

**UNIVERSITY OF NAIROBI COLLEGE OF
HUMANITIES AND SOCIAL SCIENCES
SCHOOL OF LAW**

**Utilizing the Traditional Justice System to guarantee the Right to
Security of the people of Marsabit County under the 2010
Constitution**

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**A Research Thesis Submitted in Partial Fulfillment of the Requirement for
the Award of the Degree of Master of Laws, School of Law, University of
Nairobi**

NOVEMBER 2016

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Signed: _____ Date: _____

Supervisor: **Dr. Duncan Ojwang**

DEDICATION

This Research Project is dedicated to my parents Mr. James Matunda Okari and Mrs. Elizabeth Kemuma Matunda who have been a source of great inspiration and have constantly encouraged me in furthering my education.

To my husband and children, your genuine support and understanding motivated me to pursue this work to completion.

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Any errors and mistakes in this argument are entirely mine. I also wish to thank the interviewees, those who requested to remain anonymous and Hon. Jillo Falana, former MP Marsabit. Last, but not the least, I wish to acknowledge my Research Assistant, Conradus Nyaribari, whose assistance in this study was commendable.

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R v Mohamed Abdow Mohammed (2013) eKLR

ABBREVIATIONS AND ACRONYMS

CJS	Community Justice System
CSOs	Civil Society Organizations
DC	District Commissioner
IDPs	Internally Displaced Persons
KPR	Kenya Police Reservists
REGABU	Rendile, Gabra, and Burji
REGABU-GA	Rendille, Gabra, Burji, and Garre communities
TDRM	Traditional Dispute Resolution Mechanisms
NCIC	National Cohesion and Integration Commission
NFDs	Northern Frontier Districts
NGO	Non- Governmental Organization
NSC	National Steering Committee on Peace Building and Conflict Management
NPPBCM	The National Policy on Peace building and Conflict Management

Definition of terms

Right to security: It covers both conflict and development aspects of social progress. It refers to actions that put people first and provide them with a sense of security in their homes, at their workplace and in their communities. It encompasses the idea of liberty that is freedom from fear (basic human rights) and freedom from want (basic human needs).

Traditional Dispute Resolution Mechanisms: It refers to all those people-based and local approaches that communities innovate and utilize in resolving localized disputes, to attain safety and access to justice by all. There are localized approaches by communities to achieve justice and guarantee their rights and freedoms.

Ungoverned Territory: Is a region where the state is unable or unwilling to perform its functions. It is the lack of penetration of public institutions into the general society. State penetration of society is measured regarding the presence or absence of public institutions, the state of physical infrastructure, the prevalence of the informal or gray economy, and social and cultural resistance to state penetration.

Urbanization refers to the process by which large numbers of people become permanently concentrated in relatively small areas, forming cities. It also refers to the increasing number of people that leave in urban areas, as a result of having moved away from rural areas in search of more opportunities to enable them earn a living. This process predominantly results in the physical growth of urban areas, horizontally and vertically.

Abstract

The Constitution of Kenya 2010 bestows upon the government the mandate to guarantee the rights and fundamental freedoms of the people of Kenya under the Bill of Rights. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

Marsabit County has suffered its share of conflicts with most being the constant struggle over scarce resources of pasture and water especially during the dry-spell that leads to drought in most cases. The communities have also had their interpersonal and social trust undermined by conflicts that have afflicted them destroying their social norms, values, and institutions that mitigated and resolved them for the common good of the community.

The conflicts have resulted in numerous casualties, due to the neighboring unstable countries like Somalia and Sudan, the proliferation of small arms and ammunitions that have made cattle raids complex and sophisticated and commercialization of livestock rusting. It has led the state to fail to guarantee the right to security of the people of Marsabit County.

Due to the County's marginalization, most public institutions are not adequately equipped, staffed or facilitated to handle their service delivery to the people. The State Agencies are unable to prevent or adequately respond to these conflicts. The judicial institutions lack the capacity to try perpetrators making them have a less deterrent effect. The work of both the judicial and enforcement agencies is undermined as the legal processes have been unable to stem conflicts.

This study examined how the right to security of the pastoralist communities in Marsabit County has been violated by successive governments both pre and post-independence. The study

explored how such violation has led to the recurrence of conflicts that have escalated and intensified over the years leading to loss of lives, massive destruction of property, internally displaced persons (IDPs) and refugees.

The study established how the communities in Marsabit used the traditional justice system to restore peace after conflict situations through reconciliation by bringing harmony to the warring communities. The study interrogated the relevance and potential utilization of the traditional judicial system to manage and resolve current conflicts in the region, which have in most cases contributed to a violation of their right to security. The study utilized the case study of the Borana justice system to illustrate the potential use of the traditional justice system with government as its custodian to guarantee the right to security of the people of Marsabit County. The study recognized the central role and importance the government plays in the provision of human security, hence its position to act as the custodian of the right to protection of the nomads.

The causes of violent conflict in Marsabit County, the dynamics of conflict and their impact are well researched by both Peace and security experts and academicians. Most of these researchers have focused on strategies and mechanisms used to prevent, mitigate and transform violent conflict in Marsabit County. However, there has been insufficient analysis on how such strategies and tools can be effectively utilized to minimize the recurrence of conflicts to guarantee the right to security of the people of Marsabit County.

Chapter One

1.0 Introduction

All the people of Kenya have a right to security which has been entrenched in the Constitution of Kenya 2010. The Constitution guarantees the people of Kenya security for their lives and property. Chapter Four of the Constitution states the fundamental rights and freedoms of the population of Kenya that should be safeguarded and enjoyed by all Kenyans.¹ These are stipulated in Articles 26, 29, 40 and 43 as the right to life, the freedom and security of the person, protection of the right to property and economic and social rights respectively.

The Constitution also recognizes that the Bill of rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.² The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote social justice and the realization of the potential of all people.³

However, there is a challenge in ensuring the right to security is guaranteed during and after conflict situations in Marsabit County. Marsabit County has suffered its share of conflicts with most being the constant struggle over scarce resources of pasture and water especially during the dry-spell that leads to drought in most cases. The communities have also had their interpersonal and social trust undermined by conflicts that have afflicted them destroying their social norms, values, and institutions that mitigated and resolved them for the common good of the community.⁴

¹Constitution of Kenya 2010

²Constitution of Kenya 2010 Article 19 (1)

³Constitution of Kenya 2010 Article. 19 (2)

⁴David Francis J, African indigenous and endogenous approaches to peace and conflict resolution. in Tim

These conflicts have resulted in numerous casualties, destruction of property, massive displacement of populations, and loss of lives that have led to the violation of the right to security of the affected persons. Some of the causes of the conflicts in the region include the neighbouring unstable countries like Somalia, Ethiopia, and Sudan that have led to the proliferation of small arms and ammunitions making cattle rustling become complex and sophisticated.

Due to the County's marginalization, most state institutions are not adequately equipped, staffed or facilitated to handle service delivery to the people. The State Agencies are unable to prevent or adequately respond to these conflicts. The judicial institutions lack the capacity to try perpetrators making them have a less deterrent effect.⁵ The County lacks access to general government services and has long existed on the periphery of development assistance.⁶ The work of both the judicial and law enforcement agencies is undermined as the legal processes have been unable to stem conflicts. Service delivery has been hampered by many factors including the harsh climatically conditions, vast distances and the lack of infrastructure in the arid lands of the County.⁷

The poor National Government representation in the County has forced the people of Marsabit County to continue relying on the traditional justice system to resolve and prevent conflicts. Their culture and traditions plays a significant role in managing their lives. It emphasized cooperation and communal responsibility especially during and after conflict

Murithi (ed), *Peace and Conflict in Africa* (Zed Books Ltd 2008) 16

⁵ Tanja Chopra, 'Building Informal Justice in Northern Kenya': Justice for the Poor/Legal Resources Foundation Trust, Research Report, Nairobi, 2008

⁶ Ibid

⁷ Denge Fayo Godana, 'Coping with scarcity in Northern Kenya The Role of Pastoralist Borana Gada Indigenous Justice Institutions in Conflict Prevention and Resolutions for Range Resource Management' ([Http://www.thesis.eur.nl](http://www.thesis.eur.nl), 2011) <<http://www.thesis.eur.nl>> accessed 17 October 2016

situations. The elders and the institution of seniors were respected, and they were bestowed with the responsibility of ensuring the security and justice of the people was safeguarded.⁸

Article 159 (2) of the Kenyan Constitution states that Courts are allowed to use reconciliation, mediation, arbitration and Traditional Justice system in resolving cases, for as long as they do not contravene the Bill of Rights are repugnant to justice and morality or inconsistent with the constitution and (or) any written law⁹. This section is perhaps the clearest legal justification for the strengthening of Traditional Justice Systems. Additionally, Article 67 (f) of the Constitution explicitly mandates the National Land Commission to employ Alternative Justice Systems in the resolution of land conflicts¹⁰. Section 5(f) of the National Land Commission Act actualizes this provision by requiring the commission to, in line with the constitutional requirement, use Traditional Justice mechanisms to resolve land case¹¹. This Article rests on the assumption that property rights and land ownership are so much integrated with customs that it would be impossible to address land problems without addressing the cultural underpinning.

Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and society. It encourages the state to: promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage. Within this context, Traditional justice systems are considered as forms of cultural expression and must be promoted in line with the constitutional

⁸ David Francis J, African indigenous and endogenous approaches to peace and conflict resolution. in Tim Murithi (ed), Peace and Conflict in Africa (Zed Books Ltd 2008) 16

⁹Ibid (n) 1

¹⁰Ibid (n) 1

¹¹National Land Commission Act NO 5 of 2012

requirement.¹²

However, over the years and with the advent of urbanization and many social changes such as the introduction of the cash economy and shifts in the traditional decision-making structures, the traditional institutions have been weakened with elders and religious leaders losing legitimacy to resolve conflicts. There are many factors that led to the weakening of the traditional institutions including colonialism where the colonial administrators put in place laws that favoured them as opposed to supporting the traditional justice system.¹³

Modernization and other causes of the conflicts have led to an escalation of conflicts and eroded the influence of elders and religious leaders who often are perceived to be impartial while administering justice. The causes of conflict include commercialization of cattle rustling, use of sophisticated weapons that are readily available through the porous borders to carry out cattle raids. Information communication technology that has come with the use of mobile phones and social media, use of militia from neighbouring countries to carry out attacks, political supremacy and skewed allocation of resources.¹⁴

Despite the above challenges, the traditional justice system is better placed to solve the conflicts among the people of Marsabit County as the system is restorative, reconciliatory and it is more inclusive, and it utilizes community-based processes that strengthen and bind the community to live in solidarity, thus resolving the conflict.¹⁵

To guarantee the right to security for the people of Marsabit County the duty bearers namely; state and state agencies must ensure that the people receive quality service delivery. For this

¹² Ibid (n) 1

¹³ Ibid (n) 6

¹⁴ Ibid

¹⁵ Ibid

to be effective the principles of good governance, democracy and the rule of law must be adhered to realize the aspirations of the people of Marsabit County. The general rule of law is inclusive; in that, all members of society must have equal access to legal procedures based on a fair justice system applicable to all. It promotes equality before the law, and it is believed that the rule of law is measured against international law regarding standards of judicial protection.¹⁶ The rule of law encompasses a defined, publicly known and fair legal system protecting fundamental rights and the security of people and property; full access to justice for everyone based on equality before the law; transparent procedures for law enactment and administration and accountability by governments.¹⁷

The most significant obstacles to the rule of law are the lack of sufficient infrastructure that of legal, security and administrative institutions, due to the vastness and remoteness of the County and high cost of advocacy/legal representation, illiteracy and lack of information.¹⁸ The rule of law is the foundation for both justice and security. Marsabit County is faced with the above hurdles making access to justice difficult to a majority of the citizens. The facilities that provide basic service are far apart, and the people have to walk long distances to access services such as health, judicial, education and other basic essential services.

1.1 Background to the Problem

All the people of Kenya have a right to security which has been entrenched in the Constitution of Kenya 2010. The Constitution guarantees the people of Kenya security for their lives and property. Chapter Four of the Constitution states the fundamental rights and freedoms of the population of Kenya that should be safeguarded and enjoyed by all

¹⁶Dag Hammarskjold Foundation, Rule of Law and Equal Access to Justice ([Http://www.sidase](http://www.sidase), January 2013) <<http://www.sida.se>> accessed 29 January 2015

¹⁷ Ibid

¹⁸ Ibid

Kenyans.¹⁹

The Constitution states that it is the role of the judiciary to solve conflicts between individuals, amongst communities and between citizens and the state. However, in Marsabit County the judicial institutions play only a marginalized role in addressing local disputes. Though some of these conflicts including cattle rustling, quarrels over pasture and water are reported to police, they hardly ever reach the courts.²⁰

These rights and freedoms have become elusive with many conflicts that have devastated the people leading to loss of lives, wanton destruction of property and internally displaced persons (IDPs) and refugees to neighboring country Ethiopia.²¹ In the 2013 Moyale conflict property worth millions of shillings were destroyed, about 50, 000 people were displaced with most of them fleeing to Ethiopia and some lives lost.²² Under the Constitution, the judiciary has been bestowed with the powers to resolve disputes, in particular, those involving serious crimes. However, various challenges hamper the court from fulfilling its mandate in Marsabit County. These include the vast geographical distances to the nearest courts, the high cost of traveling and filing of cases has made it impossible for the people to seek redress in the courts.

The Government has not been able to address the root causes of the conflicts to bring them to an end. Conflicts among the communities in Marsabit County have become an integral part of their lives. Conflicts have changed in structure, intensity, and had in their wake caused the destruction of property and loss of many lives leaving families impoverished and homeless;

¹⁹Constitution of Kenya 2010

²⁰Tanja Chopra, 'Reconciling Society and Judiciary in Northern Kenya. Justice for the poor' (Legal Resources Foundation Trust Nairobi 2005)

²¹ Ibid

²² Ibid

whereas the devastation of the conflicts is high, but the level of government responses is little and uncoordinated.²³ It has been worsened since the promulgation of the Constitution of Kenya 2010 which has given citizens a wide range of rights under the Bill of Rights and introduction of the devolved system of government which has led to recurrence of violence in the County over different allocation/distribution of resources.

Due to the violation of the right to security for the people of Marsabit and the failure of the National Government to provide adequate safety and the insufficient policing of the County territory, the people of Marsabit have continued to rely on their customs to guarantee their right to security. It has been occasioned by many factors including banditry where militia fight the people and steal their livestock's or drive them away from their lands. As such, this study acknowledges that the traditional justice system can resolve conflict and maintain peace. The commercialization of most conflicts has weakened the social institutions in the society; undermining the interpersonal and social trust that destroy social norms, values and institutions that have regulated and coordinated cooperation and collective responsibility for the well-being of the community.²⁴ Urbanization has also contributed to social changes that have introduced the cash economy that has led to commercialization of cattle rustling which is no longer regulated by elders.

