4 Working Paper

LOCAL COMMUNITIES' ACCESS TO JUSTICE AND THE STATE IN KENYA

Impunity, Legal Pluralism and the Resolution of Conflicts

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1. INTRODUCTION

1.1 Background

One of the challenges African countries affected by political tensions and violent conflicts are facing is to ensure that communities with legitimate grievances have access to judicial mechanisms addressing their complaints and providing remedies for violations of their rights. In this context, access to justice has to be understood in a broad sense: Procedurally, it comprises not only access to courts and other state institutions but also to traditional or other non-formal mechanisms of conflict resolution. In substantive terms, accessible institutions must be effective in resolving conflicts peacefully.

Non-access to justice leads to impunity. Impunity is characteristic for many countries with violent political or social conflicts. In this context, impunity should be understood broadly as comprising not only the absence of sanctions against those responsible for a crime but also of other forms of reparation for norm violations. Such norms may be encoded in state (official) law, traditional (customary) law or even non-formal normative frameworks of specific groups (e.g. religious communities, sects, political movements).

Although impunity is little understood, its negative impacts are increasingly recognized. Impunity also affects the rights of people and communities and undermines good governance. Access to justice becomes particularly relevant in the context of inter-communal conflicts or conflicts between them and the state as unaddressed grievances may create frustrations that contribute to conflicts becoming protracted. Impunity undermines the legitimacy of the state and its government, both at the domestic and the international level. However, impunity of perpetrators is often an expression of the weakness of the state and its institutions (such as courts, police, prisons, army), unable or unwilling to impose its monopoly of force.

1.2 Research outline

This study examines the issue of access to justice in Kenya with regard to three types of norm violations: Cattle raids, conflicts over land, and common crimes (murder and theft). Kenya provides a unique opportunity to study the issue of access to justice: The country is suffering from different types of conflicts including struggles related to agricultural and pastoral land, control of the state apparatus (also on the regional level) and conflicts related to criminality. At the same time, it is not a failed state but has a judicial system.

The field-work for this report was carried in the following locations: 1) Southern Rift Valley province, Narok District (Maasai) and 2) Northern Rift Valley province, Turkana District (Turkana). The locations were selected because state presence in Narok is fairly strong whereas in Turkana state institutions are almost absent, thus allowing to examine to what extent distance to such institutions is a relevant factor for access to justice.

The project, combining law, legal sociology and social anthropology, seeks to contribute to a better understanding of what obstacles to access to justice exist and how local communities in areas affected by conflicts deal with the lack of such access. Such understanding is relevant for the on-going and future efforts to strengthen the rule of law.

1.2.1 Judicial institutions

Two categories of judicial institutions in Kenya were taken into account for this study: Informal (customary) institutions and state institutions. We did not look at religious courts a third category existing in Kenya for people of Muslim faith.[1] We did also not look at non-

[1] According to Article 170 Constitution so-called Kadhis' courts are a recognized part of the lower courts. They determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and choose to submit their case to such court.

traditional or semi-state institutions such as churches and NGOs or "councils of elders" appointed by local authorities and competing with traditional councils or District Peace Committees that try to address disputes and contribute to their resolution.

Customary judicial institutions are situated on the local and regional level (village, sub-location and location level) and include village elders or chiefs or sub-chiefs with trans-local competence or reputation, but also councils of elders from different villages that are involved in the resolution of a conflict.

The efficacy of traditional law institutions is often limited to local context. The authority of elders is locally bound, and the council of elders mostly deals with local conflicts. Sometimes they also intervene in conflicts between neighboring local communities, but not if these communities are on hostile terms, which is mostly the case if they do not belong to the same ethnic groups. (This has something to do with ethno-political conflicts nation-wide or with competitions for the same resources).

State judicial institutions (such as courts, judges and police, but also executive authorities) exist on division, district and provincial and national level. According to the ethnographic literature, conflicts between litigants of a same ethnic groups or subsection of an ethnic group are never brought to court. But for the other conflicts, the institutions of state judiciary should be in charge. State judiciary has to define the rights and obligations in a clear way, it has to specify which legal system are applicable under the condition of legal pluralism, and it has to judge and sanction illegal behavior in an impartial and just way. However, there are impediments in accessing state judicial institutions on the side of actors seeking conflict resolution, such as institutions being too far away, to costly (transport, bribing, fees and salary for lawyers, time costs), not reliable enough (corruption, not enough overlap of traditional conception of justice with state law) and time costs (court decision takes too much time while conflict resolution is urgent).

1.2.2 Conflicts and grievances

There are different types of conflict that require intervention by judicial or quasi-judicial institutions. We excluded purely domestic conflicts (e.g. domestic violence or adultery) which are usually solved within the (wider) family. We also excluded nation-wide conflicts such as ethno-political violence at the eve of national election. Instead, we focused on three type of conflict, which are most common and thus represent typical problems related to accessing justice: cattle raiding between pastoral communities in the northern Rift Valley, land conflicts between local communities in the Southern Rift Valley as well as crimes such as theft and murder again mostly in the Southern Rift Valley.

These three conflicts are often not brought to court, but very often cases lead to violence: warlike raiding among pastoral communities, eviction, violence and power struggle between local communities in land disputes as well as mob justice in case of murder and theft without legal consequences for the involved. All these cases point to a widespread impunity, for which the failures of state judiciary is held responsible.

1.2 Hypotheses and Assumptions

1.2.1 Distance to courts and lack of information

One possible explanation for non-access to justice and resulting impunity could be that courts are too far away in geographical terms to be accessible to. The remedy thus would be to establish more police stations and courts. One way of testing this hypothesis is to compare the level of impunity (lynching of suspected sorcerers, thieves and killers, but also in the warlike cattle raids among pastoral groups and violent clashes in the course of land conflicts) between an area with relatively strong state presence (in our case Southern Rift Valley) with one where the state is largely absent (Northern Rift Valley).

An additional hypothesis maintains that the reduced access to justice to be explained with a lack of information about the law and the functioning of the judicial institutions (courts and police). Hence impunity is explained with a lack of relevant information as to how to access legal institution.

1.2.2 Failure of state judiciary

Certainly, distance to courts and lack of information are not the only obstacles making access to justice difficult. Rather, people may often be reluctant to bring their case to court exactly because they know the actual (dis-)functioning of the judicial system quite well. High procedural costs (lawyers, court fees, bribes etc.), unpredictable results due to partiality of judges, corruption and political pressure, incompatibility of legal philosophy (English law against indigenous law, punishment versus compensation), backlashes in one's own community (revenge, retaliation etc.); risks that files may be lost or destroyed, perpetrators released due to bribes; witnesses intimidates and similar factors may also be strong incentives for not bringing conflicts to courts.

1.2.3 Legal pluralism

We also thought that the failure of state judiciary has something to do with problems related to legal pluralism. The Kenyan legal system follows the logic of legal pluralism. Certain offenses and conflicts should be punished and solved locally and regionally by traditional authorities, while the regional and national authorities on district or province level are responsible for the resolution of other offenses and conflicts based on formal state law. People having the choice to bring a certain offense or conflict to formal court have alternatives: customary court (tribal elders), NGO, informal mediators etc. They will select that instance from which they expect the most advantages to have the problem settled in their interest. Since litigants have diverging interests, it is not easy for them to agree on the body which has to solve their conflict. This forum-shopping is a shortcoming of legal pluralism as long as the recourse to higher instances is not clearly defined and followed. This may contribute to acerbate conflicts rather than to solve them.

2. LAW AND JUSTICE IN KENYA

The existence of several normative systems with their own independent institutions to enforce relevant norms and resolve disputes is a reality in most in most formerly colonised states (Forsyth 2007: 67). This is also true for Kenya and the issue of access to justice cannot be understood without taking this reality of legal pluralism into account. This section gives a short overview of the formal (state) legal system with a particular emphasis on the judiciary, briefly describes informal (non-state) legal and judicial systems that emanate from and build upon traditional customary law and then examines the relationship between the two.[2]

2.1 Overview

Kenya's legal system is hybrid in several regards. It is heavily influenced by its past as a British colony until independence in 1963 and its continued membership in the British Commonwealth. However, common law as unwritten law created by judges is overlaid and often replaced by a dense net of written law adopted by Parliament that follow continental European

[2] The qualification of informal legal systems as customary law is problematic insofar as it fails to recognize the manifold transformations such law has undergone and is undergoing in the context of state penetration of rural areas.

legal traditions insofar as they are based on a written constitution. The present Constitution of Kenya, adopted in 2010 resembles most other modern constitutions. [3]

Kenya is also marked by a parallelism of formal law building on these European legal traditions and informal law drawing on African legal traditions. This amalgam has its roots in history: During colonial times, direct rule" or English law was applied to people of European descent and the Africans who opted for the "European status" while local communities (native populations) lived under the "indirect rule" where customary or traditional laws applied under the supervision of the British colonial authorities[4] (also see, Salm et al 2005). Depending on the parties to a dispute, the formal courts and tribunals applied common law, African customary law or Islamic law; at the same time "informal customary law tribunals continued to operate at the level of the village and the community, in several forms, including councils of elders, clan or family tribunals and village associations" (Kane et al 2005:6; see also Juma 2002). Today, as Ebbe has observed: "Kenya has an informal, customary […] justice system. This system is carried out by local chiefs and a council of elders in remote villages, where police and formalized courts are not readily accessible. The colonial government and the post-independence governments have limited the types of criminal cases that these local chiefs and councils of elders can try, although these informal courts often exceed the limits of their powers. These informal courts help to reduce the delays and backlog of cases occurring at the formal […] courts." This is probably one of the reasons why the Constitution of Kenya 2010 (Article 159) recognizes that "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted".

2.2 Formal dispute settlement mechanisms

2.2.1 The Judiciary

The judicial system is relatively simple: Kenya has a four tier judicial system with the *Supreme Court* as the apex court deciding cases raising constitutional issues or matters "of general public importance" (Art. 163 Constitution).

Below it, the *Court of Appeals* hears appeals from the High Court or special tribunals set up by an Act of Parliament (e.g. labour or land courts) (Art. 164 Constitution).

The *High Court* has original jurisdiction in most criminal and civil matters, decides constitutional cases and hears appeals from the subordinate courts (Art. 165 Constitution). The High Court sits continuously in Nairobi, Mombasa, Nakuru, and Kisumu, and periodically in Eldoret, Kakamega, Kitale, Kisii, Meru and several other locations.

Minor matters start at the level of *subordinate courts*. According to Article 169 of the Constitution the subordinate courts include the Magistrates courts and the Khadis' courts. The 105 Magistrates courts handle civil and criminal cases of minor importance at district or divisional level and are presided over by resident magistrates and district magistrates.[5] The Kadhis' courts determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and choose to submit their case to such court (Art. 170 Constitution).

The 2010 Constitution guarantees the independence of the judiciary by stating, that "in the exercise of judicial authority, the Judiciary […] shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

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[3] It replaces the 1969 Constitution of Kenya with superseded Kenya's Independence Constitution of 1963.

[4] Serious offenses against the state, or criminal offenses, were generally dealt with under English law. Common Law systems recognize unwritten rules and norms as part of the law (as opposed to civil law systems that generally require law to be written) and today customary law is increasingly treated as part of the common law (see Kane et al. 2005).

[5] The higher the rank of the magistrate, the bigger the case he can handle. The hierarchy of Magistrates in descending order is as follows: Chief Magistrate; Senior Principal Magistrate; Principal Magistrate; Senior Resident Magistrate; Resident Magistrate and District Magistrate.:

(Art. 160) It further provides that "justice shall be done to all, irrespective of status" and "shall not be delayed" (Art. 159). These provisions reflect a widespread dissatisfaction with Kenya's judicial system under the previous Constitution. Gicheru (2007) criticized that in the past the executive had used courts to get authorization for illegal actions, that the executive and the legislature had been holding the judiciary in contempt when court rulings adversely affected their interests and that Parliament had not shied away from discussing pending court cases. The present Chief Justice of the Supreme Court, Dr. Willy Mutenga (2012: 2), described the situation in the following drastic words:

> "The overweening influences of the Executive created an enfeebled Judiciary, an arm of government strikingly reluctant to play its classical role in the defence and upholding of the constitutional principle of separation of powers. This capture by narrow interests created an institution plagued by corruption and inefficiency – a veritable figure of scorn at odds with the public interest. […]
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> These pathologies saw the institution develop toxic insularity and cold insensitivity. It internalised privilege and entitlement, rather than service. It intoned authoritarianism rather than authority, thereby alienating the very public it was meant to serve and ingratiating itself to the very arms it was supposed to check. Creeping dysfunctionality, unprofessionalism and corruption were the result; institutional ignominy, the effect."

