriage disputes, etc.

2.1 Colonialism and its impact on CJS

British colonialism in Kenya introduced a legal pluralism weighted in favor of English statutes and common law but devalued and delegitimized local institutions of dispute resolution. Bromley, (1991)¹⁹ succinctly summarizes this as follows:

"First rapacious kings and princesses, then alien colonial and imperial administrators, and finally often inept national governments have conspired to subvert or to destroy regimes at the local level."

Despite independence, few if any, official attempts have been made to reverse the trend for desegregation of rights in the non-formal legal system. Legal empowerment of Kenyans has not been a process and goal associated with state officials. In fact the independent Kenya government has attempted to be represented at all levels of society particularly in the appointment of chiefs at the local level often in total

¹⁷ Mwanzi, H.A (1976) A History of the Kipsigis (1700-1940) Historical Texts, Nairobi

¹⁸ Kipkorir Benjamin, (1978) A people of the Rift Valley, Warlop, Hampshire.

¹⁹ Bromley, D.W. (1991) Environment and Economy: Property and Public Policy. Blackwell. Oxford.

disregard to existing informal structures. In this regard rule of law has been undermined. Social bifurcation has remained important for political repression and governance on the basis of tribal coalitions and exclusion. Today governance is even more acutely exclusionary, and community resentments have fuelled many inter and intra community conflicts and reprisals. Communities, groups and individuals are frequently denied access to justice in the mainstream legal system, and have consequently found themselves adopting a combination of traditional and/or community justice systems and elements of the formal legal system, particularly in the form of coercive and administrative element of formal legal system. This is particularly common in rural areas and as well in low socio-economic urban areas where the use of the formal system to resolve disputes, and to seek representation in administrative procedures, and to seek recourse in formal systems is ineffectual and many times inaccessible in many ways. This inaccessibility is attributed to lack of access to formal legal skills or services, legal illiteracy, cost aspects, most of which are attributed to poverty.

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Community (and traditional) justice post elaborate mechanisms, practices and procedures including reconciliation, compensation, punishment, and mediation. They emphasize collective good but not individual appeasement. Some frequently come into conflict with the limitations imposed by formal legal systems especially in the prohibitions of discrimination against women and children as it relates to family and customary law provisions and in issues relating to access and freedom of association.

In most rural and urban poor communities judicial services cannot be reached because of various barriers-geographical, economic and intellectual. In some areas, the presence of formal legal systems is represented in varying ways by NGO in legal and human rights work. Yet the impact of NGO in addressing inaccessibility to formal legal resources is only modest in enabling target groups to acquire knowledge. Hence NGO need to use additional grassroots resources by co-opting existing structures and boosting their capacity to deal with modern legal issues.

In the Poverty Reduction Strategy Paper (2001-2004), (PRSP) the Government of Kenya recognizes reform of the administration of justice as critical in the fight against poverty. High costs and lack of legal services are mentioned as principal factoring poverty reduction. Yet there is a dearth of substantive information on CJS that can enrich the procedural, substantive and administrative reforms in the legal sector to address the aforementioned issues. Formal understanding of community rights and traditional justice is very limited and in essence requires raising awareness and understanding. The Judiciary has for instance a limited capacity to deal with conflicts over land (e.g. land rights), or against Female Circumcision issues. Hence the value of community approaches to development of a formal legal system has been neglected. In fact the Kenya government does not even have a policy statement on it. The inaccessibility of formal justice to all communities and rural populations in particular is generally a direct result of the devaluation of community justice systems of dispute resolution, while the formal system has failed to take root. This has translated itself into an agent of poverty, and a legal system that many Kenyans do not identify themselves with. In order for many Kenyans to effectively access justice and legal protection, and in order for the disadvantaged sections of the population to have control over their lives, a practical strategy today is to institutionalize community justice systems. In countries like South Africa, India, Zimbabwe, Zambia, New Zealand, Timor and Canada CJS processes are now increasingly applicable in dispute resolution within the formal legal systems. Therefore improving the skills of determination panels in CJS is necessary in order to secure common legal standards that protect human rights for all. The CJS are legitimate, and in some areas, the only available recourse for access to justice. State actors lack a substantive understanding of CJS or interest in acquiring critical awareness about rights and actions under the law in CJS. Hence little is expected of institutional reformers without this critical consciousness.

This study recommended institutional and procedural reforms and changes for legal empowerment for all people. Traditional and/or community case management need to ventilate modern legal practice. In principle, there is a dual justice system in Kenya, but not acknowledged. However, this native and people oriented system has gradually been

advantages can be enhanced and disadvantages minimized. It has been convincingly argued that traditional/informal/community justice systems overcome the principal obstacles, which deny access to formal justice systems to many. Practically, informal systems are quick, carried out within walking distance, carried out in local languages with procedures that are understood by all and enforced by people who are socially important to disputants.

2.3 The duality of the Justice System

In many contemporary communities, a dual justice system exists. In the American case, one system is based on the American paradigm of justice and the other on the indigenous paradigm. The American paradigm has its roots in the world view of Europeans and is based on a retributive philosophy that is hierarchized, adversarial, punitive and guided by codified laws and written rules, procedures and guidelines. The vertical power structure is upward, with decision –making limited to a few. 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, in this case, 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 however offer a reduction in future crime or reparation to victims. The paradigm functions to declare winner and loser in a civil case. interaction between parties is minimized and remains hostile throughout.(<http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.html>)²¹

The indigenous justice paradigm is based on a holistic philosophy and the worldview of aboriginals inhabitants of North America. The system is guided by the unwritten customary laws, traditions and practices that are learnt primarily by example and through oral teachings of restorative and reparative justice and the principles of healing and living in harmony with all beings and with nature. Restorative principles refer to the mending process of renewal of damaged personal and communal relationships. The victim is the

²¹ <http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.html>

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focal point, the goal is to heal and renew the victim's physical, emotional, mental and spiritual well being. It also involves deliberate acts by the offender to regain dignity and trust, and to return to a healthy physical, emotional, mental and spiritual state. These are necessary for the offender and victim to save face and to restore personal and communal harmony. Reparative principles refer to the process of making things right for oneself and those affected by the offenders' behaviour. To repair relationships, it is essential for the offender to make amends through apology, asking forgiveness, making restitution and engaging in acts that demonstrate sincerity to make things right. The communal aspect allow for offence to be viewed as a natural human error that requires corrective intervention by families and elders. Hence the offender remains an integral part of the community because of their important role in defining the boundaries of appropriate and inappropriate behavior and the consequences for the same. The indigenous paradigm involves a spiritual realm through prayer throughout its processes. Restoring spirituality and cleansing one's soul are essential to the healing process for all those involved in the conflict. In the indigenous approach, the problem is handled in entirety. Issues are not fragmented nor are the process compartmentalized into stages. These states hinder the resolution process for victims and offender's wider kin group hence there is a wider sharing of blame or guilt. The offender as well as the kin members is held accountable and responsible for correcting behavior and repairing relationships. (<http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.htm>²²).

In the American Indian case, forms for handling disputes differ from tribe to tribe which may vary in combinations of family, family and community forums, traditional courts, quasi-modern courts and modern tribal courts. Family elders or community leaders facilitate family forums such as family gatherings and talking circles. Matters usually revolve around family problems, marital conflicts, juvenile misconduct, violence or abusive behavior, parental misconduct or property disputes. Individuals are summoned to these gatherings following traditional protocols. For example in Pueblo communities the gathering is convened by the aggrieved person's family, which must personally notify the accused and his/her family of the time and place of the gathering. Elders are selected as

²² <http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.htm>

spokespersons for opening and closing the meetings with prayers. In the meeting each side has the opportunity to speak. The family may assist in conveying the victims' complaints. If the victim is young or vulnerable the family members directly convey the case. A spokesperson may be designed to speak on behalf of the accused particularly if the accused is juvenile or when the circumstances prevent the accused from speaking. Offender compliance is obligatory and monitored by the families involved. Community forums require more formal protocols but must draw on the families' willingness to discuss the issues. Tribal officials or representatives mediate these forums. Some tribes have Citizen Boards that serve as peacemakers or facilitators. When necessary a personal escort to the gathering place may be provided by tribal officials. In some communities, notice may be by mail. Tribal facilitators act as facilitators and participate in the resolution making process with the offender and victim and their families prayers are said at beginning and at closure.

2.4 The Pueblo Communities

Traditional courts incorporate some forms of modern judicial practices to handle criminal, civil, traffic and juvenile matters but the process is similar to community forums. These courts exist in communities that retained an indigenous government structure such as in the South West Pueblo. Matters are initiated through written criminal or civil complaints or petitions. Relatives accompany defendants to the hearings. Generally, anyone with a legitimate interest in the case is allowed to participate from arraignment through completion. Heads of tribal government preside and are guided by customary laws and sanctions. In some cases, written criminal codes with prescribed sanctions may be used. Offender compliance is mandated and monitored by the tribal officials with assistance from families. Non-compliance by offenders may result in more punitive sanctions such as arrest and confinement. (<http://www.ojp.usdoj.gov/nij/rest-just/ch 1/indigenous.htm>)²³.

²³ <http://www.ojp.usdoj.gov/nij/rest-just/ch 1/indigenous.htm>

Quasi –modern tribal courts are based on the Anglo-American legal model. The courts handle criminal, civil, traffic, domestic relations and juvenile matters. Written codes, rules procedures and guidelines are used and lay judges preside. Some tribes limit the types of cases handled by these courts. For instance land disputes are handled in several Pueblo communities by family and community forums. Like traditional courts, non-compliance by offenders may result in more punitive sanctions such as arrest and confinement. Some quasi-modern and modern courts incorporate indigenous justice methods as an alternative resolution process for juvenile delinquency, child custody, victim-offender cases and civil matters. Some programmes are court-annexed such as the Alternatives for First Time Youth Offenders Programme sponsored by the Laguna Pueblo tribal court in New Mexico. Under this programme juvenile offenders are referred to the village officers, who convene a community forum. Recommendations for resolving the matters may be court-ordered or the village officers may handle the resolution informally. This joint effort by the court and village officers allows them to address the problem at the local village level and to intervene early to prevent further delinquency.

Common terms or references to the law of indigenous societies include: customary law, indigenous law, native law, tribal law and community law. All refer to the same thing i.e. informal law. Customary law is derived from custom. Custom in this sense means a long-established practice that has acquired the force of law by common adoption or acquiescence and it does not vary. Tribal law is based on the values, mores and norms of an ethnic community and expressed in its customs, traditions and practices. For many tribes in the Northwest coast such as the Yurok, customary laws dictate the areas where families can conduct their fishing, hunting and gathering. These areas are passed from one generation to the next. When someone else fishes in another family's area it is considered an affront to the entire family. By custom the offended family convenes a family forum as the proper way to handle the matter and to request compensation which may be in form of fish, fishing equipment, feathers, hides, beadwork, traditional clothing or other agreeable forms of payment.

Among several Pueblo communities, it is customary for discipline to be administered by the fiscal, who is responsible for maintaining the peace and overseeing the welfare of children and youth. It is common for parents to summon the fiscal when their children are unruly or misbehaving. But when parental misconduct occurs such as physical and sexual abuse or neglect, the parents and extended family convene through the leadership of an elder to address the matter. In a minor case of physical abuse or neglect, the family forum is used. In all settings, those accused of wrongdoing are required to give a verbal account of their involvement in an incident, whether or not they admit to the accusations. This verbal account is considered crucial in discovering the underlying factors precipitating the problem. In all cases parents and family members must attend the sessions. Sometimes parents may be admonished for not providing proper discipline and supervision for their children. Relatives may be criticized for allowing a son or brother to abuse his wife or children. Face to face exchange of apology and forgiveness empowers victims to confront their offenders and convey their pain and anguish. Offenders are forced to be accountable for their behaviour, to face the people who they have hurt, to explain themselves, to ask forgiveness and to take full responsibility for making amends. Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing.