1.2 Statement of the Problem

The key mandate of the government is to guarantee the protection of lives of its citizens and their property²⁵. Failure by the government to ensure safety and security of its citizen's causes security breakdown which in turn violates their right to security. Marsabit County

²³ Wako, F & Ekuam, D, 'Rationalization of conflicts in Northern Kenya series: A critical look at existing institutional framework on conflict resolution and peacebuilding, Kenya ' [2005] CEMRIDE

²⁴ Ibid 4

²⁵ Constitution of Kenya, 2010

continues to experience full blown conflicts that have resulted in loss of lives, wanton destruction of property and displacement of persons.

The County is located in an area that has a porous border with kith and kin traversing the Ethiopia-Kenya border with no adequate controls. The contiguous border allows for movement of people across Kenya and Ethiopia with ease. It presents an opportunity for movement of illicit small arms and light weapons across the frontier. Some government policies implemented over the years have contributed to the security lapses in the County especially on resource sharing, access, control, and management.

State and non-state actors have intervened to resolve conflicts in Marsabit with minimal success as the County continues to experience recurrent conflicts. This study explored and examined how enforcement of traditional dispute resolution mechanisms with the government as the custodian can help to eradicate recurrence of conflicts in Marsabit County.

1.3 Justification of the study

Personal/Professional

Marsabit County experienced the worst conflict in July 2013 four months after the March 2013 General Elections. The primary trigger of the conflict was as a result of the 2013 General Elections. The Borana community lost a majority of the County positions to smaller communities who had formed an alliance coined REGABU (Rendile, Gabra, and Burji) before the first General Elections under the current Constitution. Political isolation and skewed distribution/allocation of resources escalated the conflict. It led to loss of lives, displacement of over 50,000 persons from Moyale constituency that has a population of about 88, 000 persons to the neighboring country Ethiopia and massive destruction of property that has never been witnessed in the area.

His Excellency the President Uhuru Kenyatta then formed a Committee led by Hon. Francis Kaparo and Senator Yusuf Haji to mediate and find a lasting solution to end the conflict. During the fact finding mission, I was privileged to be part of the team that visited the areas affected by the conflict. The massive destruction of property was unbelievable where the looters had the time to bring down many permanent houses brick per brick in one village where a police post was situated within 100 meters away from the village.

The conflict went on for over seven months with minimal intervention by the security forces/government. Though the conflict was complex the absence of government especially the security forces to enforce the rule of law contributed to the massive destruction of property and displacement of persons. The conflict brought the town of Moyale and its environs on its knees with the residents having no place to turn to for help forcing them to flee their homes with a majority crossing over to Ethiopia to seek refuge. The delivery of all essential services broke down, and the standard life of the people of Moyale was disrupted for the entire duration of the conflict that almost lasted for eight months. It substantially violated the right to security of the population of Moyale and its environs that had to bear the burden of the conflict.

State responses to violent conflicts are mostly politically driven and consist of coercive measures that often involve the military which focuses on disarmament as opposed to the reconciliation of warring communities. It does not reduce violence in the long term. Instead, some of the affected communities become vulnerable, and it also stimulates violent resistance.²⁶

²⁶ Responses to pastoral Wars: A review of violence reduction efforts in Sudan, Uganda, and Kenya, Sudan Issue Brief No. 8 of 2007 available at <Http://> accessed on 15th February 2015

Due to systemic marginalization by the national government, the communities in Marsabit County have a history of rejecting the authority of the state, which they perceive as a threat to their unique nomadic way of life. The independence government demonstrated this through Sessional Paper No. 10 of 1965 on 'African Socialism and its application to planning in Kenya.' The government policy stated that the limited available resources should be used in the highly potential areas automatically marginalizing the County making it lag behind in development. It is among the primary causes of conflict in the area which remains largely inaccessible due to poor infrastructure.²⁷

It has made access to justice and provision of services like health, education, and security a nightmare for the people of Marsabit County. The only solution left is for them to revert to their original methods of resolving disputes. However, these methods have been weakened over time through structural violence where the Council of Elders of various communities are not in a position to control their youths who go to fight or join militia groups to fight other tribes. Due to the limited presence of the government and failure to contain conflicts, there is a need to support the traditional disputes resolution mechanisms and government to act as a custodian of their resolutions, to safeguard the right to security of the people of Marsabit County.

In Marsabit County government interventions during conflict crisis often comes too late when lives have been lost and property destroyed as witnessed during the Turbi massacre and Moyale conflict of 2005 and 2013 respectively. The government's response to the conflict has been slow and sporadic hence need to have a hybrid system where the traditional justice system is enforced with the help of government to guarantee the people of Marsabit County

²⁷Republic of Kenya, 'African Socialism and its application to Planning in Kenya' (1965)

the right to security.

This study supplemented the existing literature on conflict management by finding out whether or not enforcement of the Traditional justice system in disputes resolution where the government becomes the custodian plays a significant role in sustaining peace among the rural communities so as to guarantee their right to security. The study focused on the study of the Borana justice system to see how it can be enhanced to avoid a recurrence of conflicts among the people of Marsabit County to enhance their right to security.

1.4 Statement of Objectives

The principal mandate of the government is to guarantee the protection of its citizens and their property. Failure by governments to ensure safety and security of its citizens leads to security break-down. Marsabit County experiences insecurity and recurrence of conflicts due to poor governance which is a hindrance in achieving sustainable peace in Marsabit County. The study examined the Borana judicial system to see how it can be used to restore and bind the community during and after conflict situation. It also established whether or not the government acting as the custodian of the traditional justice system will resolve and avoid recurrence of conflicts among the people of Marsabit County.

1.5 Research Questions

- i. Has response to conflict by the government in Marsabit County led to the violation of their right to security?
- ii. To what extent has the traditional dispute settlement mechanisms among the Borana community contributed to peace and safety.
- iii. Is there a relationship between insecurity and recurrence of conflicts in Marsabit County?

1.6 Scope of the study

The extent of the research was on how the use of Traditional Dispute Resolution Mechanism (TDRM) can guarantee the right to security of the people of Marsabit County. The primary focus was on how the Borana Traditional justice system can be used to resolve and avoid recurrence of conflicts. Marsabit County is one of the forty-seven Counties.²⁸ It is located in the upper eastern part of Kenya composed of four constituencies namely; North Horr, Saku, Laisamis, and Moyale. The County is home to the nomadic communities that have faced challenges, with uncertain help from the national government. Geographically, it borders Ethiopia to the North and North East, Isiolo County to the South East, Samburu County to the South and South West and Lake Turkana to the West and North respectively. Administratively it is subdivided into Marsabit North, North Horr, Laisamis, Loiyangalani, Marsabit, Sololo and Moyale Sub Counties.

The County Headquarters is situated at Marsabit Town. The County is the largest in Kenya with an area of 70, 961 km square;²⁹ it has a total population of 291,166; a male population of 151,112 and a female population 140,054.³⁰ The County is home to the Borana, Gabra, Rendile, Burji, Garre and the Corner Tribe composed of other smaller communities including the Sakuye, Elmollo, Somali, Turkana, and Dasannach.

Due to its aridity, inadequate and unreliable rainfall in most parts of the County, history of socio-political and economic marginalization, poverty and conflicts have continued to define the better part of the history of Marsabit County. With a poverty rate of 83.2% against the

²⁸ Ibid

²⁹ Commission of Revenue Allocation Fact Sheet: Marsabit County available at <http://kenya.usaid.gov/sites/default/files/profiles/Marsabit%20County.pdf>, accessed on 7th February 2015

³⁰ The Republic of Kenya, National Population and Housing Census Report, 2009, Government Printers, Nairobi

national average of 47.2%³¹, the Commission on Revenue Allocation (CRA) ranks Marsabit as the fourth poorest County in the country. These dire conditions have cumulatively resulted to bouts of violence either between the Borana and Gabra and Rendille or Borana being the major communities residing in the County. However, the Burji community has now been drawn into the fray.³²

The County has been experiencing recurrent conflict since 2005 Turbi massacre. This conflict has recurred almost annually since 2010 with Moyale Sub-County being the epicenter. The current conflict began on 15th July 2013 and went on in a sporadic manner for over eight months.³³

1.7 Research Methodology

This study used both primary data and secondary data. The secondary data was used to establish the traditional justice system can be used to guarantee the right of security of the people of Marsabit County. It was used to study the past agreements that have been signed among communities and why they have failed to contain recurrence of conflicts leading to the violation of the right to security of the locals. The study utilized the 2013 conflict to illustrate how the traditional justice system can be employed to guarantee the right to security of the people of Marsabit County.

The secondary data included a review of reports of various studies in the area, reports of Commissions established over the years to examine the causes of conflict in Marsabit County. The various government policy documents to develop the region which has mostly lagged behind since independence and their relations with conflict management. It included the National Policy on Peace-building and Conflict Management and Sessional Paper No. 10

³¹ See <http://kenya.usaid.gov/sites/default/files/profiles/Marsabit%20County.pdf>

³² Francis Kaparo and Yusuf Haji, 'Committee on Conflict in Marsabit' (Government Printers 2014)

³³ Ibid

of 1965 on African Socialism and its Application to Planning in Kenya. The study also interrogated whether enforcement of Traditional Dispute Resolution Mechanisms by the government can facilitate eradication of recurrence of conflicts. The study also reviewed other relevant secondary sources including newspapers, journals, publications, library research and Internet research pertinent to the study.

Primary data was collected using interviews with the stakeholders concerned among them judicial officers, government employees both at the County and National levels, security officers, Peace Committee Members and other actors in the peace building and conflict prevention and management. The study also used participant observation, focus group discussions and structured questionnaires targeting the youth, women, and elders to understand how recurrence of conflicts has led to the violation of the right to security of the people of Marsabit County.

About one hundred and forty-six (146) interviews were conducted targeting elders, administrators, youth and women both in Town and the remote areas of Marsabit County. I also did an observation study during the mediation process to resolve the 2013 Moyale conflict from 5th February 2014 to September 2014.

1.8 Literature Review

A lot of literature has been written on the conflict in Marsabit County; however, most of the literature focuses on causes, resolution, and management of conflict through the traditional disputes resolution mechanisms and humanitarian assistance in post-conflict management. The study examined and analyzed the work of other researchers to identify the gaps by accurately analyzing the role of enforcement of the rule of law during and after a conflict

situation.

Most literature on conflict in Marsabit County fails to bring out the issue of geopolitics. For example in the 2013 Moyale conflict, the government of Ethiopia has been accused of stocking conflict between communities in Moyale.³⁴ The conflicts in Marsabit County have evolved with terms as ‘new- wars paradigm being used to describe the changing nature of conflict.’³⁵

Galtung’s proposal in his thesis “peace by peaceful conflict transformation: the Transcend approach” creates a shift from security focused interventions advocated by Hammarskjöld, Boutros Ghali he instead advocates for looking at goals as an answer as to why conflicts happen in the first place.³⁶ Incompatible goals according to Galtung lead to ‘blocked goals’ which result in frustration and eventually polarization. He proposes three things that contribute to these goals namely; nature, culture and structure. This presents a new understanding where nature is influenced by basic needs, culture by values and structure by interests of actors within generations, class, regions, race, ethnicity, countries and civilization. A blocked goal leads to frustration results in polarization, hatred, violence, revenge of glory in a vicious feedback cycle. Such a premise presents a catalyst for in-depth study to fully understand the sources of conflict hence start a process of finding solutions.³⁷

The implementation of the Constitution of Kenya 2010 has a potential of solving problems of blocked goals including political representations, equitable sharing and allocation of resources, devolution of resources, resettlement and reparation for internally displaced and

³⁴A, A. (2013) Ethiopia accused of stocking violence in Marsabit. Available at: <http://www.standardmedia.co.ke/mobile?articleID=2000997> (Accessed: 9 April 2015).

³⁵Malesevic, S. (2010) *The Sociology of War and Violence*. New York: Cambridge University Press. (Malesevic, 2010).

³⁶Galtung, J. (2007) ‘Peace by Peaceful Conflict Transformation-the TRANSCEND approach’, in Webel, C. (ed.) *Handbook of Peace and Conflict Studies*. New York: Routledge, pp. 14–34.

³⁷ Ibid

affected persons among others. Some of the incompatibilities that have been witnessed during implementation of the constitution in the County are party representation, inherent rivalry between tribes which informs formation of the coalitions as evidenced by the formation of ‘REGABU’ to lock out the Borana from elective positions in the 2013 General elections and contestation on sharing of County executive positions as a result of political re-alignments in Marsabit County.³⁸

The Constitution gives some assurances as it clearly spells out the principle of fair representation where all communities including the minorities are represented politically in the devolved government structures.

The National Policy on Peace-building and Conflict Management (NPPBCM) was established to among other things provide policy guidelines for a coordinated approach to peace-building and conflict management. However, the Policy is yet to be enacted since it was drafted in 2011.³⁹ Cabinet approved the National Policy on Peace-building and Conflict Management in July 2012. It was then drafted as Sessional Paper No. 5 of 2014 and sent to the National Assembly.⁴⁰ It was tabled for adoption in August 2015. Drafting of legislation is still ongoing. The National government formulated the NPPBCM which stipulates that an early warning and rapid response system will be formed by use of accurate and timely information, dialogue, contingency resources and capacity, monitoring restoration of normalcy and learning from the conflict in a systematic and structured manner.

³⁸Wanambisi, L., and Munyori, G., (2013) “ Governor- County Commissioner Clash Looms,” <http://www.capitalfm.co.ke/news/2013/04/governor-county-commissioners-clash-looms> accessed on April, 2015

³⁹National Council for Law Reporting (NCLR), (2011), National policy on Peace-Building and Conflict Management, Nairobi, NCLR.

⁴⁰National Council for Law Reporting (NCLR), (2011), National policy on Peace-Building and Conflict Management, Nairobi, NCLR.

The prestigious institutions such as the National Peace Council, District Peace Committees, and Local Peace Committees are clearly stated on how they should be formed. These facilities are necessary but have proved inadequate to deal with a recurrence of conflicts in the area. They are unable to deal with the root causes of the conflicts which are mainly rooted in identity and are political in nature driven by conflicting goals of different groups within the County. Therefore, Galtung's approach would suffice where a multilateral approach involving stakeholders at all levels⁴¹ is undertaken concurrently within the framework provided under NPPBCM.