As a consequence, the judiciary under the leadership of the Supreme Court developed a reform agenda entitled "Judiciary Transformation Framework, 2012 – 2016" The first of the four envisaged reform pillars[6] is entitled "People focused delivery of service" and addresses as first priority a series of measures to improve access to justice. These include not only the establishment of new courts and mobile courts but also the introduction of simplified procedures to reduce costs, the reduction of backlogs and the acceleration of case management as well as the promotion and facilitation of alternative forms of dispute resolution (The Republic of Kenya 2012: 22).

2.2.2 Administrative authorities at the local level

The administrative system at the local level is central for the topic of this paper as it is there where most disputes erupt and people may turn to authorities. Local administration is presently significantly changing with the introduction of a system of devolved government based on counties with elected authorities that possess a certain degree of autonomy (Articles 174 – 200 of the 2010 Constitution).

At the time of this research, the new system was not yet implemented. The following description therefore is limited to the *previous system* based on provinces and districts that were not autonomous bodies but administrative units administered by the central government. More specifically, they were is under the authority Ministry of State for Provincial Administration and Internal Security attached to the Office of the President. The Ministry of State was central in the executive management of the country as well as the management of conflict at the local level. It was in charge of the provincial administration with offices in each district dealing with all governmental activities in a particular district as well as with conflict management and peace building challenges (see also Ruto et al 2010). The key official was the District Commissioner (DC) serving as the patron of District, and he was supported by officers of the provincial administration. The District Commissioner's office served as the "epicentre" of all government activity in a district and most coordination of conflict management and peace-building activities by state and non-state actors were sanctioned and coordinated from this office. In their respective areas of administration, the chiefs and their assistants play a central role in the resolution of disputes. In partnership with local elders, the chiefs and their

[6] The three other pillars are „(b) Transformative leadership, organization culture and professional, motivated staff; (c) Adequate financial resources and physical infrastructure; and (d) Harnessing Technology as an Enabler for Justice.

assistants are consulted to mediate domestic, matrimonial and other petty disputes. However, they often lacked sufficient logistical and financial capacity to respond to conflicts.

An institution that goes back to the early 1990 and still exists are the *Peace Forums* and *District Peace Committees* which constitute the primary administrative avenue for conflict management in the rural and marginalized areas of Kenya (Adan et al 2006). They have been described as hybrid bodies providing "a conflict intervention structure that integrates both traditional and modern conflict intervention mechanisms to prevent, manage or transform intra-ethnic or interethnic conflicts" (2006: vi). They play the role of giving early warning to the authorities on matters to do with insecurity, and looming conflicts in areas with no police presence. Their members are drawn from the respective communities but they were often placed under the authority of the District Commissioner's office. District Peace Committees have become an important medium for conflict management activities in many parts of Kenya, providing both a forum and resources for the activities of state and non-state actors. Their role include facilitating resolution of intra-district conflicts, responding to security incidents, deploying rapid response teams, addressing inter-district conflicts, responding to conflicts over natural resources use, weapons collection and addressing broader peace building issues.[7]

The Peace Forums as well as the District Peace Committees' efficiency in conflict prevention management and reconciliation are viewed as effective and operational in some areas and non-existent or ineffective in others. However, these structures face a number of challenges, from structural to operational, including in areas of harmonization, communication, coordination and monitoring (see Adan et al 2006: vii and 17–23): They are not anchored in any legal instruments and therefore their operations are dependent on the goodwill of the local administration and the local community. They face challenges of politicization of their structures, lack of funding and capacity constraints among their members. There were instances where the relationship between the district peace committees and the District Commissioner was unclear, with the District Commissioner exercising varying levels of control over the resources and operations of the District Peace Committees.

2.3 Informal dispute settlement mechanisms

2.3.1 Council of elders

The council of elders is a term used to denote a group of elders who work together in a specific location or area of jurisdiction for a common purpose. Usually, it represents a particular village. While this is old institution has often been ignored in favour of formal judicial system, it is today looked at more often as conflict resolution mechanism at the community level were elders remain epitomes of authority and wisdom in many communities.

On the other hand, village elders (*wazee WA mtaa*) are elders selected from various villages to represent the interests of their respective villages and report to the area Chief. They may not necessarily work for a common purpose but their collective responsibility is for the good of the Chief's location (area of jurisdiction), a division (manned by D.O./District Officer) and eventually the entire District (manned by D.C- District Commissioner). In summary the council of elders can belong to one village while village elders (*wazee WA mtaa*) belong to different villages, which may be in a single location (Chief's area of jurisdiction).

In Kenya informal, customary criminal justice is carried out by local chiefs and a council or community of elders in remote villages, where police and formalized courts are not readily accessible. The colonial government and the post-independence governments have limited the types of criminal cases that these local chiefs and councils of elders can try to petty offences, although these informal courts often exceed the limits of their powers.

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[7] See the Draft National Policy on Peace building and Conflict Management at Section 2.2.3.3; Peace Net funding at http://www.peacenetkenya.org/index.php?

The council of elders plays a major role in the informal system in conflict resolution and management mechanism. Most communities of Kenya have a council of elders, which is the premier institution charged with the responsibility of managing and resolving conflicts at the local level (also see Krätli et al 1999). During our research, 64% of respondents in Narok north district (45 out of 70) asked to assess community elders' effectiveness in conflict resolutions, judged them very effective in domestic disputes; while 79% of respondents (55 out of 70) in Kibish, north Turkana, judged them very effective and only 10% of respondents in the same group (7 out of 70) felt that they were not effective.

In the past, write Adan et al (2006:9 f.), the elders were greatly respected because they "were seen as trustworthy and knowledgeable people in the community affairs thus enabling them to make informed and rational decisions. Their age gave them accumulated experience and practical wisdom useful for making decisions which were not only for the parties to the conflict but also for the better good of the whole community. The council of elders used to sit and adjudicate disputes. The primary consideration was the need to maintain family harmony and peaceful co-existence in the society. As much as possible, the process encouraged reconciliation of the parties". Today, asserts Almagor (1979), the weakness of the councils of elders in Kenya is the deterioration of unity among the elders, which increases the risk of escalation of conflicts when they cannot agree what a just solution would be. Mburungu (2002) in his study conducted amongst the Turkana, Borana and Somali communities established that "the institution of the elders is very much in use even today but somewhat weakened as the elders are unable to enforce the punishment meted out" (Adan et al 2006:9). Duffield (1997), quoted in Krätli's work (1999), stresses the fact that, "the elders' authority has been undermined by the introduction of a market economy and the increasing polarization of rich and poor that resulted in labour migration. The youth have found new sources of influence and wealth including the flourishing armed militias of young men and the new income available through banditry". Odhiambo (1996) strongly believes that traditional authority is being eroded by the progressive replacement of elders' councils and tribunals with government-appointed agencies and functionaries. Meanwhile, urbanization and increasingly frequent migrations to town of young people, especially men, expose them to other cultures and make them question traditional values. Another way in which elders may have lost their authority is through increasing distrust from the communities, particularly from the warrior age sets. This may have various causes (see also Wanjala 1997). One may be their association with an increasingly distrusted administration. Others have argued that the elders may increase their influence and prestige by providing an interface between their communities and local authorities; thus, when the public sector is reduced, the role of the elders weakens, too (Galaty 1994).

In case of conflicts, such as banditry (attacks on the roads), cattle raiding, or grazing disputes, local communities very often use traditional mechanisms, including inter-community agreements, negotiations or compensation (also see Krätli et al 1999). Such mechanisms are more attractive than bringing cases to court, and the attendant costs in formal legal institutions. Often, elders try to move cases from the courts, or ensure that cases never reach court.[8] Sometimes, in cases of stolen livestock, the communities involve the police in order to recover the stolen animals because the traditional approaches fail to do so, but even then do not take such cases to court.

Often, the efforts of elders led to "declarations", or "agreements ending the conflict. A particular interesting example of inter-community agreements is the Modogashe Declaration adopted in 2001[9] and revalidated in 2005 and 2011 by representatives of pastoralist communi-

[8] See, e.g., the case of a man of Indian origin who impregnated a Maasai girl, in August 2011 at Lemek village in Narok South, described below section 4.2.3 c).

[9] Community leaders from Eastern Province (Moyale, Marsabit and Isiolo) and North Eastern Province (Wajir, Mandera and Garissa districts), together with respective security organs, met at Modogashe in Isiolo in 2001 and signed the peace accord.

ties of Northern Rift Valley in order to remind the community of the importance of maintaining it.[10] The Declaration, which imposes fines for crimes such as banditry, theft of cattle and killings was endorsed by the Office of the President. The implementation of the declaration on the local level involved the executive, as well as the provincial administration (Chief and Sub-Chief, District and Provincial Commissioners).

Most agreements, however, do not reach that level of attention and endorsement. A significant proportion of respondents of respondents (70% = 49 out of 70) in north Turkana asked during the course of research were not familiar with various peace declarations of the past, while only 20 % (14 out of 70) rated them effective and 10% (7 out of 70) very effective.

2.3.2 Religious leaders

Religious leaders have been perceived as peacemakers, since no religion propagates conflict or violence. In most rural communities of Kenya, religious leaders have participated in brokering peace, which is why the formal institutions should work with religious institutions in peace-building efforts (also see Ndegwa 2001). In Narok north district, for example, 50% of respondents (35 out of 70) asked during our field research rated religious leaders as important agents of resolving conflict, mainly during the post-elections violence of 2007 and 20% (14 out of 70) perceived them as effective.

2.4 Legal pluralism in Kenya: Challenges and shortcomings

According to a classical definition, legal pluralism denotes "the presence in a social field of more than one legal order" (Griffiths 1986: 1; see also Galanter 1981, Merry 2004, Woodman 2004, von Trotha 2000). Thus, a "situation of legal pluralism […] is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities" of different social fields (id. 1986: 39). This understanding of legal pluralism acknowledges that not only the state but also communities may develop and implement law, i.e. norms that are binding and enforceable through institutions created for that purposes.

Kenya explicitly recognizes the reality of legal pluralism: Its Constitution (Article 159) establishes the principle that "traditional dispute resolution mechanisms shall be promoted", but, at the same time, prohibits the use of such mechanisms if they and the outcomes they produce contravene human rights, the Constitution or any written law, or are "repugnant to justice and morality". Kenya thus recognizes the potential tension between informal and state law. This corresponds with Forsyth's fourth model of which she calls "Limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system" (Forsyth 2007: 83).[11] Situations of legal pluralism in general and the specific Kenyan situation in particular raise a series of questions and challenges that are relevant for this paper. Three need to be highlighted at the outset:

2.4.1 Accessibility

One prominent feature of legal pluralism is the possibility it creates for forum shopping, i.e. the strategic choice to take as dispute to the one among available fora that is most likely to render a positive decision (von Benda-Beckmann 1981). This hampers access to justice where

[10] However, communities that have enthusiastically signed the declarations and taken oaths are known to break them when their interests are at stake. Most of the agreements, such as the Turkana, Pokot, Samburu and Naivasha declarations have not held. In other instances, the youths have increasingly been blamed for ignoring the peace agreements of their forefathers, terming them irrelevant or claiming to be ignorant of them. With the decreasing influence of elders over the youth, declarations pose a strong challenge.

[11] Forsyth (2007) identifies seven models of the relationship between formal and informal law, ranging from the repression of non-state law by the state to the complete incorporation of non-state law into the formal legal order. With the recognition of Kadhis' courts as part of the formal legal system (Article 170 Constitution) it also accepts to the validity and authority of religious (Islamic) law in the sense of Forsyth's model 5 ("Formal recognition of exclusive jurisdiction in a defined area") (Forsyth 2007: 89).

parties to a conflict cannot agree on where to take their dispute. At the same time, choice related to judicial mechanisms is positive insofar as it provides people with opportunities.