The restorative aspect frequently involves the use of ritual for the offenders to cleanse the spirit and soul of the bad forces that cause the offender to behave offensively. Ceremonial purifications and other methods are used to begin the healing and cleansing process necessary for the victim, the offender, and their families to regain mental, spiritual, an emotional well-being and restore family and communal harmony. The agreements reached in family and communities are binding. Participants are compelled to comply through the same interlocking obligations established in the individual and community relationships. Compliance and enforcement are important aspects of indigenous systems because there is little coercion. However, accepting punishment does not guarantee that an offender will be accountable therefore it is essential that the offender(s) perform outward acts to demonstrate their responsibility

for correcting behavior. Equally important is for punitive sanctions to be decided and applied by individuals who were affected by the offenders' behavior.

Historically, there is little evidence to penal systems in the informal justice systems. This fact remains today, although there are suggestions about the need for secure confinement facilities to address serious and violent crimes. Many customary sanctions include: public ridicule, public shaming, whipping, temporary and permanent banishment, withdrawal of citizenship right, financial and labor restitution and community service. Other temporarily or permanently banish individuals who commit serious crimes. Among the warm Springs in Oregon, it is customary to refer lawbreakers to the "whipman" who may whip a person for misconduct In the Laguna, Alternatives for First Time Youth Offenders programme, community service is extensively used.<http://www.ojp.usdoj.gov/nij/rest-just/chi 1/ indigenous.htm>)²⁴.

President Xanana Gusmao (2003) while addressing a conference in Dili remarked that whereas contemporary written laws warrant a permanent and global concept of values, traditional laws lack residue in their expression because they are unwritten and may change according to the narrator's interpretation, although still maintaining a dynamic of its own. Traditional chiefs acting as the authority usually enforce that traditional justice, and also by elders whose experience prevails as the keepers of the word. Elders work together with the "*lia-nain*" who are usually the custodians of the "*lulik*"(all that is sacred) or have some links to it. This arrangement in Timorese society derives from the need to link that which is real to that which is not in order to accord moral credibility to whichever solution is adopted.<http://www.asiafoundation.org/news/news-62703.html>)²⁵.

Among the Timorese when there is a dispute, the injured person/partly presents the complaint to the hamlet chief. If the disputing parties are from the same hamlet, the chiefs, the elders and the "*lia-nains*" will try to resolve the problem by calling together

²⁴ <http://www.ojp.usdoj.gov/nij/rest-just/chi 1/ indigenous.htm>

²⁵ <http://www.asiafoundation.org/news/news-62703.html>

both parties involved. But if one of the parties is from a different hamlet within the same village the complainant will be presented to the village chief. If it is between people from different villages, the chief of the village of the plaintiff will inform the village chief of the accused party and the “*lia-nains*” will meet to seek a solution. If a solution cannot be found, the issue will rise to the “*chefedopo*” i.e. chief of the next level of social and administrative organization.

In this society the “envelope” culture does not exist but there are lobbies to impress opinions though promises of payment in kind to agents of justice often in amounts, which are much higher than what is in dispute. In this case, the issue at stake is not to loose the case. It is common practice for plaintiffs to provide food to those acting on behalf of justice since they are seeking their assistance. Once resolved it is common for the winning party to give monetary reward to the agents of justice. There are no defense lawyers but testimonies of witnesses are deemed to be of great importance. Facts are presented between both parties at an assembly and all are free to contribute. Most of the time, this method positively influences the agents of justice leading to an impartial decision. In cases where land or property is seized, the men of justice will travel to the said land to verify the validity of the complaint or event. There is no common pattern in the sentencing or punishment because there were no prisons; alternative was community work either in the village or in the house of the “*liurai*” (traditional leader). The most often used solution is indemnity and the amount varies according to the gravity of the case and taking into account the means of the offender. (<http://www.asiafoundation.org/news/news-62703.html>)²⁶.

Traditional justice has a very positive trait. The “*badame*” is literally forgiveness or reconciliation. The spirit of appeasement underlies the “*badame*”; hence the parties will not drag on when a solution is agreed on the problem into the future. To accomplish “*badame*”, it is not enough for the agents of justice to rule a sentence and all comply with it instead the sentence is put to the offender who might deem it too harsh and in such cases; dialogue is established between the parties until agreement is reached. Both sides

²⁶ <http://www.asiafoundation.org/news/news-62703.html>

accept voluntarily to make the commitment. Informal justice has the advantage of reminding people of their blood ties by evolving their common family tree. It solves existing problems but also has the ability to prevent, to focus the attention and to bring closer people who have chosen to break away from each other. It is more or less the custodian of the “memory archives” on the legitimacy of acquired or inherited property. It also recognizes the means of each party. Notwithstanding the benefits it is important to clearly define the limits to which traditional justice must comply with and thus avoid trampling on the spirit of the law of a country or stepping on human rights. It will also be possible to establish the level of disputes to be handled at village level by the traditional justice system.

2.5.0 SELECTED COMMUNITY JUSTICE SYSTEMS IN KENYA

2.5.1 Wajir Peace and Development Committee(WPDC) in Wajir District.(WPDC,2004)

This is a composite body made up of various parts-Women for Peace, Youth, Religious leaders, District Security Committee, NGO representatives and leaders and Elders for peace (Al Fatah). The Al Fatah is the one responsible for dispensing peace and resolving disputes. It is a male outfit only. It was formed in 1991, initially as a peace committee, a role it plays to the present besides settling other disputes. All the Somali clans are proportionally represented. WPDC was created in 1991 after the fierce inter-clan conflicts. It was formed to restore peace, law and order in the district on realization that the government had been unable to contain the situation. WPDC is the leading dispenser of justice and conflict resolution institution in the district that wears both formal and informal clothes. Based on the respect and fairness of Al Fatah in its decisions, once a ruling has been made, the concerned party fails to honor the ruling; the council reports the matter to the police who come in to enforce. The council of elders has no powers of enforcing their decisions. In a dispute between two clans, police will come in to confiscate the livestock of the offending clan until it makes the payments as passed by the Al-Fatah. In most cases though, payments are made on time and as required since the community has confidence in the council due to its fair and considerate decisions.

2.5.2 How different crimes/disputes are resolved

2.5.2.1 Inter-clan conflict

Usually the offending clan is required to pay *saben* (an apology) to the aggrieved one and this is in the form of livestock. Once it is accepted, it commits the two clans to dialogue and negotiation in resolving the dispute. If it is a dispute between two families, the Al-Fatah receives the *saben* on behalf of the offended family. Some of the *saben* is given back to the offender as a sign of good will. The *saben* initiates as a healing process to avoid bitter memories so that when the dispute is being resolved the two parties do so genuinely and in good faith as friends. The *saben* is then divided into two equal parts—one to the complainant and other to Al-Fatah.

2.5.2.2 Domestic disputes between men and women/family squabbles

Women report the dispute to their next of kin. The next of kin informs the council of elders who first investigate the matter. The two, husband and wife are summoned by the council of elders for the dispute to be discussed in the open. Based on their assessment, a decision is reached. If they fail to reach an agreeable decision to both, the matter is then referred to the Kadhi who resolves it on basis of Islamic law.

2.5.2.3 Murder

The police, if known, first arrest the murderer. The two clans meet and agree on the payments, minutes of the agreement are written and the court is asked to release the murderer. *Saben* is paid to the family of the deceased. This is resolved by Al-Fatah based on traditional law. If a man murders a fellow man, the murderer is fined 100 camels (or Kshs.500, 000). If the deceased is a woman, the fine is 50 camels. The clan of the murderer must attend the burial, pay a camel, sheet and coffin as well as meet all other funeral expenses. The whole clan collectively pays the fine though the murderer himself gives the highest contribution. The rationale behind this kind of punishment is that offenders should be allowed to lead normal lives as the reform and that the offender's family should not be made to suffer for his offence.

2.5.2.4 Inter-clan livestock theft

The matter is first reported to the Al Fatah by the offended clan and later on to the police. The Al-Fatah dispatches a team of elders to meet elders of the offending clan to notify them formally of the theft. Saben is then paid and shared. The elders of the offending clan take the initiative to return the stolen livestock to the offended clan at a time, place and date agreed upon. The agreement between them is recorded and a copy given to the police. On the day of handing over, the Government represented by the police, chief, Divisional Officer or District Commissioner attends only to witness the handover. It is only when the offending clan refuses to honor its commitment that the police are informed. They come in to confiscate livestock from the clan through communal punishment. The payment is twice the number of livestock stolen. This is meant to be a deterrent measure.

2.5.2.5 Rape

If the husband or parent of the raped woman reports the incident to the Al Fatah, the rapist identified and evidence incriminating him found uncontestable, the rapist's family pays saben as an apology. The rapist's family also pays for all other damages.e.g if dress was torn. Other women to ascertain that the rape indeed took place must check the rape victim. If the rape victim was a girl and who consequently conceived, the rapist will be forced to marry her. If the girl was a virgin the rapist will be fined 4 cows to compensate the girl and if it results into a pregnancy, the child is given to the rapist. The payment of 4 cows to the girl is equal to the amount or level of bride wealth paid in a normal marriage. Usually it is the father or the husband of the raped girl or woman respectively who receives the compensation. At conclusion of the case, the ruling is recorded and a copy given to the police or sometimes to the court.

2.5.2.6 Fines

Once passed by the Al -Fatah, the fine is collectively paid by the whole clan of the offender himself. Payment of fines is a collective responsibility, not an individual affair. Usually, fines must be paid within an agreed period of one week to one month.

Sometimes the payment time frame is determined by the seasons e.g. when it is a dry season, the period is longer. Determination of fines is based on the extent of the damage or injury inflicted on the complaining party hence it is a product of a careful process and not arbitrarily arrived at. The offending party is free to request Al-Fatah for additional time to be able to raise the fine. The system is therefore flexible, not static. Appeal is provided for all parties but it is a rare occurrence because the process of resolving conflicts, crimes or disputes is a transparent and fair one.

2.5.2.7 Cost

No payments are involved in reporting a dispute to Al-Fatah. The Al-Fatah never demands any payments to resolve disputes. It is a voluntary service to the community. This has ensured that all people or parties are free to access justice without the fear of expenses. The lack of payments has also made it very difficult to induce the members in their assessment of disputes and final judgments. However, among the Meru, Njuri Njeke receives payment of Kshs.200/- for a case to be reported. The *Ngasikou ekitoe* of the Turkana demand between Kshs 200-300/- which is the most expensive so far reported. But among the Samburu, no costs are involved at all.

2.5.2.8 Time

There are no time delays in resolving a dispute. Once it is reported to the Al-Fatah it is resolved as soon as possible. More often than not, disputes are resolved the very day they are reported. Hardly do disputes stay unresolved for more than two weeks however complicated they may be. A similar situation is to be found among the Meru, Samburu, Pokot and Turkana. Hence the Community Justice Systems have the reputation of being fast in dispensing justice.

2.5.2.9 Access

There are no limits in reporting a dispute. All people: men, women, youth, the disabled and children are free to report their cases to the Al-Fatah without fear. There are no

conditions attached to it. People from all walks of life have access to justice and it is usually in good time. People get fair hearings with no bias because all disputes are listened to and determined in a group context based on consensus. Many times women cases are prioritized over men because they recognize that women have many responsibilities to attend to. This is common among the Turkana, Somali, Meru and Kikuyu CJS's.