Kariuki Muigui (2014)⁴² in his paper 'ADR: The Road to Justice in Kenya' he analyzed how the right to access to justice can be actualized through Alternative Disputes Resolution (ADR) mechanisms. He argues that although the right to access to justice is internationally and nationally recognized, the existing legal and institutional frameworks are not efficient in facilitating the realization of this right by all persons. He acknowledges that ADR is a viable option that can complement formal justice to promote the full enjoyment of all aspects of justice; justice must demonstrate fairness, affordability, and flexibility.

It was relevant in the study while examining the enforcement of Traditional Disputes Resolution mechanisms in conflict management and whether or not traditional and formal justice systems should complement each other to achieve lasting peace among the pastoralists' communities to guarantee their right to security.

⁴¹Galtung, J., (2007) "Peace by Peaceful Conflict Transformation- the TRANCED approach," in Webel, C., and Galtung, J., (eds.) Handbook of Peace and Conflict Studies, New York, Routledge, pp: 14-34

⁴²Kariuki Muigui, "ADR: The Road to Justice in Kenya" a paper presented to Chartered Institute of Arbitrators, International Arbitration Conference, Mombasa Kenya, August 2014. Available at <http://www.ciarbkenya.org> accessed on 29th January 2015

Tanja Chopra (2008)⁴³ in her paper "Peace versus Justice in Northern Kenya" she highlights the role of the rule of law in a post-conflict environment. The challenges of the use of the formal justice system in conflict management have been articulated. She has advocated for the use of traditional justice systems to complement the official justice system. She acknowledges that this has not been possible forcing the communities to development their ways and means to stop and prevent conflicts. The study recognized that traditional justice systems should complement the formal justice system. However, in as much as the Constitution of Kenya acknowledges Alternative Disputes Resolution mechanisms, no proper arrangements have been put in place on how traditional justice and formal justice mechanisms are to interlink to mitigate conflicts in Marsabit County.

It played out in the current conflict that is being referred to as the Moyale conflict in Marsabit County. The battle took place in a span of eight months; the warring parties to the conflict were engaged in an armed conflict that led to the loss of lives and wontons destruction of property. The armed conflict never relented even with the intervention of elders, local peace committees and religious leaders.

Ewa Wojkowska (2008)⁴⁴ In "Doing Justice: How informal justice systems can provide" she acknowledges that UNDP has put little emphasis on the use of the informal justice system to address access to justice among the poor and disadvantaged persons in many developing countries. She agrees that informal justice systems are often more accessible and usually used to resolve between 80 and 90 percent of disputes. She noted that in post-conflict situations, where formal mechanisms may have completely disappeared or discredited, natural systems

⁴³Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya,' Justice for the Poor, Legal Resources Foundation Trust, Research Report, Nairobi (2008)

⁴⁴ Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems can contribute,' UNDP, OSLO Governance Centre (2006).

of dispute resolution is crucial to restoring some degree of law and order, and this has been useful over the years. She also recognizes the limitations of informal justice systems. She terms IJS as often discriminatory towards women and disadvantaged groups, do not always adhere to international human rights standards, are susceptible to manipulation by the elite and the quality of the justice is often dependent on the skills and moral values of the individuals involved in dispensing justice. Despite, the above-illustrated challenges she concluded that engaging with is necessary for enhancing access to justice for the poor and disadvantaged persons especially in conflict-prone areas. She is the view that initiatives should be undertaken to gradually improve the quality of dispute resolution and addressing the weaknesses faced by IJSs.

These views related to the study that recognizes the need for integration of the traditional and formal justice systems with the government as the custodian to avoid recurrence of conflict in Marsabit County.

1.9 Hypothesis

This study was carried out on the assumption that the right to security of the people of Marsabit County can be guaranteed with the use of the traditional justice system and government as its custodian.

1.10 Theoretical Framework

The study was grounded on two theories namely restorative justice theory and theory of law and society that is the social contract theory to understand how the right to security of the people of Marsabit County can be guaranteed through enforcement of the Traditional justice system.

1.10.1 Restorative Justice Theory

In simple terms, Restorative justice is a process whereby all the parties with a stake in a particular offense come together to resolve how to deal with the aftermath of the offense. It is a different way of thinking about crime and conflict.⁴⁵ Restorative justice focuses on holding the offender accountable in a more meaningful way. It repairs the harm caused by the offense, help to reintegrate the offender into the community and contributes to achieving a sense of healing for both the victim and the community.⁴⁶

Restorative justice is a movement in the fields of victimology and criminology that acknowledges that crime cause injury to people and communities.⁴⁷ The therapeutic process of involving all parties, often in face-to-face meetings, is a powerful way of addressing not only the material and physical injuries caused by crime, but the social, psychological and relational injuries as well.⁴⁸ Restorative justice views criminal acts more comprehensively rather than defining crime as simply law-breaking, it recognizes that offenders harm victims, communities and even themselves and measures crime by taking into account how much is repaired or prevented as opposed to how much punishment is inflicted.⁴⁹

There are various forms of traditional justice systems used to resolve conflicts among the diverse communities in Kenya. However, the following are the common characteristics of Traditional justice systems.⁵⁰

⁴⁵Tony Marshall's 1999 project for the Home Office (Marshall) 1999.

⁴⁶ Ibid

⁴⁷Centre for Justice & Reconciliation at Prison Fellowship International, 'What is Restorative Justice' (2005) Restorative Justice Briefing Paper, one available at <http://www.d.umn.edu/jmaahs/Correctional%20AssessmentRJ%20brief.pdf>. Accessed on 09th October. 2016.

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰Faundez, Julio, February 2006 University of Warwick, "Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America,"

- The problem is viewed as relating to the whole community as a group. There is strong consideration for the collective interests at stake in the dispute;
- There is an emphasis on reconciliation and restoring social harmony;
- Decisions are based on a process of consultations;
- There is often a high degree of public participation;
- There is no professional legal representation;
- Arbitrators/Mediators are mostly appointed from within the community by status or lineage;
- The rules of evidence and procedure are flexible;
- The process is voluntary, and the decision is based on agreement;
- There is no distinction between criminal and civil cases, informal justice systems often deal with both;
- Often there is no separation between informal justice systems and local governance structures- a person who exercises judicial authority through an informal justice system may also have executive power over the same property or territory;
- Enforcement of decision is secured through social pressure.

Traditional justice systems are often more accessible to poor and disadvantaged people and may have potential to provide quick, inexpensive and culturally relevant remedies. Traditional justice systems are prevalent throughout the world, especially in developing countries. They are the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries, where traditional justice systems usually resolve between 80 and 90 percent of disputes.⁵¹

⁵¹EwaWojkowska, "Doing Justice: How informal justice systems can contribute," Available at siteresources.worldbank.org Accessed on 8th June 2015

The traditional judicial systems are restorative in nature. The restorative justice theory can be used to explain how traditional justice systems can be utilized by the people of Marsabit County in particular among the Borana community to resolve their disputes. The Restorative justice theory is viewed as ‘an overarching paradigm of public problem solving, citizen participation and collective responsibility for building stronger communities.’⁵² Restorative justice has varied conceptualization depending on the cultures and traditions of different communities. However, there is a common meeting point, which is how people think about crime and responds differently to it, against the conventional formal court systems.⁵³

Zehr⁵⁴ States that ‘Restorative justice focuses on the harm caused by offenders by seeking to repair harm to victims and communities and reducing future damage by preventing crime. Restorative justice requires offenders to take responsibility for their actions and for harm those actions have caused. It seeks redress for victims, reparation by criminals, and reintegration of both within the community as communities and governments achieve restorative justice through a cooperative effort.’ Restorative justice looks for the greater good of the society through an orientation that is future focused, and the offender's harm is balanced with "making things right"⁵⁵, and through reconciliation and integration, the offender is restored back to the society.

1.10.2 Social Contract Theory

"Hobbes' grounds his political philosophy by exploring human nature. He urges that man is necessarily motivated by a desire for self-preservation. Without a powerful sovereign,

⁵²Clear, T.R & Karp, D.R (1999) The community justices Ideal: Preventing crime and achieving justice, Boulder, Co. Westview.

⁵³ Ibid

⁵⁴Zehr, H (1990) Changing Lenses: A new focus on crime and justice. Scottsdale, PA: Herald pp 48

⁵⁵ Ibid

(Leviathan) to hold in awe, we would live in a constant state of war as we struggle to protect our persons. In essence, life would be 'solitary, poor, nasty, brutish and short.'

The concept of social contract theory has been derived from a man living in the State of Nature. There was no government and law to regulate them. In the State of Nature man's life was that of fear, hardship, and oppression. To overcome these, they entered two agreements namely 'The Pactum Union' and 'Pactum Subjection.'

In the first act of Union, man sought protection of their lives and property. By the second act of subjection, people united together and pledged to obey an authority and surrendered the whole or part of their freedom and rights to power. The administration guaranteed everyone protection of life, property and to a certain extent liberty. To ensure their escape from the State of Nature, they must both agree to live together under common laws and create an enforcement mechanism for the social contract and the laws that constitute it.

It is how the authority of the government of the sovereign of the state came into being because of the two agreements.

1.11 Limitations

The study was limited to how the right to security of the people of Marsabit County has been violated and how it has played a role in recurrence of conflicts, as such, there may not be enough time to evaluate all aspects of security rights and breaches that have occurred in the County. It is limited to the enforcement of the Traditional African justice system for dispute resolution, because of time we may not be able to investigate all the customary laws of all the fourteen tribes in the County hence we limited our study to the Borana justice system.

1.12 Chapter Breakdown

Chapter One outlines the aim of the study. It describes the background of the research study which addresses the issue of utilizations of the traditional justice system to guarantee the right to security of the people of Marsabit County. It further outlines the problem the research purposes to address as a result of difficulties experienced with regards to guaranteeing the right to security. It includes the objectives, research question, and significance of the study, theoretical framework, research methodology, hypothesis and limitations identified.

Chapter Two is a discussion on the government's response to conflicts and the changing nature of conflicts in Marsabit County.

Chapter Three analyses the Borana justice system on how it can be utilized to avoid the recurrence of conflicts in Marsabit which has aided in violation of the right to security of the people of Marsabit.

Chapter Four outlines and discusses the study carried out and the various findings with regards to the use of traditional justice system to guarantee the right to security of the people of Marsabit.

Chapter Five gives the conclusion and recommendations of the study by identifying the major problems facing traditional justice and outlining the challenges faced and how the same may be resolved.

Chapter Two

2.0 Government's Response to Conflict in Marsabit County

Marsabit County is prone to conflicts which have evolved over the years and are now more sophisticated and violent. The conflicts have led to the loss of many lives, wanton destruction of property and displacement of persons and refugees to the neighboring country of Ethiopia. It has negatively affected the social-economic and political development of the population of Marsabit.

The government through security operations and peace initiatives has been unable to quell the conflicts. It has resulted to recurrence of conflicts which have become complex and sophisticated due to many factors. Some of the factors include cultural practices such as cattle rustling which has become commercialized, competition over scarce resources, political supremacy among ethnic groups, weak governance, unemployment especially among the youth, and an influx of illegal arms from neighboring countries and collapse of the traditional system of governance.⁵⁶

2.1 Conflicts experienced in Marsabit County

Marsabit County has witnessed many skirmishes over the years; they have evolved and become more violent. The most devastating ones in the recent past are the Turbi massacre of 2005 and the Moyale conflict of 2013. The two conflicts led to a loss of lives, massive destruction of property, displacement of persons and refugees to neighboring Counties and Ethiopia respectively. The conflicts have mainly revolved around the Borana and Gabra Communities. The other communities in the County support either group depending on the cause/trigger of the conflict. The other communities include the Rendile, Burji, and the Corner Tribes.

⁵⁶Asfaw Kumssa et al., " Introduction: Conflict and Human Security in Northern Kenya," 2011

2.2 Changing nature of conflicts in Marsabit County

The character of the conflict in Marsabit County has evolved over the years leading to unprecedented loss of lives, massive destruction of property and displacement of persons and refugees to the neighbouring country of Ethiopia. Some of the factors attributed to the changing nature of the conflict in Marsabit County relates to the proliferation of Small Arms and Light weapons, political supremacy and representation, instability in Somalia and Ethiopia, weak governance, border conflicts and policing among others.

The pastoralist's population of the arid lands has been subsisting on the periphery of Kenya's governance and development assistance for many years since the country attained independence in 1963. It has placed the communities among the poorest in the country⁵⁷ Successive governments have failed to develop the area with most of the public service delivery sectors including security, education, health and roads having the poorest infrastructure not readily available. The Constitution of Kenya 2010 took cognizance of regions that have been marginalized and underdeveloped by ensuring that affirmative action has been taken to try to make these areas be at the par with other relatively developed Counties. It was done through devolution and additional funds to marginalized and underdeveloped Counties from the Equalization Fund which would enhance development in such areas. Marsabit County falls under this category; conflicts could have been resolved through development brought about by the same.

The Equalization Fund has been well captured in the Constitution. It mandates the Commission on Revenue Allocation under Article 216 (4) and Article 204 (4) to determine to publish and regularly reviews the policy in which it sets out the criteria by which to identify

⁵⁷Oxfam International, 'Delivering the Agenda, Addressing chronic under development in Kenya's arid lands' Briefing Paper No. 88, (2006)

the marginalized areas for purposes of the allocation and use of the Equalization Fund.⁵⁸ It has, however, not seen the end of conflicts in the Arid and Semi-Arid Lands; instead, there is a resurgence of conflicts that have intensified over the recent past leading to loss of lives and wanton destruction of property in a magnitude that has never been experienced in the history of Kenya. More so, the conflicts have taken on a new dimension with boundary disputes being more pronounced. Concomitantly, the conflict issues have to do with resources and power.

The law has been used to marginalize the people of Marsabit both by the colonial and post-colonial governments. The colonial government enacted several laws targeted at the Northern Frontier Districts made up of the present-day Counties of Mandera, Wajir, Garissa, Isiolo, and Marsabit. These districts as they were then referred became closed zones. A special pass was needed for movement in and out of the districts under the Outlying District Ordinance of 1902. The colonial administration further enacted the Special Districts (Administration) Ordinance of 1934 and the Stock Theft and Produce Ordinance of 1933 that gave the colonial Administrators extensive powers of arrest, detention, restraint and seizure of property of "hostile tribes." The seizure of assets legalized collective punishment for crimes committed by their community members. These ordinances also applied to another pastoralist of the present day Counties of Tana River, Lamu, Kajiado, and Samburu.⁵⁹ The isolation policy propagated by the colonialists led to the systemic marginalization that has characterized the history of the region and its people.⁶⁰

The Independence Constitution of 1963 provided for procedures to be followed in the event

⁵⁸Constitution of Kenya (2010)

⁵⁹Ahmed Issack Hassan "Legal impediments in Northern Kenya" available at <http://pambazuka.org/en/category/comment/51377> accessed on 7th February 2015

⁶⁰Dadacha L.G, 'Kenya: The Politics of Deprivation and Separation, The case of Northern Kenya' (Gadda.com 2009) <<http://gadaa.com>> accessed on 23rd January 2015

of declaring a state of emergency under Section 29. However, section 19 of the Kenya Independence Order in Council, a subsidiary legislation provided that the Governor-General;

"may by regulations which shall be published in the Kenya Gazette, make such provisions as appears to him to be necessary or expedient for the purpose of ensuring effective government or about the North Eastern Region. And without prejudice to the generality of that power, he may by such regulation make sure temporarily adaptations, modifications or qualifications or exceptions to the provisions of the Constitution or of any other law as appear to him to be necessary."