In the context of Kenya, however, taking a dispute to the state may not always be a real option. It is commonly accepted (Mutenga 2012: 2; ILAC 2010: 52) as well as confirmed by our research that access to the formal justice system in Kenya is a problem. The use of formal law and institutions to solve conflicts and the trust in the state judiciary had been traditionally low (ILAC 2010: 52). There are many obstacles which seriously obstruct access to the public administration, the police and the courts such as long distances to far flung public administration offices, the expectation that the authorities will not react or not properly sanction those responsible for wrongdoing, high costs for lawyers, the excessive duration of court processes or the fear that the outcome of proceedings will be tainted by corruption and politicisation. Many Kenyan, therefore, assume that the justice system is not capable of protecting their interests or resolving their disputes. This is exacerbated in urban areas where a "mafiatisation" of justice, with organized ethnic gang groups, exists.[12]

On the other hand, there is a common perception among communities that disputes between members of a community must be solved by the community itself and should not become known to the outside world. In light of these elements, it is easy to understand that and why people resort to traditional dispute settlement mechanisms. As outlines above (section 2.2), they are often seen as more legitimate, more effective and closer to the communities. This, however, may lead to situations where decisions rendered on the basis of non-formal (customary) law contradict state law and thus are not recognized by the state. As we will show (below section 4.2), this may happen with regard to land conflict when traditional owners of land do not accept that according to state law "their" land belongs to the state (and those who received title deeds from the state) and not them.

Furthermore, there are circumstances where access to traditional institutions is not possible, e.g. because of a lack of agreement of both parties to submit their conflict to such an institution. Structurally, access to such institutions is blocked where they lack jurisdiction.[13] For instance, traditional institutions with powers to decide about cattle raids do not exist in cases where the raiders come from far away areas or even neighbouring countries where elders do not have any contacts (see section 4.1. below).

2.4.2 Impunity

Where access to justice is limited or non-existent, impunity prevails. The most serious cases of impunity are those where, as just described, no traditional mechanisms to solve a conflict are available or accessible and the state authorities are not accessed for any of the reasons that may be an obstacle to submitting a case to them.

Lack of trust in the police and the judiciary are an important reason for mob justice. As we will describe below (section 4.3), data collected in the course of the research indicate, for instance, that in urban areas people resort to mob justice in case of thievery. One reason is that public institutions dealing with crimes do not get the full collaboration and cooperation from the community in identifying wrongdoings, or bringing witnesses before court, factors that not only seriously handicap the prosecution but all too often lead to the release of criminals. The outcome of mob justice is that the thief may be punished, albeit outside any fair procedure, but the crime of murdering the criminal remains unpunished.

2.4.3 Clashes of concepts of law and justice

Another reasons why cases are often not brought to court is the fact that communities have little faith in court verdicts, especially if the judgement challenges their understanding of the

[12] Mapping of ethnic gang groups in Kenya, Source: Kenya National Dialogue and Reconciliation (KNDR), Monitoring Project, Report on status of implementation, Nairobi South Consulting, January 2009.

[13] See, e.g., Article 170 Constitution setting out this requirement regarding the jurisdiction of Kadhis' courts.

concept of justice. In such cases, communities are convinced that their conflict resolution mechanisms are better suited to offer a good solution. They do not believe that courts can bring peace to the society. In fact, even when the police investigate a case, which the community deems a crime, and the police want to press charges, the elders will often do everything possible to have the case transferred from the state institution, to their level, for solution according to the local customary laws. When the police try to intervene, the rural community very often mobilize themselves to impose their will and views on the public institutions (court and provincial administration), because generally, officers serving in public institutions at the district level, come from "outside", they fear being sacked from their jobs, if communities hold demonstrations against them. What happens as a result is that the elders succeed in taking a case from the official institutions. To do this, elders or leaders of the community usually argue that, it is part of their duties, as guardians of their traditions, to protect all members of the community, by solving disputes amongst the members, in order to maintain peace.

The rationale behind this attitude by the elders is that, in their areas, they have more powers than public officers in matters to do with their community. These examples show the differences, in understanding the concepts of justice, between the formal (legal) systems, and informal (customary) institutions, the culprits of crime and who pays the consequences. It is well known, in most rural communities, including pastoralists, that it is the entire clan that assumes, and pays, for crimes committed by a member. The clan endorses the act committed by one of its members, as guardians of the traditions of the entire community. For example, if a clansman is killed by members of another group, the entire community has to protect its members against revenge by the victim's relatives and therefore negotiates with that of the victim for compensation. . In this perspective, elders from both parties, as leaders of their respective communities, will try to reach an agreement, which will bring peace between the two groups. Because payment as compensation for crimes is essential for the restoration of peace and the social contract between two parties in conflict; it is also very important in maintaining good relations with members of different clans living in the same society.[14]

Systems of compensation which are an expression and reinforcement of a social contract (Chopra 2008: 23) are very different from the logic of state law, because even if the perpetrator pays compensation to the victim, or to the relatives of the victim, or in the event that, the victim, or his relatives withdraws the case, from the courts or police; the prosecutor, on behalf of the society, should still pursue the guilt of an individual, before the court. In this case, the trial and sentencing of the wrongdoer, does not help to resolve the conflict, on the contrary, it results in more violence among the families and clans involved.

As a consequence, the fact that elders, or leaders of the community can withdraw a criminal case that involves a member of their community from public institutions (courts as well as provincial administration) so as to informally resolve the disputes, makes it a serious challenge to the formal legal systems, in charge of implementing the law (also see Mbote/ Akech 2011). This leads to impunity in the eyes of the state: Police officers investigating a crime may be faced with a situation where the relatives of offenders or even the victims or their relatives may know the identity of perpetrators, but refuse to reveal or report, or to testify as witnesses. If the police officers arrest suspects, clansmen request his release (or bribe the police) before negotiations with the victim's clan start, arguing that it is difficult to start the process while the offender is detained. At the same time, the victim's clan is interested in compensation, instead of the long, tedious, costly and time-consuming court procedures.

[14] This can take place at different social levels. Depending on who the conflict parties are, it can comprise clans from different ethnic groups , in which scenario the clans may get support from other clans of their own ethnic group, or it may entail members of different lineages within one clan.

3. THE SOCIAL SETTING

In this part we will first elaborate on the selection of our research sites. Then we will give a brief overview on the populations among whom our research was carried out. The main focus will be on the Maasai in the South and the Turkana in the North of the Rift valley. We will not give a comprehensive ethnographic description but rather focus on some basic features of these two societies. Finally we will briefly turn to the methodological side of our research.

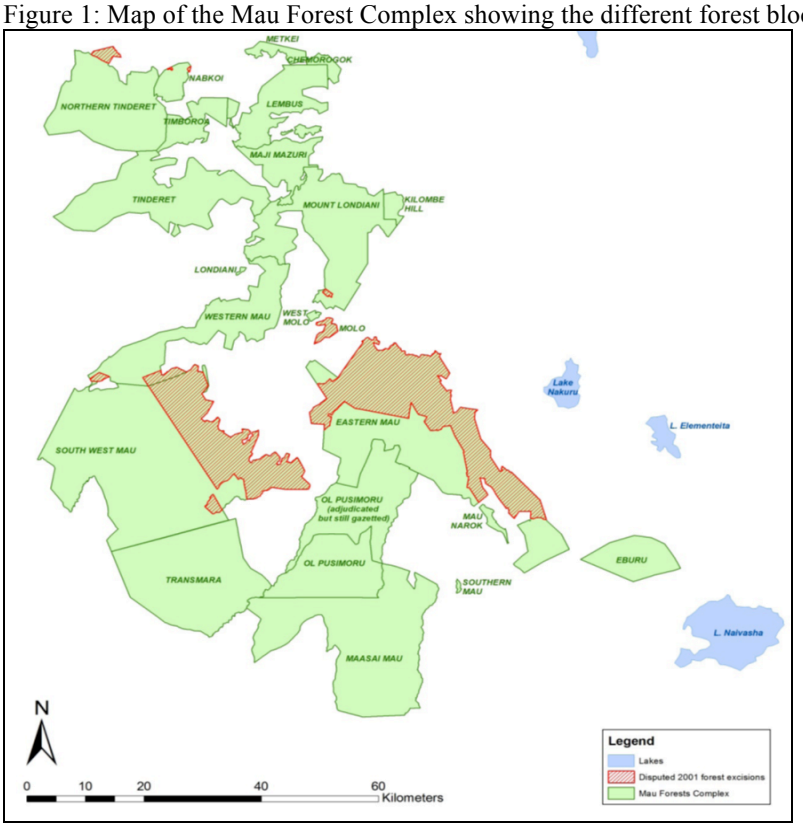
3.1 Site selection

We selected the area of Mau forest complex in southern Rift valley and some parts of the North (Kibish division, Lapur division, Oropoi division) and the South (Naipa, Kotaruk and Kanaodon) of Turkana district in the Northern Rift Valley. We conducted interviews with informants from various local communities and ethnic groupings such as the Maasai, Kipsigis, Ogiek and Kikuyu as well as the Turkana and Pokot. The main criterion for this site selection was the extent to which the state and its representatives were present: there is a weak state presence in the north and a stronger one in the South of the Rift valley.

3.1.1 Mau Forest

The Mau forest complex consists of seven blocks (Ololung'a, Olokurto, Narok town, North Tinderet and Enaibelbel, Kapcholola village, in El-burgon location, Molo district).[15]

Figure 1: Map of the Mau Forest Complex showing the different forest blocks[16]



[15] According to Sang 2001:113: „The Mau Forest complex is the largest remaining near-contiguous bloc of Montane indigenous forest in East Africa. It covers an approximate area of 350,000 ha and is situated about 170 km north-west of Nairobi and stretches west bordering Kericho District, Narok District to the south and Nakuru to the north and Bomet to the south-west. The forest is divided into seven blocs comprising South-West Mau (Tinet), east Mau, Ol'donyo Purro, Transmara, Maasai Mau, Western Mau and Southern Mau. These seven blocs merge to form the larger Mau Forest complex. (…) The forest lies 1,200 – 2,600 m above sea level with an annual rainfall of about 2,000 mm spread throughout the year."

[16] Source: http://www.maurestoration.go.ke/index.php/downloads/cat_view/62-maps (no longer accessible).

The Mau forest complex is a public domain or a national reserve with an intense interaction of pastoralists and farmers, between local communities of different ethnic identity and between original settlers and immigrants.

We chose the Narok North part for two reasons: First, we had already visited in Narok North district in February 2011 to September 2012 in order to map the grievances of the communities, mapping the state institutions as well as the customary and intermediary institutions of conflict management. Second, we chose Narok North district because it is so different from Turkana district with regard to population size, and local politics – Narok North district is a divisional headquarters. This means that Narok North district is the home of public administration and the magistrate's court.

3.1.2 Turkana District

We also decided to select some villages in the North and South of Turkana Districts in Northern Rift Valley (Kibish, Lapur, Oropoi, Naipa, Kotaruk and Kanaodon), as our second site, for two reasons: First, because cattle raiding as well as the use of fire arms by pastoralists are widespread, and second, because state presence is very weak in this area.[17]

Figure 2: Map of The Turkana (www.nema.go.ke/index2.php)

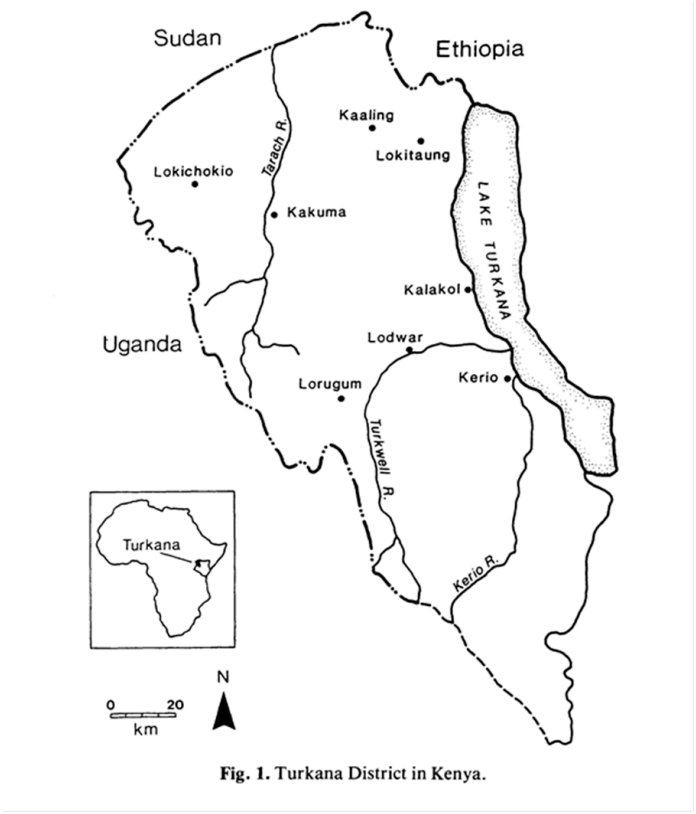


Fig. 1. Turkana District in Kenya.