2.6 Isiolo Peace and Reconciliation Committee

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In Isiolo District there exists the Isiolo Peace and Reconciliation Committee whose membership is both male and female. It is an inter-ethnic committee of all groups living in Isiolo. Largely Somali, Samburu, Boran, Meru and Turkana. It was formed in October 2000 after the inter-ethnic conflicts of that year, with facilitation from Oxfam. In 2001 a new committee was constituted which now incorporated the District Security Committee. The committee agreed that whenever there was conflict, its members go to the affected area unarmed to settle the issue. It works with a constitution, which stipulates that any murder of a man is compensated for by 200 cows; a woman 50 cows and any injury inflicted on a person 15 cows. They also agreed that five cows compensate for any stolen cow. All communities apart from the Samburu, who, because of their culture; found it difficult to sign, signed the MOU. To them, livestock rustling is a normal part of their culture; therefore, the new ways of conflict resolution and crime prevention are in conflict with Samburu culture. Because of that conflict, the Samburu have not found reason to repay 4,250 cows, 500 camels, 740 goats and not compensated for 28 murders so far. The MOU also developed and agreed on the dedha system, which sets the procedure to be followed by any community here when requesting for pasture. It requires that the community in need send its elders to meet the elders of the other community. So far the system works save for the Samburu dimension. The IPRC is a meeting points for all the cultures bins the district. All its members are elected at the grassroots and they are people of impeccable integrity in the communities they represent.

In order for a dispute to be resolved by the (IPRC), all the officials and members from the diverse ethnic communities must be present. The exact number of people to be present is

not clear but it must be a reasonable group. Based on practice, it is usually a large group. The (IPRC) is not an everyday institution, it only meets when summoned or when an issue to deliberate on arises.

2.7 Turkana's "ngasikou ekitoe"

Among the Turkana the CJS that is identified is "ngasikou ekitoe" which is exclusively of male membership. This CJS resolves all types of offences/crimes/disputes that occur within their area. Today, however some women are to be allowed to attend its sessions if the issue(s) being discussed is/are important to them, in such circumstances, women only address the *ngasikou* while seated and can never arise to address the *ngasikou*. The CJS meets only when summoned or when a dispute has been reported and awaiting deliberation. It discusses issues as they are reported hence not possible to tell the number of disputes settled within a specific period. *Ngasikou* means council of elders; *ekitoe* (office) hence the elders council that meets under a tree shade. Crimes usually resolved include: rape (*atikonor*), premarital pregnancy, livestock theft, domestic violence and murder

Reporting procedure among the Turkana depends on the gravity of the matter. Serious cases are first reported to police, and then withdrawn to be solved informally. The verdict reached is again reported to the police. Reporting a dispute /crime to the elders is free.

2.7.1 Cost

Once a date has been set and the issue deliberated on and finalized, elders then request some compensation. Usually it is in form of a sheep, goat or cow or Kshs.200-300 or even more depending on ability and willingness to pay. The people here that the cost is affordable.

2.7.2 Enforcement mechanism

Once a decision has been reached, it is incumbent upon the fined person to pay as soon as possible and as demanded. Traditionally, the Turkana would curse the person if he/she goes against their decisions. Hence for fear of experiencing the wrath of the curse people willingly and promptly pay as demanded.

2.8 Samburu *siamu/enkigwana*

Among the Samburu the CJS is *siamu*, or *enkigwana*. Men are the members, but the youth (morans) and women are excluded. *Siamu* and *enkigwana* resolve all the disputes or offences reported to it and passes punishments, which are enforced using traditional mechanisms. Each sub-clan elects prominent people, who are respected to be members of its decision-making organ. It has an elected chairman who presides over meetings. The *siamu* meets only when a dispute or an issue affecting the community has been reported. Issues are discussed as they are reported. It is not possible to measure its efficiency in terms of number of disputes settled within a specified period. The common crimes or disputes resolved include: murder, rape, livestock theft and domestic violence.

2.8.1 Enforcement

If the thief refuses to pay, the *siamu* is informed. The *siamu* then organizes to take the fine forcefully. If the thief has no livestock, it is taken as a debt, which must be paid in future. The fine is personal responsibility. Usually when the *siamu* is unable to resolve to conflict, the police is informed. The practice however has been that once a ruling has been made by the *siamu*, the payment is always made. Anybody who witnessed the theft, or was seen near the scene of crime, or was seen associating with the criminal is equally guilty and punishable.

2.8.2 Costs

There are no direct costs involved in reporting a dispute. It is only the people who live in the area where *siamu* is meeting who are expected to provide food. Neither are there any payments involved after the case has been decided. Therefore the fact that no payments are involved makes justice accessible to all people. Notwithstanding this, all the issues are resolved in the village, which is accessible again to all people.

2.8.3 Gender access

The *siamu*, notwithstanding its total male membership is accessible to all people. Disputes are not segregated but listened to in the order they were reported. There is no bias at all. Issues are openly discussed and conclusions arrived at by consensus. While it is common among all the groups so far reviewed in this study that women are not members of the respective CJS's, it is also clear that there is no form of gender discrimination. All people have equal rights to be heard. Even though, it is reported that Meru women complain most of the bias of Njuri Ncheke

2.8.4 Time

In terms of time, the *siamu* takes a short time to resolve conflicts. Usually most disputes are resolved the same day, it is only those, which are complicated or require many witnesses that may take a fairly long time but this hardly takes a month. Therefore justice is obtained as soon as possible.

2.9 Nchuri Ncheke of the Meru

Among the Meru (in Meru North), the identified CJS is Njuri Ncheke whose membership is restricted to married men only. To qualify to be a member, one must have undergone all the required rituals besides making all the prescribed payments. One takes an oath of secrecy before being exposed to the laws, procedures and conduct to be upheld all the time. The fear of the consequences of the curse, *uta*, is a strong enforcement mechanism. To report a case or dispute one is expected to pay kshs 200-500/= before it commences. In Rumuruti Township, the CJS is the Council of Elders, which is multi-ethnic. The members are the Kikuyu, Samburu and Turkana. Only men are members. The council is the lower level of the Laikipia Elders for Peace Initiative, which was formed following the intensification of inter-ethnic livestock theft. Initially it was as a security committee but it has subsequently started to resolve diverse disputes. This Peace Initiative also subscribes to the Modogashe and Wamba Declarations.

2.9.1 Procedures for reporting disputes/crimes

In all cases the issue is first reported to the Njuri Ncheke at the sub-location level. The Njuri Ncheke then sends one of its members to summon the accused

2.9.1.1 Domestic violence

In cases where a husband assaults a wife, the matter is first reported to close family members to try to effect a settlement. If it fails, it is then reported to the sub location level of Njuri Ncheke for settlement. In most cases, domestic violence is a minor offence that does not get to the level of the Njuri Ncheke. If it gets to the Njuri Ncheke, then the complainant and the accused each pays itundu which is between kshs.200-500/- or even material things like porridge. Each party pays an equal amount before their issue is determined. Witnesses can be called to give evidence and judgment done.

If one of the parties refuses to accept liability and maintains innocence, then both are asked to go for oath taking but on payment of a ram. Clan members must be present to accept their clan member to take an oath. The clan acceptance is important because if it turns out that their clan member was on the wrong then a curse will befall the whole family and the whole clan. Hence out of this fear of the unknown people always say the truth to avoid the curse which once said cannot be retracted. Whoever declines to take oath is taken to mean admission of liability and at that point a fine is imposed or other judgment arrived at. Fines or some other judgment must be observed otherwise the curse will befall one's family or clan. The consequences of the curse include mysterious deaths of family and /or clan members besides other unexplainable but dangerous episodes.

2.9.1.2. Sugar daddy (sex with minors)

If an old man has sex with a young girl, the fine is usually "thirty" which is translated to mean three types of payments i.e a bull, a ram and one pot of honey. If it's incest the fine is similarly "thirty" but if a boy rapes a girl with whom there is no relationship and the victim was a virgin, then the boy is forced to marry her. Should one refuse to marry then there is no claim to the child to be born out of the rape ordeal.

2.9.1.3 Land ownership

The two people present their disputes to the Njuri Ncheke. Both are then required to pay a ram each. The issue of land ownership is discussed and a decision arrived at. Usually the discussion involves a history of land ownership in the area before the verdict is reached. Throughout the discussion, each party takes a gichiario, which is an oath that one swears by to say the truth only or not to offend others. Alternatively, the disputes over land are solved in a different way. The two litigants are dressed in banana leaves and the one who claims ownership comes with a goat (nthenge ya gaciu) and a knife. This goat is carried on his shoulders and as the two move on the edges of the disputed plot, he cuts off parts of the goat while saying a prayer. This is done in broad daylight with the public in attendance. When the goat is finally dead the genuine owner of the land falls on his farm while the other runs away never to return to that farm again. It is assumed that if you claim men attend the shamba that is not legally yours you would suffer the way the goat suffered. the event only.

2.9.1.4 Murder

Njuri Ncheke discusses the murder and the murderer is fined. Usually the fine is 15 cows and five goats, which are paid in five installments. The elders of the Njuri Ncheke receive the fine. It is divided as follows: mother of the deceased three cows one goat and the rest shared among the clans and other dependents. After all the payment has been received, the clan of the offender provides another cow, which is slaughtered and shared by members of the two clans. The sharing of the meat is meant to signify sealing of payment and re-affirmation of good relations between the two clans.

2.9.1.5 Livestock theft

The livestock owner makes a report to the Njuri Ncheke on payment of kshs.300/-. The Njuri Ncheke makes the information public and urges whoever stole the livestock to own up. If nobody accepts, the Njuri Ncheke gives the complainant authority to issue a curse (uta). but given the fear of the curse, the offender always comes forward before the

curse is said. In such a case, the thief is ordered to repay the livestock stolen, pay all the cost incurred by the complainant but which must not be exaggerated. This way he is spared the curse. Today the agreement signed in 1989 at Nanyuki between Meru, Samburu, Boran, Turkana and Somali which states that every cow stolen is compensated for three cows is in force.

2.9.1.6 Enforcement

The curse is used as an enforcement mechanism. The fear of the curse befalling a family or clan and the elaborate procedures and practices involved make people to easily submit once a decision has been taken.

2.9.1.7 Cost

Every report made to the Njuri Ncheke is accompanied by payment of between Kshs.200-500/- which is used to fund its activities. For each reported case Kshs.50/- is paid to the mutunguri (the old man who is sent to summon the accused). However, it was indicated that failure to pay does not translate into ones case not being listened to and determined. There have been no cases where people failed to report because they did not have money. Notwithstanding that, it is clear that justice is relatively expensive in Meru North district. Without money you may not be able to access justice. The high poverty level and the fact that many women, children and other marginalized groups may not afford to pay the kshs .200-500/-, implies that they may not access justice.

2.9.1.8 Access

While it is true that women are free to take their problems to the Njuri Ncheke, the fact that they cannot approach it direct but through a male member denies them full access. When thenge is performed, women cannot witness, she does it thorough a male proxy of her choice. Children also do not have direct access to the Njuri Ncheke hence they have to channel their grievances through old men.

The costs of between kshs.200-500/- may be a hindrance to some people to access justice even though it was found out that nobody has failed to report just because of lack of money. Many people perceive the Njuri Ncheke with awe. it is a feared institution that makes people to avoid it as much as practically possible especially regarding the seriousness of the oath.

2.10 The *Kokwo* of the Pokot

Among the Pokot, the identified CJS is *Poi Kokwo*. *Poi* means elders while *Kokwo* refers to a tree shade. Hence the elders who meet under a tree shade. Membership is limited to men only. The *Poi Kokwo* resolves disputes as and when they are referred to it.

The identified CJS is *poi kokwo* , a council of elders who meet under shade. Membership to the council is limited to only those men above 50 years. Membership to the council is determined by one's reputation and standing in the community. The *poi kokwo* is the ultimate decision making organ and the dispenser of justice in the community. It is the reference point for the community. The *poi kokwo* does not formally meet daily to resolve disputes. It only meets when summoned to do so by its chairman and only when there is an issue to resolve or be informed about.