The above orders were transferred to the President when Kenya became a Republic in 1964, giving him the power to rule the Northern Eastern Region by decree.

2.2.1 Traditional elders (Gadha and Yaa)

Ubah Hassan⁶¹ traditional elders have for decades played a major role in regulating the affairs of their communities. They have historically played crucial roles in resolving both Intra- and inter-communal conflicts and continue to play a significant role as mediators and arbitrators in addressing disputes over water and pasture. In this respect, they can also provide important links between the community and the political class.⁶² However, when their capacity is weakened, the same groups can drive conflicts. Politicians and elite were widely perceived by individuals from all communities to have played a role in undermining traditional systems, limiting their ability to address and resolve the causes of conflict proactively.

⁶¹Ubah Hassan Emmie Auma, Thomas Nyagah, Bonita Ayuko, and Kathryn Achilles. Saferworld briefing: Marsabit County conflict analysis pp. 3 of 10 (2015).

⁶²Ibid

2.2.2 The Marsabit Peace Restoration Committee (Kaparo and Yusuf Haji Committee)

The Committee was appointed by H.E President Uhuru Kenyatta on 5th February 2014 to identify means of bringing peace to the County following the violence that had led to the Moyale conflict in late 2013 and early 2014.⁶³ The Committee was made up of elders from all different communities in Moyale Sub-County where violent conflict was most experienced. The Committee played a significant role in negotiating and facilitating the return of stolen livestock from both the Gabra and communities at the height of the conflict. The Committee was responsible for the return of one hundred and thirteen camels to the Gabra and seventy-six cattle to the Borana community. However, joint efforts by the elders have stalled because of a lack of resources to facilitate the movement and meetings of the elders.

2.2.3 Religious leaders

Religious leaders were not considered to be active in peace building in the County, except of the Catholic Diocese of Marsabit. The Diocese initiated peace dialogues and peace caravans amongst the opposing clans. Participants explained that religion does not play a tremendous role in the conflicts currently experienced in Marsabit County and there have therefore been only half-hearted attempts from religious leaders to get involved.⁶⁴

2.2.4 District peace committees

The District Peace Committees (DPCs) exist at the local level under the control of the National Steering Committee on Peace Building and Conflict Management (NSC) which also serves as the Kenyan Conflict Early Warning and Early Response Units under the Intergovernmental Authority on Development. There is, however, lack of clarity about the

⁶³ Ibid

⁶⁴ Ibid

role of the NSC as more peace structures are established as the character out of devolved governance continues across the country. The government is in the process of drafting a Peace Council Bill that will embed the DPCs in law. Provisions exist for a county peace forum for the formation of the same; however, at the time of collecting data, Marsabit was yet to create this forum. Participants interviewed stated that the County government is in discussions with the NSC to identify ways of strengthening the peace committees as well as areas of collaboration for promoting peace work in the County. The County Cohesion, Integration, and Coordination of Non-State Actors office has also been established in Marsabit town. It is mandated to facilitate processes that encourage the elimination of all forms of ethnic discrimination irrespective of background, race, and religion. The office is still in its infancy but has begun efforts to support inter-ethnic dialogue to prevent future conflict from spilling over from Moyale town into the rest of the region.⁶⁵

2.2.5 Ministry of Interior and Coordination of National Government

The Ministry, through the County Commissioner's offices in Moyale sub-county and Marsabit County, has supported peace efforts through participating in joint peace *barazas*⁶⁶ in Marsabit and Moyale. The Kenya Police have also increased their patrols along the Marsabit–Moyale highway following the burning and looting of vehicles. Increased police patrols in both Moyale and Marsabit have contributed to a decline in violence, with hopes that they will prevent future violence. However, both the National and County governments have been heavily criticized for appearing to align themselves with one party to the conflict and therefore further fuelling the conflict. Examples were given of lack of responsiveness to crisis situations by the police.

⁶⁵Ibid

⁶⁶Community meetings or forums that are convened by the chiefs to discuss issues of concern within those communities as well as to share government policies on various issues

Police personnel are mostly not from Marsabit, and at times understandably feel intimidated or threatened when operating in this environment.⁶⁷ However, there were perceptions amongst those consulted, including participants, that the representatives of the national government, such as the County Commissioner, at the County level are pro-am. The community broadly does not feel represented by the County government, and therefore individuals tend to seek services from the County Commissioner's office. It has led to a development of tensions between the two agencies as they are now undertaking similar functions and encouraging a duplication of roles. Similarly, the County government has been accused of being "the party of the alliance."⁶⁸ Some observers say that battles between the national and county governments for control of resources further aggravates the situation⁶⁹.

2.2.6 Civil Society Organizations

CSOs have been known to play a major role in peace building initiatives at the local level. They have increasingly been recognized by the government as potent forces for social and economic development. CSOs have managed to build capacity and support communities to engage in peace building through dialogue and reconciliation programs.⁷⁰ (Ubah Hassan *et al.* 2015).

2.2.7 Technology transformation through use of social media

Advanced technology through the use of social media has complicated conflict in Marsabit County. The political leaders, youth, and women often use the social media platform to spread hate speech and propaganda that heightens animosity among warring communities during and after conflict situations. During the Moyale conflict in 2013 social media was

⁶⁷Marsabit focuses group discussion, October 2014.

⁶⁸ Participant in a focus group discussion in Moyale

⁶⁹ Ibid Op.cit (127)

⁷⁰ ibid

used at very unprecedented levels that escalated the conflict to levels that have never been witnessed before in the history of the County. According to a fact-finding mission led by a Committee appointed by H.E the President Uhuru Kenyatta to resolve the Moyale conflict in 2014 led by Hon. Francis and Senator Yusuf Haji it was noted that social media played a significant role in escalating the conflict.⁷¹

2.3 Conclusion

The causes of conflicts in Marsabit County still remain complex and sophisticated. They include cattle rustling and banditry due to decline in pastoral economy. Some of the factors that continue to cause conflict in Marsabit are drought, lack of effective policies and intervention's on usage and management of rangelands, weakened government interventions during conflict situations and insecurity among others.

The devolved government presents an opportunity to solve some of the causes of conflicts by engaging a broader section of the community under the guidance of the traditional justice system. Some of these initiatives should target peace building activities that would repair the broken relationships and rebuild livelihoods.

⁷¹Ibid

Chapter 3

3. Borana Traditional Justice System

3.1 Introduction

The colonial government instituted policy frameworks that segregated Marsabit County from the rest of Kenya commonly referred to as “Kenya Proper”. The pastoral communities of the region were seen as hindrance to the colonial enterprise due to their geographical location from the centre in Nairobi and their livelihood that clashed with the colonialists’ agenda.⁷² The colonialist agenda was to extract value through modern agriculture and taxation. The situation in Marsabit was not different and the colonial government legalized the use of military and set the foundation for the instrumentalization of violence as the ultimate arbiter in the region.⁷³

The post-independence government followed suit and put in place emergency laws after independence to quell the pro-Somali militia, shifta, this gave leeway to the government to combat insurgency that was being experienced then. What had begun as a legitimate struggle for self-determination degenerated into widespread banditry. The firearms that remained after the rebellion were later used for banditry and highway robbery.⁷⁴

Recent studies indicate that formal courts in Marsabit County are few, bureaucratic and often seen to dispense a type of justice that is either too long in coming or has retributive rather than reconciliatory impact on the concerned individuals and communities.⁷⁵ Restorative justice is more victim centered justice system that seeks to restore victims as well as restoring

⁷² Korir Sing’Oei, “Customary Law and Conflict Resolution among Kenya’s pastoralist communities, 2011” Available at <http://Panafricanthinking.blogspot.com/2011/4/customary-law-conflict-resolution.html> accessed on 11th April, 2015

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Tanja Chopra, 2009

offenders and restoring community.⁷⁶ The formal system through the courts, on the other hand is popularly seen to be retributive justice, it is punitive and aim is to make offenders suffer as much as the victim if not more. The offenders' accountability is to the state and not to the offended- victim or the larger community as is the case with restorative justice.

In traditional systems, decision-making is usually based on consultation and under the authority of non-lawyers/jurists, mainly local tribal or religious leaders, either individually or in a group. Traditional justice systems tend to address a wide range of issues of significant concern to the people, including personal security and local crime; protection of land, property and livestock; resolution of family and community disputes; and protection of entitlements, such as access to public service. These community-based mechanisms, which play an important role in community cohesion, are usually more available and affordable and often enjoy greater legitimacy with the people than the formal systems.⁷⁷

In this study the Borana traditional justice system was studied to see how the right to security can be guaranteed and why the formal justice system has remained elusive to administer justice to the pastoral communities of Marsabit County.

3.2 Borana Traditional Justice System

The Borana are part of the larger Oromo speaking people of Ethiopia. Oromo is one of the most populous language groups in Africa.⁷⁸ In Kenya according to the 2009 census report the Borana are about 291 000, 000. Borana are generally divided into two moieties namely Sabbo and Gonna, where Sabbo has three sub moieties and Gonna has fourteen sub moieties. The Borana generally co-exist as a unit irrespective of whether you are a Sabbo or Gonna, the only restriction is inter marriage from the same moiety is not allowed. Sabbo marries from

⁷⁶ Braithwaite, J 1996

⁷⁷ United Nations Rule of Law, Informal justice. Available at http://www.unrol.org/article.aspx?article_id=30

⁷⁸ Asmarom Legesse, 'Oromo democracy: an indigenous African political system' (2000)

Gonna and vice versa. Their community unit and pattern of life is structured along rules and regulations of the Gada system of administration, which has a well-defined chain of command from the lowest to the top.⁷⁹

The general community unity and pattern of life is ordered along the rules and regulations of the Gada system of administration, which has a structured chain of command with the Aba Gada at the top. The Gada system is a system of generational classes that succeed each other every eight years in assuming political, military, judicial, legislative and ritual responsibilities. Each one of the eight active generation classes has its own internal leadership (Adula hayyus) and its own assembly (ya'a).⁸⁰

At the community level the Borana are an egalitarian and democratic society. Decision-making and action among the Borana can occur at different levels including the individual, household and community levels. Community level decisions are made through group discussions and consensus by assembly. Decisions can be made along both kinship affiliation and territorial divisions.⁸¹

3.3 The BOMA Peace Agreement

The BOMA Peace Agreement was mediated by a Committee formed by His Excellency the President Uhuru Kenyatta under the Chairmanship of Hon. Francis Ole Kaparo and Senator Yusuf Haji on 5th February 2014. The Kaparo and Haji Committee held its initial meeting on 6th February, 2014 at Panafric Hotel in Nairobi and drew a program to chart the way forward on how to approach the issue to bring long lasting peace to Marsabit County. The meeting was attended by the Governor, Members of Parliament, County Representatives, Religious

⁷⁹ Ibid

⁸⁰ About Borana, Available at www.borana.webs.com/about_borana.htm accessed on 11th April, 2015

⁸¹ Dejene Aredo et al. "Indigenous Conflict Resolution in Pastoral Areas of Ethiopia: The Case Study of the Well Council and Arara Borana. Available at <http://www.ossrea.net/index.php> accessed on 11th April, 2015

and local leaders who resolved the following;-

- i. That the people of Marsabit County observe a ceasefire with immediate effect from 6th February, 2014.
- ii. That whoever contravenes the ceasefire to pay a compensation of Kshs. 5 Million to the community which has been wronged in accordance with traditional conflict resolution and dispute settlement mechanisms.
- iii. That the Committee visits the areas affected by the conflict to assess damages and thereafter hold meetings with the affected communities in Moyale and North Horr between 7th and 9th February 2014.
- iv. After the field visit, the Mediators in the presence of the whole Committee held a series of consultations with the affected communities except in one occasion where the Mediators held a meeting with communities not actively involved in the conflict in absence of the other members of the Committee. **In all the consultations on the ground, the Committee members apart from the Mediators did not actively participate in the consultations.**
- v. The leadership of Marsabit County appealed to the residents of Marsabit to cease using social media, rumours and propaganda in order to reduce tension, so as to allow mediation and negotiation to continue.

The agreement illustrates how enforcement of the traditional justice system by the government can be used to enhance the right to security of the people of Marsabit County.

“THE BOMA DECLARATION”

BY LEADERS OF MARSABIT COUNTY TO END CONFLICT IN MARSABIT

PREAMBLE

We the leaders of Marsabit County are deeply concerned with the adverse impact of the Marsabit conflict on our people.

We acknowledge the serious humanitarian crisis arising from the conflict leading to loss of lives, wanton destruction of property and displacements, which has further resulted to lack of access to basic need like shelter, food and medicare.

We take cognizant of the root causes of the conflict that basically revolve around Land and Settlement, politics and political representation and distribution/allocation of resources.

We therefore, do hereby DECLARE that;

We have reached an agreement with the facilitation of the Kaparo/Haji Committee to bring long lasting and just peace to Marsabit County.

We will form an Oversight Committee to oversee implementation of the BOMA recommendations of the Kaparo/Haji led committee.

The National Government enhances security and declares the Marsabit conflict a National Disaster.

Negotiations and consultations on resource allocation have commenced and shall be embraced by all leaders with a view to find means and ways of equitable distribution.

Reconstruction and resettlement of the displaced shall take precedence in all the affected areas; and the County Government shall closely work with other organizations to facilitate this process.

However, joint efforts by the elders have stalled because of a lack of resources to facilitate the movement and meetings of the elders.

3.4 Conclusion

The traditional justice system was used to end hostilities during the 2013 Moyale conflict with the help of government through the mediators led by Hon. Kaparo and Senator Haji. The conflict has lasted for a period of over eight and the government's interventions had failed to quell the conflict.

