

**THE DANISH
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HUMAN RIGHTS**

**THE IMPACT ON
OFFENDERS OF RIVALRY
BETWEEN THE FORMAL
CRIMINAL JUSTICE SYSTEM
AND THE INDIGENOUS
JUSTICE SYSTEM**

**EXPERIENCES AMONG BORANA
OROMO IN RELATION TO THE CRIME
OF HOMICIDE**

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JUSTICE SYSTEM AND THE INDIGENOUS JUSTICE SYSTEM:
EXPERIENCES AMONG BORANA OROMO IN RELATION TO THE CRIME OF
HOMICIDE**

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GLOSSARY OF LOCAL TERMS

The meanings of the following words are according to contextual usage.

Abbaa	Father, owner of something
Abbaa Gadaa	Father of Gada or Gada Leader – president in <i>Gada</i> patri-class.
Abbaa Seera	Retired Abba Gada in charge of matters of law, advisor to The Abba Gada.
Aadaa	Culture/ custom. Broadly, it means the totality of values.
Aadaa-seeraa	Traditional norms and laws recognised by everybody as binding, combines culture and law, also used to mean value system.
Abaarsa	Curse as part of ostracising a Borana, or exclusion from Nagaa Borana.
Adulaa	Gada Ruling Council
Argaa Dhageeti	A person who is an expert in Borana oral history
Bisaan	Water
Dhugaa	Truth
Eela	Well water/water hole
Gadaa	Indigenous socio cultural institution of Oromo in general and Borana in particular.
Gaadisa	Shade
Gogeessa	Line of classes in the Gada system
Gosa	Sub moiety
Gumaa	Blood price/ revenge/ feud/ ritual of purification after homicide.
Hayyuu Gosa	Knowledgeable person elected to lead each gosa for term of eight years.
Jibbaata	A sheep offering given by a killer for ritual ceremony for cleansing blood feuds
Jaalaba	A person elected by kin groups to enforce decisions
Jaarsa	Male elder
Jaarsa araara	Mediator/ reconciliation through mediation

Jaarsa-Gosa	Clan elder
Jaarsumma	<i>Is a reconciliation process or act of reconciling</i>
Kebele	Sub-district administration unit (Amharic)
Kora	Meeting held to discuss a certain issue
Kora gosa	Clan assembly
Luba	Generation set, membership of <i>gogeessa</i> .
Maakkala	<i>Abba Gada's</i> assistants – messengers who help the hayyu to implement their tasks, particularly through keeping communications with the local communities, scattered throughout Borana land.
Marra	Grass or pasture
Muru	Cutting, making a judgment or decision
Nagaa	Peace/cosmic harmony
Nagaa	Peace of Borana
Booranaa	
Ollaa	Smallest unit of residential area of homesteads
Raaba Gada	The jaarsa at gada level
Safuu	A moral category showing respect and distance, it deals with taboo and condemned habits, and it refers mutual relationship between elements of the social and cosmic orders
Seera	Rules and regulations underlying something
Seera tumuu	Making law
Woreda	District
Waaqa	The creator/God
Waaqeffannaa	Original Oromo religion and means believing in or worshipping one God
Waldhabdee	Is disagreement or dispute between persons
Warra gumaa	Families between whom there are blood feuds caused by killing of a member

CHAPTER 1

1 INTRODUCTION

1.1 BACKGROUND TO THE STUDY AND PROBLEM STATEMENT

Prior to the emergence of the modern state and its formal justice system, human society had customary rules, procedures and institutions through which disputes were resolved. In the resolution of disputes, particularly in criminal cases, the main stakeholders involved were victims, offenders and the community within which the crimes had been committed. The process of justice administration was mainly through reconciliation. Apart from being community based, the customary justice systems aimed at restoring the ruptured relationships and in providing reparation to the victims for the harm caused to them by the crimes. It also aimed at reintegrating offenders with the community (Elechi, 2004; Llewellyn & Howse, 1998; Van Ness, 2005; Zehr, 1990).

In many parts of the world where there are indigenous peoples, these distinct bodies of laws and institutions have been maintained to varying degrees. In different parts of the world where indigenous peoples live and where the indigenous justice systems are given recognition, significant aspects of the societies' affairs are governed by the indigenous justice system and institutions (Badger, 2011; Elechi, 2004). But in some other states with indigenous populations the indigenous justice systems have persisted despite bans made on them.

In Ethiopia, particularly as regards criminal matters, the diverse indigenous justice systems operate *de facto* without state recognition. Hence, the two systems co-exist in an uneasy relationship and compete without mutual recognition and support. Owing to the rivalry between the two systems, among the Borana of Ethiopia offenders in homicide cases and their families are experiencing injustice. In the context of the Borana, the study will be examining the rivalry between the two systems and its attendant impacts on offenders in the crime of homicide. The study aims at revealing the unexplored impacts of the rivalry on offenders in the particular case of the crime of homicide. Little research has examined the nature of the relationship between the two and the impacts of their competition on users of the systems.

The formal criminal justice system in Ethiopia considers retribution as the best and only mode of dealing with crime and its consequences. Those pursuing retributive justice resolutely promote more punitive and centralist approaches. The retributivists advocate the exclusive control of the state law over crime. They are reluctant to explore the possibility of revitalising the existing customary justice systems. But nowadays, as the effectiveness of this retributive approach has come under increasing criticism, an alternative, restorative approach, competing with the retributive approach, is increasingly gaining ground among scholars, policymakers and criminal law practitioners (Zehr, 1990).

In Ethiopia, the justice system is characterised by its extreme retributivist and centralist approach and lack of sensitivity to cultural diversity. The justice system shows no tendency to promote formal pluralism in the area of criminal justice. The mainstream criminal justice system uses the adversarial system where the state claims full control of prosecuting and punishing offenders. The approach considers incarceration of offenders as the only option to deter crime and rehabilitate offenders. But after having been locked up behind bars for years, most offenders do not appear to be censored or reformed. Rather, the offenders experience great difficulty in successfully reintegrating into their communities (Tsegaye, Urgessa & Tena, 2008).

While sending more offenders to prison each year and increasing investment in prisons and incarceration of offenders, the formal Ethiopian criminal justice system does not seem to be improving the character of the offenders or stopping others from committing crimes. In addition, the performance of the formal criminal justice system does not seem to please victims of crime, offenders or the larger community who are the major stakeholders (Tsegaye et al., 2008; Macfarlane, 2007; Pankhurst & Getachew, 2008).

Since the Ethiopian formal justice system was brought in from outside and introduced by way of adopting new codes, the people are not familiar with it. As a result of the imposition of an alien legal system, the customary justice systems and the values and institutions of the majority of the Ethiopian people have been delegitimised and they have been disempowered.

In practice, despite the inhospitable legal climate in Ethiopia, the diverse indigenous justice systems in the country are still widely used in nearly all parts of rural Ethiopia outside the realm of the formal criminal justice system (Pankhurst & Getachew, 2008). The indigenous justice systems have their own laws, procedures, and institutions (Tsegaye et al., 2008). Owing to the fact that the indigenous justice systems are more accessible, flexible, participatory, and relevant, the people favour these justice systems (Macfarlane, 2007; Pankhurst & Getachew, 2008; Tsegaye et al., 2008).

Among the Borana of Ethiopia, the actual operation and competition of the two systems without mutual recognition has given rise to undesirable consequences for the users of the two systems. Particularly in criminal cases the state demands that all criminal cases be submitted to the regular courts while the people want to settle their cases out of court. In this competition, apart from tensions between the police, who insist that criminal cases be brought before regular courts, and community members, who want their criminal disputes to be settled according to the customary justice system, the two systems both impose their own sanctions/ punishments on offenders with total disregard for the one already imposed by the other.

The people in the study area have become vulnerable to the jurisdictions and sanctions of the two systems. While the offender is sentenced to imprisonment based on state criminal law, the offenders' families are penalised under the indigenous justice system. Hence, the main problem to be examined in this study will be the adverse impacts resulting from the rivalry between the two systems which directly impact on offenders in homicide crimes.

1.2 RESEARCH OBJECTIVES

Although the Ethiopian criminal justice system does not give official recognition to customary justice systems, in practice, there are diverse customary justice systems that are widely used in several parts of Ethiopia and are functioning well. Since the two systems co- exist and equally assert their authorities on the same people, users are being subjected to penalties by the two legal regimes for the same crime. In this context, the study has the following objectives:

- Understand the nature of the relationship between the two systems from the perspectives of elders, offenders and judicial officials
- Determine the impacts of the rivalry between the two systems on offenders
- Find out viability of the two systems working together.

1.3 RESEARCH QUESTIONS

This study assumes that there are consequences attached to the rivalry between the two systems and the simultaneous subjection of the people of the study area to two legal regimes. To determine these possible consequences, the following main research questions have been formulated.

- What is the nature of the relationship between the two systems?
- What are the attendant impacts of the rivalry between the two systems on offenders?
- What possible ways are there to make use of the two systems?