[17] The Turkana district is an administrative district in the Rift Valley Province of Kenya, which is situated on the North-western Province, Kenya. With an area of nearly 77, 000 Km², Turkana is the largest district in Kenya. It is bordered by Uganda to the west; Sudan to the Northwest and Ethiopia to the North. To the south and east, neighboring districts in Kenya are West Pokot, Baringo, and Samburu Districts, while Marsabit District is located on the opposite (i.e. eastern) shore of Lake Turkana. The district has a population of 855, 399. There are 123'192 households in Turkana district with a population density of 6.9 persons per Km². Despite the fact that the Turkana has six administrative districts, there are three constituencies namely Turkana north (composed of Turkana North and West districts), Turkana central (comprising of Turkana central and Loima districts), and Turkana south, which covers Turkana East and Turkana south districts (See Turkana District Profile in www.aridland.go.ke)

We do not intend to give a comprehensive ethnographic description but instead focus on some basic features of these two societies, which are relevant to our research topic. These comprise: demography and location, local and kinship groups, economy (cattle herding, agriculture, territories, integration into market economy) and politics (power of the elders, modes of local conflict managements, age system, issues of conflict, warfare). We will focus on the Maasai and the Turkana as well as on the relations to their neighbours (Kalenjin, Kikuyu and Ogiek in the South as well as the Pokot and other pastoralist communities in the North.

3.2 Communities in the Southern Rift valley

3.2.1 Maasai

The Maasai are a mainly pastoral people living in Kenya and parts of Tanzania.[18] According to the 2009 Census, about 850'000 Maasai lived in Kenya.

a) Local and social organisation

The most important residential groupings are the tribal section, the village, and the polygynous homestead, or joint family. A tribal section contains a certain number of villages, which are dispersed throughout the territory of a tribal section. The interaction of villages is most frequent and the elders meet to discuss the issues that affect the villages within a tribal section.

Each village contains about four or five clusters of huts and stock corrals forming joint-family homesteads (or extended families), which are the most important units within the village. It is the joint family that has much more continuity than a village. Most conflicts and other issues are being decided and settled by the head of the extended family. These joint-family households may leave the village and migrate to another locality at any time. However the young men of the age grad of warriors (*moran*) leave a part protecting the area from marauders. ”Typically, there are three or four warrior villages in any tribal section, and the warriors who are associated with them claim considerable autonomy from the elders and adopt a contrasting life-style that emphasizes their dependence on one another” (Spencer, HRAF).

b) Economy and strategies of livelihood

According to Briggs (2006), “the Maasai lifestyle centres on their cattle which constitute their primary source of food. The measure of a man's wealth is in terms of cattle and children. A herd of 50 cattle is respectable, and the more children the better. A man who has plenty of one but not the other is considered to be poor”. Whereas cattle are the most important wealth among the Maasai, ”sheep and goats play an important part in their diet, especially during the dry season, when milk is scarce. The need to graze stock necessitates dispersal over the whole area of a tribal section in search for grazing and water, especially in the dry season” (Spencer, HRAF).

The herd of a joint family is usually divided, with the milking cows kept at the compound and the rest of the herd sent to another site on the grazing land. The constant rotation of cattle from one pasture to the next makes it extremely difficult for outsiders to know precisely how many cattle a herder owns and where those cattle might be grazing.

Each tribal section owns the grazing rights in its territory. Joint-family groups may own wells for watering stock. However, in times of need all Maasai land and water belong ultimately to all Maasai and no one should be denied access. This principle conflicts with two economic trends that began in the 1960s and have been steadily gaining force, which entail a shift toward local ownership of land: the encroachment of agriculture and the government's

[18] The information about the Maasai are taken from Bekure et al (1991), Fratkin (1994), Galaty (1991, 1994), Saitoti (1986), Sankan (2006), Spencer (1988, HRAF) as well as from own field work data.

attempts to confine Maasai to group ranches. Neither of these developments is consistent with the erratic nature of droughts" (Spencer, HRAF).

Traditionally, cattle have been the sole source of income for Maasai men. Sheep and goats were traded with neighbouring peoples for vegetable and grain, whereas cattle was only sold from absolute necessity. Today many Maasai men have abandoned the nomadic lifestyle and are active in farming, business (selling of traditional medicine, snuff tobacco, running of restaurants/shops). Wage employment includes working as security guards, waiters and tourist guides (see Pavitt 2011). The women sell butter and milk and buy corn and other vegetables from the Kikuyu. Before the Maasai in Mau-Che did not farm, but recently the women are making small gardens within the compound, using cow dung from their cattle to fertilize the soil. Some Maasai pay Kikuyu women to work on their farms.

c) Socio-political Organisation

The Maasai society is strongly patriarchal in nature, with elder men making major decisions within the extended family group, the village, a patrilineal sub-clan as well as with a tribal section (Ondicho 2010).

The father has the main authority in the patriarchal family. The authority of the leading elder man of an extended family-household is only limited by the intervention of close senior elders in situations of conflicts between groups. As long as the father was alive, no son has final control over his cattle or over his choice in marriage. "However, as they grow older, older men rely on their sons to take over the management of the family, and it is the subservience of women that is the most permanent feature of the Maasai family. After her husband's death, even a forceful widow is subordinate to her sons in the management of her herd, and she finds herself wholly unprotected if she has no sons" (Spencer, HRAF).[19]

The authority of elders ultimately resides in their power to bless and to curse, which is linked to their moral superiority in all spheres (see Saitoti 1986). However, as Spencer (HRAF) states, conflicts among the Maasai focus on the relation between the generations. "The young warriors are seen as the defenders of Maasai herds even today. There is a strained relationship between warriors and elders over stock theft and adultery by the warriors, both of which stem from their prolonged bachelorhood and from the food shortages they often endure, in contrast to the lives led by the wealthy and polygynous elders." (Spencer, HRAF).

3.2.2 Kikuyu

The Kikuyu are the largest community in Kenya. According to the census of 2009 the Kikuyu numbered about 8.8 million and thus constitute 22 per cent of 40 million Kenyans (World Factbook 2010). They mostly settle in Central Kenya and are the second largest group in the Rift Valley. The Kikuyu are found all over Kenya, especially in towns where they live and work as traders, artisans and professionals.

a) Local and social organisation

The Kikuyu in the rural area live in extended family compounds (mucii) consisting of several houses. Some of these family compounds form a village community.

b) Economy and strategies of livelihood

The Kikuyu are farmers growing millet and maize as well as several kinds of peas and other legumes and fruits, not only for their own consumption but also for sale in local and regional markets and, in some cases, for export to Europe. They also rear domesticated animals such as

[19] At marriage, a bride is allocated a herd of cattle, from which all her sons will build up herds of their own, overseen by their father, who also makes gifts of cattle to his sons over the course of his life. When the parents die, the oldest son inherits the residue of his father's herd, and the youngest inherits the residue of his mother's allocated cattle. Daughters inherit nothing at all.

sheep and goats for own consumption. Some Kikuyu farmers are also businessmen and shop owners. Their strong integration into the market economy is also the reason why Kikuyu In the Mau-Che are have a far higher standard of living as compared to the Maasai and Kipsigis living in the same area.

”Originally land was communally held by a *mbari* (lineages) and allocated to individual men by lineage or clan elders. Only sons inherited land and property from a father until 1991 when the Kenyan Parliament passed a law extending the right to inherit land and property to wives and daughters. Since the early 1960s, the trend toward entitlement of individual lands has gained force. It also has led to and increased competition even between brothers as heritable parcels continue to shrink with land fragmentation and rapid population growth, beginning in the 1980s. Land tenure is still contested terrain in rural areas. Some holdings remain communal, others are individually held by a father, or an eldest grown son or daughter” (Davison, HRAF).

c) Socio-political Organization

The *kiama*, or elders’ council is the predominant judicial body in a Kikuyu village. It heard complaints and settled disputes in a public space. ”The *kiama* is responsible for settling conflicts between individuals over property, scarce resources, and women. For example, they heard cases concerning the control of particular beehives in the forest, cases over stolen goods such as a goat, stored food, or a hoe. They also heard disputes that could not be settled by family elders, such as marital quarrels of younger members or disagreements between co-wives.” The elder men of extended families, lineages (*mbari*) and clans (*muhiriga)* and villages ”acted to ensure security, order, and social justice but British common law and indirect rule, now supplementing these indigenous institutions for control over people’s lives, relationships, and livelihood” (Davison, HRAF).

3.2.3 Relationship between the Maasai and the Kikuyu and others

According to the key informant interviews, the Kikuyu were traditional enemies of the Maasai, who raided the Kikuyu, Meru and Kamba. The Maasai would steal cattle from the Kikuyu, though farming is their main focus and not cattle keeping. At the same time, they have had close trading ties with the Maasai and even intermarried with them. The pastoralists needed agricultural produce, i.e., cereals and vegetables while the agriculturists needed animals and animal products. When affected by droughts and famine, the Maasai heavily depended upon their agricultural neighbours, with whom they had either to trade, or seek refuge to avert deaths from starvation. Inter-marriage also contributed to peaceful coexistence between both communities. Peaceful coexistence therefore, was of prime importance to the well-being of the two communities, sporadic skirmishes over cattle notwithstanding.

Violence erupted across Kenya in early 2008, putting Kikuyu living in Rift Valley and elsewhere outside Central Province at great risk and loss of life. In Mau-Che area conflicts broke out between Kikuyu and Kalenjin.

The Kipsigi constitute one part of the Kalenjin people. They largely live on agriculture and animal husbandry. The use cattle for bride-price, for consumption and for market sales. They are thought to number about 600'000, some of them settling in Nakuru, Molo, Njoro, Kuresoi, Narok South and Trans Mara. Since the 1950s, virtually all agricultural land was claimed as private property, which is also true for the Kipsigi. Traditionally animal husbandry was much more important, and the Kipsigi also practice cattle raiding against the Maasai.

Ogiek (sometimes called Dorobo) constitute a small population of less than a 1000 people. They were thought to be the aboriginal population in Mau forest and before the first half of the 20th century they lived on hunting and gathering, when they started to practice agriculture and animal husbandry. After independence they were given individual land right titles, which many Ogiek sold to non-Ogiek people settling in Mau Forest. They money was

used for consumption, including alcohol. Since the 1990s the Ogiek began to protest against the infringements of their land rights. The Ogiek who still practice some additional hunting-and-gathering and depend on the forest for food, medicine, shelter and the preservation of their culture.[20]

3.3 Communities in the Northern Rift valley

3.3.1 Turkana

The Turkana are mainly nomadic pastoralists. According to the 2009 Census, about 850'000 Turkana live in the Northern part of Kenya, which equals 2.5% of the Kenyan population.[21]

a) Local and social organisation

Whereas the Turkana occupied no permanent settlements before, following the droughts of the 1980s, about one-third to one-half of the Turkana population now remains settled. The fastest-growing settlements are the district capital, Lodwar, and the villages located along the Turkwell River that depends upon irrigated agriculture (McCabe, HRAF).

A Turkana homestead (*awi*) is composed of a man, his wives and their children, and often his mother and other dependent women. (Turkana men are often polygynous.) A village *(ere'irerya*) is made of several such homesteads. Most herd owners live and travel with two to five other herd owners and their families, forming an *awi apolon*, or large *awi*. The composition of such a unit changes frequently, as individuals and families leave to join other large homesteads (McCabe, HRAF).

A main settlement area is divided between wet-season and dry-season. While the head of the homestead lives with his elder wife, children, old people, children, calves and a few lactiferous goats and camels at the *eegos* on the plain, the youth (young men and girls) of the homestead live at the *abor* on higher ground and commute with milk and food between the two places. All the members of the homesteads are coming together for a short time after heavy rains in the wet season when grass is abundant. During this time, marriages are concluded and initiations held. These associations break up as resources become scarcer with the progression of the dry season (McCabe, HRAF).

b) Economy and strategies of livelihood

The climate in Turkana land is hot, dry, and highly variable. Annual grasses and shrubs are growing in the plains, perennial grasses and large tress in the highlands. The lowlands are crosscut with temporary streams and rivers. The larger of the river courses, the Kerio and the Turkwell, support a dense forest, and acacia trees grow along the banks of most of the smaller streams and river-beds where limited agriculture is possible (McCabe 1990).