Chapter Four

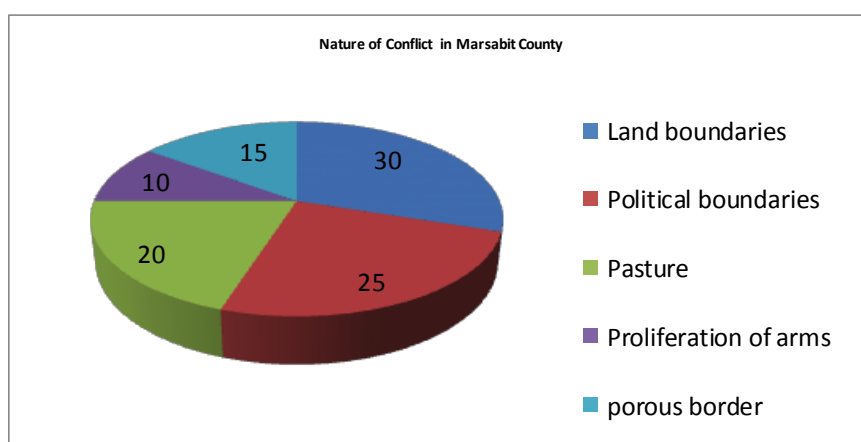
4. Analyzing the use of traditional justice system to guarantee the right to security of the people of Marsabit County

4.1 Introduction

This chapter focused on in-depth study findings analysis by extensively expounding on the conceptualizations and realization of the right to security among the people of Marsabit. It correctly analyzed the use of the traditional justice system to solve conflicts among the Borana community. The study through participant observation, Focused Group Discussions (FGD) and interviews with senior elders, women and youth formed a narrative from their narrated experiences on how conflicts have violated the right to security of the people of Marsabit. Causes of conflict were studied to appreciate the complexity of the conflicts in Marsabit County that make the community rely on their traditional justice to avoid recurrence of conflicts to guarantee their right to security.

4.2 Nature of Conflicts

Figure 1: Nature of conflict in Marsabit County



The chart above shows the percentages of causes of conflicts in Marsabit County, the major

causes being land and political boundaries disputes and pasture.

Causes of Conflicts in Marsabit County include.

4.2.1 Land and boundary disputes

The latest National census of 2009 indicated that Marsabit County has a population of 291,166, of which 64,000 are residing in urban areas, and most of these population concentrate in Marsabit town and, to a lesser extent, Moyale town on the Kenya–Ethiopia border.⁸² It is because Marsabit is near Mount Marsabit which provides grazing and water even during dry seasons. The majority of the interviewed Elders, Administrators, Youths and Women about 90% of them cited migration as the primary source of conflict among the tribes within Marsabit County; this is because these migrating clans occupy land which is not theirs when they are searching for pasture and water for their livestock.

According to Hussein Haji⁸³ "there was massive exodus of Gabra families along with their animals and armed militias from Region Five of Ethiopia to the areas stretching from Funannyata all the way to Antuta pasture lands on the Kenyan side." This migration led to a furious reaction from the Borana leaders, who demanded to know why the Gabra communities from Ethiopia were allowed to occupy their land, from the Deputy County Commissioner. This marked the beginning of hostilities that culminated into an armed conflict of 2013 after the General Elections where the Borana lost their grip on power to the Gabra and their allies. While Guyo Jirma⁸⁴ referred to Borana contestation over administrative boundaries of Turbi and Forole towns which were moved from Moyale constituency into the new constituencies he was of the view that the Borana wanted them to remain in Moyale. After the General Elections of 2013, there was heightened tension, which

⁸² Kenya National Bureau of Statistics (2009).

⁸³ Hussein Haji, Interview excerpts (2016).

⁸⁴ Guyo Jirma, Interview excerpts (2016).

led to violence in December of the same year.⁸⁵ Political incitement triggered the outbreak of violence, which lasted until February 2014. At least twenty three people were reported to have been killed, a hundred homes destroyed, and 8,521 households displaced⁸⁶ the most affected were Marsabit town, Butiye, Moyale central, Heilu, and Funanyata.

All the elders interviewed agreed that there were no clear boundaries between Borana and Gabra communities because there have coexisted and some regard it as some community, but Hussein Charfi⁸⁷ A Chief said that "there was a widespread perception amongst the Borana that the Gabra in pursuit of political influence and urge to expand their territory is accelerating conflict between the two communities." It was reinforced by a former government official, Malim Musa⁸⁸ Who stated that "members of the Borana community are now more conscious of whom they are selling their land to – an indication that personal area is now viewed as a community property and its use has consequences for the broader community." There is also increasing competition over new and growing urban settlements because the community members anticipate that the value of land will appreciate along the road giving them better economic returns.

As reported in the Standard media in June 2014 villages in Bosnia Junction and Fununyata and Bori were destroyed in the inter-communal violence.⁸⁹ This violence was attributed to by one security official as the desire of each community to remove permanently the other from these villages. Arson of houses and vehicles is becoming particularly common during these incidents. Participants interviewed throughout the research emphasized land as a key factor driving conflict in Marsabit County. Following the 2013 General Elections and subsequent

⁸⁵ Saferworld 2015

⁸⁶ Finland Church Aid and ACT Alliance Marsabit-conflict- analysis (2004).

⁸⁷ Hussein Charfi, Interview excerpts (2016).

⁸⁸ Malim Musa, interview excerpts (2016).

⁸⁹ Saferworld briefing: Marsabit County conflict analysis (2015).

installation of the County government, there were rumors and fears of ethnic expansionism. What was once considered as regular migration by pastoralist communities in search of water and pasture is now perceived with a lot of suspicions. The members of the Borana interviewed accused Gabra politicians of encouraging immigrant of the Gabra Migo from Ethiopia to occupy their land, particularly in the rich pasture lands of Funanyata (Bosnia-Junction) and Antuta in Moyale Sub-County.⁹⁰ Many believed that this was so the Gabra could increase their community's voter population in the County in the run-up to the 2017 General Elections.

Also the cross-border nature of the clan alliances created to protect their tribesmen has too contributed to armed conflict, as all the fourteen tribes in Marsabit County always seek reinforcement from their fellow brothers from Ethiopia. It is prevalent especially among the major tribes in the County namely the Borana and Gabra. The respondents who were interviewed 100% of them agreed that these two tribes and indeed the other twelve tribes do seek reinforcement from their tribesmen from Ethiopia Region Five.

It is evidenced by the actions of Garri tribe from Ethiopia to push for inclusion of Moyale to Somalia to increase their land mass and political influence. The Garri reached out to the Gabra to re-drawing of Border between Region Four and Region Five to include Moyale and all the land east of the highway connecting Kenya and Ethiopia. They mobilized their fighting force and engaged the Borana in a battle around Moyale in Ethiopia in July 2012.⁹¹ For three days resulting in massive loss of lives and Garri community were forced to flee to Moyale in Kenya.⁹² Meanwhile, the Gabra of Ethiopia identified themselves with Region Four, but sensing that their little numerical strength would not afford them much political

⁹⁰ Saferworld briefing: Marsabit County conflict analysis (2015).

⁹¹ Ibid.

⁹² Ardajila.com MOYALE CONFLICTS: The Actors, the Contests and the Interest web (2014)

leverage, they opted to join Region Five instead.⁹³ They were not comfortable in Region Five as well. Knowing how ambitious and power hungry their new Garri partners were, they quietly embarked on a long-term scheme, which was to create their zone in Moyale in Kenya and extend it to North Horr Constituency where their kins already lived. In corroboration with the Gabra of Kenya, they offered weaponry and military training to the Gabra youth in Moyale. After the General Elections of 2013, the Borana lost their grip on power, and the Gabra took advantage of their gains on political power, to expand their territory in Moyale Sub-County, hence triggering the violence of 2013.⁹⁴

4.2.2 Political representation

The issue of geopolitics as a contributing factor to the conflict in Marsabit County has not been adequately articulated in most literature. It can be highlighted for example by how the Ethiopian government has been accused of stoking conflict between communities in Moyale Sub County in the 2013 conflict.⁹⁵ It may be among the reasons why conflict continues to recur due to failure to recognize such a crucial factor as geopolitics. For example, the conflicts in Somalia and Ethiopia that led to the collapse of the Siad Barre and Mengistu Haile Mariam governments respectively had spillover effects on Moyale Sub County in Marsabit County. When in 1991 the government of Siad Barre was deposed by the United Somali Congress,⁹⁶ the weapons used in the Civil, increased proliferation of arms and ammunition, and the communities of pastoralists armed themselves to defend their livestock and some formed militia for cattle rustling groups which keep terrorizing resident of Marsabit County.

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Abdi, A., "Ethiopia accused of stoking Moyale clashes," (2013) Available at <http://www.standardmedia.co.ke/mobile/?article/D=2000099706>, accessed on 22nd June 2015

⁹⁶ Tracey I. Cousin, "Somalia: The Fallen Country," Available at <http://www1.americam.edu/ted/ice/somwar.htm> accessed on 15th March 2015

Since independence, the political system in Marsabit County was dominated by the Borana because of their numerical strengths and the National Government propaganda and perpetuation of tribal kingpins. Because of the Borana numerical force and economic influence, the other thirteen tribes felt marginalized, all the Gabra, Rendile, and Burji interviewed alluded to ‘historical injustices committed by the Borana against the other thirteen tribes.’ Even with the advent of a new political dispensation that heralded a devolved system of governance, most of the Counties in the Arid and Semi-Arid lands, experienced persisted flare-ups across the region. Fear of devolution and complex political and economic interests converge to fan violence among communities in the area.⁹⁷

Politics has often been a trigger for violence in Marsabit County, for example, the Moyale conflict of 2013 was triggered partly by political representation in the County government. The origin of political representation can be traced back to 2005 when the teachers of Marsabit County formed a coalition of the Rendile, Gabra and Burji (REGABU) and clinched all the positions of the Kenya National Union of Teachers.⁹⁸ It was replicated in the 2013 General Elections where REGABU managed to clinch the positions of Governor, Senator and Women Representative. It left the leaders from the Borana community feeling marginalized and in the cold.

Since independence the Borana community had politically and economically dominated Marsabit. This dominance created growing resentment from smaller communities such as the Rendille, Gabra, and Burji. Some months towards the 2013 General Elections these three tribes formed a political alliance that also included the Garri of Region Five in Ethiopia, to

⁹⁷Roba Sharamo, "The politics of pastoral violence: A case study of Isiolo County, Northern Kenya," Working Paper No.095, 2014, Available at www.future-agricultures.org accessed on 12th March 2015

⁹⁸Ndungu Report, "Marsabit Conflict Assessment Report," Nairobi (2005)

form REGGABU alliance to take County and national policy positions from the majority clan, whose numerical dominance meant they were widely expected to capture most of the available seats.⁹⁹ After this union had won the said elections, the governorship went to the Gabra community, the deputy governorship to the Burji, the senator position to the Rendille, and the women's representative to the Garre community. Thus, locking out the Borana from the most important political positions in the County and National politics, this triumph was achieved courtesy of the infighting between two Borana candidates that split their votes. Just before they had the chance to take stock of their lot, along kept plan of taking over their lands both in Ethiopia and Kenya was set in motion. Now even more motivated by their election win. Political incitement continued to fuel local conflicts and was believed by many to have been the trigger for hostilities between December 2013 and February 2014. There is growing consensus that the role played by current and previous MPs was significant. Elites were more broadly seen to play a role in fuelling conflicts through supporting violence including funding militias and paying for food and weapons and spreading rumors, particularly through social media.

This win for the REGGABU alliance and the loss of the Borana Community led to political incitement, which is believed by many to have been the trigger for hostilities during the 2013 Moyale conflict. There is growing consensus that the role played by current and previous MPs was significant. Elites were more broadly seen to play a role in fuelling conflicts through supporting violence including funding militias and paying for food and weapons and spreading rumors, particularly through social media. Political supremacy and representation have been cited as the causes of conflict in Marsabit County. The imposition of permanent tribal boundaries by the colonial administration had significant ramifications on the rural

⁹⁹The REGABU alliance was initially formed by teachers from minority communities during the local KNUT to block Boran teachers from winning elective positions.

communities. These boundaries were set up without due regard to the seasonal variations and demands of the nomadic lifestyles of the pastoralists. The new administrative units were meant to provide distinct and exclusive units of governance along ethnic lines; rural communities have often been forced to ignore these territorial boundaries during times of drought. I have inevitably led to tension and conflict among communities fighting over scarce resources of water and pasture.¹⁰⁰

4.2.3 Pasture and water

In Marsabit County, the majorities of conflicts have been caused by competition over grazing space and water for livestock and sporadic cases of cattle rustling and revenge killings. Most parts of Marsabit County are arid except for some areas around Marsabit mountain and hurri hills.¹⁰¹ Hon Jarso Jillo Fallana, Guyo Jirma, Hussein Charfi, Abdi Falar and all the other Elders and Youth interviewed indicated that due to scarcity of natural resources like pasture and water competition over the use, access and control of these resources is often the primary cause of conflict among rural communities; especially during the dry spell when livestock tend to concentrate in limited areas with pasture and water.¹⁰² However, after the advent of devolution, the source of the conflict has changed and now it is mostly influenced by control of political power and resources allocated to the County.

The analysis of data collected from Marsabit County indicates that Pasture and water are the primary sources of conflict within the County especially during the dry season. All the one hundred and forty-six interviewed, the Elders, Administrators, Youth and Women agreed that continuing drought that reduces areas where pasture and water could be accessed from to the confines of Mt. Marsabit and its surroundings. The scramble for the limited pasture and water

¹⁰⁰ KHRC, "Morans No More: The Changing Face of cattle rustling in Kenya," (2010).

¹⁰¹ *Ardajila.com* MOYALE CONFLICTS: The Actors, the Contests and the Interest web (2014)

¹⁰² Ibid

by almost all Pastoralists in the County is one of the primary sources of conflict because these resources are communally owned. Therefore, "The use of these resources has been governed by elders who enforce communal laws—"103 So far after the 2010 promulgation of the Constitution, there have not been any major conflict involving pasture and water in Marsabit County.

4.2.4 Proliferation of Small arms and ammunitions

Firearms were cited by 90% of the interviewed individuals in Marsabit County as the principal factor fueling conflict in the county. It is because sophisticated weapons of military type are easy to procure due to the conflicts in Somalia and Ethiopia that led to the collapse of the Siad Barre and Mengistu Haile Mariam governments respectively had spill-over effects on Moyale Sub County in Marsabit County. The wars resulted in proliferations of automatic weapons that had been used in the wars. Arms were made available by fleeing refugees and fighters who were disposing them at very low cost to herders and businesspersons in Kenya.¹⁰⁴ There were also made available by insurgent groups like Oromo Liberation Front who find their way into the Kenyan territories from time to time. Heightened shared resource conflicts among the pastoral communities have been associated with the proliferation of Small Arms and Light Weapons.