1.4 SIGNIFICANCE AND SCOPE OF THE STUDY

As it reveals the status of the problematic relationship between the formal criminal justice system and the customary justice system in Borana, the study will hopefully add to the body of knowledge. By revealing the undesirable consequences of the rivalry between the two systems, the findings of the research will serve as a fruitful input for the government in its endeavour to reform its criminal justice policy. The study will be helpful to all stakeholders, particularly the victims of crime, offenders and the community who are unwillingly subjected to two justice systems. The study will also contribute to the scarce literature in the area of the customary criminal justice system. The issues raised in the study may as well provoke other researchers to engage in further research and lead to ensuing debates along this line.

The scope of the proposed study is limited in terms of geographical area, time and its subject matter. I have selected Borana Zone¹ of Oromia National Regional State, as it is the zone where the indigenous justice system is prevalent and is a strong competitor to the formal criminal justice system. From Borana Zone, Dirre and Yabballo districts were chosen because they are considered the heartland of Borana Gada rituals. Criminal matters, specifically homicide, is chosen because the state claims exclusive monopoly but the indigenous justice system is also involved in resolving criminal cases including homicide. This will have impacts on those involved in criminal matters. As for civil matters, since disputing parties are free to settle their own case out of court, issues of competition between the two will not be a matter of concern.

1.5 ORGANISATION OF THE STUDY

In order to address the main issues of the research, the study is organised into seven chapters. The first chapter provides a brief overview of the research which includes: background of the study, problem statement, objectives of the study, research questions and significance and scope of the study. Chapter two will explain the methodology used in doing the research. A review of the literature and a conceptual framework will be given in chapter three so as to put the research into the context of the existing literature and lay out the theoretical and conceptual framework of the study. Chapter four will give a brief description of the study area and the people. The Borana indigenous justice system will be looked at in chapter five of the study. In chapter six, a profile of the Ethiopian formal criminal justice system will be given. The seventh chapter will look at the rivalry between the indigenous justice system and the formal justice system and the impacts of the rivalry between the two systems on offenders in the case of

¹ Borana Zone is an administrative unit but Borana are one major Oromo group living in the zone and in northern Kenya.

crimes of homicide. Conclusions drawn from the discussions will be presented at the end.

CHAPTER 2

2 METHODOLOGY

Because the data gathered from the participants consists of accounts of their experiences regarding the relationship between the formal criminal justice system and Borana Oromo indigenous justice system and its impacts on them, the research method used in this study is qualitative. Qualitative research helps to explore and understand the meanings the participants ascribe to their experiences (Creswell, 2009). One important characteristic of qualitative research that makes it appropriate for this study is the fact that it seeks to understand a research problem from the perspectives of the local population involved. In this study also, my interest was to know the local participants' perspectives and social experiences regarding the rivalry between the two systems.

The multiple sources of data used in this study include interviews, observation, documents and focus group discussions. Spatially, the qualitative data required for the study was gathered from participants living in one or two districts of Borana Zone of Oromia National Region State, who are involved in the customary criminal justice processes, familiar with the practices, or affected by them. The site was selected deliberately because Borana is a place where the Oromo indigenous justice system is functioning relatively well. I collected multiple forms of data in person from the study site to elicit the required data from knowledgeable and selected members of the community.

Targeted sampling techniques are concerned with seeking information from specific groups or individuals in a population based on whether the individual has the information necessary to answer the research questions in the study (Dawson, 2009). Opportunistic sampling has also been used, since there were persons capable of conveying useful information who appeared in the process of the study (Lodico, Spaulding & Voegtle, 2010).

With regard to access to the required data and the informants, I received a letter of support from Addis Ababa University describing the purpose of my visit and what kinds of cooperation were expected from the informants. At the study site, I was able to identify or locate key informants with the help of 'gatekeepers'. The gatekeepers of this study were community elders and persons with official or

unofficial authority who could connect the researcher with the informants and make his access easier (Mackwood et al., 2005).

The research participants were selected based on their experiences regarding the impacts of the rivalry between the two systems. These participants were offenders, clan elders (*hayyuus*), criminal justice professionals and others familiar with the justice systems. The Cultural and Tourism Bureau of Borana Zone was helpful in the identification of the initial informants from among the elders. I then used snowballing or networking methods, where some of the participants were asked to recommend others (Mackwood et al., 2005).

The main techniques of data collection for the study were interviews, researching documents, participant observation and focus group discussions (FGD). A rough estimate of the total number of persons involved in the study is about 30–45. The main objective was to get as much primary information as possible through individual interviews and FGDs with some degree of observation. The FGDs were used to provide the opportunity to obtain data that might possibly be missed during the interviews.

Face-to-face interviewing was the principal technique through which important data were gathered from the participants. Interview guides were designed in such a way as to enable all the participants – the elders, offenders and the criminal justice professionals – to narrate their own appraisal of the relationship between the two systems. The questions were made deliberately open-ended. They helped in probing and getting the personal reflections of the participants concerning the impacts of the rivalry between the two systems. They have also allowed the participants to talk about what was in their minds freely

In the FGDs, my main aim was to understand the issues from the perspectives of the participants themselves. The FGDs helped me to identify wide-ranging issues concerning the subject matter of the study. Besides, the FGDs helped me to check whether or not the views propounded by individual participants were shared among community members. A total of three FGDs were conducted, two for offenders and one for elders. The three FGD sessions enabled the researcher to generate multiple viewpoints on the subject matter by way of responses which, in terms of variety and quality, were adequate.

Observation was one other technique that was used to gather data in the study. As a data gathering technique, observation is helpful in understanding the overall social, cultural and economic contexts in which study participants live (Mack et al., 2005). But it would require prolonged engagement with the community to win their trust and understand them and their viewpoints. In the context of this

study, I made observations of the law-making and decision-making processes under the Borana customary justice system during the 40th Gumii Gaayyo in August 2012.

The study has also gathered, reviewed and interrogated literature on the Oromo customary justice system and others from secondary sources: books, journals and court archives, as well as audio and visual materials. The data collected from multiple sources were recorded with the observation being handwritten as field notes and the interviews audio-taped in recordings of the interviews. Data gathered from participants through open-ended interviewing were triangulated with the FGDs and observation (Dawson, 2009). In making combined use of multiple sources, the limitations of using a single source have been reduced and the respective benefits of each have been exploited.

The data analysis process was done concurrently with the data collection. The analysis continued making the required refining and reorganising where necessary (Lodico et al., 2010). I transcribed the data verbatim and then translated it into English from Afaan Oromo (Kothari, 2004). From the mass of data gathered, I had to determine or single out the relevant data by way of data reduction (Miles & Huberman, 1994). Finally, I had to reflect on what the analysed data meant and assessed the implications in light of the research questions of the study.

The strategies I used to establish trustworthiness included prolonged engagement in the field and data triangulation. There was triangulation of multiple data sources and data types. Triangulation of multiple sources and perspectives is an important strategy which helps in generating converging/diverging ideas and reduces the chance of bias (Baxter & Jack, 2008). I had the opportunity to go to the study area three times for ranges of time between ten days and one month. This enabled me to have a reasonable degree of engagement with participants and consequently some exposure to the phenomenon under study. I was able to establish a relationship of trust and to gain an adequate understanding of the phenomenon, which in turn contributed to trustworthiness (Baxter & Jack, 2008).

The study relates only to the relationship of the indigenous justice system and formal justice system among the Borana Oromo of Ethiopia, whose system is based on the Gada System of governance. As such, this difference in the socio-cultural–historical contexts of the Borana will have an influence on the outcomes and implications of the study, which has the effect of limiting the degree of generalisability of the produced knowledge to other people or settings.

In conducting qualitative research, people are involved as research participants. Hence, research ethics in qualitative research focus on safeguarding the interests of research participants and the interaction between the researcher and the people involved in the study (Mackwood et al., 2005). In this study, I have done my best to establish a relationship based on trust between the participants and me. Respect for communities and their values were at the centre of my approach. From an ethical point of view, I explained the objectives of the research to the participants. The voluntary nature of participation and the right of the participants to withdraw from the study at any time were clearly explained to them at the inception of the study. Explanations were given regarding the issues of confidentiality, anonymity, and potential uses of the findings (Creswell, 2009).

CHAPTER 3

3 DEFINITION OF CONCEPTS AND REVIEW OF LITERATURE

This section presents definitions of key concepts and a review of literature. First, the concepts central to the proposed study are defined. Then, a review of literature is made with a view to putting the study within the context of the existing literature by way of exploring prior and relevant research in the subject area. This would show what body of knowledge exists in the area of study and place the research in the context of previous research (Creswell, 2009; Maxwell, 2005).

3.1 DEFINITION OF KEY CONCEPTS

For the purpose of this study, the relevant key concepts requiring explanation include: justice, formal justice, informal justice, indigenous/ customary justice, legal pluralism and punishment. These concepts will be used and understood in this study in the senses defined below:

Justice: Justice is an abstract concept with no one generally accepted definition. In its broadest terms, justice is the ‘measure of right and the reaction to wrong’ (Parrillo, 2008). Its meaning varies according to time, place and the persons concerned. Different meanings have been given to justice by different thinkers at different times. Positivists see the concept of justice in terms of the existing law (Oraegbunam, 2010). Whatever the view and nature of justice, its measure and essential quality are the fulfilment of human needs/ goods in society (Parrillo, 2008).