2.10.1 Procedures for reporting disputes/crimes

2.10.1.1 Domestic violence (wife beating)

When a man assaults his wife, usually she goes back to her parents. Subsequently her husband in the company of his close male relatives follow up to resolve the disputes with his in-laws. A meeting is convened during which the couple states their cases. Based on that, a decision is reached. If the husband is the guilty party, he is fined a female cow *mosor*. He is also warned against battering his wife and the two are finally re-united. It is upon him to the fine is paid immediately at his convenience. Alternatively the battered wife informs brothers-in-law together with her relatives to discuss the issue at her matrimonial home. In this case, if the man is repeatedly found guilty, he is caned in

public by three strong men and then forced to slaughter one of his cows. The numbers of strokes of the cane are countless. If the woman is found guilty she is only rebuked in public but not fined material things.

2.10.1.2 Murder

When a murder has been committed by a member of another clan, all members of the clan of the offender are informed. The elders of the two clans agree on a meeting place, which must be in the middle of a forest because the issue to be discussed is a bad one. The two clans do not talk directly to one another but through elders of another neutral clan who serve as intermediaries. The role of the neutral clan is to defuse tension between the two. The aim of the meeting is to discuss the compensation (*lapai*), which is paid for in terms of cows and goats but not sheep, donkey, camel or bull. The cows must be those without hornless.

The maximum fine or *lapai* is 200 cows/goats if the deceased was an unmarried man. A married man is compensated for with 150 cow/goats. An unmarried woman is compensated for by 100 cows/goats. The proportions of cows and goats are agreed to beforehand in the meeting as well as the period within which the *lapai* is to be paid.

Lapai is not paid instantly; it can be spread over a long period of time but it still remains deterrent.

During the negotiations, the clan to which they belong to produces a cow, which is slaughtered to feed the negotiators. The negotiation are held at night because murder is itself immoral. It becomes inevitable that *lapai* must be paid. If the clan of the murderer refuses to pay the fine as agreed and within the stipulated time, then the clan of the deceased forcefully takes *lapai*. The use of force involves taking as many cows/goats as they wish. They however, do this unarmed. They use sticks alone and the other clan is not supposed to prevent them from undertaking this duty otherwise it would turn bloody. In normal circumstances *lapai* is paid by the whole clan and not the immediate family alone.

2.10.1.3 Livestock theft

Once livestock has been stolen, the victim reports the theft to the *poi kowo*. If the thief is known, an elder of the *poi kowo* reports to his father who is then summoned to attend a *poi kokwo* meeting accompanied by his friends. The case is then stated and if it is proved right, the complainant is asked to state his demands. If his demands are high, the *poi kokwo* intervenes to make a reasonable compensation. The *poi kokwo* investigates the history of the thief and whether the stolen livestock was slaughtered or found alive. The level of cooperation with the elders determines the nature and level of the fine. If the thief is a habitual one, the fine is higher and stiffer. Usually the offender is asked to pay back the equivalent plus additions which may be determined depending on the nature of the case.

2.10.1.4 Rape

Rape judgement depends on the nature of the victim, if the rape victim is a girl; she reports it to her mother who then reports it to her father. The father reports this case to his sons and the closest *poi kokwo* members. The elders of the *poi kokwo* summons the rapist's father as the father of the rape victim dispatches his sons to arrest the rapist. Once arrested, his hands are tied and brought to the *poi kokwo*. The *poi kokwo* interrogates the rapist and if found guilty, he is caned in public. He is then forced to give in his pride-bull, which he sings for, spear it to death and skin it. Elders then pray for him to reform and be law abiding. In the whole process, neither the rape victim nor any woman is allowed to attend the ceremony and the victim is not at all directly compensated.

2.10.1.5 Enforcement

The threat of force is here used as an enforcement mechanism. Further the prize to pay for failing to comply is much greater hence people comply. The *poi kokwo* is made up of very respectable elders whose knowledge and skills are respected by all the people, hence the respect they have in the system functions to ensure that all decisions arrived at are implemented.

2.10.1.6 Cost

There is absolutely no financial implications involved in order to access justice. Those with disputes/grievances are free to report.

2.10.1.7 Access

All people irrespective of age, sex or social status are free to report their cases and be listened to. However, it is only that women, children and the youth are not permitted to attend *poi kokwo* sessions but this does not amount to denial of justice, even though it deprives them of the freedom of association and expression. Further, the inability to compensate a female rape victim not to listen to her story when determining the case implies denial of justice. Generally, all people have access to the institutions of justice. There is no prioritization of cases depending on age, sex or social status but all depends on first come first served basis.

2.10.1.8 Time

The *poi kokwo* takes a much shorter time of between 1 – 3 days at most to resolve disputes. Justice is never delayed hence justice is achieved.

2.10.1.9 Pokot women perspectives of the CJS

Pokot women feel that the CJS does not compensate women adequately. A good illustration is in the issue of property whereby women do not own property at all. Besides their own personal property, all property is usually at the disposal of her husband. Most misunderstanding and/or disputes between men and women are attributed to the woman. In terms of access to justice, women prefer the chief (formal system) because they get a fair hearing from him it.

2.11 Urban areas and CJS

In Nairobi (Kibera) there exists a multiplicity of CJS all modeled along ethnic and political parties supported by respective ethnic groups. In all of them save the Kenya Nubian Council of Elders, The Youth aligned to LDP,DP,Ford Kenya and KANU are the dispensers of Justice. The Langata Elders Council is known to use whipping as punishment. Therefore the CJS is not functional due to ethnic suspicion and rivalry. Consequently the people here prefer the formal system to access justice.

2.11 .1 Nairobi (Kibera and Mukuru)

Two sites Kibera and Mukuru slums were covered in this site. They fall in the Langata and Embakasi constituencies respectively. Majority of the people are the poor, unemployed Nairobi inhabitants whose access to government services and even justice is negated by many factors including inaccessibility to courts ignorance and cost.

2.11 .2 Kibera(Urban)

Many community justice systems were identified in Kibera, the most important of which are; Langata Elders Council (LEC) and Kenya Nubian Council of Elders (KNCE) and Kibera Council of Elders (KCE). Others are NARC, Ford Kenya and KANU youth groups.

2.11 .2.1 The Langata Elders Council

This council was started in the year 2002, just before the general elections and after the landlord-tenant rent violence of 2001. It was formed to stem the then anticipated politically motivated violence by the Luo and Nubian Youth. The Electoral Commission of Kenya (ECK) engineered its formation to control violence. Further the council's other objective was to promote peaceful co-existence between the diverse ethnic communities living in Kibera. Today this council has diversified to HIV/AIDS awareness and has been registered as a CBO. The Luo and Nubian elders initiated the formation of the LEC. To be a member one must be a resident of Kibera.

The council has three officials; Chairman, Secretary and Treasurer. It handles most disputes/crimes before they are reported to the formal system (chief). Those issues which could have by-passed them to the chief are referred back to them. The council has two committees; the development committee and the peace committee. The council “educates” the public every Sunday afternoon at Kamukunji and Bukhungu groups on the issues affecting the area.

Each village is headed by a village elder supported by six elders who assist him in resolving disputes. The village elder has a team of 8 years who are sent to investigate, summon and ensure that the parties to a dispute attend meetings. Any resistance is met by force. These are youth allied to political parties. There are so far 13 villages in Kibera along with 13 village elders.

The council meets every evening in its office to arbitrate and/or receive new cases and punish offenders as well. Corporal punishment is reported common here. Meetings usually start shortly after 5.00 p.m.

2.11.2.2 Procedures for reporting disputes/crimes

2. 11.2.3 Theft (burglary)

The victim reports to the village elder who then reports to the council. If the issue is serious the criminal is handed over to the police, but if not the criminal is summoned to the council of elders and his case deliberated and decided on. The offender is usually fined and given time within which to pay, he is also reprimanded and threatened with instant reporting to the police next time he repeats the offence. His movements are then monitored throughout the slum. Usually the Liberal Democratic Party (LDP) youth act as the enforcers of the council’s decisions. They also arrest the accused, beat him up before being handed over to the council of elders. Decisions are enforced on the bases of threats that the case may be reported to the police which is much more serious. Also the fear of youth as well as the threat of expulsion from the area works as an effective enforcement mechanism.

2. 11.2.4 Domestic Violence

In cases where a husband assaults his wife, it is the wife who reports to the village elder. The village elders then report the matter to the council, which summons the husband. Usually the youth are sent to ensure the parties to a dispute come for the meetings which usually take place in the evenings after work. The two parties state their cases. If the wife is found guilty, she is reprimanded and advised in the presence of her husband. But if the man is found guilty the woman is dismissed before they reprimand him. The policy of the council is not to condemn a man in the presence of the woman because this is likely to create disharmony in the family. But if assault continues after the warning for a third time, the issue is then straight away reported to the chief.

2. 11.2.5 Rent dispute

The case could be where a landlord has declined to receive rent. The aggrieved party reports the matter to the village elder who reports it to the council of elders. As a basis of solving the problem, it must be the rent, which was reduced by half. The council summons the landlord and tenant to a meeting during which each party presents its case. If the tenant is unable to pay them the council gives him a notice period within which to vacate the house. If the period lapses it is reported to the chief who summons him and refers the matter to the council again. But if it is inability to pay the tenant is asked to propose his payment plan to the council and landlord. But if the landlord refuses to reduce rent and yet it is the basis of the dispute, he/she is advised by the council to report the matter to the police straight away. All disputes are reported and determined in the evenings after work in the council's offices at Kamukunji.

2. 11.2.6 Cost

No money is paid on reporting a dispute but after the dispute has been resolved one can determine what to give the council, but this is not mandatory.

2. 11.2.7 Enforcement

The fear of being reported to the chief, police and/or court makes people implement or enforce what has been ruled. The formal system is feared because of the expenses, torture and confinement. The fear of these hence makes them conform.

2. 11.2.8 Access

All people have the freedom to report any dispute without any discrimination. Disputes are also determined on the basis of first come first served. However, the justice dispensing institution is solely a male outfit.

2. 11.2.9 Time

The informal system takes a much-shorter period to resolve. Many disputes are resolved the very day they are reported or day after.

2.12 Kibera : The Nubians

The Nubians are a migrant committee having originated from Sudan and settled in Kibera by the colonial government. They are one of the leading landlord communities in Kibera today. Their identified community justice system is the Kenya Nubian Council of Elders (KNCE) but whose specific committee dealing with justice is *Majalis Ashura*. The Council was formed two years ago with the following aims:

- To promote peace
- To improve the people's welfare
- To enhance the people's access to education
- To improve the people's health
- To improve business
- To enhance culture
- To protect the land

The disputes and reconciliation sub-committee of the larger Kenya Nubian Council of Elders receives, processes and arbitrates disputes before they are pushed over to the

court, chief of DO if they have defied settlement at this level. The sub-committee has ten members of whom some are imam leaders because of their knowledge of Islamic law. The ten members are all men chosen on the basis of knowledge of the area, issue commitment to the community and level of enlightenment. All members are 50 years old and above.

The Nubian community is a minority in Kibera and therefore very closely knit, intermarries closely and in one-way or the other all the other people are related. Because of this, most disputes between people or families tend to be solved at the family level for fear of embarrassing the community. In many cases neighbours and elders come in to resolve the disputes but there is strict adherence to Islamic law in determining disputes. Given the closeness of the community, common crimes like murder, assault, rape, burglary do not occur. In situations where disputes arise between a Nubian and a member of another community the formal system is preferred.

The (KNCE) usually meets whenever an issue affecting the community or the area arises. The council has over twenty elders.

2. 12.1 Procedure for reporting a dispute

In the case of a domestic dispute between husband and wife, all issues are referred to a *wakil* (a man) who was appointed by the community on a couple's wedding day. It is this person to whom all domestic disputes are reported whenever they occur. The *wakil* attempts a settlement before it gets out of proportion. If he does not resolve the issue then elders are informed. Elders attempt settlement at local level but if they fail to, the matter is referred to the court.

2. 12.2 Costs

No payments are involved when reporting a dispute or after it has been resolved. The closeness of the community does not in effect require payment before justice is accessed.