The Turkana are mainly nomadic pastoralists. They depend on five species of livestock for their subsistence: Camels, cattle, sheep, and goats provide most of their subsistence needs; donkeys are used to transport household goods during migrations. Cattle are only eaten during festivals while goat-meat is consumed more frequently. Livestock does not only serve as a milk and meat producer, but as a form of currency used for bride-price, compensation payments and fines for fathering illegitimate children as well as gifts on social occasions (Amin et al 1987). Trade is still small in scale among the Turkana, but they sell livestock to buy grains and household needs such as tobacco, beads and ironware (McCabe, HRAF).

The land-tenure system is similar to that of other pastoral peoples (as the Maasai). Pastureland is open to all members of a tribal section. Water in rivers and streams when they are flowing, open pools, and shallow wells are not owned. Deep wells dug, however, are owned

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[20] For more information, access the site http://www.ogiek.org/contact/org-profile-opdp.htm

[21] The information about the Turkana are taken from Gulliver (1966, 1968), McCabe (1990, 2004), McCabe (HRAF), Sobania (1991), Ruto et al (2003, 2004) as well as on own field work data.

by the individual, who dug them, and can be used by close male relatives and friends (McCabe 1990, 2004).

c) Socio-political Organization

One of the fundamental units in Turkana social organization is the exogamous patrilineal clan (*ateker* or *amachar*). Clan members call upon each other for help in times of need (McCabe, HRAF). Bride-wealth is unusually high among the Turkana, including 30 to 50 cattle, 30 to 50 camels, or 100 to 200 small stocks. This high bride-wealth means that a man cannot marry until his father has died and he has inherited livestock. The high bride-wealth, thus, requires that a man collect livestock from all his relatives and friends, but is at the same time a strong incentive for cattle raiding (Ruto et al 2004, McCabe, HRAF).

As among the Maasai, elder men have the authority within extended families, villages and the whole tribal section. The council of elders meets at the Tree of Men to plan and resolve conflicts – both between families and within a tribal section. Elder men are making the decision on cattle raids and livestock migration for pastures. They deal with cases such as adultery, theft and homicide and impose compensation payments (mostly in cattle). But political influence is not only gained through age, but also through wealth (in cattle), and oratorical skill. Intense intra- and inter-ethnic group competition for resources is a part of the normal lives of pastoral Turkana. As among the Maasai the young men are not completely controlled by the elders and are the important actors in inter-ethnic conflicts, mostly fuelled by cattle raiding (McCabe, HRAF).

3.3.2 Relationship between the Turkana and the Pokot and other groups

The Turkana are heavily involved in inter-ethnic conflicts among the pastoralist groups in Northern Kenya. The Turkana are in conflict with the Merille and Dong'iro to the north (Ethiopian border), the Toposa to the northwest (Sudan), the Karamojong to the west, and the Pokot and Samburu to the south. These strong enmities in Northern Kenya most often take the form of cattle raiding which has always been an important feature of the pastoralists' societies.[22]

3.4 Data Collection and Methodology

We conducted semi-structured interviews with a large number of informants in the Mau forest area in southern Rift valley and, in Turkana-land in the Northern Rift Valley. Our informants were Maasai, Kipsigis, Turkana and Pokot, Ogiek and Kikuyu, pastoralists and farmers. We also interviewed members of councils of elders and as well as policemen, chiefs, members of the magistrate courts and land dispute tribunals.

Our study relied both on primary and secondary data, using qualitative and quantitative methods of data collection. To begin with, the study examined the existing work and/or literature on conflict in the Mau Forest Complex as well as in Turkana. These reports provided valuable insights that strongly influenced the design of data collection tools.

3.4.1 Mau complex ethnographic and survey interviews

A starting point of our field research in Mau-Forest complex was our contact with the ProMara team who conducted a conflict assessment in the Complex in mid-2011.[23] Elly Maloba, a Kenyan anthropologist working in the District Peace Commission (DPC) of Narok north

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22 The Turkana consider all non-Turkana people as (potential or actual) enemies (*emoit*). Those pastoralist groups are organized in approximately the same way as the Turkana. The main enemies of the Turkana are the Toposa from Sudan and the Pokot from Kenya and Uganda, and to a lesser degree the Dodoth (Karamojong and Jie) from Uganda, the Didinga from Sudan, the Merille from Ethiopia, the Matheniko from Uganda and the Tapeth from Uganda. The Turkana do not raid amongst their people (Ruto et al 2003: 35).

23 ProMara is a USAID program implemented by a company called ARD – a Tetra Tech Company. The program seeks to conserve the Mau Forests Complex.

district advised us to visit Mau complex and endorsed our work, others there also gave us support. This encouraged us to follow and map conflicts in the complex.

During our field-work in the Mau forest complex (Ololung'a, Olokurto, Narok town, North Tinderet and Enaibelbel and Kapcholola village, in El-burgon location, Molo district), we interviewed approximately 30 people. This pilot study was aimed at getting an overview on the most pressing problems of the people such as land eviction, cattle raids and the destruction of their farms by cattle.

All the main communities in Mau-Che forest were represented in the sample Maasai, Kipsigis, Kikuyu, Ogiek, and we interviewed male village elders, religious leaders, the villagers, and school teachers, old and young, male and female, herders as well as farmers, knowledgeable herders, herders with cattle raiding experiences, evictees and internally displaced people.

In order to build a sampling frame for the communities living in Mau-Che, we drew a map and conducted a census of all of the villages. We recorded the names of the village heads, and of all the resident adults. We finally distributed 500 questionnaires: 200 in Mau forest complex were completed across the various sample areas of the study. Out of the respondents (the youth as well as the old age groups), 140 (70%) were male, and 60 (30%) were women.

In the fieldwork, we used participant observation that allowed us to take place in community settings (Maasai, Kalenjin, Kikuyu) in locations where we believed to get some relevance to the research questions (South Rift valley in Mau-forest). The communities we interviewed for this study were mainly the Maasai in Narok north district in South Rift Valley Province. In addition, we also interviewed the Kalenjin and Kikuyu in Molo and Transmara districts in the same Province. We also talked with Maasai warriors and Kikuyu community who had become internally displaced due to Mau-forest clashes of post-violence elections (2007-2008), particularly in sub-locations of Molo and Njoro in Nakuru district.

We also conducted semi-structured interviews with authorities, in particular the regional commissioner of South Rift Valley Province in Narok North district, the districts commissioners of Narok (North and South), Transmara and Nakuru as well as members of magistrate court of Narok and Officer of commissioner and security of Narok.[24] Finally, we talked with other stakeholders in Narok County. These included the Provincial peace committee in Nakuru (Headquarter of Rift Valley Province), church organization (Imam of Narok Mosque, pastors of Christian churches and priest of Catholic Church), and international programmes – including ProMara (USAID/Kenya´s Mau-Forest Initiative). In all, we spoke with over 400 people in Narok North and South and neighbouring areas such as Transmara and Nakuru.

We used a variety of open-ended semi-structured interview in the several meeting called by ProMara (USAID/Kenya´s Mau-Forest) in his programme of protecting the complex Mau-forest, in particular on settings of: Very often, the meeting organized by ProMara team has been attended by the representative of local community (male and female), the political leaders and the representative of government (District commissioner, chiefs and Officers of commissioner and security) because of payment of informants and participants after every séance of work. The meeting often reached around 100 people (elders, men, women, youth both sex) and the representative of public administration mentioned above.[25]

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[24] Most of interviews with districts commissioners have been conducted during the meeting involved the districts authorities organized by promara team (USAID/Kenya´s Mau-Forest Initiative). Different interviews and distribution of questionnaires have been easy because after every meeting organized by USAID/Kenya Government through Promara progamme, the participants have been rewarded 20$ as transportation fees and lunch prime , which encouraged many groups to reach the Promara meeting.

[25] For example, around 180 people (male and female, elders and youth groups) plus the representative of government (Districts commissioner of Molo and Narok, chiefs of both district and representatives of security force) attended the séance of negotiation process on abuse of cattle raiding organized under supervision of

In addition to the questionnaires and interviews conducted in public at the insistence of the respondents, a total of 10 Focused Groups Discussions (FGDs) were held across four of the seven blocks that make up the Mau Forest Complex. In addition, 20 key informant Interviews that cut across civil society experts, members of Provincial Administration, particularly the chiefs, elders and District Peace Committee (DPC), were conducted.

3.4.2 Turkana ethnographic and survey interviews

Having been established in Narok North District, we decided to select some villages in the North and South of Turkana Districts in Northern Rift Valley – Kibish, Lapur, Oropoi, Naipa, Kotaruk and Kanaodon – as our second site.

We arrived in Turkana, our second field site, on 30th June 2012; we remember wondering aloud, why there was all the talk about security concerns, the "bad roads". On that day, during the dry season, the road from Nairobi to Nakuru-Eldoret-Kitale-Kapenguria-Turkwell and on to Lodwar, in Turkana, seemed just fine. Before travelling to the North, we interviewed in Lodwar 6 herders and 14 administrators including the District Officer (DO), the Officer Commanding Police Division (OCPD) and the Officer Commanding Police Station (OCS) and then made fine-tunings in the survey accordingly.

As we prepared for the pastoralist survey in Lapur division of Turkana North, we could not find an appropriate sampling frame. In this area, there is no government office; it is covered by forest, rough roads and very often surprise bandit gun attacks. There is no public transportation available and travelling by personal or rental vehicles is at your own risk.

We continued our search for a viable sampling frame. The only one school in the village was under tree and had no reliable records of parents or students. Furthermore, the chief of the location, who is from the Ngisiger clan, only had lists of names of economically successful members of Turkana, most of them living in Nairobi town. The recent census materials that reportedly would have contained a list of household heads by village, has not been sent to Lapur to date. We had just returned from Lodwar, District headquarters. So, instead of allocating any more time to the search for a reliable sampling frame, we created our own.

We found an old map of Kibish division, and then pencilled about 100 dots around the perimeter of the Lapur area. We used a random number table to select pairs of dots, and then drew about 50 lines between them. Then, we numbered the points created by the crisscrossing of lines across the map. Again, we used a random number table to select 80 dots and painted them bright pink. As advised by Bernard (1988), we decided that we would interview one Turkana warrior in each of the first five *manyatta* (homestead) found in close proximity to each pink dot.

"Constructing randomness" seemed to be the best way for us to create a representative sample (Bernard 1988). It was quite impossible for us to stratify the sample by village or population density. First, because of persistent daily gunfights and second the map had little information about the boundaries between villages. Nor did the village chiefs or government officers sitting behind their office desks in Lodwar, agree on village boundaries. We also did not have the population density for each village. A chance finding of a filled census form circa 1970, in Kibish chief`s office, we did estimate the population of adults from 14 to 67 years of age in Lapur to be around 7,000. Honestly, there was insufficient information to disaggregate that figure by sex, which would have been useful since we wanted to survey Turkana cattle raiders.

Working with the Turkana pastoralists required a little more planning. It was extremely important for us to be accepted quickly among the Turkana. First, there is high level of insecurity in the area, so we needed the support of each member of Ngisiger as well as the Nyangatom clans. Second, there was little time for long-term rapport building; it took a lot of time

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Promara between Maasai community and their neighbor´s Kipsigis (Kalenjin) and Kikuyu in August-September 2011.

and energy to hike out to the villages, each on a satellite hilltop a few kilometres from Lapur town. Therefore, we hired a teacher from the school under a tree in Lapur sub-location to translate Swahili to Turkana. Since we were well integrated into both the Ngisiger and the Nyangatom clans of Lapur, we decided it would be an appropriate sign of respect to conduct the interviews in the respondents' first language. Additionally, we had spent all of our time working with Turkana pastoralists, and we did not want the Pokot community living in the area to feel that we were taking sides in the conflict between them and the Turkana community. So when we interviewed a Ngisiger clansman, we used a Ngisiger interpreter to demonstrate that we had links with the clan. Perhaps the interviews would have gone just as well in Swahili with a Ngisiger interpreter – but we were following our intuition to maximize opportunities for successful field encounters. With our Ngisiger interpreter, we interviewed 30 pastoralists who had at least once in his life-time participated in cattle raids and owns cattle. We also interviewed pastoralists who had only a few cows and never participated in a raid. We surveyed a representative sample of 150 pastoralists.

4. JUSTICE OR IMPUNITY IN THREE TYPES OF CONFLICT

In order to address the problem of access to justice, we not only have to distinguish various (formal and informal) legal institutions on the local and regional level, but also various conflicts, grievances and perpetrations. We will first deal with the cattle raiding complex, which can mainly be observed in the Northern Rift valley but also – to a lower degree – in the Southern Rift valley, then we will turn to conflicts over land, which is a main conflict in the Southern Rift valley, and finally address criminal cases such as manslaughter, theft and sorcery, which occur all over Kenya.