Justice is not as such, a feature of individuals; it is something inherent within an act, a rule or procedure. Justice manifests itself through the action or inaction of human beings. As its objective, justice aims at “balancing the integrity and rights of the individual with the collective needs of society and dictates the corresponding responsibilities or duties of society and individuals, as well as the essential rights of the individual” (Parrillo, 2008: 512).

Informal justice system: The term informal justice is used in its broader sense to make a distinction between the non-state administered and state-administered formal justice systems. As an umbrella concept, the informal justice (non-state justice) system incorporates customary justice systems, community-based

justice, and indigenous justice; and restorative and alternative dispute resolution systems (Penal Reform International, 2000; Tamanaha, 2008). In that broader sense, the informal justice system refers to any non-state justice system or dispute resolution system that falls outside the scope of the formal justice system which includes customary justice, restorative justice and others like alternative dispute resolution (Harper, 2011; Wojkowska, 2006).

Indigenous/customary justice: Owing to its culturally specific and localised nature, there cannot be one universal definition of indigenous justice. The term traditional justice is also used in some literature to refer to customary or indigenous justice (Penal Reform International, 2000). Some use the broader term ‘informal justice’ to collectively encompass the terms traditional, indigenous, customary, restorative, and popular justice (Wojkowska, 2006).

Formal justice system: The FJS refers to, “controls organised by the state and enforced by specific institutions that follow procedures determined by law. These include courts, the police, prosecution offices and correctional facilities” (Harper, 2011: 18). In the FJS, laws made and codified by the state are used within courtroom settings based on procedures and institutions (Dinnen, 2003; Wojkowska, 2006). Strict procedural rules are followed when administering justice and the process is adversarial (Woolford & Ratner, 2008).

Legal pluralism: Pluralism is a normative concept referring to a system that recognises other norms emanating from outside state institutions, along with a state-ordained system of norms. According to Twining (2010), the concept legal pluralism refers to legal systems, networks or orders co-existing within the same geographical space or jurisdiction.

Punishment: Punishment refers to, “a penalty imposed for wrongdoing with the intention of expressing the community’s disapproval of the wrongdoing. It may as well refer to the entire process of criminalizing and penalizing conduct” (Johnstone & Van Ness, 2007: 635). Normally, punishment is given as a criminal remedy and compensation as a civil remedy, given to the victim to restore the damage or loss caused to him by the offender’s act. Some writers define punishment as anything that is unpleasant, a burden, or an imposition of some sort on an offender (Daly, 2000; Zernova, 2007). In that broader sense, punishment embraces social sanctions in the form of moral pressure that is applied to ensure compliance with an existing custom (Johnstone and Van Ness, 2007: 636). Retributive responses to crime aim at “the infliction of suffering on a person in order to satisfy vindictive emotions or passions” (Murphy, 2003:17). In the context of this study, whether or not the sanctions along with the payment

made to the victim's family for murder may be considered a punishment is controversial.

3.2 REVIEW OF LITERATURE

In many countries of the world and almost all African countries, broadly, there are state justice systems and non-state or informal justice systems. This dual system of law or co-existence of various indigenous/ customary justice systems in parallel with the formal state-based justice system has created multiple legal orders in these societies. Legal pluralism recognises that multiple forms of law may be present within any social field and that different forms of law can have different ranges of functions. To date, studies made within the context of dispute resolution have been limited to the formal justice system (Forsyth, 2007; Penal Reform International, 2000; Wojkowska, 2006).

In the context of multiple legal settings, the kind of relationship between the formal justice system (FJS) and the informal justice system (IJS) has become an important issue. Depending on how the FJS treats the IJS, the relationship between the two may be friendly or unfriendly. If the two systems work in a mutually beneficial and supportive manner, there may not be many problems for the users of the two systems. Where the dominant approach is positivism, the IJS is either totally integrated into the FJS or prohibited. In between repression of the IJS and recognition, there can be different models of relationships (Forsyth, 2007). In countries where the IJSs are recognised, the two systems may operate in their own spheres independently. But there are countries like Ethiopia where the IJS functions well without formal state recognition. In such cases, there will be competition and uneasy tensions between the two systems which may create a problem for the users of the systems.

When it comes to the comparison of the two systems, they basically differ in their approaches, definition of crime and the way to address the consequences of crime. The reviewed literature indicates that the FJS basically does not focus on healing and restoring the relations disrupted by the wrongful act. The FJS views crime as an offence against the state in total disregard of its social setting. The approach of the FJS is based on retributive theory, where incarcerating the criminal is given main emphasis. Offenders are kept in custody for a long period of time after which reintegration into the community usually becomes difficult to them (Zehr, 1990). By reintegration we mean the re-establishment of offenders' "practical and meaningful ties and relationships to their community of origin" (Johnstone & Van Ness, 2007: 635).

As for victims, the major reason for their discontent is exclusion or lack of a legitimate role in the processing of their cases beyond that of being a witness for

prosecution. Even after their cases are brought before courts of law, victims do not have the opportunity to be consulted about the progress of their cases. Under the formal criminal justice system, the community in which the criminal offence has taken place has no role in resolving the criminal dispute (Zehr, 1990).

Now, having looked at some of the weaknesses, we should also have a look at some of the strengths of the FJS. The fixed rules/codes are good guides for those who are the addressees of the norms. The rules and procedures give certainty and predictability to the decisions. The fixed rules help in controlling the possible subjectivity and arbitrariness of the decision makers. The rules applied by the FJS are more or less compatible with international human rights standards and are applied by trained legal professionals who may be lacking in the IJSs (Penal Reform International, 2000; Wojkowska, 2006).

In the IJSs the dominant view is that crime or conflict is considered to be a problem causing harm to the society, which requires that members of the society be involved in seeking a solution to the problem. In Africa, the indigenous justice systems are based on customary laws whose roots are in the culture, beliefs, values and traditions of the people in a particular geographic area (Nwabueze, 2002). The IJSs dispense justice in line with the beliefs, customs and traditions of the inhabitants of the local area through the administration of customary law by the institution of local courts (Elechi et al., 2010). In Africa, law is an inseparable part of the peoples' culture (Ayinia, 2002). Among many people of Africa, religion, law and philosophy are interwoven in the analysis of life of the people (Olaoba, 2007).

In the African context, "the concept of justice is derived from what the society considers to be fair and just in light of the overall context, and not what is fixed in advance by law" (Penal Reform International, 2000: 28). Hence, in order to know the African view of justice, one needs to understand the social setting within which an African is placed and interacts. The Afro-centric concept of justice gives emphasis to the spiritual as the main source of knowledge whereby morals and justice supersede the law. As such, the law does not aim at creating offences or making criminals, but "directs how individuals and communities should behave towards each other" (Jenkins, 2004: 153).

In short, the African view of crime is different from that of the FJS. Firstly, the African-centred perspective explains crime not as a violation of a state rule, but as a disruption of the spiritual harmony of the community. Secondly, the Afro-centric perspective is more communal where priority is given to the community rather than the individuals involved in criminal dispute. In African indigenous system, the society is characterised by strong ties. Disputes and conflicts are

viewed as issues concerning the entire community, which requires that the justice system give weight to the restoration of social harmony (Jenkins, 2004).

In Africa, the IJSs are community based and as such give the victim, the offender, their families and, the community as a whole the opportunity to take part in the resolution of disputes. The IJSs administer justice based on customary rules and traditional procedures. The rules and procedures derive their authority from practices and beliefs embedded in the way of life of the community. The IJSs employ restorative and transformative principles (Elechi, 2004).

Although IJSs are unique to the communities within which they operate, and thus differ from place to place, studies reveal that they have a number of characteristics common to them all (Wojkowska, 2006). A major feature of all customary laws is that they are unwritten, flexible, and pluralistic. In its broader context, the customary justice system is characterised by the following features. Firstly, the process is voluntary and not backed up by state coercion and relies on social pressure to secure attendance and compliance with a decision. Secondly, the procedure employed is informal and participatory based on principles of restorative justice. Thirdly, in its outcome, the decision is based on compromise rather than strict rules of law and the disputants and their supporters play a central role in the decision-making process (Penal Reform International, 2000).

IJSs are characterised by having a dynamic and flexible operating modality. Owing to their dynamic character, they are capable of constantly evolving and incorporating legal concepts drawn from other legal systems. As such, they are capable of adaptation to changing circumstances (Cuskelly, 2011). They apply flexible rules and procedures and the norms are changed from time to time in response to the changing social, economic and political realities. They are also characterised by having a broad jurisdiction. They make no distinction between civil and criminal offences since wrongdoing in general is perceived in terms of its disruption of social harmony. For this reason, adjudicators deal with both types of disputes in the same manner (Harper, 2011).