The main livelihood of most of the pastoral communities is herding cattle, which is no longer viable without arms to protect cattle rustling. Kennedy Mkutu ¹⁰⁵ In his book "Guns & Governance in the Rift Valley Pastoralist Conflict & small arms" he posits that conflicts among the pastoralist communities have changed from customary conflicts where cattle rustling was used for re-stocking and payment of dowry to the commercialization of cattle

¹⁰³Prof. D. Obara, "Land Tenure in pastoral areas of Kenya, KPF Topic Meet, September, (1994).

¹⁰⁴Pkalya R. et al., "Conflict in Northern Kenya: A Focus on Internally Displaced Conflict Victims of Northern Kenya, Nairobi, DTP (2003).

¹⁰⁵ Kennedy Mkutu, "African Issues: Guns & Governance in the Rift Valley: Pastoralist Conflict & small arms," Fountain Publishers (2008).

rustling. The study acknowledged that conflicts are no longer the customary conflicts.

These conflicts have intensified and became more vicious with the use of sophisticated arms where lives have been lost and property destroyed.¹⁰⁶ Also, the National government has often been forced to use excessive force to repulse the said insurgent groups, which sometimes targets innocent civilians in Marsabit County, and this has left the Marsabit residents feeling unprotected and vulnerable to armed militia who attack them from time to time to steal their livestock. As such they believe that their right to security is being violated by the Government that is supposed to protect them, hence the need to arm themselves to protect their lives and livestock.

It has alienated in most occasions the local population from the government making them reinforce their dynamic character.¹⁰⁷ Corrupt government officials at the porous borders have also compounded the problem by being compromised by arms traders and criminals to allow weapons from the war-torn countries to find entry into County and other conflict-prone areas.¹⁰⁸

This impact of arms proliferation was demonstrated by the conflict of 2013 around Moyale where the minority Gabra community, with access to endless supplies of weaponry procured by Burjis business tycoons and tactical support from police, were able to dislodge the Borana community from several parts of Moyale. This new form of power has substantially undermined the traditional culture of reciprocity and mutual respect.

Those who wield the power of the guns know no limits and pay little attention to the values

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Kirui, P, and Mwaruvie, J "The Dilemma of Hosting Refugees: A Focus on Insecurity in North-Eastern Kenya," IJBSS vol.3 No.8, pp: 161-171

and relational ties of the past. Through the analysis of secondary data, we found some literature alluding to the scheme by the Garre of Ethiopia to create what they call the Garre Land Republic which was alluded to by the Inspector General of Police as quoted in the local media. Here is part of what the Inspector General of Police said about the Garre scheme.

*'...Inspector General of Police David Kimaiyo said he had directed the grilling of the leaders from the region to the bottom of the problem there. It is hoped that the grilling of the leaders who will including Governor Ukur Yattani will help solve the problem that has seen hundreds of locals who are fighting following the outcomes of the last General Elections. "The government will not sit and watch unnecessary inter-clan killings which are politically instigated. I, therefore, direct the Director of Criminal Investigation to cause statements be recorded from all the political leaders from Marsabit County both those who won several seats and even those who vied for legislative seats and didn't win. Kimaiyo said they are also investigating a website known as Garr online for allegedly inciting the skirmishes. The website calls for the secession of parts of North Eastern Kenya. According to the map, the new region will be called the Garre Land Republic which stretches from Isiolo, Moyale, Wajir, and Mandera to part of Ethiopia. The group has so far been blamed for rising tension and fighting between major ethnic groups that have left more than 100 people dead in the past year.'*¹⁰⁹

It is so because the Garre in Ethiopia are supported by the ruling Government and can access weapons, and by the Islamic influence they are real businessmen who can bankroll the purchase of weapons, training and pay youths to be trained as militia.

¹⁰⁹Read more at <http://www.Standardmedia.co.ke/?articleID=200009249>:

4.2.5 Clan/tribal affiliations

From the interviews carried out, we can deduce that an individual identified himself totally as a member of an ethnic group, such that his role, protection, friends, and enemies are to a large extent determined by his clan. All the forty- nine youths and some Elders consented that the clan identity was paramount especially during the conflict and hence it was important for them to associate themselves with clan activities including waging war against a perceived enemy. Elder Bonaya Guyo, Youth Dida Muhamed among others indicated that "a clan member owes his allegiance to the clan, and it means life and death for the clan members because that is where they are protected; their right to use community resources is guaranteed." It made it difficult to get the correct information regarding the involvement of a clan in an armed conflict; the interviewed individuals were readily willing to discuss the other clan's participation in an armed conflict in detail than the involvement of their clan's role in a conflict.

It could well be demonstrated when it came to the exploitation of natural resources which is viewed as a community issue. Therefore, alliances and agreed leadership systems to the clan level guide internal competition within local grazing groups. Major conflicts happen between large groups that identify themselves in the ethnic patterns of language, blood, and which claim or contest assumed rights of occupancy to grazing land over which there is no agreement over occupancy or use, or for which no alliance exists. Clans make a military type treaty alliances that unite several clans or even tribes who speak different languages.

For example in Günther¹¹⁰ averred that the -Degodia Alliance of 1989 held until early 1997, binding together more than half a million people across the Kenya, Somalia, and Ethiopia

¹¹⁰ Günther Schlee, 'Territorialising Ethnicity: the political ecology of pastoralism in northern Kenya and southern Ethiopia' (Working Paper 121, Max Planck Institute for Social Anthropology, Halle/Saale, 2010).

border. They have realized that on the national level, ethnic mobilization has played a significant role in political struggles, and they carry these dynamics even into the remotest pastoralist areas. Where the fight for land is progressively ethnicized, while Saafo Roba Boye and Randi Kaarhus 2011¹¹¹ Suggests that the current political and administrative restructuring, as well as on going land reforms have created windows of opportunity for violent (re)negotiation of territorial claims in the pastoralist areas in Kenya's arid north.

4.2.6 Cattle rustling/cultural violence

Cattle rustling in Marsabit County involves brutal and reckless murder, acts of 'ethnic cleansing,' criminal marketing chains, and "highway banditry," as well as ordinary petty theft; it is commonly lumped together and labelled as 'cattle rustling' or 'cattle raiding.' Straight¹¹² Observed that this tends to encourage the association of more recent violence with traditional and ritualized acts of raiding, portraying it as something cultural and thus intrinsic to these societies. However, since 2010 after the promulgation of the constitution, cattle rustlings has not been associated with any major armed conflict in Marsabit County; this is because the Elders the from all tribes in the County have been actively involved in resolving any case of cattle rustling. Some cattle were stolen during the Moyale conflict of 2013 they were returned after the NCIC Chairman Francis Ole Kaparo negotiated for their return.

Cattle's rustling in Marsabit County mainly involves and affects the pastoral communities in Kenya and bordering countries.¹¹³ Cattle rustling have been practiced since time immemorial; it has been traditionally accepted as a cultural practice. It was carried out within set rules and regulations. The cattle rustling practiced today has significantly changed. It is no longer used to re-stock and pay bride price; instead, it has been majorly commercialized. It serves the

¹¹¹ Saafo Roba Boye and Randi Kaarhus, 'Competing for claims and contested boundaries: legitimating land rights in Isiolo District, northern Kenya,' *Africa Spectrum* 46, 2, pp. 99–124, (2011).

¹¹² Bilinda Straight, 'Making sense of violence in the "badlands" of Kenya,' *Anthropology and Humanism* 34, 1), pp. 21–30. (2009).

¹¹³Joshia O. Osamba, "The Sociology of Insecurity: Cattle rustling and Banditry in North-Western Kenya pg 13

interests of the urban centers across the country especially Nairobi City County where the demand of *nyama choma* among the growing middle class has increased.¹¹⁴

Traditional raids were under the strict control of the elders, community healers, and soothsayers. Everyone knew a raid was coming, the aspect of surprise involved only time and place. Attacks would only take place at dawn or in the evening.¹¹⁵ The recent upsurge of an incident of cattle rustling by pastoral communities has been facilitated by the availability of small arms and light weapons in the cattle rustling prone areas.¹¹⁶ The current practice of cattle rustling has fundamentally changed and deviated from the traditional rules of engagement. It has now become a criminal venture where the laws are flouted and human rights violations such as loss of life, rape and torture are visited on innocent citizens. Culture has also played a role in fuelling inter-ethnic conflict through women who rebuke their men through songs if they are not successful in raiding other communities to provide for their needs. It is prevalent among the communities in Marsabit County including the Borana, Gabra, Rendile, and Samburu.¹¹⁷

The government has compounded the situation, and it is security agents who have been unable to guarantee the right to protection of the pastoral communities. They have inherited the colonialists' negative "war-like" tag attributed to the pastoral communities. The security agents have approached the security challenges such as disarmament with an imperial ruthlessness which often leads to the perpetration of gross human rights violations by security personnel meant to restore law and order in these regions.¹¹⁸

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Marshal Thomas, 1965

¹¹⁷ Mohamed Alan and Ruto Pkalya, "Closed to Progress: An Assessment of the Socio-Economic Impact of conflict and Pastoral and Semi-Pastoral Economies in Kenya and Uganda

¹¹⁸ Paula Palmer, "When Police are Perpetrators, Cultural Survival, 2010. Available at www.culturalsurvival.org/publications, accessed on 12th March 2015

The problem is exacerbated by the involvement of politician and influential businesspeople, marginalization, unemployment of the youth, poverty and proliferation of small arms and light weapons targeted at vulnerable groups. It has had an adverse impact on the socio-economic, political and cultural aspect of the pastoral communities that manifests itself regarding underdevelopment, insecurity and systematic violation of their human rights.¹¹⁹

The trend of increased militarization of cattle rustling and its transformation from a traditional practice to the current criminal activity of livestock theft can be traced back to the 1970s. In the early 1970s, the pastoral communities become dependent on donors after they were faced with prolonged acute famine. In keeping with the policy of developing "high potential areas first,"¹²⁰ The government made no effort to alleviate the suffering of the pastoral communities caused by the said famine. The policies of the post- independence government persistently relegated and sidelined development concerns of the pastoral communities to the periphery. It led to the upsurge of livestock theft among the rural communities, exhibited through heightened inter-clan and inter-tribal armed conflict, as a means of survival.¹²¹

4.2.7 Historical injustice

According to Ardijala¹²² the traditional relational networks and authority of elders that used to hold different communities together for generations seem to be on a steady decline. It is because of influences of selfish political leader's interest in political conflicts in Somalia, Ethiopia and even Kenya. For instance, the '*shiftas*' movement that was active in Northern Frontier Districts of independent Kenya in the 1960s opened a new chapter in the history of

¹¹⁹ KHRC, "Morans No More: The Changing Face of cattle rustling in Kenya," 2010

¹²⁰ Sessional Paper No. 10 of, Government Printers (1965).

¹²¹ Ibid, op cit

¹²² *Ardajila.com* MOYALE CONFLICTS: The Actors, the Contests and the Interest web (2014)

the Pastoralism. The Garri, Marrehan, and other Somali groups were armed by the Somalia government to facilitate secession process of the communities, they turned their guns on poorly armed Borana communities both in Ethiopia and Kenya, leaving hundreds of them *dead* and robbed of their livestock.

This bitter experience is one reason why the Borana community has always been wary of any Somali-linked people group coming into their area. It was also during this period when the force and value of the gun-power came to be fully understood by Borana communities in Ethiopia. From the Borana interviewed 80% of them indicated that there are suspicious of the Gabra, Burjis, and Rendiles for their association with the Somali Muslims and the Garre from Ethiopia, as its this alliance that has been used to arm, train and give support either financially or as workforce before. And during the conflict; as it was witnessed in the recent Moyale armed conflict of 2013, where the Gabra were supported by the Garre and Burjis to fight the Borana in Moyale.

Two schools of thought have been used to explain the nature/cause of conflict in Marsabit County. These are namely; fight over scarce resources and wars of liberation.¹²³ The second school of thought has been illustrated by the evidence adduced by proponents who claim that the Borana colonized parts of Northern and North Eastern Kenya and Somalia before the British and Italians colonial period. According to the second school of thought conflict over scarce resources is only a catalyst. Thus the primary cause of conflict is that the other tribes are trying to free themselves from their colonial master, the Borana.¹²⁴ Golicha Ibid further elaborates i¹²⁵ as follows; "After the arrival of the White British, the Borana themselves were colonized together with their subjects." In fact, during the British colonial rule the land was

¹²³Golicha, D., "The British of Marsabit County" (2014) Available at <http://drgolicha.wordpress.com/2014/01/03/the-british-of-marsabit-county-2/> Accessed on 22nd July 2015

¹²⁴Ibid

¹²⁵Ibid

shared between the different groups, and the Borana lost most of these lands and with power to rule over others. Like the British colonialists are hated by their former subjects so are these British of Marsabit and Isiolo Counties hated for their past deeds."

The Liberation school of thought explains the recurrent violence in Marsabit County through an untransformed relationship between different parties as illustrated by Golicha¹²⁶ in the following statement "observers of the Marsabit conflict say that it may be much harder to broker peace this time than any other time. It is because for the first time a red line was crossed, whereby people were involved in unheard of acts such as burning of houses and killing of women and children. Like the general peace between the Python and the father of the only son killed by the python until the wounds heal, it may be difficult to come by.

The second school of thought can be used to illustrate the 2013 Moyale conflict. The conflict was mainly blamed on the politics of exclusion and clan rivalry. It was triggered by the 2013 General Elections that saw the smaller communities clinch power through the REGABU coalition, locking out the Borana from the County government leadership. It is said to be the primary cause of this conflict. The Borana leaders, however, refute these claims to say that the Gabra community was encroaching on traditional Borana areas of Moyale Sub County through the help of the County Governor, a Gabra in preparation for the 2017 General Elections.¹²⁷

4.3 Role of the State in conflict in Marsabit County

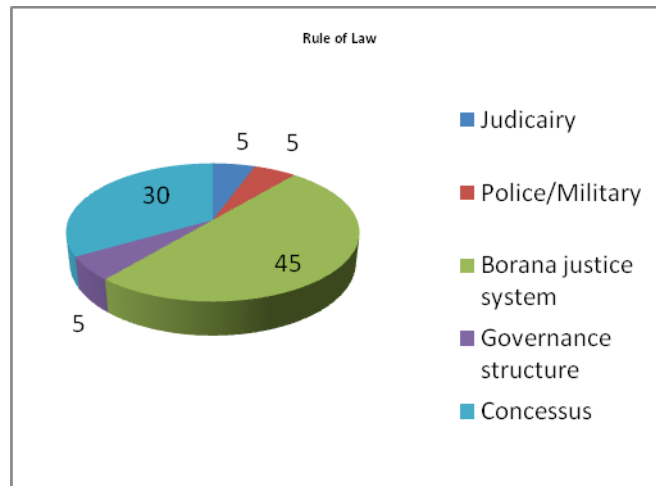
Under the constitution, it is the role of the national Government to guarantee the right to security for the people of Marsabit County. This mandate has been bestowed upon the

¹²⁶ Ibid

¹²⁷ Wachira, M., "Politics and foreign militia blamed for killings in Marsabit," (2013), Available at <http://www.nation.co.ke/news/politics-and-foreign-militia-blamed-for-killings-in-marsabit/-1950946/1993864/-format/xhtml/item/1/-q9x2siz/-/index.html>, Accessed on 22nd July 2015

security organs namely; the National Police service, the National Intelligence Service, and the Kenya Defense Forces.¹²⁸ The chart below indicates that enforcement of the rule of law is majorly through the traditional justice system (Borana justice system).