4.1 Cattle raiding

Cattle raiding is a crucial element of Turkana society as it is among the Maasai and other pastoralists in Eastern Africa (Bingham 2011). Cattle plays an important role not only in Turkana economy, almost exclusively based on animal husbandry, but also in the context of initiation rituals, of marriage and bride payments as well as the competition for political status within local communities relying on agriculture. Besides this political and ritual value cattle obviously is also an economic value: as a provider of meat, blood, skin and manure but also as an object of trade. The Turkana had, and as it turns out, still have a strong incentive not only to raise cattle but also to steal it from neighbouring groups through raids. These raids often lead to retaliation and to wars between groups.

A common belief among the Maasai, Kalenjin as well as the Turkana herders is that, all livestock belong to them. Any other community rearing livestock in their neighbourhood is, therefore, prone to raids for cattle. Male circumcision – an important step in male adulthood – has been blamed for triggering cattle raiding and sustaining violent conflicts principally among the pastoralists in the north Rift Valley region. But also in Mau-Forest complex, amongst the Maasai and Kipsigis, the rite of passage has for long been blamed for increased incidences of cattle thefts. According to key informants, after circumcision young men have to demonstrate that they became real men being able to care for their families and protect their community by raiding their neighbour's livestock (also see Rodriguez 2007).[26]

Today, cattle raiding has a stronger business aspect in Kenya is a consequence of changing economic practices in pastoralist areas which involved politicians and other interests groups (see also Krätli et al 1999). Often businessmen, officers or administrators instigate and

[26] Circumcision ceremonies take place mainly between August and December when schools have been closed for vacations and also because food is available after the harvest in December.

pay young men to raid neighbouring people to steal their cattle. However, the so-called "commercial raids" do not represent a separate category in which "external" interests interfere with pastoral economy. They are probably better understood as an aspect of the wider integration of pastoralists within a market economy. They steal cattle from people who have a lot of them. They either exchange the stolen cattle with other groups in far-flung areas or sell the stolen cattle in the markets and then restock in order to own more cattle. It is usually overlooked that the early 1980s not only saw an upswing in the marketing of light weapons, but was also a turning point in Kenyan development policy for pastoral districts favouring market economy (see Evangelou 1984).

Violent disputes and cattle raids, especially in the northern Rift Valley, have increased, especially with the easy access and rampant circulation of cheap, automatic small arms in cross-border trade with neighbouring countries (also see Mkutu 2001, Kiugu 2007, Weiss 2011). The now wide-spread use of fire arms is also responsible for the high fatalities in violent conflicts (also see Mkutu 2011). Growing insecurity and inadequate responses by security agencies have led to an increase in demand for small arms among different groups (also see Evoy et al 2008). According to Akwabai, the stronger commercial side of cattle raiding is also connected to a brutalization of warfare: Whereas in earlier times it was "considered particularly bad to kill defenseless women, children, and old folk and it was believed that anybody who did so would be tormented …" it is now common "among some tribes, [that] without a shred of shame, a to indicate he has killed a woman" (Akwabai & all 2007).

4.1.1 Cattle raiding in the Southern Rift valley

Cattle raiding conflicts in Mau-forest complex (Narok North) often oppose Maasai communities and neighbouring groups of Kalenjin and Kikuyu. During the panel organized by ProMara on resolution of resources conflicts in Mau-Forest, inhabited by Maasai, Kalenjin and Kikuyu communities, the communities asserted that the politicians and powerful business owners in Narok district have organized raids of Maasai or Kalenjin warriors for their own enrichment. Therefore, to achieve this purpose they provide small guns and sometimes even the transport for the Maasai warriors to raid the Kalenjin groups, and vice-versa.[27] For example, at Kirindoni village, in Transmara District, mainly inhabited by Maasai communities a number of business raiding that go on among the Kipsigis (one of Kalenjin groups) appears to be instrumentalised by the interests of dominant groups or commanded by youth warriors in economical target, which happen very often in frequency of killing attacks in order of stealing animals from the neighbours groups.

In order to illustrate the commercial side cattle raiding we refer to the following case in Mau-Forest complex:

On Thursday 7th of July 2011, "youth" warriors from Maasai community came earlier morning from Kirindoni village, in Transmara district, mainly inhabited by Maasai communities to raid at Mau-che village in Mau-Narok at sub-division of Molo in Nakuru district, mostly inhabited by Kipsigis and Kikuyu. During the attack; they killed an old man and small boys from Kipsigi community who herding their livestock in the forest near Mau-Narok zone, border of North Narok district. The Maasai "attackers" drove away more than 150 heads of Cattle and goats and, left ten more Kipsigis seriously injured. They disappeared in the forest with all cattle stolen until they arrived on the road. In the road they attacked the lorry and killed the driver. They then loaded all the stolen cattle on the lorry, and disappeared. The Kipsigi community alerted the police but the agents did not arrive on time, they came late when the assailants had already left. As Kipsigi groups could not find identification of the attackers, they suspected the Maasai warriors behind the attack and they decided to take revenge of case. Two days later, on Saturday 9th of July 2011, Kipsigi warriors attacked sub-location Emurua

[27] Own data recorded during the panel. More detail, see also Akwabai & al (2007).

Dikirr in Transmara district. As result of assault 6 Maasai have been killed and 10 *manyatta* burnt and they left.

After the Kipsigi's attack, the Maasai from Emarti, Ntulele, Esoit Naibor and Kimit rescued those of sub-location of Emurua Dikirr, they burnt several *kot ap mosop* (houses) of immigrants Kipsigis in Transmara district. In the same time, the general clashes between Maasai and "immigrants" Kipsigis (Kalenjin) appeared in the rest of Maasai community basically in Mau-Narok, Narok South and Mau-Che.

As a result of these conflicts, many immigrants Kipsigis (Kalenjin) have been expelled from the area, many inter-ethnic marriages between Maasai and Kipsigis (Kalenjin) were breaking down in Narok as well as in Transmara.[28] These conflicts did not only lead to the internal displacement of people, but have also created distrust and trauma among the various ethnic groups in South Rift Valley region.

According to Maasai, Kipsigi and Kikuyu informants, cattle raiding is facilitated by the forest and that bandits are helped by the members of community who direct the bandits to raid cattle.

4.1.2 Cattle raiding in the Northern Rift Valley

According to Ruto et al (2003) inter-ethnic conflicts among the pastoralist groups in Northern Kenya are rampant. The Turkana are in in conflict with the Pokot, the Toposa and the Najangatom (see also Bollig 1990, 1993, Osamba 2000). But they consider all non-Turkana people as potential or actual enemies (*emoit*). Cattle raids between Turkana clans are a new development, although – even today – not occurring very often. Young men steal the cattle and sell it immediately since the cattle can hardly be integrated in family herds. Before, cattle raids among the Turkana was highly discouraged. When such (and other) conflicts between neighbouring Turkana clans break out, the council of elders' (*Ng'ekeliok*) – composed of clan representatives and other respected leaders in the neighbourhood – will discuss the matter and try to settle the dispute peacefully.

We unfortunately cannot offer a comprehensive overview about cattle raiding in the North, but examples from Kibish Division (Turkana North) as described by Ekal must suffice:

> "On 7th February 2008 Ngisiger clan of Turkana from Lapur division Turkana North District raided Nyangatom Manyattas at a place called Nangusilngatuny in Kibish area and drop away 386 herds of cattle and during this incident six (6) Nyangatom people were gunned down by the attacking Turkana cattle rustlers and 1 Turkana man was killed.
>
> On 8th February 2008 at Lapur division a violent armed clash occurred between the Turkana of Ngisiger clan and the General Service Unit based at Kibish when the security force was pursuing the Turkana raiders to recover the stolen Nyangatom cattle. This incident happened in Liwan sub location of Meyen Location. During the scuffle to recover the cattle the armed raiders opened fire at the security force injuring three (3) on the spot.
>
> In an apparent retaliation to the Turkana attack on 7th Feb. the Nyangatom on 8th of February 2008 attacked Kibish trading centre in the evening at around 9.00 pm shooting in the air, but injured no one after fierce exchange of fire returned by the security forces and the Kenya Police Reservist.
>
> On 17th Feb. 2008 three (3) Turkana women were gunned down at a place called Lopeat in Lokamarinyang sub location by the Nyangatom. The women were returning home from a water point after collecting water. The incident is believed to be revenge from the Nyangatom after their cattle were taken away the Turkana from Ngisiger clan.
>
> On 19th Feb. 2008 fifteen donkeys (15) belonging to Kibish Ass.chief Mr. Kaleng were raided by the Nyangatom while grazing near Kibish. Only 1 donkey managed to come back" (Ekal 2008:1f).

[28] See also Chapter three, Violence in Rift Valley Province: The North Rift Region (at http://www.marsgroupkenya.org/pdfs/2008/10/Waki_Chapters/Chapter_3_Violence_in_Rift_Valley.pdf.

4.2 Conflicts over Land

We will mostly focus on land conflicts in the Southern Rift Valley, since land ownership is more important for farmers than for the pastoralist groups in the Northern Rift valley.

Land disputes occur between Maasai and Ogiek landowners and immigrant settlers – mostly Kikuyu and Kipsigi – as well as farmers evicted from their land during political violence. A crucial point is the divergent conceptions of land ownership held by the conflicting parties. However, the main reason for land conflicts are economic, but also political since ethno-political turmoil before and after national election fuels land conflicts.

4.2.1 Conceptions of land ownership

As Kimpei & al (2005) state: "[…] middle of 1960, the Kenyan government, with the support of the World Bank, began to divide Maasai pastoral regions among registered 'ranches', titles to which were held by Maasai 'groups' rather than individuals. But over time, some group lands were allocated to a few individuals who wanted to establish their own ranches. But the hemorrhage of group lands annexed to individuals progressively undermined the integrity of collective holdings and calls were heard for the ranch to be subdivided among its members (…) each of whom would receive individual title" (Kimpei & al 2005, Mwangi 2005, Bekure & al 1991). This process of increasing privatization of land went parallel to the increasing weight of agriculture in Maasai communities. At the same time, the Maasai´s customary law still adhered to their conception of land ownership as "usufructuary" right. As long as a man is using land and working it, he has the exclusive right to do so. As soon as he ceases to use or work it, the right ends and the land reverts once again to the common weal. This conception of an "usufructuary" land right also influenced the disputes over land ownership between Maasai community and the settlers (Dunning 1990).

In a survey we conducted in sub-location of Kuresoi at sub-division of Molo in Nakuru district, the communities (Kikuyu, Kalenjin as well as Maasai), considering its accessibility, fast administration of justice, affordability and comprehensible language. preferred the tree sitting elder´s court over the formal justice system. However, the decisions taken by the council of elders (*waaze*) are not always recognized by the formal courts. If the elders cannot solve a land dispute, the case is reported to the magistrate court. According to data collected at Narok magistrate court, 27 of the 104 cases recorded were cases over issues of land. 89 per cent of the land cases involved a prior *waaze* or elders decisions as opposed to 59 per cent of prior *waaze* decisions in the total of sample. The overall rejection rate of *waaze* decisions was 16 per cent, whereas in the land cases that figure fell to 12 per cent. The magistrate court also accepted 67 per cent of the prior *waaze* decisions without imposing any modifications, which is significantly higher than the 59 per cent overall unqualified acceptance for all categories of cases. While 27 cases do not constitute a significant sample, it still confirms the trend established through participant-observation field study of the *waaze* in its judicial capacity. This revealed that the settlement of land cases was being effectively carried out by the *waaze*, and that the result was land fragmentation. A necessary conclusion appears to be that the development of land law among the Maasai communities has arisen through the modification of pre-existing custom rather than as a result of introducing alien concepts into their legal culture.

4.2.2 Eviction from land

In Mau Forest complex (South Rift Valley Province) was a hotspot of eviction of people from their land by ethno-political opponents, oft before and after national election. Most of the evictees admitted of having reported the eviction to the Mau Task Force, but they did not get any response. Yet, after briefly examining records of the Task Force at their offices, and the records at the magistrate's court in Narok district, we found that most eviction cases were not reported. The land issue is in the competence of the Land Dispute Tribunal, which deals with

cases of division of land, and land boundaries, including land held in common; claim to occupancy, and/or work on land and trespass on land. The land issue falls in the competence of a district magistrate's court in cases of eviction.