IJSs have a hierarchy of dispute resolving forums where small disputes are usually adjudicated at the lower levels and others are referred to higher levels depending on their complexity. At lower levels, respected elders within the extended family may adjudicate the small disputes within the family. For complex disputes, adjudicators at higher levels might include persons with specific expertise in indigenous law (Harper, 2011).

Under IJSs, the dispute resolution process is participatory and the decision is consensus based. Offenders, victims, others who have a stake in the case, and the community take part in the dispute resolution and the solution is acceptable

to the parties and the wider community. The solutions given are essentially restorative which may take the form of restitution or compensation depending on the particular case. Decisions given under IJSs rely on social pressure for compliance and enforcement. One important feature of IJS dispute resolution is the reconciliation or reintegration rituals. The rituals symbolise apology by the perpetrator to both the victim and the community and the offender will be forgiven by the victim and the community (Harper, 2011; Penal Reform International, 2000; Ubink & McInerney, 2011).

Research findings in Ethiopia show that IJSs are characterised by more accessibility to the people. Procedurally, the process in customary justice is participatory, where parties are given sufficient time of hearing and work their way to the solution. Hence, the results are often negotiated. IJSs focus on communal harmony and reconciliation of the parties in the dispute. The system ensures that the victim is compensated and the offender reintegrated (Jetu, 2012; Macfarlane, 2007; Pankhurst & Getachew, 2008; Tsegaye et al., 2008).

These being the positive attributes of indigenous justice systems, there are also a number of constraints tending to undermine the potential value of IJSs. Major constraints of IJSs include lack of predictability and coherency in decision making. As there are no fixed standards to guide the elders/judges, judgments are based on the decision-makers' knowledge and moral values. The flexibility of the rules and procedures of customary justice systems may result in unpredictable and arbitrary decisions (Harper, 2011; Wojkowska, 2006).

There are no clear checks in place as generally exist in the FJS for the selection and appointment of judges, and since the IJS dispute resolution systems may lack a well-established appeal system and fixed procedures, the decision-makers may not be held accountable. In addition, the decisions made by the IJSs may fail to be executed since the systems rely primarily on social pressure for their enforcement (Harper, 2011; Wojkowska, 2006). The IJSs are not well resourced and the proceedings and decisions are not recorded. The systems are also criticised as being susceptible to elite capture, which may serve to reinforce existing hierarchies and inequalities at the expense of the disadvantaged groups (Ubink & McInerney, 2011).

But according to the views of those who argue for more engagement with IJSs, the dynamic and flexible characteristics of the systems compensates for their weaknesses. In their view, these systems are capable of curbing existing flaws and building on their strengths. Moreover, these characteristics allow the systems to constantly grow and adapt to the social, cultural, economic, and political imperatives of the society in which they operate. In terms of making

justice accessible to the poor and enabling people to take part in the justice process, IJSs provide a better option. In the outcome of the justice process itself, IJSs deliver decisions that are mutually acceptable to all the parties/stakeholders (Ubink & McInerney, 2011).

As is the case in many pluralistic societies, in Ethiopia the relevant reviewed literature reveals the existence of two distinct justice systems. These are the FJS and the IJS with their own separate institutions competing and operating in parallel. The two justice systems are not working in ways that support and enrich each other (Macfarlane, 2007; Tsegaye et al., 2008); The relationship between the two systems is co-existence “without mutual recognition” (Pankhurst & Getachew, 2008: 258).

Despite the legal exclusion of the IJSs, in practice the various IJSs have remained prevalent in the larger part of rural Ethiopia (Jetu, 2012; Pankhurst & Getachew; 2008; Tsegaye et al., 2008). The studies revealed that IJSs continue to play a significant role in regulating the day-to-day lives of the members of different communities in Ethiopia (Dejene, 2002). They are still “more influential and affect the lives of more Ethiopians than the formal system, which is remote from the lives of many ordinary people” (Macfarlane, 2007:488).

CHAPTER 4

4 BRIEF DESCRIPTION OF THE STUDY AREA AND THE PEOPLE

The Borana Oromo belong to the larger group of Oromo people in Ethiopia with whom they share common language and basic cultural values. Most of the Oromo in other parts of Ethiopia trace back their ancestors to Borana (Bassi, 2005). According to the belief of the people, Borana refers to anybody belonging to the Borana tribe who lives in Borana land which is an extensive territory straddling the Kenya–Ethiopia border (Leus, 1995). In their oral accounts, the Borana Oromo trace their origin to *Madda Walaabu*, a place located north-east of the present Borana land.

Borana is one of the 13 administrative zones of the National Regional State of Oromia. With an area of about 95,740 km², Borana Zone has a common boundary, to the east, with Somali National Regional State, to the west with Southern Nations, Nationalities, and Peoples' Region, to the north-east with Bale Zone of Oromia, to the north-west with the Guji Zone of Oromia and to the south with Kenya. Borana Zone is divided into 13 districts called *woreda* (districts), and the study was conducted mainly in Dirre and Yaaballo *woreda*.

The population of Borana zone is approximately 1 million (2007 CSA Population and Housing Census). While Borana and Guji Oromos constitute the major groups of people in the zone, other minorities include the Gabra, Burji and Garri. Most of the Borana are followers of indigenous Oromo religion called 'Waqeffanna' (Lasage et al., 2010).

Climatically, Borana land is characterised by a semi-arid environment and lies in an altitudinal range of 1,000 to 1,500m above sea level. Physically, Borana land is divided into two agro-ecological zones: semi-arid and lowlands to the south and more humid lands at higher altitudes to the north. The largest portion of the zone (62.5 percent) is below 1,500 meters. The mean annual rainfall is 500–700mm, and the overall average is below 600mm. The minimum temperature is in the range of 14.10 to 18.10°C and the maximum is 25.26 to 28.79°C (Boku, 2008).

The land is covered with light vegetation/grass that favours pastoralism more than farming. Water and pasture are the two most important natural resources

in Borana land. Borana usually call the two resources together *maraa–bishan*, which means grass and water. The people in semi-arid areas are engaged in cattle herding and pastoralism provides the major livelihood in Borana. The main area of the study lies in the semi-arid parts of Borana Zone where the people are engaged in pastoralism and where the IJS is functioning relatively well.

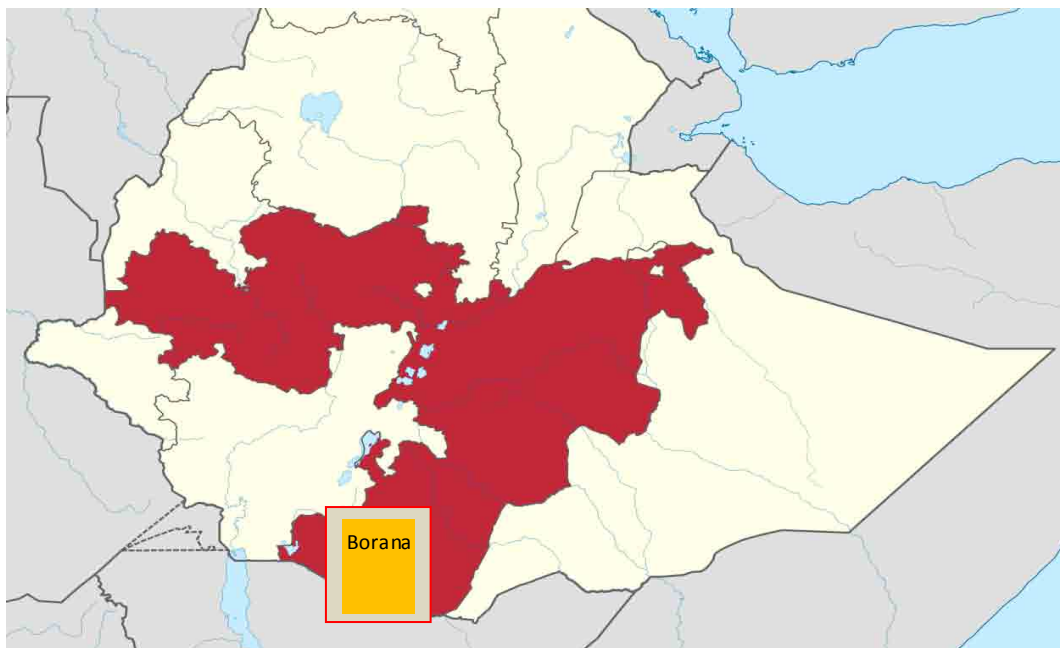


Figure 1: Map of Ethiopia Showing Oromia Region

http://en.wikipedia.org/wiki/Oromia_Region

In its social structure, the highest level division in Borana social system is the two exogamous halves of the society known as 'Sabo' and 'Gona'. The moieties are further subdivided or segmented into *gosa* (clans). Numerically the two moieties of Borana are approximately equal. In terms of settlement pattern, the clans are completely intermingled throughout Borana territory. Members of one moiety can marry only into the opposite moiety. Borana is a patrilineal society where descent is counted through male links and both men and women are considered to descend from a common ancestor. The Borana constitute a corporate group and, as such, they share many collective rights and obligations (Asmarom, 1973).