Figure 2: Enforcement of the Rule of Law in Marsabit County



4.3.1 Under policing/inaction

The first observable factor when non-resident arrives in Marsabit County; it is the presence of Kenya Police Reservists (KPR) who either escorts vehicles to and out the County. And are the ones who patrol the town, while the national police officers are mainly guarding the banks and other national institutions in the County and could be easily distinguished from the KPR through their well-ironed and clean uniforms, while the KPR wear worn out uniforms.

It is clear that the County is under-policed by the small number of National Police Service personnel present. And the many KPRs who are employed to guard the town have more allegiance to their clans than to the government as witnessed during the 2013 Moyale conflict. It is the KPRs who were involved for example on 2nd of January 2014, as the then District Commissioner Elias Kithara was conducting what was supposed to be a peace

¹²⁸ Ibid 1

meeting in Heilu Village, Gabra youth stormed the meeting venue and pelted everyone including the DC with stones.¹²⁹

It was immediately followed by heavy gunfire from militia who were right behind the youth.¹³⁰ The DC managed to get out of Heilu with the help of Borana KPRs who bravely fought off and kept Gabra militia in check. That afternoon and through the following two days fierce battle raged as the few Borana KPRs fought with Gabra militia that viciously attacked Heilu Village, Mansile and Oda. As this struggle went on; all families fled from Heilu to Ethiopia. By the fourth day of the fight, Borana KPRs ran out of ammunitions and left the village to be razed down as police officers watched.¹³¹ While fighting in Heilu and other areas was going on the army battalion based in Moyale was deployed to Kenya-Ethiopia border to prevent Borana militia from crossing over to support their kinsmen who were under attack. But at the same time, Ethiopia Gabra militia from Region Five was pouring into Kenya to fight with Borana KPRs on all fronts.

On 5th of January, 2014 when KPR from Heilu, Butiye and Oda ran out of ammunition and were about to be vanquished, Ethiopian militia managed to get through the Kenya army cordon to offer support. Soon after their arrival Gabra militia was driven from all Borana villages and faced certain defeat. Their role in this conflict is both direct and indirect. Normally it is the office of Police Commandant that vets and issues firearms to KPRs of all the communities; it is widely known that there is no transparency or fairness in this process.

For instance, whereas KPRs are supposed to be providing security only to rural communities

¹²⁹Wachira, M.,“Politics and foreign militia blamed for killings in Marsabit,” (2013), Available at <http://www.nation.co.ke/news/politics-and-foreign-militia-blamed-for-killings-in-marsabit/-1950946/1993864/-format/xhtml/item/1/-q9x2siz/-/index.html>, Accessed on 22nd July 2015

¹³⁰ *Ardajila.com* MOYALE CONFLICTS: The Actors, the Contests and the Interest web (2014)

¹³¹ Ibid

who roam around with their animals, Burji communities who are living and doing business in towns are not only given more guns and ammunition. But superior weapons like AK47 and G-3 while Borana KPRs are saddled with only a handful of the old model of 303 rifles that have long been confined to archives.¹³² Even Gabra KPRs are better equipped and apparently given more ammunition than their Borana counterparts. The reason for this anomaly is anyone's guess.

4.3.2 Porous border

Marsabit County shares a long and porous border with the Oromia and Somali regions of Ethiopia. The Borana, Gabra, and Dasnatch ethnic communities straddle the two countries and migrate as the availability of water and pasture dictates. Due to the pastoral nature of the population, resource-based conflicts tend to spill over the international border.

Some locations along the County's border with Ethiopia, and in particular from Moyale town to Godoma, constitute a serious cross-border threat according to residents of Moyale town. The dynamics are directly related to events in Ethiopia and in particular the presence of the Garre-Somali community along the border. The Garre community has been accused of financing Gabra militias. Individuals from the Borana community allege that the Garre are now part of the REGABU alliance and refer to this association as REGABU-GA, an acronym representing the names of the four clans (Rendille, Gabra, Burji, and Garre communities).

4.3.3 Militarization of conflict and biasness

From the interview we conducted we find out that the residence of Marsabit County all the interviewees admitted that the deployment of Military and Para Military personnel's to the

¹³²Ibid

County during conflict is a serious issue as the military most often are used to suppress those people the government feels are against them hence causing more hostility. According to *Ardajila*¹³³ during the Moyale Conflict of 2013, they reported on heavily armed attack of Mansile and Hulu Borana villages by the Gabra militia within Moyale surroundings.

They said several weeks in advance to the all government security agents, but no action was taken. The fighting broke out and continued until the fourth day when Borana KPRs ran out of ammunitions and left the village as police officers watched as their house were torched and burnt. At the sometime, the Kenyan army based in Moyale was deployed to Kenya-Ethiopia border to prevent Borana from Ethiopia to cross over to support their kin who were under attack. But, allowed the Gabra militia from Ethiopia to pass and defend their Kenya allies. But on 5th of January 2014, Ethiopian an army forced their way through to Kenya to fight along with their brothers, and when they were almost defeating the Gabras, the Military intervened and stopped the fight hence their open biased towards the majority Borana residents.

4.3.4 Administrative units

The perception held by 90% of Borana Elders interviewed is that the Marsabit County Governor used is using his influence to secure support for his community's war campaign against Borana community in both Kenya and Ethiopia¹³⁴.

The series of attacks against Borana villages in different parts of Moyale constituency during the conflict of 2013 was meant to be the starting point of further attacks against the Borana community to drive them out of the County. It explains why all mediation between Borana and Gabra leaders' failed including one held under the auspice of National Cohesion and

¹³³Ibid

¹³⁴ Interview excerpts from Marsabit County 2016

Integration Commission (NCIC) took place in Bomas of Kenya; Nairobi could not stem the tide of violence. Here is a quote from the NCIC chairman Mzalendo Kibunja.¹³⁵

‘‘We have initiated dialogues in previous meetings on Moyale which culminated in the signing of a resolution by Gabra and Borana opinion leaders. He said referring to decisions penned on December 11th, 2011. The recommendations arrived at after a meeting held at the Bomas of Kenya in the capital Nairobi was signed by eight Borana leaders and seven of their counterparts from the Gabra community.’’ We regret the senseless loss of life and wanton destruction of property in Moyale recently and condemn the perpetrators in the strongest terms and we urge for the immediate cessation of hostilities and ask all and sundry to give room to dialogue.’’ Part of the resolution reads.

Normally its expected Kenya Security and Intelligence Service personnel in Moyale were to take the necessary steps to contain the situation. It is rather shocking that the Gabras decided to carry out attacks without the Kenya police force stopping them and protect the lives of innocent people of their properties against unwarranted Gabra aggression. Beyond this, there was no any other action taken against the planners and executors of this evil scheme that resulted in substantial loss of lives and massive destruction of property. Even more strangely Kenya government security agents who deliberately failed to protect the innocent Kenyans have gone unchallenged, and no legal action was taken against them to date.

4.3.5 Inefficient Judiciary System

As M. Adan & R. Pkalya¹³⁶ Stated that the role of the judiciary to mitigate during conflict

¹³⁵ *Ardajila.com* MOYALE CONFLICTS: The Actors, the Contests and the Interest web (2014)

¹³⁶ M. Adan & R. Pkalya

situations in Marsabit County had not been a success. The main prevalent reasons being that customary laws and judicial processes have largely failed to respond to social-economic and political realities of the rural communities. Moreover, state laws and procedures often contradict economic concepts of justice. During the interview with Chief Hussein Charfi of Marsabit town he alluded to the fear or unwillingness of the residents of reporting crimes to the Chief's office or the police, because of the bureaucracy the process take long to complete. This has forced the people to use their traditional justice system to resolve conflicts.

Though the Kenyan constitution has taken cognizance of the traditional justice as a means of disputes resolution under Article 159, this is yet to take root because it has not been operationalized. A household survey conducted by the Governance, Justice, Law and Order Sector Reform program¹³⁷ revealed that the Judiciary is not the main body that deals with conflicting parties seeking the assistance of a third party in rural areas in Kenya, only 3% of the population files their cases in court.

The youth and women who were interviewed 50% of them indicated that the police stations and the magistrate courts were far and they had to use buses to reach these institutions. For instance Fatama Guyo, Sadia Omar, Zainabu Hussein, and the others indicated they live about or more than 10km from the police station and the magistrate court. Hence accessing justice from the courts is far from them thus they prefer using their traditional justice system which is near them and is cheaper to access. In regards to administrative services, the number of courts are limited while distances are vast and costs of filing a case are relatively high for a poor population.

In Marsabit County, the courts are situated at Marsabit Town and Moyale Sub County to

¹³⁷GJLOS is a full sector program embracing 32 Ministries, Departments and Agencies

serve the entire County. According to the Kenyan Constitution, the judiciary is the principal institution for dispensing justice and the maintenance of law and order in the conflict-ridden arid lands. However, administrative agencies and personnel in the region face significant constraints as indicated above.

4.3.6 Inefficient governance structures

Both the colonial and post-colonial governments have subjected the pastoralists to extreme repression through the state security agents. The laws enacted by the colonial government as illustrated earlier in this report shows how free movement of people and animals led to negative economic and social integration of the inhabitants of the region. The pastoralists were viewed with suspicion as they were seen to be "war-like" and were denied many of the state privileges.

Also, any incidents of traditional cattle-raids among the rural communities were handled with brutality often leading to loss of life. The brutal force meted on the pastoral communities only made them resistance to colonial domination and influence. It, in turn, hampered development in the region that was taking root in other parts of the country.¹³⁸

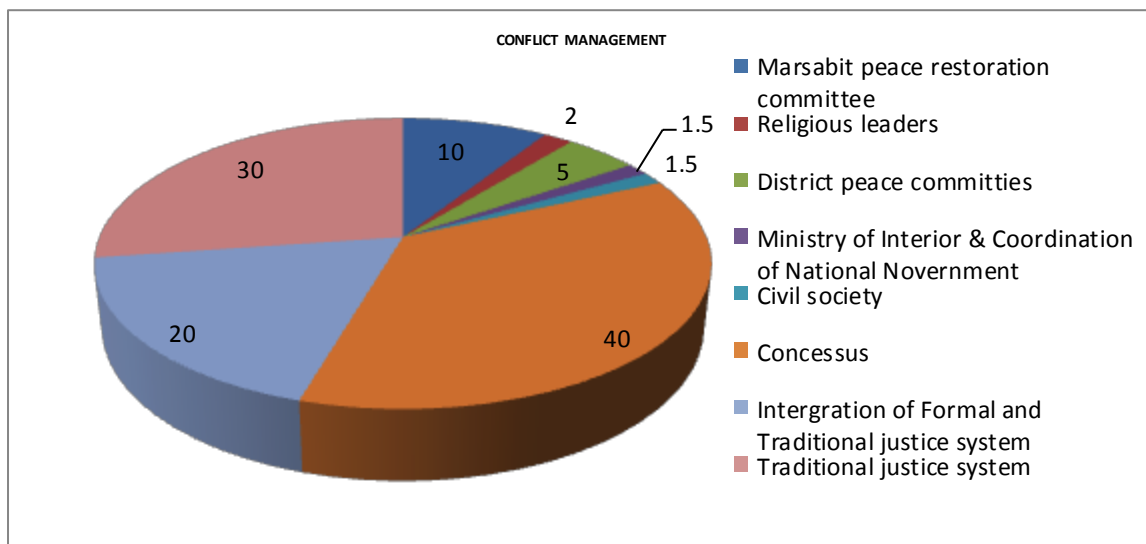
All the one hundred and forty-six respondents interviewed agreed that accessing government institutions for services is cumbersome and it takes weeks, months or years to access essential services such as registration of persons, reporting the crime to the police it adopts a long time before they investigate. As they are few and they cannot trust the KPRs from other clans to do the investigation due to perceived biases or unwillingness to let other KPRs from other clan do the investigation, and in addition, they are ill-equipped to carry out effective investigations that can stand in the court of law.

¹³⁸ KHRC, "Morans No More: The Changing Face of cattle rustling in Kenya," 2010

4.4 Conflict Management in Marsabit County

The conflicts in Marsabit County have over the years become involved and sophisticated due to many factors as illustrated above. It calls for the players in the security sector to innovate ways to ensure the right of security of the people of Marsabit County has been guaranteed. The following charts show some players and ways conflicts have been managed in the County. It illustrates the main players in conflict management as consensus building among the warring communities and traditional justice system.

Figure 3: Players in Conflict Management in Marsabit County

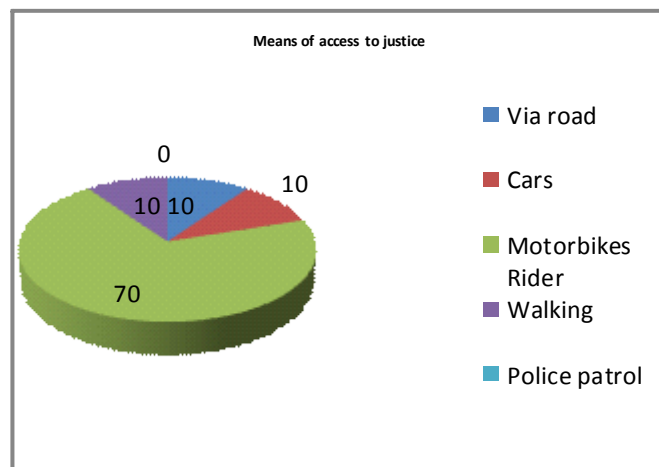


4.4.1 Cultural/customary mechanism

For example Hon Jarso Jillo Fallana¹³⁹ When interviewed he said that in as much as the traditional justice system has worked in the past, it is no long tenable to use is as it was witnessed during the Moyale conflict of Yusuf Haji, where all the Elders from all the fourteen tribes negotiated for a ceasefire. And currently that's the mechanism which is in place, and so far it is working.