2.12.3 Access

All people irrespective of age, sex or social status have the freedom to have their disputes resolved. Their system has no costs involved to access justice unlike the formal one, which is expensive. Their system has no bias, lies or cunningness compared to the formal system, which thrives on them. Their system has a personal touch; it treats people as human beings but not as a statistic unlike the formal system, which is alienated from the people. It is modeled around their Islamic religion unlike the formal system in which religion has no place.

2.13 The institutions of elders and mediators

Community Justice Systems Institutions are based on the principles of reciprocity. Culture beliefs and values fundamental to parties in a dispute govern the extent of reciprocal behaviour. Hence the role of community justice systems in preventing disputes and managing them depends on two issues. The first is the degree to which these institutions are seen to be important in the cultural setting of the parties to a conflict. The other is the influence of external factors that supplement or even supplant the role played by these institutions. The fact that these institutions still exist and in some cases new ones formed imply that they play an important role today. This is however despite the many challenges posed by modern judicial mechanisms based on state laws. Infact some CJS of dispute resolution verge on being criminalized when viewed in the context of modern legal provisions in state laws. These institutions which to the present still play an important role in dispute or crime resolution are mainly the institutions of elders, the emissaries, lineage groups, family and even mediators.

The institution of elders in all the groups is the referral unit for any crime or dispute that cannot be solved at family level arrangements (Mburugu and Mohammed,2001)²⁷.In almost all the communities-Turkana,Pokot,Somali,Boran,Meru and Samburu save the Kikuyu, the institution of elders as a dispute managing authority feature at all levels of

²⁷ Mburugu, K.and Mohammed. (2001)Customary Institutions of conflict management among pastoralist communities in Kenya: The case of the Turkana, Borana and Somali communities. Oxfam G.B.Nairobi

social organization. The council of elders commands power to regulate interaction within and between groups as well as between individuals. It is endowed with supernatural power that makes its rulings mandatory and binding to all people.

The use of emissaries is important innovations in resolving or averting disputes. Emissaries perform quasi-diplomatic roles particularly during difficult situations to inform neighboring groups of an imminent dispute. They facilitate negotiation over grazing pasture and water between the stake holders. They are also used to prevent retaliation in cases of livestock theft and/or murder or assault. This is done with the understanding that the elders who sent the emissaries will arrange to compensate the aggrieved.

Mediators are an institution that is found in all communities but specifically pronounced among the Pokot and Somali. It is practiced at all levels of social organizations and in the context of cross-cultural issues it recognizes the meaning systems of the parties to a dispute. Therefore mediation is process –centered but not outcome centered. It is focused on the cultural sensitivity and peace building through consensus and trust building. Usually the mediator is not external to the socio-cultural setting, which he mediates. The attributes of a mediator include credibility, prestige, reputation and integrity.

2.14 The Maasai and Pokot Peace Concepts and Symbols

According to Sultan Somjee(n.d.) peace concepts and symbols are used in the process of reconciliation. The Maasai have the “Osotua” which denotes peace, relationship or a gift out of a relationship. The word is derived from the umbilical cord and symbolizes the first relationship between mother and child. One does not just the “Osotua” with a knife as it is done in hospitals today. A prayer is said first and grass tied on the head. The midwife raises up the knife three times while some grass is tied on the head before she cuts the umbilical cord to terminate the relationship. This ritual portrays the deep respect of life as well as the respect for the relationship.

Grass is another symbol used by the Maasai and some Kalenjin groups to demonstrate peace in war times and ethnic tensions. Whenever there is a fight and a maasai picks up

grass, the fighting stops because they believe they all come from one womb, one mother and one relationship. To the Kalenjin, grass denotes pasture and pasture is milk from cows. So grass is a life –sustaining element. The maasai word “Osutua” is also the word for beauty. They believe that where there is no beauty there is no peace. For the Pokot, the word is “pichio” which also means beauty. Beauty follows peace. Where there is peace there is beauty.

“Leketio” among the Pokot is a pregnancy belt, which supports pregnancy hence life. This belt is studded with cowrie shells. When the Pokot are fighting and a mother removes the pregnancy belt and puts it between the men, the fighting must stop. She does not need to be the biological mother for among the Pokot any mother is a mother for the whole community.

The Maasai, while making peace sit under a shade “oloip” of a particular tree. Before they sit, each one must drop all the weapons that he is carrying and then proceed under the tree to begin negotiations. When there has been a murder in the clan or within a group, the Maasai meet under a dead tree where there is no “oloip” because the matter under discussion is grave. (Sultan Somjee: <http://www.cecore.org/paper-pokot.html>)²⁸.

2.15 The Gada System

According to Legesse (1973)²⁹ Gada system is the central institution of the Boran while the hereditary Kallu is the ritual leader. In every period of eight years, “muda” ceremony is celebrated in honour of the Kallu. In every eight years again Aba Gada and Hayu are elected.

However, Legesse (1973:14) reports that the Kenya Boran compared to their Ethiopian counterparts, have in varying degrees abandoned their traditional way of life under the influence of Islam and colonial experience. Therefore Legesse’s writings are only truly representative of the Ethiopian Boran.

²⁸ sultan somjee: <http://www.cecore.org/paper-pokot.html>

²⁹ Legesse, A. (1973) *Gada: Three Approaches to the study of an African Society*. Free Press. New York

According to Hogg(1981)³⁰ the Boran of Isiolo are cut off from the north by the Somali and Rendille hostility. They are recent converts to Islam, and therefore no longer participate in the traditional Boran Gada Organization. While the Boran refer to themselves as one Boran,they differ sharply in ritual and social contexts.

The Kallu as ritual leader of the Boran is the senior-most in the kinship system. Only major conflicts between clans may be taken to him for adjudication. According to Legesse(1973),there are many Kallu office holders heading each moiety.Their principal power lies in the right to elect the political (Gada) leaders who govern the Boran for eight year periods. They come from a specific major lineage, in a specific clan in each moiety. The Kallu also functions as the head of a council of electors. This council retains the power to remove any “jallaba” who fails to meet his ritual –political responsibilities.

This council consists of six men elected from the Kallu lineage of the “Oditu” clan. They are elected by a general meeting of the clan every eight years. This council becomes the senior most leadership of the moiety. Once in every eight years the clan meets at his home during which he is presented with gifts of cattle in return for his blessings.

The kallu is mystical and has supernatural powers. On his death he is not buried but ascends. He is strong, wise, blameless and untouchable. As a spiritual leader of the Boran he was sent by god and was found by a Waarta warriors in marshy ground with three black cows, a horned ram, a big snake and various important ritual regalia.The kallu undertakes ritual performances and mediates Boran relations with God.By 1981, (Hogg 1981) reports that there were two Kallu-each associated with one of the exogamous moieties i.e. “Sabho” and “Gona” into which the Boran are divided. The Kallu of Gona then lived in Liban,that of Sabho in Dirre.Neither kallu is allowed to descent the Ethiopian escarpment which in effect implies that Kallu can never visit Kenyan Boran owe them allegiance.Kallu as the high priest,and the Gada system are the mainstay of the social structure of the Boran.

Gada is a generation system in which every eight years one generation set (luuba) becomes responsible for maintaining the peace of the Boran through prayer and

³⁰ Hogg,R.(1981) The Social Organization of the Boran Isiolo District.PhD thesis Faculty of Economics and Social Studies.Manchester University.

sacrifice. Gada therefore consists of a series of elaborate rules and rituals. Gada officials appointed each eight years act as respected case settlers, lawmakers and ritual leaders.

According to Hogg (1981)³¹ the following is the hierarchical structure of the Gada system:-

Kallu-supreme leader, king, monarch, hereditary, supernatural.

Hayu-office holders in the Gada system. Messenger of the Kallu of Sabho Gona to appoint jallab. Referred to in judicial capacity.

Jallaba- a traditional honorific office appointed from among some of the senior and respected elders of Isiolo Boran. In the ceremony during their appointment, Boran customs are followed even if some Borans are Muslims. Each appointee is given mediated thin wristlets of skin from the sacrificed animal.

However, Baxter³² says that in the 1950's there were no Jallab who had been directly appointed. The Kallu instructed, through a letter which Baxter quotes, the Isiolo Boran to appoint their own Jallaba. This symbolizes to the Isiolo Boran people of their separation from their homelands (Baxter 1966:244). As the Boran were pushed farther south away from Ethiopia, many men lost generation sets, and therefore are excluded from the Gada organization. Many Boran in Isiolo have therefore undergone a culture loss and culture change.

2.16 Social ordering of life

Social ordering is an integral part of human life. The heart of a society depends on its consistent and regular activity. There is no record of any form of community or society that existed without agreed ground rules as to how individuals and groups ought to behave and ways to enforce adherence to such group rules. According to Thomas Hobbes, such group rules constitute a social contract. Hobbes observed that people come together to give away some of their rights, especially the use of force, for the good of all. Without social contract, the great man reasoned that, life would be "solitary, poor, nasty,

³¹ Hogg, R. (1981) The Social Organization of the Boran Isiolo District. Phd thesis Faculty of Economics and Social Studies. Manchester University

³² Baxter, P. T. W. (1954) Social Organization of the Boran of Northern Kenya. Phd Thesis Lincoln College, Oxford University.

brutish, and short.” Michael Foucault, the famous French philosopher, sees these ground rules of living together as “conduct of conduct”. (Tshehla,2001).

There are two ways of ordering. These are the formal and the informal. The formal ordering is vested in the state, or king/monarch. The informal ordering is vested in the society outside government. In South Africa during apartheid the formal ordering was meant to protect whites and control blacks. As such blacks adapted their pre-modern system to urban conditions as a way of ordering their lives and seemed to shun the state created structures. Many of the blacks informed ordering structures were apolitical and concentrated on merely regulating the lives of urban residents. In 1994 when the black led government was inaugurated, the informal system under community policing was reinforced. The South Africa Law Commission is today working on a legislation dealing with non-state ordering to make it into state law. Majority of South Africans to the present use non-state dispute resolution mechanisms more than they use the state justice system. In spite of the reforms, the non-state justice system is not receiving adequate government support compared to the formal justice system. In the 1970s, many of these popular, informal and community-based justice systems posed themselves as an alternative form of ordering to the state justice system. This development invited the wrath of the then apartheid South African state with the 1980s being the climax in the 1980s, the state intensified its attacks so that many of these informal ordering systems and their leaders as well as members were either imprisoned or went into hiding. In the 1990s, Community Justice Structures re-emerged under the leadership of adult members of the community while the NGOs started entering urban townships teaching and training on mediation and dispute resolution. This led to the emergence of the Alexandra Justice Centre and the Quaker Peace Centre. There also emerged Street Committees in Nyanga and Khyelitsha in Western Cape Province. (Tshehla,2001).

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In 1999 the South African government issued a Discussion Paper aimed at regulating non-state ordering as “Community Dispute Resolution Structures.” Tshehla, 2001 argues that the paper sought to create uniform structures of dispute resolution for all non-state structures yet the community-specific and day-to-day experiences within the targeted

communities militate against such a uniform model. Hence a one-size-fit-all approach ignores the local diversity of the different communities and their sense of justice and expectations from a justice structure.

In Chile, there exists a dual system providing justice to the poor. The first is the formal system staffed by professional judges with formal rules. The other is a system that operates like a community court, as it is the case in South Africa. The two systems operate side by side with disputants shopping for the kind of justice best suited to their needs. [\(file:///C:/Windows/TEMP/Specialist courts.html\)](file:///C:/Windows/TEMP/Specialist%20courts.html)³³.