In Borana social structure, a clan is an enduring group that has considerable influence on the life of its individual members. It is the most important descent structure for “disposing of a regular general assembly whose members recognise a common *Hayyu*” (Bassi, 1994: 19). Much of the social privileges, rights, duties, seniority positions, and the social identity of persons are based on clan membership. A person can be obliged to fulfil his obligations towards his clan and his *gada* class through his clan. So apart from being an effective way of reaching him in Borana land, a person’s clan comes to his assistance in times of need.

CHAPTER 5

5 BORANA INDIGENOUS JUSTICE SYSTEM: NORMS, INSTITUTIONS AND DISPUTE PROCESS

In this chapter, an overview of the Borana indigenous justice system has been presented, with a view to providing an idea of the indigenous normative and institutional framework operating in Borana. The indigenous justice process has been examined to show how disputes are settled under the IJS. Since the Borana IJS is an integral part of the Gada governance system, a brief outline of the Gada system is necessary. It is not possible to understand one aspect without understanding the whole and how a part fits into the overall system (Desalegn et al., 2007; Asmarom, 1973; EI5, August, 2012, see Annex A).

Professor Asmarom Legesse is a known scholar on Borana. He has defined Gada as: “a system of classes (*luba*) that succeed each other every eight years in assuming military, economic, political and ritual responsibilities. Each Gada class remains in power during a specific term (Gada) which begins and ends with a formal power transfer ceremony” (1973: 8). Based on this system, Borana society is organised into age grades (*Hiriyyaa*) and generational class systems, in which five generational classes (*gogeessa* or *luba*) alternate in assuming power every eight years (*gada* period) in terms of governance responsibilities (Boku, 2008; Asmarom, 1973).

The Gada system is an indigenous governance system that organises and governs “the life of every individual in the society from birth to death” (Asmarom, 1973: 8). Upon his birth, each male Borana will have a social status determined by the established social pattern from which certain obligations and privileges arise. His obligations and privileges in the society are determined by the generation–grade to which he belongs (Bernardi, 2007; Asmarom, 2000). The generation–grade patterns on the basis of which the corresponding obligations and privileges are determined are shown hereunder.

Oromo social organisation–Oromo Gada system**Table -1. Different Gada grades with their corresponding roles**

	Designation	Age limit	Remarks	Role and activities
1	Dabballe	1–8	Status sacred	Childhood ritually protected Symbolic role as mediator between man and God
2	Gaamme Xixiqo	8–16		Look after livestock around settlements, Perform light work, lead life of adventure
3	Gaamme Gurgudo	16–24		Elect their six leaders/ Hayyu Adula/ (future leaders)
4	Kuusa	24–32		Take part in military action and pastoral life
5	Raaba Doorri	32–40		Junior warriorhood, Hunting and warfare, Marriage
6	Gadaa	40–48	Luba(the Gada class)	Assume power as leaders
7	Yuuba 1	48–56		Transfer power, retire, act as Abbootii Seera Have advisory role
8	Yuuba II	56–64		Advisors
9	Yuuba III	64–68		Advisors
10	Gadamoojii	68–76	Sacred–respected	Retired
11	Gadamoojii/Jaarsa	76–84	Sacred–respected	Retired

Adopted from Desalegn et al., *Indigenous systems of conflict resolution in Oromia*, Ethiopia, 2005

5.1 GADA SYSTEM: NORMATIVE AND INSTITUTIONAL SET UP

Under the Borana Gada system, there are strong sets of indigenous institutions which provide the Borana with a coherent internal form of governance which is still functioning and has a strong influence in the daily lives of the people (Watson, 2003; Ibrahim Amae, 2005). This study will consider only those which have direct relevance to the subject matter of the study.

5.1.1 GUMII GAAYYO–SUPREME LEGISLATIVE AND JUDICIAL BODY

Among the Borana, the governing power is vested in the assemblies at various levels at the apex of which is *Gumii Gaayyo* (multitude of Gaayyo/ 'meeting of the multitude'. *Gumii* refers to the assembly and *Gaayyo* refers to the place where the assembly meets. As an assembly formed from representatives of the major Borana clans, *Gumii Gaayyo* is a pan-Borana assembly. The assembly takes place every eight years, mid-point within one *Abba Gada* period (Shongolo, 1994).

The *Gumii* has supreme authority on important matters like lawmaking and enforcement of laws. During its sessions, the *Gumii* proclaims new laws, amends the old ones, and evaluates the *Abba Gada* (father of Gada). As it is also the supreme judicial body, the *Gumii* resolves disputes referred to it which could not be resolved at lower levels. No other Borana authority can reverse decisions made by *Gumii Gaayyo* (Asmarom, 1973; Bassi, 2005; Shongolo, 1994; EI1, EI4, August 2012).

In addition to the *Gumii*, there are several clan assemblies (*kora gosa*). The clan assemblies meet annually and have powers of making decisions on all matters concerning the clan and they also resolve disputes. Both *Gumii Gaayyo* and clan assemblies are similar in their rules of procedure. Every Borana assembly opens and closes with *eebba* (blessings) (Bassi, 2005). I had the opportunity to observe the formal procedures they follow in their assemblies to arrive at a binding decision during the 40th *Gumii Gaayyo* in August 2012.

5.1.2 GADA GOVERNANCE (EXECUTIVE BODY)

The governance of Borana is in the hands of Adula Council composed of six elders three of whom are drawn from Sabo and three from Gona. The heads of the two moieties are involved in the election of these Gada leaders making sure that there are representatives from both moieties. The Council is presided over by the *Abba Gada* (father of Gada). With his councillors, the *Abba Gada* comprises the legitimate leadership of the Borana. Members of this leadership are, "nurtured starting from the third Gada grade to become leaders during the sixth Gada grade when they reach the age of 40" (Ibrahim Amae, 2005: 18). The *Abba Gada* is supported by retired Gada officials known as *Abbootii Seera* (fathers of law) who play an advisory role (Asmarom, 2000; Bassi, 2005). The

Abba Gada and the leadership are in power for eight years. For the enforcement of decisions, the *Abba Gada* and his councillors have attendants called *Maakkala* (messengers). There are also *Jaallabs*, elected by clans to enforce what has been decided by *Gada* leaders (Homann, 2004; EI6, EI7, EI8, August 2013).

The Borana have put customary territorial administrative structures in place going down to the *olla*/village level, thus making them accessible to the people (Asmarom, 1973). Maintenance of law and order and administration of justice at the local level is done by elected *luba* leadership and the local councils (*Kora*). The local councils follow *Gada* laws and practices (Lemmu, 1994). The Borana, clan-based social structure integrates cultural and territorial administrative arrangements that differ from the formal state territorial administrative structure. The localities are built further up into wider territorial units starting from the *olla*/village, which is the smallest, family-based, administrative unit comprising about ten households and going up to *Gumii Gaayyo*² (Ani Muir, 2007; Desalegn et al., 2007).

Thus, for their pastoral way of life where resources are scarce and the climate is harsh, the Borana have been able to make appropriate rules, natural resource management institutions and structures. Without this appropriate indigenous governance system it would be difficult to maintain and use the scarce natural resources, especially the water wells. The indigenous institutions are well structured and characterised by effective integration of the cultural, political, judicial and administrative functions (Bassi, 2005). With the help of their indigenous governance system, Borana society has succeeded in mobilising resources, organising “large groups of people over prolonged period of time – to make orderly and legitimated decisions on access to and utilization of all wells” (Helland, 1996: 137).

5.1.3 BORANA INDIGENOUS LAWS/AADAA SEERA

The totality of the Borana normative system is described by two Oromo words *aadaa/custom* and *seera/law*, which together mean customary law. Putting clear demarcations between *aadaa* and *seera* would not be easy. But of the two, *aadaa* is more fluid and broader than *seera*. *Aadaa* can have several wider meanings depending on the context (Bassi, 2005; EI1, EI2, EI3, Aug. 2013). *Aadaa* refers to way of life that can be comprehended and reflected only through and by one's daily experience.

According to one of the well-known Borana *Argaa Dhageetii* (Oral historian), Borana *aadaa* is the embodiment of codes of conduct for social relations, natural

²At each one of these levels there are elders to settle disputes within that locality and there are assemblies.

resource management, food and dress (EI1, August 2012). It is this body of customary norms and laws that is referred to as *aadaa seera* and that keep the well-being of Borana and that are recognised by every Borana as binding (Bassi, 1994). *Seera/law* is narrower in its scope and has a more binding character than *aada*. *Seera* are specific authoritative rules which can serve as a basis for passing judgments in cases of disputes. Even if the laws are unwritten, Borana elders/*hayyus* can determine whether or not there is law applicable to a certain case. Besides, as Borana laws are made by Gumii Gaayyo at one point in time in the past, their existence can be determined by the elders (EI1, EI2, August 2013).³

With respect to the use of their natural resources, the Borana have formulated resource-specific laws known as *seera mara-bisaani*/laws of pasture and water/. In Borana pastoral life, deep water wells known as *eela* are vital sources of water but they are few in number. With the help of these specific laws, they have managed to prudently use and maintain these scarce water wells for centuries. With their environment-friendly indigenous natural resource management and laws, the Borana have managed to survive under harsh climatic conditions (Bassi, 2005; Desalegn et al., 2007). Along with laws dealing with the use of natural resources, the Borana have laws to do with criminal fines and punishment, protection of personal property, theft, etc., indeed, the Borana have laws for everything (Asmarom, 2000; EI4, EI1, August 2012).