In Kericho District (a location of the Mau-Forest Complex, southern Rift Valley), for example, Maasai youths were reportedly promised "jobs and land" for their participation in attacking Kalenjin, or "immigrant" communities and their property. Parts of Nakuru District, particularly in Molo, Njoro, and Olenguruone, which has a large Kalenjin "immigrant" population, was also affected (see Kagwanja 2003).

Currently, in Narok district, private property rights of "immigrants" mainly Kikuyu "were usually acquired – often at the expense of other communities – as collective privileges rather than individual achievements. (…) The Narok case stemmed from a dispute over Maasai land that been allocated by a government then controlled by the recipient group; the Trans-Mara case stemmed from illegal, but effective occupation of land held under Maasai group title by cultivators claiming squatter's rights. In both cases, conflict involved Maasai resistance to the expropriation of portions of their land under the guise of law" (Kimpei & al 2005).

4.2.3 Modalities of land conflicts

Kimpei & al (2005) use a categorization of land conflicts that adequately describes the situation in the Rift valley and is followed in the following description.

a) Dispossession through decisions taken by a land committee

In 2001, the land committee of the Ogiek made unbalanced allocations of land to their members, which resulted in public protests from some Ogiek and appeals to the Nakuru court. An out-of-court arrangement (compromise) was achieved in 2009, negotiated in part by the District Commissioner who lived nearby. The old Ogiek committee was allowed to save their face by remaining in power, but was ordered to develop a new plan for equal subdivision between all registered members (see also Kimaiyo 2004).

b) Dispossession by de-registration in East Mau

In 2000, when the Ogiek community was formally recognized in East Mau constituency, it received 175,000 acre portions annexed from the collective land. But within a decade, 80% of these Ogiek owners had sold their land, and while technically no longer formal members, they returned to the group to ask for more land (Kimaiyo 2004). Seeing community collective lands gradually diminishing with the expansion of individualization, the Ogiek community decided to divide the existing ranch among its members (Mukundi 2008, see also Alden 2011).[29] The Ogiek land committee decided that younger age-sets should not be registered; that anyone who is not from this location or who has been registered by mistakes or registered twice, should be simply removed and "foreigners" should be deleted.[30]

c) Dispossession by selling land

When the members of a Maasai community have obtained individual land titles, they are legally allowed to sell their land, but as they often are illiterate, are not familiar with the concept of individual or private property but still adhere to a concept of usufruct of land, many Maasai lose their land under freehold titles (Kimpei & al 2005).

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[29] Critical questions were debated regarding who should be included on the register. First, should the next cohort of young men coming of age be added to the register? Second, what should be done about outsiders who, through generosity, friendship, or bribery, had already been added to the register? And third, who should decide these questions: the formal ranch committee, the registered members, or the community as a whole?

[30] More details see "Mau Forest Complex on the Spot Light": Kenyan´s must be told the truth in www.ogiek.org (consulted 31 January 2012)

Many of those land transactions are "of dubious legality. Buyers often approach land holders and purchase futures at less than market price, then can bribe officials to enter the buyer's rather than the seller's name on the register, thus claiming an entire holding. Also, while awaiting title, prospective land holders may sell piece of land to several buyers, but then refuse to hand over the title since transactions concerning land for which title has not yet been obtained are illegal. Family members must give permission for land sales before the Land Board" (Kimpei & al 2005).

Kimpei et al (2005) asserts that: "[…] many Maasai who received individual ranch […] have sold […] land to which they received legal title. [… The] money […has] been used […] to pay development loans, […] pay for school fees or vital expenditures […] or buy alcohol. As a result, large tracts of Maasai land are increasingly falling into the hands of non-Maasai. Thus, while not illegal, the tacit encouragement of and passive acquiescence to Maasai land sales, especially those involving poorer pastoralists who will be left destitute, represents a scandal with only one precedent: the expropriation of the desirable central Rift Valley from Maasai by white settlers at the beginning of the 20th century".[31]

The culture of selling or renting land in Maasai community involved land as commercial value and brought a new conception of property such as privatization of land which in past was not known in Maasai land and which Maasai find difficult to handle. These conflicting conceptions of dealing with land and of land ownerships also contribute to land conflicts. As Bruce (1988) points out "the Maasai believed that the land they sold would still be available for their livestock during the critical periods". Hussein (1998) finds another reason for land conflicts in the "customary 'host-guest' practice, which recognizes newcomers as guests who are offered rights to use the land but only on a temporary basis, while the original habitants retain ultimate authority over land use and ownership".[32] Following cases illustrate the above point of view.

The following examples observed during field research illustrates the situation well: In July 2011 at Majengo in central administrative division of Narok North, Mr. O had three children and divided his land in three portions one for each son. One of them, Mr. Z, sold his portion of land to Mr. V from Kikuyu community without informing his father and his two brothers. They signed the paper but when Mr. V brought the material for construction of his plot, the two brothers and father´s of M. Z refused and said to Mr. Z that they cannot allow him to construct in their plot because their brother Mr. Z was not allowed to sell the plot without consulting all the family members. The same day they called a meeting of family members. During the talking Mr. Z denied of having sold the land although admitted of having leased it. The members of Mr. Z family called Mr. V to inform him that their brother Mr. Z never sold the land but said he leased it out, and even if he had sold it, they could not allow Mr. Z to use their land. Mr. Z protested and asked to get back his money. Verbal discussion escalated and the two brothers started beating Mr. Z. Mr. Z went back in his home and brought a group of his relatives, when they came they started to fight. This brawl escalated into violence between the Maasai and Kikuyu communities in the whole area. Mr. Z brought the case to the Narok chief Office. The chief summoned the Mr. O family to pay back what his brother took from Mr. V; but the family did not turn up, instead they accused the chief of being bribed by Mr. V.

The case of escalation of violence at Kuresoi in sub-location of Molo in Nakuru district took place in April 2011. In fact, the land known as Kuresoi extension measuring 1,780 acres and was removed from the Kuresoi forest, grazing, water catchment area, and given to

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[31] Entirely quoted from Kimpei Ole, J. G and Munei, G (2005), "Maasai Land, Law, and Dispossession", op. cit.

[32] These two approaches above mentioned on one hand, land as common property cannot be sold and anytime can return back to owners (Maasai view) and other, land as private property, the land sold is belong to buyers or newcomers (immigrants view) are source of most disputes in areas of this study

Kipsigi families in 1997. According to Kikuyu community, the Kipsigis were brought into the area in 1997 for purpose of influencing the general elections of 1997 in favour of KANU. Now in 2011, many Kipsigis very threatened and left the place because they could not use their land; some of them, allowed their relatives to cultivate the land. The Kikuyu claim that they are the original inhabitants of the region and, therefore, must have more right of access to the forest for cultivation. What the Kipsigis denied. The internally displaced persons, who had run away the clashes after general elections of 1992 in other parts of the South Rift valley, also moved to area penetrating further into the forest. In April 2011, Mr. X, from a Kipsigi community, leased his land to two Kikuyu, when one of Kikuyu came to use the land he found another Kikuyu exploiting the same land. They started a quarrel then fighting began. When Mr. X tried to separate the fighters, both turned against Mr. X and injured him. As a consequence the relatives of Mr. X came and started to fight with the two Kikuyu, the violence escalated to the two ethnic group, eight people were killed in a bloody confrontation among villagers at dawn. The killings sparked off protests by three hundreds of displaced persons who marched to the District Commissioner´s Office in Molo, demanding police action. Business in the town came to a standstill when the protesters threatened to loot shops. Shops hurriedly closed down and police fired in the air several times to disperse the masses. Three men were beheaded and four other bodies were chopped off during the clash involving the members of three communities (Kikuyu, Kalenjin and Maasai) in Kuresoi village. Later, after clash scene, Police agents took the mutilated bodies to the district hospital mortuary.

4.3 Criminal justice

There are also criminal cases such as murder and manslaughter, theft and sorcery, which are acknowledged as crimes in all informal and formal legal systems (criminal law), although in different ways: Customary law (sorcery, theft, killing or compensation after establishing evidence), formal courts according to state law. But people sometimes resort to violent self-help, because they see the state judiciary and traditional authorities as unable to punish perpetrators and are not being punished for having lynched a perpetrator. Violent self-help is the opposite of traditional legal institutions and of state judiciary as well.

So we will first address cases of criminal justice in large villages and small towns in the Southern Rift valley and then among the Turkana.

4.3.1 Sorcery and killing of sorcerers in Southern Rift valley

In Kenya, witchcraft is illegal, lent support by the Witchcraft Act, Chapter 67 Laws of Kenya, article 3 which states that: “Any person, professing a knowledge of so-called witchcraft (…) who advises any person (…) how to bewitch, or injures persons, animals, or other property (…) shall be guilty of an offence and is liable to imprisonment for a term not exceeding ten years”.

In principle, it is under the competence of the provincial administration (chef/sub-chief, Administration Police, District Commissioner) to apply the Witchcraft Act, in Chapter 67 Laws of Kenya. According to the law, suspected practice of witchcraft must be reported to the provincial administration which on investigation presents the matter to the court. Very often, the community does not report to the authorities, they prefer ”mob justice”, when they catch a witch (she/he is burnt, her/his property destroyed and house torched).

On 14th of September 2012, in Bochura village, Kisii district, a 54 years old woman was lynched on allegations of witchcraft. A month earlier, the woman had reported at a nearby police station, a plot to kill her, as confirmed by some respondents interviewed in the focus. Apparently, the police did not take any measures to protect her. She died from deep *panga* cuts on her neck. Her death by lynching was considered as being the result of the failure by the police, to respond to the information given to them by the victim. The police contravened the witchcraft Act, Chapter 67 Laws of Kenya, Article 6, which provides: “Any Chief [who

learns about] witchcraft by any person, and does not, forthwith, report [the case] to a District Commissioner, shall be guilty of an offence, and is liable to a fine not exceeding five hundred shillings, or to imprisonment, for a term not exceeding three years"

4.3.2 Murder and Manslaughter in Southern Rift valley

According to Sankan, "the conception of the guilt of murder among Maasai community does not extend beyond the borders of Maasailand" (Sankan 2006). Consequently, the Maasai only consider as murder the killing of another Maasai. Usually the culprit has to pay a compensation of about 49 cattle. If the victim's family accepts the compensation payment, the matter is considered as settled. If a Maasai, however, kills a non-Maasai, according to Maasai culture there is no murder and no criminal case by their own standards. The following is a point in case.

On 24th of April 2011, at Olpopongi village in Narok town, one man from Kikuyu community, well-known as a notorious murderer because he had killed his parents and relatives over a quarrel over land inheritance. For this crime he had to spend several years in Narok prison. After being released from jail, he started his career as a drug and alcohol dealer. When he fell in love with a Maasai woman from Limanet village, she resisted in the beginning, but then accepted to date the Kikuyu man. One night, the Kikuyu man and the Maasai woman began to quarrel. The Kikuyu man killed the Maasai woman, cut her body in small pieces and put them in a bag. Soon afterwards the relatives in Limanet village organized a funeral for the deceased woman who – as they believed – had been eaten by wild animals. Three days later, the Kikuyu man together with his gang buried the body in the bush. However, they were observed by two young boys from Limanet village who grazed their cattle nearby. When the gang left, the two boys came to open the grave, they discovered the head and mutilated body parts of the deceased Maasai woman, and then they went to the Limanet village to report the scene. Two days later, the warriors from Limanet village came to Olpopongi village in order to revenge the deceased Maasai woman. During the revenge attack, the Maasai warriors from Limanet caught the Kikuyu man, brought him to the Narok football stadium and set fire on him. They then went back to Olpopongi village and burned the murderer's house. They started to fight with the Olpopongi Maasai warriors until the time the elders from Plopping called the elders of Limanet for the peace negotiation process. During this entire scene, there were no police agents who intervened. The police agents of Narok town came three hours late to collect the body to mortuary.

4.3.3 Dealing with thieves in Southern Rift Valley

Mob-justice is often used to deal with thieves, as the following case illustrates.

On 26th of May 2011 at Total area in Narok town, north Narok district, a taxi motorcyclist drove a client from Narok town to Total area near Lemek village. When they reached the forest area, the client decided to get off the motorbike. He then took a long knife to kill the motorcyclist because he wanted to steal the motorbike. One Maasai woman passing nearby observed the scene and alerted other taxi motorcyclists in Narok town. Few minutes later, the taxi motorcyclists and other people reached the place and surrounded the client. They started to beat him and then used the old vehicle tires to burn him to death. The police agent only arrived the place several hours later.