According to Wilfried Scharf (2002), in African township and informal settlements, there is not yet the capacity within the state to manage and implement a formalized system. Communities are not yet ready for a formalized system as proposed by some writers. In all likelihood, the urban informal communities are likely to continue using structures that are familiar to their own even if a new system was set up. In South Africa, Community Courts are now fully functional. The Community Court is usually composed of between 7 and 11 members elected from their area. They are mostly the elders. But from about 1988 there has been awareness that a males-only committee is no longer politically correct hence women have become routine members. In some case representatives of youth structures have been incorporated. That has been of great benefit as many of the problems the communities deal with relate to the youth. Community courts are accessible to their constituency. The typical pattern is that a street committee has a constitution of between 50-250 households of people living in the most immediate vicinity. [\(file:///C:/Windows/TEMP/specialist courts.html\)](file:///C:/Windows/TEMP/specialist%20courts.html)³⁴.

The procedure of the community court is common sense. The disputes are brought to any member of the committee who usually encourages the complainant to approach the secretary. The secretary records the complaint, sets a date and notifies the other parties. Depending on the nature of the dispute the parties bring their supporters to help them tell the story. Proceedings usually commence by prayer. Committee members ask questions for clarity and to understand the motivations of the parties. The public may also ask

³³ [file:///C:/Windows/TEMP/Specialist courts.html](file:///C:/Windows/TEMP/Specialist%20courts.html)

³⁴ [file:///C:/Windows/TEMP/specialist courts.html](file:///C:/Windows/TEMP/specialist%20courts.html)

questions and offer comments. However, it has been argued that Community Courts can be vulnerable to powerful personalities and cliques unless more responsible members of the community balance them.

According to Rosiers,(2001)³⁵ there is abstraction about reality in the current legal regime the world over. There is an abstract notion of justice and equality between parties to a dispute. The community is rendered spectator, as the abstract notions of justice do not seem to capture the complexity of human experiences. People today are yearning to be involved in a world from which they have excluded. Victims want to hear acknowledgement for the crime from the mouth of the offender. Needless to say, the momentum across the world is that a dual justice system is long overdue if all people, poor, vulnerable, subjects, the rich and powerful are to access justice.

2.17 Concerns of the marginalized groups

In all the CJS's reviewed women and youth indicated outright bias by men when arbitrating disputes. In some cases, women and youth are not supposed to attend the deliberations even when what is being deliberated on concerns them, or where they attend, they do so as inferior parties. Of particular concern is access to justice concerning issues like domestic violence where the offender is a man and who has to represent a woman complainant. In this case, women are invariably declared wrong since men are seldom wrong because the dispensers of justice are all men. Women and youth do not approach the justice institutions as equal parties to men. This overarching male dominance has made it pretty difficult for women and Youth to access justice in the informal justice systems and practices. Based on this, their preferences for the formal system is quite compelling. The clear issue is that while men access justice under the CJS, women and youth do not because of the cultural impediments. This finding is common among the Somali,Meru,Turkana,Pokot,Samburu,Boran and Kikuyu women and youth.This is unlike urban women whose access to justice is easier. This is because they have been enlightened by NGOs on where to go to report abuses.

³⁵ Rosiers,N.(2001) Restorative Justice: Its promises, Its challenges and Its place in a Democratic Society. Ottawa Ontario

2.18 Human and Constitutional Rights

On human and constitutional rights, there is a diversity of practices which undermine or negate the rights of others or give others the opportunity to trample on the rights of others. A good example is among the Samburu where a child born out of wedlock must be killed by its mother. If the mother refuses to do so, it is poisoned by the parents and at times together with its mother. Among the Turkana when a murder has been committed, the offender is only identified by symptoms similar to those of a sick person and then summarily executed. Certainly this does not respect human and constitutional rights, which demands that a person is innocent until proved guilty. The CJS system does not in this case provide for hearing the accused. Further, exclusion of women and the youth from membership into the justice institutions denies them their constitutional right to associate and assemble at will.

Among the Somali, Turkana, Samburu and Pokot a victim must be married to the rapist whether she likes him or not. Similarly the rapist is forced to marry his rape victim. While the logic behind it is that the rapist was attracted to her before the rape then it follows that he must continue being attracted to her. Marriage should be by consent not force as it is in this case. Forced marriage certainly contradicts the provisions of human rights, which provides for freedom of choice for whom to marry. In this case the women's rights are grossly violated.

The CJS does not meet on a daily basis or during specified days. They only hold sessions when summoned to do so by the chairmen or in other case, the chief. They meet only when there is substance to be discussed and once finalized it does not hold sessions. It is not possible to discern the number of people each CJS serves because of disparities in population density. Some are village, locational, neighborhood, divisional and district based. All people within that neighborhood are free to access it whether they are members of the respective ethnic community, locality or not.

Male dominance of CJS systems in all communities, rural and urban surveyed in this study and women's exclusion from the same amounts to discrimination based on sex. Discrimination based on sex amounts to gross human rights abuse. The exclusion against women in CJS is not based on incompetence but on sex considerations.

2.19 Theoretical Framework

2.19.1 Modernization theory

As a central concept in the sociology of development, it implies the interactive processes of economic growth and social change whereby historical and contemporary underdeveloped societies and institutions or ideas are thought to become developed. It also implies that there is a clear dichotomy between pre-modern and modern.

Modernization studies typically deal with the effects of development on traditional social structures and values, and – conversely – with the manner in which traditional social structures and values can either hinder or facilitate complete transformation of societies towards becoming modern. It lays emphasis on lineal change, for instance the move from primitive to modern societies for instance, introduction of cash crops into traditional peasant communities and in this context the progressive replacement of traditional structures like the *kokwet* with modern courts. Given the contemporary developing countries wish to adopt the economic institutions (Money, Markets, Industrialism, etc) of modern societies, structural compatibility dictates that they adopt the social, political and cultural forms characteristics of modern societies.

Modernization is perceived as an increasing ability to master the environment. It means the growth of social complexity. The question however is; Does modernization completely erase pre-modern institutions and practices or do aspects of them persist? Pioneers of modernization theory were to large extent later sociologists. Starting from Durkheim, who introduced notions of mechanical solidarity, as characteristic of small scale societies with a low division of labour, and organic solidarity, found in modern societies with a complex division of labor. He held that an advanced division of labor bound people together ‘organically’ through their interdependent specializations. In smaller scale societies, on the other hand, people following very similar ways of life developed a conscience collective. However, conscience collective is also found in complex societies. Mechanical solidarity, on the one hand, is that which can be found in primitive folk society when people relate to one another in a total manner. That kind of relationship exists today within the modern family for instance; it is characterized by a deep fellow feeling, a desire to share everything together. Organic solidarity, on the other

hand, is characteristic of modern industrial societies. It consists of a web of relationships based on contracts. Such relationships are governed by law. Among the Kipsigis, in the process of living together, there are rules and regulations that guide individuals, violation of which may be overlooked. There are however, other rules that are binding on everyone in the community, violation of which can be very serious indeed. Yet it cannot be said with certainty whether the Kipsigis are pre-modern or modern people or have aspects of both.

Talcot Parsons in pattern variables argued that cultural patterns force actors to make four fundamental choices between alternative modes of orientation towards social situations: Between particularism and universalism, quality and performance, affectivity and affectivity neutrality, specificity and diffuseness. Particularism/universalism is a social object judged according to criteria peculiar to that one object and its particular context, or by criteria generally applicable to a whole class of similar objects. Performance/Quality. It is often useful in classifying the criteria by which people are recruited to roles in society. In modern societies, people who have demonstrated their performance or achievement by acquiring educational qualifications fill most roles. Positions such that of king, however, are still generally filled by a person to whom some inherent quality is ascribed, like being the eldest son of the monarch.

Similar arguments have been presented by Redfield (1947³⁶) and Tonnies, (1887)³⁷. therefore it is pretty difficult to draw a line between pre-modern and modern and even the relevance of pre-modern institutions in modern societies. There are many examples in the world, which demonstrate that pre-modern institutions are the engines for modern societies; and that modern societies are dependent on premodern institutions for their success. The English society for instance owes their unity and success to the institution of the queen-a pre-modern society while Japanese family and personal orientation (particularism) is the basis of the success of the Japanese industry. The same argument can be applied to the *kokwet* as the institution of pride and unity of the Kipsigis, a people who are today involved in a capital system of tea production. Therefore while modernization theory can be used to understand the evolution of

³⁶ Redfield, R. (1947) *The Folk Culture of Yucatan*. Chicago

³⁷ Tonnies, F. (1887) *Gemeinschaft and Gessellschaft*.

societies in which certain institutions are classified premodern and others modern it is also important to appreciate, as I have attempted to say, that within modernity, there is pre-modernity closely enmeshed.

2.19.2 Rational Choice theory.

The focus in rational choice theory is on decision-making based on several actors. Actors are seen as being purposive, or as having intentionality. They have ends or goals toward which their actions are aimed. For those with lots of resources, the achievement of ends may be relatively easy. However, for those with few, if any resources, the attainment of ends may be difficult or impossible. (Friedman and Hecter, 1988:202)³⁸. An individual will typically find his or her actions checked from birth to death by familial and school rules; laws and ordinances; firm policies; churches, synagogues and mosques; and hospitals and funerals parlor. By restricting the feasible set of courses of action available to individuals, enforceable rules of the game-including norms, laws, agendas, and voting rules-systematically affect social outcomes. These institutional constraints provide both positive and negative sanctions that serve to encourage certain actions and to discourage others. In Kenya there exist two justice systems from which people are sometimes free to choose-the indigenous and modern courts. Noting that the actor's choice is informed by past experiences, notions of justice, accessibility, cost and convenient the *Kipsigis* have given the opportunity choice of where they feel will obtain fair justice. Of course modern courts have been bedeviled by many allegations (many of which are real) of justice for hire and the highest bidder gets the justice required.

Given the opportunity choice between CJS and modern law, individuals will be driven by their interests. Their interests and actions can violate some provisions in both the CJS and modern law. For example the payment of alimony after divorce or child custody after divorce. Who can administer justice in these matters-CJS or modern law. To whom will the affected individual appeal and why? It is that system which will serve his/her interests-even though this may harm the other party's interest. Therefore the people are guided by where they feel they will maximize their personal or group benefits. It is on this basis that rational choice theory is both a microtheory as well as a macrotheory.

³⁸ Friedman, D. and Hechter, M. (1998) 'The Contribution of Rational Choice Theory to Macrosociological Research' in *Sociological Theory* 6:201-218.

CHAPTER THREE

METHODOLOGY

3.1 Site Description (Kericho-Londiani location of Londiani division)

Kericho district is one of the fourteen districts of Rift Valley province. It borders Uasin Gishu in the north, Baringo and Nandi in the northwest, Nakuru in the east and Bomet in the south. To its south-west is Nyamira and to the west is Kisumu. The district is divided into six administrative divisions of Londiani, Bureti, Belgut, Kipkelion, Fort Ternan and Ainamoi. The district lies between longitude 35 degrees 02 and 35 degrees 40 east and between the equator and latitude 0 and 23 south. The major part of the district is characterized by undulating topography and it forms part of the Mau escarpment.

Londiani division, in which the study was done occupies an area of 523 square kilometers and it is the third biggest division after Belgut. It has five locations and eleven sublocations. As an urban council it has seven wards but politically it falls within the greater Kipkelion constituency. According to the 1979 national population census, the division had 30,261 people, which was projected to 42,198 in 1993, and 46,054 in 1996. Compared to the rest of the district, Londiani has the lowest population density. It has a population of 88 persons per square kilometer.

The main economic activity is agriculture, both small and large scale farming of especially wheats, pyrethrum, maize and livestock keeping particularly dairy and sheep, forestry and saw milling.

3.2 Methods of data collection

No social investigation can rely on one suitable method given the complexity of social realities and human behaviour. As such a triangulation of methods (Nachmias and Nachmias, (2004)³⁹ was utilized.