Apart from specific *seera*, there is a moral standard known as '*Safuu*' among the Borana. *Safuu* is a moral category determining the expected respect and distance. It regulates the mutual relationship between elements of the social and cosmic orders. Social taboos and deplorable habits are determined by *Safuu* (Gemechu Megersa, 2005). A Borana who disturbs the social harmony or who violates *aada seera* also violates *Safuu* or the totality of the moral standard. Such a person is seen as a person lacking the feeling of a Borana (EI5, August, 2013).

On the whole, the Borana *aadaa seera* refers to the totality of unwritten laws, norms and ethical values, all of which are embedded in the Gada system. It is this totality of unwritten laws, norms and values embedded in the Gada system in Borana which serves as a tool for determining right from wrong and prescribes measures to be taken in cases of infraction of these rules. The Borana consider their laws to be the strongest instrument for the safeguarding and maintenance of *Nagaa Borana*/Borana peace (Asmarom, 2000).

³Herein lies the importance of having retired/former *Abba Gadas* as advisors of the Gada leadership.

It is their holistic worldview and their respect for truth and laws which make the Borana a law-abiding society not fear of punishment. Among the Borana, what makes both the ruling and the ruled obey and enforce the laws is the free will and commitment of everyone (Tena, 2009). In Professor Asmarom's words, "how deep the sense of order is among the Borana can be gleaned from the fact that homicide—within their society—is virtually unknown" (2000:27).

5.1.4 INDIGENOUS DISPUTE PROCESS AND OUTCOME

The Borana believe in cosmic harmony where the individual should live in harmony with all beings, earth, nature and heaven. Like many African societies, their approach to settlement of disputes is guided by this holistic and broader concept of peace which goes far beyond settlement of disputes and extends to and embraces harmony with nature (Driberg, 1934).

In Oromo life, "peace is a pervasive and sustained concern" (Asmarom, 2000:77). Among the Borana everyday greetings constitute a form of preaching peace, for this reason, "a sustained feud between groups or individuals is unacceptable" (Mamo, 2008: 48). Marco Bassi maintains that "revenge, internal war and reciprocal fear do not have an institutional place" in the Borana social system (Bassi, 1994: 27). For the Borana, failure to resolve a conflict will lead to "the breaking of the social and religious harmony that is *Nagaa Boranaa*, the peace of Borana" (Bassi, 2005: 206). In order to sustain their social harmony, the Borana resolve conflicts without any delay (Dejene, 2002; Tena Dawo, 2007).

Among the Oromo, *Jaarsumma* is an establishment that deals with all kinds of disputes ranging from simple quarrels to the most serious criminal cases, even homicide. '*Jaarsa*' refers to elders and '*jaarsumma*' to the process of settling disputes by elders by way of reconciliation or negotiated settlement. *Jaarsummaa* is "a customary court/legal institution entrusted to resolve all types of conflicts that arise within a group who abide by a body of unwritten customary rules" (Areba & Berhanu, 2008). In the *jaarsummaa* process, the elders mainly aim at bringing about restoration (*araara*) of the severed relationships between the parties (Tarekegn & Hannah, 2008: 12).

Concerning matters causing conflicts/disputes, since land and water resources are communal,⁴ there is little cause for conflict between the Borana (Kamara and et al., 2004; EI1, August 2012). Besides, dispute and litigation are detested practices among the Borana. Disagreements are resolved within the kinship of the parties or at the lowest possible levels such as the household or village (EI3; EI1, August 2013). But if any dispute (*waldhabdee*) does arise, it will be resolved

⁴ Here, it is important to note that this communal ownership of pastoral land has not been given recognition in the Ethiopian Constitution.

by the clan elders (*jaarssa*) at different levels (EI1, August 2012). Since there is no classification of criminal and civil in Borana laws, the judicial authority of the elders embraces all matters (Leus & Salvadori, 2006).

The formal dispute settlement process starts with the complainant submitting his case to the elders. Every Borana believes the *Gaadisa* (shade where the elders sit) is a dwelling place of *Waaqa* where only truth is spoken. For the Borana, the worst crime is *soba*/lying (EI5, EI3, August 2013). Having heard from the complainant, the elders ask the defendant to respond to the complaint. The elders make sure that both parties have exhausted their submissions by asking them whether there are still things they want to add (EI6, EI7, EI8, EI1, August 2013).

If the defendant admits, they will proceed to the judgment/*mura* based on the relevant *aadaa seera*. If he denies, they will ask the complainant to produce evidence/*ragaa*. When witnesses are called to testify, the elders ask each one to tell the truth. Having obtained the evidence, the elders will discuss the facts deeply and finally give their verdict, based on the rule relevant to the case. If the defendant has already denied the crime and the evidence produced has not proved the guilt of the suspect, they will declare his innocence. If the evidence proves the guilt of the suspect, they will give the appropriate sentence. Depending on the level at which the case was first seen, a party dissatisfied with the decision may take his appeal to the next appropriate level (EI6, EI7, EI8, August 2013).

Among the Borana, homicide is a serious offence (*Qakke*) demanding a severe penalty. For the Borana, the worst sin is the voluntary killing of a Borana by a Borana. In spilling Borana blood, a Borana will make himself impure (*xuraa'a*). It will "lead to expulsion from the community" (Bassi, 1994: 27). Owing to this strong belief, intentional killing is rare among the Borana. *Dagu* or accidental killing is the common type of homicide in Borana (EI1, EI2, EI3, August 2013).

The common practice among the Borana when a crime of homicide is committed, is that the killer will immediately report what has happened to his near relatives and go to a certain temporary sanctuary. No Borana clan gives shelter to a Borana who has killed a Borana with a view to hiding him from justice. He will remain at the sanctuary until the victim's relatives are approached and the reconciliation process begins. With the help of elders, the relatives of the offender will approach the relatives of the victim asking for *araara* (reconciliation) (EI1, EI5, EI3, EI2, August 2013).

Since a person who kills another submits himself or reports to his clan, the possibility of a killer not being known is rare. False accusation is also unacceptable among the Borana. Besides, every Borana and every clan will collaborate in finding out the killer. But in no event can a person be punished without proof. Until proved otherwise, a person is considered innocent (EI5, EI3, EI1, August 2013).

Under the Borana IJS, since the killer does not deny the committing of a crime and asks for pardon and purification, there is little dispute on the facts of the case (EI1, EI5, EI3, EI2, August 2013). For this reason, the elders will decide whether the killer should pay the fixed 30 heads of cattle as *gumaa/blood money* to the victim's family. *Gumaa* is an indigenous institution which is part of the Gada System used for settling blood feuds between persons, families, groups, clans, and communities (Dibaba, 2012). The payment of the *gumaa* is always preceded by the offender's remorse and his approaching the victim's family through elders. It is the killer's genuine remorse, and begging for forgiveness which paves the way for reconciliation. The process has ritual and material aspects. Ritually, the offender gives *ijibaata* (sheep to be slaughtered), which symbolically is meant to wash away the blood of the deceased which the offender shed, thus removing feuds between parties (*warra gumaa*) (EI1, EI2, August 2013).

That is why the Borana attach more importance to the ritual purification than to the payment of the 30 head of cattle. In the whole process of purification or peacebuilding, genuine remorse and request of pardon by the offender and forgiveness from the family of the victim are the most important prerequisites. Having shown genuine remorse, the offender will ask the victim's family to decrease the amount as a result of which the victim's family may receive a nominal amount which will be less than 30. According to my informants, a Borana has no interest in receiving *gumaa/blood money* because taking blood money may lead to some misfortune (Bassi, 2005; EI1, EI2, August 2013).

In case the accused refuses to admit his guilt, which is quite rare, "he is left in a state of suspension with a terrible sentence hanging over him and even if it is not executed by force, it can have very unpleasant social repercussions" (Bassi, 2005:210). The formal way of excluding the recalcitrant from Nagaa Borana is through a cursing (*abaarsa*) administered by Gumii Gaayyo. The *abaarsa* will exclude the recalcitrant from blessings and prayers, even from the exchange of any greetings from the whole Borana community. He will be denied all social and ritual support from the whole of Borana land. In a pastoral life, where everything including water is collectively used and administered through the clan system, a person cannot survive without this (Baxter, 1978).