¹³⁹ Hon Jarso Jillo Fallana, interview excerpts (2016).

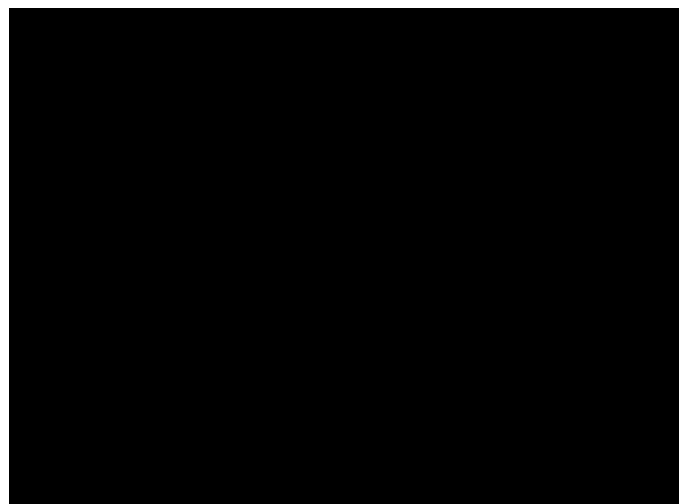
Figure 4: Means of accessing Formal justice systems



The chart above indicates that the major means of transport is through use of motor bikes. Due the poor road network motor vehicles are unable to access the remote rural areas.

The County being vast and the police stations being far apart, the majority of the residents cannot easily access police stations to report incidents of violence hence making conflicts escalate to full-blown conflict

Figure 5: Distance to Police Station



4.5 Conclusion

This chapter has done an in-depth analysis on the nature of conflicts and how the community has relied on the traditional justice system to resolve conflicts. The traditional justice system continues to play a critical role in the community and the people have faith in the system. The traditional justice is restorative in nature and the resolutions are arrived at through consensus.

Chapter Five

5. Conclusion

The government has systematically neglected the political dimensions of the conflict in Marsabit County. Since independence it has supported the majority Borana elite for political expedience, but with the advent of devolution, the other communities namely the Gabra, Rendile, and Burjis mobilized their plans to form a political alliance that currently dominates the County politics. This occurrence led to the sidelining of Borana community from the political scenes hence their desire to fight back and gain their lost political power in the County. If this continues, they will feel left out, and tension will persist. As suggested by Dowd & Raleigh,¹⁴⁰ the government is unable to guarantee the security of the residents of Marsabit County because of poor infrastructure and poorly remunerate police and safety forces and over-reliance of the Kenya Police Reservists. Who are not adequately trained, poorly paid, and a majority of them being old and of poor health; hence making policing and securing the county challenging. Also, we observed that the government response to incidence of violence in Marsabit County is often very late and ‘the effect of the force is already high.’¹⁴¹

The National and County governments in their effort to promote lasting peace in the County, they are now adopting ‘peace building from below’ that is involving all the fourteen tribes in Marsabit in maintaining and negotiating peace.¹⁴² It was the case of the Moyale conflict of

¹⁴⁰Dowd, C., & Raleigh, C. (2013). *ACLEDD country report: Kenya*. ACLED. http://www.acleddata.com/wp-content/uploads/2014/10/ACLEDD-Country-Report_Kenya_December-2013_updated.pdf

¹⁴¹Scott-Villers, P., Ondicho, T., Lubaale, G., Ndung’u, D., Kabala, N., & Oosterom, M. (2014). *Roots and routes of political violence in Kenya’s civil and political society: A case study of Marsabit County* (IDS Evidence Report N. 71, Addressing and Mitigating Violence). Brighton: IDS. <http://www.ids.ac.uk/publication/roots-and-routes-of-political-violence-in-kenya-s-civil-and-political-society-a-case-study-of-marsabit-county>

¹⁴²Gibbons, S. (2014). *Draft discussion brief: Towards peace and security in dryland Kenya: the demand for a new approach*. Pastoralist Parliamentary Group and Drylands Learning and Capacity Building Initiative for Improved Policy and Practice in the Horn of Africa.

2013 the Elders from all the communities sat and negotiated for peace through consultations and consensus. However, the political elite should also be involved along with the National Government for the negotiated peace to last and prevent future violence in the County.¹⁴³ It is essential because the influence of Elders and customary laws is waning because of modernisation, education, the availability of firearms, and the commercialisation of cattle rustling'.¹⁴⁴ Also, the proliferation of small arms cannot be adequately dealt with at the local level because there is a lack of coordination and collaboration between the locals and security forces due to mistrusts.¹⁴⁵ The local Civil Society Organizations and interreligious groups are involved in limiting violence, although their work is negatively affected by divisive politics at the local level and lack of national government support.¹⁴⁶

We advocate for the adaptation of a middle ground where both the judiciary and the traditional justice systems are applied equally or where appropriate as indicated by Scott-Villers et al.¹⁴⁷ A Mix of Elders, ordinary citizens, NGOs, and members of the political class have generated formal peace declarations, which are political settlements drawing on a long-established system of customary and civilian governance. Despite being flawed and limited, these agreements have often been more successful in creating peace and a sense of justice than modern state law.¹⁴⁸ One example is the 2008 Maikona–Walda Declaration that

http://www.fao.org/fileadmin/user_upload/drought/docs/DRAFT_Peace%20and%20security%20brief_26%20Nov%202014.pdf

¹⁴³ Ibid

¹⁴⁴ Sharamo, R. (2014). *The politics of pastoral violence: A case study of Isiolo County, Northern Kenya* (Working Paper 095). Brighton: Future Agricultures. http://r4d.dfid.gov.uk/pdf/outputs/Futureagriculture/FAC_Working_Paper_095.pdf

¹⁴⁵ Ibid Op.cit (141)

¹⁴⁶ Cox, F. D., Orsborn, C. R., & Sisk, T. D. (2014). *Religion, Peacebuilding, and social cohesion in conflict-affected countries*. The University of Denver. http://www.du.edu/korbel/sie/media/documents/faculty_pubs/sisk/religion-and-social-cohesion-reports/kenya.pdf

¹⁴⁷ Ibid

¹⁴⁸ Ibid

‘effectively ended active hostilities between the Borana and Gabra.’¹⁴⁹

5.1 Recommendations

5.1.1 Introduction

The policies and strategies that have been put in place by the successive government both pre and post-independence have disadvantaged the region which has continued to be underdeveloped and marginalized. Marginalization and undeveloped have made the area to lag behind concerning development. It has had a spiral effect which has made it tough for the government to guarantee the right to security of the people Marsabit County. Some of the challenges that face the delivery of services in the region include corruption, a proliferation of Small Arms and Light weapons, political supremacy and representation, instability in Somalia and Ethiopia, weak governance, border conflicts and policing among others.

The right to security of the people of Marsabit County has been violated as indicated above. The colonial government ruled and managed the Northern Frontier Districts (NFDs) by decree. Various laws including the Outlying District Ordinance Act of 1902 were enacted that marginalized the region and made the area a closed zone. It aided in under developing the area making provision of security especially during conflict situation a mirage. Marginalization cut them off from the rest of the population hence they naturally gravitated towards their kin.¹⁵⁰

The independence government continued ruling the region by decree has the NFDs stilled

¹⁴⁹Okumu, W. (2013). *Trans-local peace building among pastoralist communities in Kenya: The case of Laikipia Peace Caravan* (Culture and Environment in Africa Series 3). Cologne African Studies Centre. http://www.zef.de/module/register/media/f089_Okumu_Trans-local%20Peace%20Building%20Among%20Pastoralists%20Communities%20in%20Kenya-the%20Case%20of%20Laikipia%20Peace%20Caravan.pdf

¹⁵⁰Umar, A., (1997, “USAID Organized Seminar on Conflict Resolution, Resource utilization, & conflict and insecurity in pastoral Areas of Kenya,” Nairobi, Kenya Pastoral Forum

remained closed after Kenya gaining independence from the British in 1963. The policies of the sovereign government continued to undermine the NFDs. The region remained closed until 1997 when the laws were repealed. The area still keeps lagging behind in developed with Marsabit County being ranked the fourth poorest in the country by the Commission for Revenue Allocation. Provision of essential services including security, health and education are hampered by the lack of necessary infrastructure like the road network to make the area accessible for government officials to deliver services to the locals.

The colonial government instituted policy frameworks that segregated Northern Kenya from the rest of Kenya commonly referred to as "Kenya Proper." The rural communities were seen as a hindrance to the colonial enterprise due to their geographical location from the center in Nairobi and their livelihood that clashed with the colonialists' agenda.¹⁵¹ The colonialist agenda was to extract value through modern agriculture and taxation. The situation in Marsabit was different, and the colonial government legalized the use of military and set the foundation for the instrumentalization of violence as the ultimate arbiter in the region.¹⁵²

The post-independence government followed suit and put in place emergency laws after independence to quell the pro-Somali militia, *shifita*; this gave leeway to the government to combat insurgency that was being experienced then. What had begun as a legitimate struggle for self-determination degenerated into widespread banditry, the firearms that remained after the rebellion were later used for banditry and highway robbery.¹⁵³

¹⁵¹Korir Sing'Oei, "Customary Law and Conflict Resolution among Kenya's pastoralist communities, 2011" Available at <http://Panafricanthinking.blogspot.com/2011/4/customary-law-conflict-resolution.html> accessed on 11th April 2015

¹⁵² Ibid

¹⁵³ ibid

Due to this continued segregation and marginalization of the people of Marsabit, they rely on their traditional justice system to guarantee right to security for their people. Recent studies indicate that regular courts in Marsabit are few, bureaucratic and often seen to dispense a type of sentence that is either too long in coming or has retributive rather than the reconciliatory impact on the concerned individuals and communities.¹⁵⁴ Restorative justice is the more victim-centered justice system that seeks to restore victims as well as restoring offenders and restoring community.¹⁵⁵ The formal system through the courts, on the other hand, is popularly seen to be retributive justice, it is punitive, and the aim is to make offenders suffer as much as the victim if not more. The criminals' accountability is to the state and not to the offender-victim or the larger community as is the case with restorative justice.

In Traditional justice systems, decision-making is usually based on consultation and under the authority of non-lawyers/jurists, mainly local tribal or religious leaders, either individually or in a group. Traditional justice systems tend to address a broad range of issues of significant concern to the people, including personal security and local crime; protection of land, property, and livestock; resolution of family and community disputes; and protection of entitlements, such as access to public service. These community-based mechanisms, which play a major role in community cohesion, are usually more available and affordable and often enjoy greater legitimacy with the people than the formal systems.¹⁵⁶

Despite the Traditional justice systems being widely viewed by many as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which it falls well short of realizing that ideal. Traditional justice systems are often discriminatory

¹⁵⁴Tanja Chopra, *Reconciling Society and the Judiciary in Northern Kenya*, Justice for the Poor, Legal Resources Foundation Trust, Research Report, Nairobi. (2008).

¹⁵⁵Braithwaite, J 'Restorative Justice and a Better Future' Available at http://www.iirp.org/article_detail.php?article_id=NDk4 Accessed on 8th June 2015 1996

¹⁵⁶ United Nations Rule of Law, *Informal justice*. Available at http://www.unrol.org/article.aspx?article_id=30

towards women and disadvantaged groups, do not always adhere to international human rights standards, are susceptible to elite capture and the quality of justice is often dependent on the skills and moral values of the individual operator.¹⁵⁷

In this study, the Borana traditional justice system has been investigated to see how the right to security of the people was guaranteed and why the formal judicial system has remained elusive to administer justice to the rural communities of Marsabit County.

5.2 Recommendations

5.2.1 Integration of the formal and Traditional justice systems

As shown from the study, a majority of Kenyans still rely on the Traditional judicial system to resolve disputes among themselves individually and as communities.

Although the CoK has recognized traditional dispute resolution mechanisms as a guiding principle in exercising judicial authority,¹⁵⁸ There is no mechanism in place to implement the same. The government and the Judiciary should put in place mechanisms to integrate the formal and informal justice systems to avoid conflict between the two.

5.2.2 Nexus between formal and Traditional justice systems

In the case of R v Mohamed Abdow Mohammed¹⁵⁹ The traditional dispute resolution mechanism was used to resolve a murder case. Abdow Mohamed was charged, together with others not before the court, for the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh,

¹⁵⁷EwaWojkowska, "Doing Justice: How informal justice systems can contribute," 2006. Available at <http://siteresources.worldbank.org/INTJUSTINST/Resources/EwaWojkowska.pdf>

¹⁵⁸ Article 159 2 (c) Constitution of Kenya, 2010

¹⁵⁹(2013) eKLR; See also Francis Kariuki, 'Community, Customary and Traditional Justice System in Kenya: Reflecting on and Exploring the Appropriate Terminology' <http://www.strathmore.edu/sdrc/uploads/documents/books-and-articles/Paper%20on%20Traditional%20justice%20terminology.pdf> accessed on 20th July 2016.

within the Starehe District of Nairobi.¹⁶⁰ On the date of the trial, the prosecution made an application to court to mark the matter settled based on Islamic laws and customs.¹⁶¹ The prosecution stated that the accused's family had paid compensation to the deceased family in form of camels, goats, and performed rituals.¹⁶² The rituals were a form of blood money to the deceased family.¹⁶³ Further, the prosecution stated that witnesses to the murder were not willing to testify and therefore they could not be able to proceed with the case.¹⁶⁴ The court upheld the application of the traditional dispute resolution system based on Article 159 and Article 157 that allowed the Director of Public prosecution to withdraw cases with the leave of the court.¹⁶⁵ This decision depicts the widening scope of TDRMs into the arena of criminal law, a position rarely held by courts in pre-2010 jurisprudence on customary law.¹⁶⁶ The Prosecution made an application to the Court stating that the matter had been settled following the Islamic laws and customs.¹⁶⁷ The Court upheld the TDRM as stated under Article 159 and 157 of the CoK, 2010 that allowed the Director of Public Prosecution (DPP) to withdraw cases with the leave of the court.¹⁶⁸

There is the need to create a nexus between the formal and traditional justice systems to enhance access to justice to guarantee the right to security of the pastoral communities in Marsabit County.

5.2.3 Codification of TDRMs in Kenya

As evident from the study, the TDRMs are not yet documented. There is the need to carry out a survey to identify and document all the TDRMs in Kenya. It will go a long way in

¹⁶⁰ R v Mohamed Abdow Mohammed (2013) eKLR

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ Ibid

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Ibid

safeguarding the customs and traditions used by various communities to resolve conflicts.

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