3.2.1 Primary data

The sources of primary data were key informants, users of the *kokwet* and officials of the *kokwet*. Users of the *kokwet* are all the members of the village or community. It could be men women, or youth who are offended or aggrieved by another party of the same community. Their responses to the questions as well as the observations the researcher made provided the data necessary for report writing. Questions were asked around the reporting procedure, the enforcement of awards and the kind of disputes dealt with as well as the time taken the cost and the fairness of the system. Further insights were gained into the perceptions of the modern administrators, the legal fraternity on the relevance of the *kokwet* and CJS in general.

3.2.2 Participant Observation

This is a research method of studying intensively a social collectivity over a period of time by joining it and participating in its activities. The researcher gained an opportunity to get to the bottom of the social realities and complexities of the functioning of the *kokwet*, how its sessions are conducted, and procedures followed, membership, among others. In the *kokwet* sessions, the researcher was able to notice those hidden aspects that could not be obtained through other methods. During and after the session the researcher made detailed notes of the unfolding realities.

³⁹ Nachmias, F.N and Nachmias, N. (2004) Research Methods in the Social Sciences. Arnold. London

3.2.3 Interview Guide

Unstructured interviews were conducted using an interview guide, which is a list of discussion questions. In the interview detailed discussions were held following prior arrangements with pre-determined key informants. The discussions focused on topics like perceptions of the *kokwet*, how it functions, and its relationship to other structures, access, cost and appropriateness and opinion on whether it should be formalized. The strength of this method was that it gave the researcher the freedom to adapt the interview situation to capitalize on the special knowledge, experience and insights of the key informants. The face-to-face interview was helpful since the researcher was able to get clarification and other minute details. The researcher was able to talk to a cross section of people who included the following: village elders, ex-senior civil servants, chiefs, women and youth leaders, teachers, police and magistrates/advocates.(See appendix (ii)

3.2.4. Focus Group Discussions.

Focus Group discussion was the main method of data collection. Ten focus group discussions were organized and held with the users of the *kokwet* i. e women (3), youth (3) and men (4). They were held in the following villages:*Chepkongony* (March 2006),*Chebewor*(March 2006) ,*Kipkoiyo* and *Sitian* villages of Londiani division in April 2006. The aim was to obtain collective views about the various aspects of the *kokwet* e.g. its relevance, cost, functioning, access, treatment, affordability, fairness and convenience compared to the modern courts.

The reason why the focus group discussions were held separately based on age and sex was to enable each group to freely discuss their views without the fear of intimidation by other people. The membership of *kokwet* depends on age, standing in the community. It therefore proved quite fruitful since the participants became free and contributed immensely throughout the discussions. The group discussions were held at predetermined sites in the respective villages. The researcher facilitated and moderated the discussions while the research assistant took notes. All the interviews were held for one hour each.

CHAPTER 4:

DATA PRESENTATION, ANALYSIS AND INTERPRETATION

4.1 Background

For the purposes of this research, the *kokwet* refers to *boisiek ab kokwet*. This means elders of the village. Meetings of the *kokwet* are convened only if there is business that needs to be discussed. Hence there is no standing committee of the *kokwet*. Convening of the *kokwet* depends on the purpose of the meeting. No records of its transactions are kept and all that is discussed is stored in human memory. However, of late, some local administrators record the procedures and transactions made and the verdicts arrived at for future reference. Nevertheless, there is no regulation to govern this.

4.2 Membership

All the members of the *kokwet* are men. Qualifications for membership are: ownership of a house, which denotes responsibility; ownership of livestock; of good character and respectable, and above; from a family of respectable people; integrity; law abiding and married. Boys are not allowed membership since they are prone to lies and are undependable. There is no formal procedure for membership but it is automatically attained on the day one weds or officially takes a wife.

Women only attend the *kokwet* deliberations when they are either the complainant, accused or a witness. Until the recent past, women were only required to answer or address the *kokwet* when kneeling down, but of late there is a change in that women are now allowed to sit down. But to address the *kokwet*, only women who have undergone circumcision are allowed to do so. This is one element of discrimination against women on the basis of either being born female or male. This implies that those women who are aggrieved but not circumcised have no full access to justice. It also implies that being born woman and failing to attend to some cultural demands may determine one's access to justice.

Though male dominance maybe attributed to the *kokwet* ,but it is also reflected in the modern court systems where most dispensers of justice are men. Therefore the *kokwet* and the modern court system suffer the dubious distinction as being male dominated.

4.3 Reporting and Verdict

The procedure for reporting all the offences is almost similar. Generally the complainant reports the matter to the village elder, who then notifies the *kokwet*. The *kokwet* sends one of its members to notify the accused of the charge and the need to attend the *kokwet* on a specified day and time. Within a day or two the dispute is heard and determined. In the deliberations, each party is given time to state the facts of the dispute. Each party is free to call witness (es) (*baorinik*) to help them bolster their case. Members in attendance may ask questions for clarification. When all evidence has been adduced the *kokwet* then deliberates on the matter and issues a ruling, fine or punishment depending on the circumstances. In case the offender is fined, the offender swears to honour the deal. But if the offender thinks the fine is too high he may appeal for revision. However, appeal cases are rare since *kokwet* is usually fair.

The deliberations and verdict are not traditionally recorded, but of late, the chiefs have begun to record the entire process so that it may be used for future reference in similar cases. Sometimes the records are used as evidence to the court if the offender has defied the *kokwet* rulings. The same record is sometimes used in court as evidence if attempts at resolving the dispute traditionally have failed. From discussions with the people, I found that no person has ever defied the *kokwet* since they fear most the complexities of the uncertain court processes in Kenya. The use of *kokwet* evidence in court also demonstrates the positive interaction between the court and *kokwet*.

4.4 Cost

“*Kimagutit*” is paid. This is mainly in the form of traditional milk ‘*mursik*’ (about five litres) and taken by the *boisiek ab kokwet* during the proceedings. No prior payments are made or demanded. The “*kimagutit*” is provided by the complainant on the material day

the dispute will be handled, before it commences. “*Kimagutit*’ is valued at about Kshs.100/- and most people can afford it.(With the money culture seeping even to the rural areas,some villagers prefer to pay an equivalent in cash. Therefore cost is not a hindrance to access to justice and the fact that it is paid in kind makes it even more culturally acceptable. Most people have livestock hence acquisition of milk is easy. But this is contrasted to the Nchuri Njeki of the Meru who are paid Kshs.200/- mainly in cash beforehand for one to report a dispute. In spite of this, in both cases, the CJS is quite cheap compared to modern courts where one is required to pay thousands in court and lawyer’s fees, besides having to pay bus fare to district or divisional courts.

4.5 Duration

The time taken to resolve a dispute depends on the nature of the dispute and this cannot be ascertained beforehand. However on average, simple disputes like women fighting or petty thefts are resolved within hours since they do not require many members of the *kokwet*. Complicated disputes, which involve murder, rape, assault or land disputes are usually resolved within two weeks. Most respondents were happy with the *kokwet* for dispensing justice within a short time compared to modern courts which take many years and besides some complainants die before their disputes are resolved. The people find the long wait in modern courts agonizing. The short period used taken to dispense justice makes the *kokwet* more preferred than the modern courts.

4.6 Fairness

Most respondents felt that the *kokwet* is helpful and effective as a mechanism for conflict resolution. They find the *kokwet* fair as it listens to all the parties in an open forum and all people in the village are welcome to listen unlike modern courts, which hold sessions in enclosures. However, the *kokwet* justice has a gendered dimension, especially relating to women who feel that in matters of inheritance there is no fairness. This is because among the Kipsigis, men are the owners of property and the heirs hence inheritance cases are always decided with the knowledge that women do not own property. Therefore most

women felt that the *kokwet* has not changed with the modern times to reflect the new realities. A female respondent said.

“My husband passed away two years ago and recently all the land and livestock were given to my sons but not my daughter. Yet my daughter is the one who takes care of the livestock and pays the herdsboy. But they did not give her any because she is a girl”.

To a reasonable degree, being male or female will therefore determine whether or not you get a share of your parents' estate. On this account, modern courts are better since they equally consider all the children irrespective of their sex or age.

4.7 Enforcement of Fines/Awards

Depending on the award or fine arrived at, the offender is allowed reasonable time to pay but if they default to do so within the stipulated time, the offenders' clan members are summoned in order to deliberate on how and when the compensation will be paid. In cases of over delayed settlement, the complainant reports to the *kokwet*. In turn the *kokwet* sends an elder to report the matter to the chief and police so that the offender is arrested and charged in a court of law. But hardly does it get this far since most people fear the complexities and mysteries of courts and court procedures. Hence, most offenders comply within the shortest possible time. The prospect of facing the chief and/or police is deterrent enough hence most people pay fines.

The traditional enforcements of awards is by a curse, which is administered by a member of the *kaptamason* clan. For example in February 2006 in *Chebewar* village, Londiani Division, a man suspected to have stolen two (2) cows belonging to his neighbour was summoned to a *kokwet* session after the said neighbour lodged a complaint. The suspect denied the charges. When the local village curser (a member of the *kaptamason* clan) was called upon to administer the curse, which is specifically, designed for cattle thieves, the suspect owned up and promised to pay back. The suspect feared the dreaded curse which would have befallen him. Stories are abound among the *Kipsigis* about those offenders on

whom the curse befell and who died immediately after under mysterious circumstances. For fear of this, the compliance rate is high.

4.8 SPECIFIC OFFENCES AND PROCEDURES.

4.8.1 Boundary Disputes (*Ng'alek ab koret*)

One of the disputants reports the matter to the village elder who informs the local chief. The chief informs the *kokwet* which convenes a meeting at the site of the disputed boundary. Traditional land experts or *baorinik* accompany the *kokwet*. Of late however, the *kokwet* invites surveyors to attend their sessions and in the process to help determine the appropriate boundary. With the *baorinik* present, the elders then hold deliberations and draw conclusions at the site of the boundary dispute. The disputants are normally present at the meeting. The village elders are usually called upon to recall history and the clansmen could be called upon to confirm details for instance of when their clan mate moved to the particular place. Once the true position of the boundary is made, it is redrawn and that concludes the dispute.

4.8.2 Domestic violence (*Ng'alek ab kaa*)

If a married woman is a victim of her husband's violence, she reports the matter to the age mate of her husband who is essentially someone they were circumcised together on the same day and stayed in the same hut to recuperate. The person informs a village elder who in turn informs the *kokwet*, which consequently convenes a hearing session. The parties are given time to state their case but finally the offender is reprimanded and /or counseled. In extreme cases leading to injury or persistence a separation between the two is reached when both parties consent to it. But the separation is preceded by clansmen from both families attending a *kokwet* session where the two clans officially agree to

break the relationship. If the separation is successful the wife will return to her parents with all her children while all the bride wealth is returned to her former husband's clan.

4.8.3 Cattle theft

This is considered a serious offence. The reporting procedure is the same as reporting any other offence. The victim of the theft informs the village elder who passes the information to the *kokwet*. The *kokwet* quickly convenes a meeting. An investigation is undertaken by the *kokwet* but if they fail to identify the cattle thief, or if one fails to show up, on the specified time and day, a verdict is arrived at. If on the material day, nobody has accepted responsibility, the *kokwet* again convenes and passes a curse. The first curse is then followed by a second one, which is now performed by special members from the *Kaptamason* clan who among the Kipsigis are bestowed with cursing powers. Their curse is effective and once given it cannot be retracted and the offender usually dies. For fear of death, the offender owns up before the second curse is delivered. However, in the case where the offender is identified quickly, he/she pays the equivalent of the cattle stolen or returns the stolen one in addition to another number the *kokwet* decides depending on the circumstances.