After observing all these scenes of mob violence, we decided to go to the District commissioner to know why the police agents did not reach on time the place where the mob justice takes place in Narok. According to the District Commissioner and security we met: the police agents cannot reach on time where the scenes of extra-judicial execution took place because of lack of information. For him, most people report the incident after they already burn their victims. He points out the fact that the people do not want to collaborate with Police.

4.3.4 Quantitative corroboration of qualitative data

These astonishing cases of violent self-help are further corroborated by semi-structured interviews we have conducted among members of various Mau-forest sub-locations in a meeting organized by ProMara. Those who attended this meeting were also asked to answer questions in questionnaire. A total of 500 people received the questionnaire but only 280 answers were given back from the study sub-locations above mentioned; 110 from Narok North district areas (including Narok town), 70 from Narok South district areas and 40 from Transmara and Nakuru districts. Additional 60 answers came from questionnaires distributed in Narok town (40) or in public administration in particular Regional and District commissioner Offices, Police security Office and Courts (20).

The most common conflicts mentioned include theft and damages caused by cattle, conflicts emerging from selling or leasing land and conflicts in the context of cattle raiding/stealing. ”Mob justice” seems especially common in case of theft: Between 87% and 100% of the respondents said that in case of theft they would kill the culprit right away and certainly not bring him to court. The main reason being that people do not trust the police accused of releasing a culprit when paid bribes and because people fear of becoming the aim of retaliation by the accused. For the same reason nobody would act as witness in court. There is also a great reluctance of people to bring other conflict cases to court: In fact, nobody said to be willing to bring any conflicts or grievance to court, except for a small minority of 5% to 9% of the respondents that resort to court in case of cattle damage. On the other hand, council of elders, but also – but to a much lesser extent – a chief, church people or district peace committees seem to be far more acceptable for settling domestic and family disputes.

4.3.5 Criminal justice among the Turkana

The Turkana do not seem to practice sorcery. However homicide and theft occur as well, but are dealt with in a different way than in villages and towns in the South.

In case of murder, the culprit has to pay a compensation of 30 cows or camels for having killed a man, 60 animals for an unmarried and 40 animals for a married woman. If the victim’s family accepts compensation payment, the matter is considered as settled (Ruto et al 2004). However, compensation is being paid only if both parties want to settle the conflict by peaceful means, as within a clan or between clans being on friendly terms. It is only if the culprit does not pay the compensation or the victim’s family does not accept compensation, that he will be killed. Unfortunately we cannot say how often compensation is paid and accepted or the culprit is killed by the victim’s family. But killing a culprit in revenge is an integral and legitimate part of the Turkana legal codex. Thus, it is not a case of mob justice as in area, where the existing legal convictions preclude violent self-justice.

In case of theft, a thief is beaten in public and ordered to return the stolen goods. But a family can also choose to kill one of its members if he/she is publicly known of being a notorious thief. However, if a Turkana steals as a result of hunger (steal in order to eat), such a thief can be forgiven (Ruto et al 2004).

5. CONCLUSIONS

5.1 Distance to courts

It is often maintained that the problem of impunity ultimately resides in a low density of courts and police stations. So if the distance of people to the institutions of state judiciary were shorter, the problem of impunity would be reduced or even vanish. Geographical accessibility of relevant state institutions is certainly a necessary precondition to ensure access to justice, but is it sufficient? We addressed this question by selecting two research sites: one in

the Northern Rift valley where state presence (police, judge, prisons) is far weaker than in the second research area in the Southern Rift valley.

The high level of violence in the North in form of cattle raiding and banditry but also of killing of perpetrators (murderer, thieves) who do not pay compensation seems to confirm this assumption. However, as we have shown, violent cattle raids and land conflicts are also occurring in the South without the involved actors being punished by representatives of the state judiciary. And there is a very high propensity of people to lynch suspected sorcerers, thieves and killers even at sight-distance of a police station in the Southern Rift valley.

The prevalence of violent self-help is a strong indicator that low legitimacy and efficiency of the state judicial system are as important obstacles to access to justice as geographical proximity and that the latter is not sufficient to reduce impunity. Violent self-help also shows that people are not willing to accept impunity if they perceive themselves as victims of a crime.

5.2 Lack of information

The small number of disputes brought to state justice is sometimes explained with the people's lack of information about their legal rights and obligations as well as the functioning of the judicial institutions (courts and police). Thus, campaigns of instructing people on their legal rights and on how to access the institutions of the judiciary would solve the problem of impunity. However, as our data show, people are often reluctant to bring their case to court exactly because they know the actual functioning of the judicial system and its shortcomings quite well.

We may conclude from this that while a total lack of information certainly would greatly hamper access to justice significantly more information alone does not necessarily improve such access.

5.3 The low legitimacy and efficiency of state judiciary

Our results indicate that the acceptability of state judiciary in the eyes of its citizens seems to be quite low due its poor performance and lack of legitimacy as well as the desire to solve certain disputes among affected communities without state intervention. The legitimacy of state judiciary depends of legality (decisions taken in accordance to national law), on procedural efficiency (impartiality and compliance with the judicial procedures) and on substantial efficiency (good identification of the law and application to the fact).

As for the reduced legitimacy of state judiciary, the following factors are responsible (see also Gordon and Meggitt 1986 on Papua-Niugini): Unpredictability of court decisions due to corruption and political pressure; high costs in terms of time, money and procedural inefficiency (lawyers, opening files, paying bribes etc.); incompatibility of legal philosophy (English common law versus indigenous customary law, punishment versus compensation); backlash in one's own community (revenge, retaliation etc.); partiality of judges; disappearance of files; early release of perpetrators due to bribes; intimidation of witnesses and other factors are strong incentives for not bringing conflicts to courts.

5.4 Categories of conflicts and legal instances

In order to address the problem of access to justice, we also have to distinguish (1) various conflicts/grievances/perpetrations and (2) various (formal and informal) legal institutions on a local and regional level. The traditional authorities (council of elders) are usually only responsible for local conflicts or conflicts between neighbouring communities. Furthermore, their efficiency and legitimacy is largely ethnically bound. This means, that their efficiency is largely reduced when litigants belong to different ethnic groups, especially if those are on hostile terms. However the conflicts we have addressed in our research are most often between communities of different ethnic groupings: cattle raiding in the North (and to a lesser

degree in the South) and disputes over land rights in the South as well as murder and theft in the South.

5.4.1 Cattle raiding

Theft of property as for instance of cattle is a crime in state law, however, cattle raiding is considered as a legitimate practice among pastoralist groups in the North. Stealing cattle from other Turkana (of the same tribal section) is considered a wrong, which is efficiently dealt with by a council of elders. Turkana elders seem to settle conflicts between Turkana rather efficiently, although they are not always successful since the incentives of tribal youth to engage in cattle raiding and banditry is too high. However, cattle-raids against neighbouring pastoral groups are considered a legitimate and common practice the success of which largely depending on the military power and skills of the young tribal warriors. This is probably the reason why Turkana informants did not consider cattle raiding as contributing to conflicts.

The state is hardly present in Turkana land: there is only one magistrate court in the area, and the small number of policemen is unwilling to intervene in cattle raids which are a trans-border phenomenon anyway, rendering a possible intervention even more difficult and futile. From the perspective of state law the unpunished cattle raiding certainly is a form of impunity, but the legal conceptions of right and obligations propagated by a largely absent state are hardly relevant to the pastoral people in the North, all the more that the people consider cattle raiding not as a crime. Attempts to establish informal mechanism of conflict settlement, as the Modogashe Peace Declaration initiated by the central government, are not very successful. In fact most Turkana even did know about its existence.

5.4.2 Land disputes

As for land property rights and disputes over land we have studied in Mau-Che forest complex in the South, the case is certainly more complicated, because land conflicts involve customary law and conceptions of land property, modern national land law as well as individual and communal land titles of original settlers and immigrant groups. Furthermore, a variety of actors, in particular the council of elders, traditional land councils and chiefs as well as district commissioners and magistrate courts, are expected to solve land disputes. The respective responsibilities, however, are often poorly specified and enforced within the framework of Kenyan legal pluralism. Furthermore, corruption and misinformation are rampant: several land titles are issued for the same plot of land, officials in charge of issuing land titles are being bribed, there is often no clear distinction between selling and renting land etc. There are also contradictions regarding land rights between state law (declaring certain tract of lands as state land) and customary law (looking at the same tracts of land as being communal property) that cannot between reconciled. This contradicting conceptions und simultaneous multitude of land rights, the general weakness of both traditional and state institutions which decide in land disputes, and the problem of ill-defined legal pluralism mostly explain the virulent land disputes in areas such as Mau-Che Forest area, especially between communities of different ethnic origin. These land conflicts are further exacerbated by the involvement of ethno-political parties, politicians and businessmen in a region, which is a national hotspot of political conflicts as can be seen from the violent land evictions before national elections.

5.4.3 Theft and murder

Criminal cases such as murder and manslaughter, theft and sorcery are acknowledged as crimes in all informal and formal legal systems, although in different ways.

Among the Turkana in the North, the culprit has to pay compensation in case of homicide of somebody from the same tribal section. If the victim's family accepts the compensation payment, the matter is considered as settled. It is only if the victim's family does not accept compensation, that the murderer will be killed. However, this practice is an integral and

legitimate part of the Turkana legal codex. Thus, it is not a case of mob justice as in area, where the existing legal convictions preclude violent self-justice. In case of theft, a thief is beaten in public and ordered to return the stolen goods. But a family of the thief can also choose to kill him in case he is known as a notorious thief.

In the Mau-Che Forest area and also in the towns in the South, the state is much more present than in the North. So we might expect that people at least acknowledge the validity of state criminal law. However this was not the case as our quantitative studies showed. People often resort to violent self-help and kill perpetrators on the spot, because they see the state judiciary – but also traditional authorities (no chance for compensation) – as being unable to judge and punish perpetrators. This may also be because they do not have to fear of being punished for having lynched a perpetrator in turn. Violent self-help is the opposite of state judiciary, however in relation to the criminal it is not impunity but the opposite. Impunity exists insofar as the state does not stop and sanction mob justice.

In the North there is hardly any impunity in regard to state law because the state is hardly present in this area, pastoral groups largely being autonomous and practicing customary law and cattle raids against neighbouring groups. In the South, the comparatively high incidence of mob justice in cases of theft and murder refers to the low credibility and efficiency of police and judges and of the institutions they represent. The people prefer to punish perpetrators instead of handing them over to state judiciary, fearing that authorities would ultimately let them unpunished.

5.5 The shortcomings of legal pluralism

The Kenyan legal system follows the logic of legal pluralism (Griffiths 2004). Traditional authorities should solve locally and regionally certain offenses and conflicts, while the regional and national authorities on district or province level are responsible for the resolution of other offenses and conflicts according to formal state law.

Most people will have the choice of bringing a certain offense or conflict either to formal court, to a customary court (tribal elders), or to other informal mediators. They will possible select that instance, from which they expect the most advantages (to have the problem settled in their interest). Since litigants have diverging interests, it is not easy for them to agree on the instance which has to solve the conflict. This forum-shopping is a shortcoming of legal pluralism as long as the recourse to higher instances is not clearly defined and followed. Although we do not have a sound empirical evidence for this, two observation concerning the main representatives of both state and customary institutions lend evidence to our assumption:

District commissioners, judges of the lower levels (district) of the administration and policemen usually originate from other provinces, in order to prevent nepotism and partiality (however, too often, quite unsuccessfully. But these legal authorities are – compared to the colonial state – in a rather weak position, since they are not backed by a strong state, but always suspected of being corrupt or involved in ethno-politics. As a consequence, those officials do not want to take unpopular decisions (according to state law) and are reluctant of getting involved in local politics mainly because they fear of being reprimanded for instigating local problems. Or, even worse, they will align with wealthy and powerful people in their area and intervene on their behalf in a conflict.

The traditional authorities are usually only responsible for local conflicts or conflicts between neighbouring communities. Furthermore, their efficiency and legitimacy is largely ethnically bound. This means, that their efficiency is largely reduced when litigants belong to different ethnic groups, especially if those are on hostile terms. This means that the traditional authorities cannot solve certain conflicts because their range of coverage is limited. Sometimes government agencies and NGO try to bolster up the conflict resolution capacity of informal authorities. However, in this case they are often weakened by a loss of legitimacy,

being accused of being corrupt and instrumentalised by local politicians and ethno-political parties.

It may well be that instead of strengthening each other, the various subsystems of the Kenyan system of legal pluralism weaken each other. Sometime no state may even better than a weak state. At any rate, it seems that the void, left by a weak state, cannot be filled by non-state and informal institutions of settling conflicts.

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