I personally witnessed one such *abaarsa* during the 40th Gumi Gaayyo in August 2012. On this Gumii, a person who had defied the authority of the Gada was formally cursed. The person, Tuune, is a young man from Magaaddo village in Dirree district who raped a girl as a result of which she became pregnant. As reported by the Abbaa Gadaa Guyyo Goba at the assembly, he had been asked by the Raaba Gadaa of his clan and **denied everything**. He had even been summoned by the police and failed to show up. Even after his case was submitted to the *Gumii*, and he had been summoned three times, he had refused to appear.

For that reason, the case was considered disruptive of *Nagaa Borana* and had been forwarded to the assembly by the *Abba Gada*, where the *Gumii* discussed the issue and finally decided to exclude him. Since, having known about the case, the father had failed to advise his son to respect the law, he was also excluded from *Nagaa Borana*. Based on Borana law, if a person hides a criminal or advises him not to appear before elders, he is also considered unruly.

According to the cursing, if the criminal Tuune is lost he will not be looked for; if he dies no one will bury him; no one should marry his daughter nor should a person give him his daughter. He will not use water wells belonging to clans. If any person allows him to use well water, that person will face the same exclusion. No one should enter his house and sit on his stool. The assembly decided that the cursing would also apply to any Borana who violates the exclusion imposed on Tuune.

Among the Borana the responsibility to discipline its members is that of the clan. Based on the principle of collective responsibility, a wrong committed by its member makes the clan liable. Apart from disrupting social harmony, in terms of material costs the repeated crimes of a habitual offender will put “too great a strain on the resources of the clan (Driberg, 1934: 239). For this reason, in the case of a recidivist, the clans withdraw the privileges and protection flowing from membership (EI1, EI2, EI3, August 2013).

CHAPTER 6

6 FORMAL CRIMINAL JUSTICE SYSTEM IN ETHIOPIA

Starting from the time of its formation as an empire at the end of the 19th Century, Ethiopia has been a multi-ethnic and multicultural society with various indigenous systems. Since then, the subsequent rulers of the empire have pursued the policy of establishing one centralised and uniform legal system. In the 1960s Emperor Haile Sellassie launched a sweeping codification venture, as a result of which six legal codes have been adopted. The idea was to have one law applicable for the whole country denying room for legal pluralism of any kind (Fisher, 1971).

As a system, Ethiopia follows the continental legal system where the laws are in the form of codes. With the adoption of the 1957 Penal Code, the Ethiopian state assumed monopoly over all criminal matters. The subsequent Ethiopian rulers have taken a series of legislative measures to abolish the IJSs in Ethiopia. The 1960 Ethiopian Civil Code repealed all customary laws (Art. 3347) except for very limited matters.

The 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution has made a slight departure from the past in giving some room to customary justice systems. Under Articles 34(5) and 78(5) of the constitution, disputes related to personal and family matters can be submitted for customary adjudication. But concerning criminal matters, Ethiopia has continued to pursue the earlier monist and centralist policy.

The criminal justice system in Ethiopia pursues a centralist/exclusivist approach which is based on the belief that “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions” (Griffiths 1986: 3). Legally, it is the state justice system which has exclusive control over the prosecution and punishment of offenders.

6.1 ETHIOPIAN COURT STRUCTURE AND CRIMINAL JUDICIAL PROCESS

Under the 1995 constitution, the Ethiopian Federal State is divided into nine regional states that are further subdivided into: *zones*, *woreda* and then *kebeles*. *Kebeles* are the lowest level administrative set-up in the formal administrative structure. The courts of the country are divided into federal and regional. The federal courts are divided into Federal Supreme Court, Federal High Court and Federal First Instance Court. At the regional levels, the courts are structured as Regional Supreme Courts, Regional High Courts and Regional First Instance Courts (Art. 78). Structurally, regular courts exist up to *Woreda* level. They don't reach as low as *kebele* level.

In the area of criminal justice, the FJS has an exclusive monopoly over all criminal matters. Based on the 1961 Criminal Procedure Code of Ethiopia, the main actors in the process are the police, the public prosecutor, the judiciary and the prison officials. Since crime is considered an offence against the state, the parties are the public prosecutor and the defendant. Upon receiving information from any source, the police will conduct a criminal investigation (Arts. 22 & 23). After completing the investigation, the police will submit the file to the public prosecutor for prosecution (Art. 37). Offences punishable on complaint may be prosecuted and punished only upon a formal complaint by the injured party (Art. 13).

After receiving an investigation report from the police, the public prosecutor will determine whether or not the evidence is sufficient to proceed with prosecution. If the evidence is not sufficient, the prosecutor will drop the case or order further investigation. If the prosecutor is convinced that there is sufficient evidence they will prepare a charge against the suspect and formally submit it to court for trial (Art. 38). Article 42 of the Criminal Procedure Code provides cases under which proceedings shall not be instituted. Based on this article, no proceedings shall be instituted where:

- the public prosecutor is of the opinion that there is not sufficient evidence to justify a conviction or
- there is no possibility of finding the accused and the case is one which may not be tried in his absence: or
- The prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or
- The public prosecutor is directly instructed by the Minister not to institute proceedings in the public interest.

Having stated expressly cases under which prosecution may not be instituted; Article 42(2) provides that on no other grounds may the public prosecutor refuse to institute proceedings. In view of this, it seems difficult for the public prosecutor to entertain reconciliation made between the victim and the offender as a ground to refuse to institute proceedings or withdraw the case at any point of the proceedings.

With the exception of a charge under Article 522 (homicide in the first degree) or Article 637(aggravated robbery), the public prosecutor may withdraw any charge with the permission of the court at any stage of the proceedings (Article 122). Based on this provision, where the public prosecutor informs the court that the withdrawal of a charge is on the instructions of the government, the court shall, if it is satisfied that the public prosecutor has been so ordered, grant permission to the public prosecutor to withdraw the charge. The court shall give reasons for allowing or refusing withdrawal of a charge. The withdrawal of a charge under the provisions of this article is no bar to subsequent proceedings. Here again, the code has not specifically provided settlement out of court by agreement of the victim and the offender as a ground for withdrawal of charges.

At the trial stage, the proceedings will continue before the appropriate court, between the public prosecutor and the suspect. The prosecutor is expected to prove the guilt of the accused beyond reasonable doubt with evidence. The prosecutor wants to make sure that conviction is obtained and the accused is punished. After the evidence from both sides are presented and heard, the court gives its verdict.

After conviction, there will be sentencing. In the sentencing process the judge will take the maximum and the minimum penalty fixed by the law for the crime as a framework and then takes into account the aggravating and extenuating circumstances. Usually, the prosecutor is asked to propose a penalty to which the accused can react by submitting mitigating circumstances. The prosecutor may forward aggravating circumstances if there is any.

As provided under Article 82 of the Federal Criminal Code, the court shall reduce the penalty, within the limits allowed by law (Art.179) in the following cases.

- When the criminal who was previously of good character has acted without thought, or by reason of lack of intelligence, ignorance or simplicity of mind;
- When the criminal was prompted by an honourable and disinterested motive or by a high religious, moral or civil conviction;

- When he acted in a state of great material or moral distress or under the apprehension of a grave threat or a justified fear, or under the influence of a person to whom he owes obedience or upon whom he depends;
- When he was led into grave temptation by the conduct of the victim or was carried away by wrath, pain or revolt caused by a serious provocation or an unjust insult or was at the time of the act in a justifiable state of violent emotion or mental distress;
- When he manifests a sincere repentance for his acts after the crime, in particular by affording succour to his victim, recognising his fault or delivering himself up to the authorities, or by repairing, as far as possible, the injury caused by his crime, or when he, on being charged, admits every ingredient of the crime stated on the criminal charge.

In determining the exact penalty, the court appears to have a wide margin of discretion to exercise within the framework given by the law. But reconciliation agreements made under indigenous justice systems between the victim and the offenders out of court have not been included in the extenuating circumstances enumerated under Article 82 of the Ethiopian Federal Criminal Code.

According to Article 2(5) of the Ethiopian Federal Criminal Code, “Nobody shall be tried or punished again for the same crime for which he has been already convicted, punished or subjected to other measures or acquitted by a final decision in accordance with the law.” But since the settlement of criminal cases out of court and the sanctions imposed on offenders under the IJS are not legally recognised, in a strict legal sense offenders cannot claim that they are subjected to double punishment.

Overall, the Ethiopian legal system gives no space to the customary rules, institutions and procedures that relate to criminal law (Ethiopian Federal Republic Criminal Policy, Miazia 13, 2001, Ethiopian Calendar). Under the FJS, the community in which the criminal offence has taken place has no role in resolving criminal disputes. Based on its retributive approach the FCJS considers incarceration of offenders to be the best option to deter crime. In so doing, it dismisses the restorative approach pursued by the IJS, which aims at the reconciliation of parties, the reintegration of offenders and social harmony.