4.8.4 Murder (*Kebaris*)

The family of the murder victim informs the village elder who in turn informs the *kokwet*. If the murderer is identified; the *kokwet* calls a clan meeting of the murderer and deceased. The matter is discussed and always the clan of the murderer must compensate the victim's clan. This compensation is called *kebasta*. In murder cases, the *kokwet* does not make a ruling but only functions to convene a meeting to enable both clans to meet and agree on compensation, which is standard. The solution lies with the two clans. If a man is killed the compensation is nine (9) head of cattle to the deceased's clan. The murderer pays one while the clan pays eight. If a woman has been killed, the compensation is seven (7) head of cattle. The murderer pays one while the clan pays six

(6) head of cattle. The family of the deceased keeps one cow while the rest are distributed among clan members. The reason behind the distribution of the cattle is that the deceased belonged to the clan not to a family.

4.8.5 Rape (*Borien*)

The procedure for reporting a rape offence is somehow unique compared to others. The victim informs the parent or guardian who then informs the elder of the village. The elder informs the chief who in turn informs the *kokwet*. The *kokwet* then convenes a meeting. The complainant and accused are then asked to state their cases. The fine is usually heavy since rape is a serious offence. It is the clan of the rapist which pays the clan of the victim a specified number of cattle. The specific number of cattle is determined by several factors e.g. if the two were strangers or acquaintances, clanmates, or if a pregnancy occurred. If a pregnancy occurred, the offender has to marry the girl and if he does not want then his clan has to pay a herd of cattle equivalent to the full payment of bride wealth which is six cows and one bull. If a pregnancy did not occur, the offenders' family will ask for forgiveness in the form of giving a she-goat to the girl.

4.9 Administrators perceptions of the *kokwet*

According to the local administrators one of the weaknesses of the *kokwet* is that it is lenient and criminals can repeat the offences. They charge that the *kokwet* gives criminals a soft landing hence not deterrent enough. In spite of that there was consensus among them that the *kokwet* has a future in settling some of the petty and even complicated disputes in a very cheap way. That the *kokwet* is quite handy in resolving some disputes e.g. domestic ones without causing undue embarrassment in courts as it is the case today. Generally, administrators are of the view that the *kokwet* be strengthened and recognized by the government for it helps to decongest jails and court houses. They also stressed the fact that it is cheaper to many people since minimal payment is made if any and no advocates are needed.

4.10 Perceptions of the Legal fraternity

Those in the legal fraternity especially magistrates and advocates were supportive of the *kokwet* since they help in decongesting courts and resolving petty disputes at family level. To them it is a system that should be encouraged since it works quite well in other countries like South Africa and South East Asia. Generally; the *kokwet* to a large extent conforms to the basics of human rights instruments save for the perceived bias against women and youth. But this charge is not peculiar to *kokwet* alone; all over the world courts are also biased in favor of the rich and powerful. Therefore one can argue that while the CJS are gender-biased, modern courts are even more social class tainted hence all justice systems suffer from their own weaknesses.

4.11 Women perceptions of the *kokwet*

Even though the general perception is that women and children are treated fairly by the *kokwet*, most female respondents felt that the *kokwet* is gender insensitive when it comes to membership. They felt that the judgement of a case especially concerning inheritance and domestic violence lean towards men because the men are the listeners and dispensers of justice. They feel that the CJS does not compensate women adequately. A good illustration is in the issue of property whereby women do not own property at all. Besides their own personal property, all property is usually at the disposal of her husband. Most misunderstanding and/or disputes between men and women are attributed to the woman. Some women also pointed out that when they reported a matter to the clan, the clan does not move fast enough to forward the matter to the *kokwet*. To them they preferred a system where they report the matter straight to the village elder or the local chief who immediately reports the matter to the *kokwet*. In terms of access to justice, women prefer the chief (formal system) because they get a fair and prompt hearing. Women felt the *kokwet* is a man's club meant to disperse justice to men and therefore to some extent discrimination against women. This is an indictment that the *kokwet* does not recognize the U.N Bill of Rights (1948).

4.12 Youth perception of the *kokwet*

The Youth have an unfavorable opinion of the *kokwet*. This was attributed to the fact that the *kokwet* has a contemptuous attitude towards the youth especially as liars. The youth do not take this view kindly. Besides that, the youth are not allowed to attend *kokwet* sessions even when whatever is being discussed concerns them. In cases where they attend, they do so as witnesses or as passive attendants. The youth consider the *kokwet* a mean institution, a preserve of the old men, because of this; the youth have a strong preference for the formal system since the CJS is biased against them.

4.13 Advantages of the *kokwet*

The *kokwet* has been romanticized in several ways as a superior system. These include: proximity to the people, disputes resolved in a short time; it is cheap hence affordable by all; it is fair; the sessions are conducted in local language which is understood by all people, there are no bureaucratic preconditions involved; the atmosphere for discussion is free but not intimidating; resolutions are arrived at after consideration of the socio-economic circumstances by consensus; its sessions are held in open settings; and no corruption is involved. Given these advantages, the people felt that it should not be legalized but remain and operate informally. This is because if it were legalized, it would lose the advantages that it already confers to the people e.g. affordability, easy access and swift judgement.

4.14 Collaboration between *Kokwet* and Modern Justice Systems

The idea of a synergy between the *kokwet* and the formal system has been of controversy for long. Are the two systems conflictual or complementary? What is emerging is that there is a collaborative relationship though not yet fully exploited and officially acknowledged. However, areas of collaboration include sharing of information and enforcement of awards. For example, the magistrates, lawyers and police contented that investigations would be easier, faster and more factual if the *kokwet* was utilized to gather

intelligence information regarding local issues. Similarly; the *kokwet* findings and decision should be used as a basis for reaching a verdict in certain cases. For example if the *kokwet* has made a ruling and the offender defies, the court should use their evidence as a point of reference. Equally important will be the courts referring certain cases to the *kokwet* if they feel the *kokwet* is better placed to handle them. Therefore it is actual and accurate to say that the informal and formal systems already do collaborate and this collaboration can be further strengthened. Basing on examples and practices elsewhere across the world formal and informal systems fruitfully complement each other and here in Kenya the same can be done, and should be done.

As pointed out in the literature similar systems are very successful in South East Asia, North America, India and South Africa. But informal systems should not be misunderstood to mean or refer to rural or community specific institutions and/or practices, but they can and do exist in urban informal settlements as well. For example some of the petty offences committed in urban informal settlements like drunkenness, petty thefts, affrays etc could be better handled under this collaborative arrangement with the CJS taking the lead.

UNIVERSITY OF NAIROBI
EAST AFRICANA COLLECTION

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The *kokwet* is a functional system; it plays an important role in the lives of the *Kipsigis* people. It is highly appreciated due to its accessibility, affordability and proximity. The emergence of the new social problems like: succession /inheritance, divorce, children indiscipline have however functioned to make the *kokwet* to evolve new approaches and learn to resolve challenges not previously encountered. On this account the *kokwet* has heavily borrowed from the neighbouring Kisii. Hence the *kokwet* is changing and adjusting with time. The utilization of modern knowledge and expertise especially in the case of utilizing surveyors in land disputes demonstrates that the *kokwet* is utilizing both traditional and modern approaches to arrive at reasonable conclusions. Hence the *kokwet* is not a static institution as many people erroneously conceive of the CJSs.

The idea and practice of dual justice system is not peculiar to Kenya, but it is practiced all over the world and wherever it exists it has satisfactorily worked. There is a strong preference for CJS as demonstrated by its advantages compared to the modern courts. Arms of government consulted in this study similarly echoed this position.

In this regard the government of Kenya needs to formally acknowledge their work but not to control them lest they suffer from the problems faced by courts of today.

Nevertheless they must be inclusive to involve all the people - men, youth and women in its processes. While it may be initially difficult to include women in CJS, the employment of women as chiefs in some areas and their acceptability by the respective

communities is a pointer that women will with time be willingly incorporated into CJS given the ongoing social changes and adjustments in social life.

5.2 RECOMMENDATIONS

- The *kokwet* should be recognized but not to function like a government department but as a community court to deal with petty offences.
- The *kokwet* rulings should be communicated to courts so that they automatically become enforceable by the formal system.
- There is need for all social groups to be represented in the *kokwet*.
- The government should compensate the *kokwet* members since it does work that are officially assigned to courts.
- The *kokwet* needs to record procedures, rules, regulations and fines for all types of offences for future reference.
- The *kokwet* members need to be trained on basic provisions of human rights instruments and constitutional provisions.
- There is need for the government to recognize the existence of a dual justice system in Kenya. In some countries especially South East Asia and South Africa the system already works successfully.
- The *kokwet* members require training on gender given that times have changed.
- There is need for increased collaboration between the *kokwet* and courts in exchanging of information.

REFERENCES

- Awuondo, C.O.et.al (1994) Masters of Survival. Basic Books. Nairobi.
- Baxter,P.T.W .(1954) Social Organization of the Boran of Northern Kenya.Phd Thesis Lincoln College,Oxford University.
- Bromley, D.W. (1991) Environment and Economy: Property and Public Policy.Blackwell.Oxford.
- Friedman,D.and Hechter,M.(1998) 'The Contribution of Rational Choice Theory to Macrosociological Research 'in Sociological Theory6:201-218.
- File://C:/Windows/Temp/Specialist Courts.Html
- Hogg,R.(1981) The Social Organization of the Boran Isiolo District.Phd thesis Faculty of Economics and Social Studies.Manchester University
- [Http://www.penalreform.org/english/nlaccess2-3.htm](http://www.penalreform.org/english/nlaccess2-3.htm)
- [Http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.html](http://www.ojp.usdoj.gov/nij/rest-just/ch1/indigenous.html)
- [Http://www.asiafoundation.org/news/news-62703.html](http://www.asiafoundation.org/news/news-62703.html)
- Kenya Land Act.Cap 280.
- Kipkorir Benjamin, (1978) A people of the Rift Valley, Warlop, Hampshire.
- Legesse,A.(1973) Gada:Three Approaches to the study of an African Society.Free Press.New York
- Mburugu, K.and Mohammed. (2001)Customary Institutions of conflict management among pastoralist communities in Kenya: The case of the Turkana, Borana and Somali communities. Oxfam G.B.Nairobi.
- Mburugu, K.and Mohammed. (2002) Enhancing Better Natural Resource use to prevent conflict among pastoralist communities in Kenya. Oxfam GB- Nairobi.
- Mwanzi, H.A (1976) A History of the Kipsigis (1700-1940) Historical Texts, Nairobi
- Nachmias,F.N and Nachmias.N.(2004) Research Methods in the Social Sciences.Arnold.London
- Redfield,R.(1947) The Folk Culture of Yucatan.Chicago
- Republic of Kenya, Isiolo District Development Plan, 1997-2001, Nairobi.
- Republic of Kenya, Meru District Development Plan, 1997-2001, Nairobi.
- Republic of Kenya, Laikipia District Development Plan, 1997-2001, Nairobi.
- Republic of Kenya, Wajir District Development Plan, 1997-2001, Nairobi.

Republic of Kenya, Socio-cultural profile of Turkana District. 1986, University of Nairobi and Government of Kenya Joint Research, Nairobi.

Republic of Kenya, Socio-cultural profile, Isiolo District. Socio-cultural profile 1986, Nairobi

Republic of Kenya, Socio-cultural profile, Meru District. Socio-cultural profile 1986, Nairobi

Republic of Kenya, Socio-cultural profile, Wajir, District. Socio-cultural profile 1986, Nairobi

Republic of Kenya. Poverty Reduction Strategy Paper (2001-2004)

Rosiers, N. (2001) Restorative Justice: Its promises, Its challenges and Its place in a Democratic Society. Ottawa Ontario.

Sultan Somjee: <http://www.cccore.org/paper-pokot.html>

Tonnies, F. (1887) Gemeinschaft and Gessellschaft.

Towett, Taita, (1960) The Kipsigis, East African Literature Bureau, Nairobi.

Tshehla, B.J. (2001) Non –State Ordering in the Post apartheid South Africa. A study of some structures of non –state ordering the Western Cape Province. Master of Laws of dissertation. Department of Criminal Justice. Institute of Criminology University of Cape Town, South Africa.

WPDC (2004) Nabat Wajir .