CHAPTER 7

7 RIVALRY BETWEEN THE BORANA INDIGENOUS JUSTICE SYSTEM AND THE FORMAL JUSTICE SYSTEM AND ITS IMPACTS ON OFFENDERS

In Ethiopia, the FJS has been given an exclusive monopoly over all criminal matters with a view to prevent IJS from handling criminal matters. The Ethiopian government has never given formal recognition to Borana indigenous governance systems (Bassi, 2005). Despite this, the IJS is still regulating the most important aspects of the lives of Borana people. In practice, the FJS and the IJS have existed without mutual recognition. The relationship between the two systems has been uneasy and competitive. When looked at from the perspective of the people, the two justice systems are equally claiming the loyalty of the people and trying to assert their authorities over the people.

In the context of homicide, under the FJS the offender is sentenced to imprisonment by the regular courts, irrespective of what has been done under the IJS. In addition to that, this same offender will pay 30 head of cattle irrespective of the sentence given by court. This payment of 30 head of cattle by the offender is accepted by the state for inter-ethnic homicide. Where a homicide is between a Borana and any other ethnic group, both the state and the indigenous justice system authorities at the local level take part in enforcing the payment of 30 head of cattle.

The involvement of local state authorities in the execution of this payment is based on a joint agreement made at Nagelle town in the year 2000 between the different ethnic groups. In their joint agreement, all decided to apply the Borana indigenous sanction/*Guma* for any homicide between different ethnic groups in all the neighbouring pastoral areas. Based on this agreement, apart from its authority to punish criminal offenders, the government law enforcement agencies are involved in the enforcement of the payment of 30 head of cattle. Here, the involvement of local government executive authorities is without any legal basis.

In order to have an overview of what the impacts of the rivalry between the two systems are in Borana in the particular case of homicide crimes, let us look at

some homicide cases as described by prisoners in Yaballo Prison, elders and justice officers of the zone.⁵ The cases are categorised into those brought before courts of law and those settled out of court, which are different in their impacts.

To begin with homicide cases submitted to courts of law,⁶ Sora Buno is a prisoner who was accused of killing Tota Bula. This prisoner is a Borana from Karrayyu clan whose age is 27. The killing was not intentional. He was convicted and sentenced to five years imprisonment by the court. Apart from that, a reconciliation agreement was made between the two families whereby 30 head of cattle were given to the victim's family. The reconciliation was made before the court gave the sentence. According to the offender's account, when the written agreement made between the two families was submitted to the court, the judge rejected it (PI9, August, 2013, see Annex B).

In another case Saru Goba, a Borana from Moyale district in Mattu village, was accused of killing Waru Mayu and was convicted. The Zonal High Court sentenced him to 12 years imprisonment. In addition to that, based on IJS, a reconciliation agreement was made where he has paid 30,000 Ethiopian Birr and 30 head of cattle. Here a new development seems to be emerging with respect to the payment of Birr 30,000 in addition to the 30 heads of cattle, which is not a requirement under the indigenous justice system. Having made the required reconciliation, when the agreement document was submitted to the court the judge rejected it, stating that the agreement has no relevance in court of law (PI2, August 2013).

Alo Jaarso is a Gujii Oromo from Balda district in Borana, Lammi Hirphaa Kebele. He was convicted of homicide and sentenced to 18 years imprisonment. In addition, a reconciliation agreement was made between the families and he paid Birr 97,000 and 5 head of cattle. When the reconciliation agreement was submitted to the court and the two families claimed that the case had been settled based on custom, the judge said "that is your custom not the custom of court of law" (PI4, August 2013).

Now, let us look at homicide cases where the cases have been settled out of court through reconciliation based on IJS. One such case was committed in the year 2010 by Xuna Lubo in Dirre district, Dubuluq *kebele*. The case was immediately taken by the elders and resolved through reconciliation out of court. Based on the reconciliation agreement, the offender has paid 30 head of

⁵More than 25 cases have been gathered from the informants, but since all are basically of two categories, I have selected and presented only some of those cases.

⁶Here the prisoners interviewed were about 20. But since the cases are handled by the two systems are similar, only a few of the cases are presented.

cattle and no one took the issue to court. The suspect Xuna Lubo having been held under detention for a year and half was released because of lack of evidence (EI1, August 2012).

In another murder case committed in 2012, Amuna Soba killed his wife and was detained by the police. But his family requested the elders to approach the police and handle the case through reconciliation. The elders somehow succeeded in getting him back from the police and reconciliation was made. Amuna then paid 30 head of cattle to the family of his wife and the case was settled out of court (EI1, August 2012).

One other murder case settled out of court was committed in August 2012 during the inter-ethnic conflict between the Borana and the Garri around Moyale town. In that incident a Borana Yoya Xume mistook a Borana for a Garri and shot him. The killer was from Digalu clan and the one killed, Bona Namu, was a young boy from Daacitu clan. The case was resolved out of court through reconciliation. Finally, in Areero district of Borana, a Borana (Wayu Galagalo) killed his own brother Ama Gona and the case was handled by the elders based on the Borana indigenous justice system. The elders decided that the killer pay 10 head of cattle and the case was settled through reconciliation out of court (YB from Moyale, August 2012).

Now, as can be seen from the presented cases, the impacts of the two categories of cases on offenders are different. In the first category, the offenders are subjected to the sanctions imposed by the FJS and the IJS. In the second category, the offenders paid only the sanctions imposed on them by the IJS and escaped incarceration. Concerning this subjection of prisoners to two varying sanctions and the consequent inequity, I have sought the views of prisoners, Gada elders and justice officers.

7.1 VIEWS OF PRISONERS, ELDERS AND JUSTICE OFFICERS

On the whole, regarding the impacts of the rivalry between the FJS and the IJS in Borana, the study participants have divergent views. The Gada elders and the justice officials have opposing viewpoints. The prisoners accept some kind of punishment for the crime they have committed. But their contention is that payment of 30 head of cattle in addition to imprisonment is unacceptable. Since the 30 head of cattle are paid by the families of the offenders and their clan, they consider this to be a collective punishment for the crime they committed as individuals. The 30 head of cattle could have sustained the life of their families for a considerable time while they are kept in prison. In their view, the payment of 30 head of cattle has impoverished their family, exposing some of their

families to hunger and begging. The prisoners consider themselves to be victims of two systems (PFGD1, August 2013, see Annex B).

According to the accounts given by the prisoners, even in their absence reconciliation would still be made between the families of the victim and the offenders based on IJS. Regarding this reconciliation being made in their absence, the prisoners have concerns. As they are the concerned parties, they should have taken part in the reconciliation. But as they are in the hands of the police, they have no way of taking part in the reconciliation. In their view the outcome of reconciliation being made in their absence does not satisfy the desires of both families. Genuine reconciliation would require that the offender give his genuine personal apology and receive forgiveness from the family of the deceased in person. In their view, the harmony to be restored during reconciliation is both personal and communal (PFGD1, August 2013).

One of the main concerns of reconciliation under the IJS is reintegrating the offender into the community but the reconciliation cannot prevent incarceration of the offender. In short, the offender will not be spared from prison and neither is his family spared from paying the 30 head of cattle. In view of these failings and discontent, they contend, no genuine restoration of harmony between the families of the victim and that of the offender is being made. In its genuine sense, reconciliation is made to restore the spiritual, psychological and emotional equilibrium that was disturbed by the killing of a person (PFGD1, August 2013).

Concerning the 30 head of cattle paid under the IJS, the prisoners have their own dissatisfactions. As mentioned earlier, although 30 head of cattle may be the amount fixed by Borana law, the victim's family may not accept all these. The victim's family used to receive only a nominal amount. The belief was that taking *Gumaa/blood money/* would result in paying *gumaa* (blood money). But at present, the total 30 head of cattle is being received by victims' families. In the past, rather than the material, the spiritual equilibrium was given importance (PFGD1, August 2013).

Here it is important to take note of the particular grievances of those prisoners involved in inter-ethnic homicide. Based on the joint agreement made among the different ethnic groups in pastoral areas bordering Borana and the government's recognition of the agreement, inter-ethnic homicide would result in the payment of the 30 head of cattle apart from the prison sentence to be handed down by a court of law. But as explained by the prisoners, in executing the payment of the 30 head of cattle, the local government and traditional authorities collect more than 30 head of cattle. The local authorities request this

additional number of head of cattle to cover the costs of their executing the decision. Hence, the burden of this category of prisoners is heavier than those who pay only 30 head of cattle (PFGD2, August 2013).

The prisoners also complain of the general weakening of social systems and increasing abuse of power in the area. As stated by the prisoners, apart from failing to satisfy the needs of the people, the rivalry between the two systems is harming the poor who do not have the means of resisting or manipulating the authority of the two rival systems. There are rich or powerful people who are capable of using both systems opportunistically and escaping justice. In their view, as the rich can also improperly make use of the FJS whenever they wish, both as an offender and a victim, the poor are being harmed the most by the rivalry between the two systems (PFGD2 August 2013).

When it comes to the Gada elders, they say Borana laws are made by the general assembly (*Gumii Gaayyo*) of all Borana people and as leaders, they are required to enforce these laws. The people are expected to observe their laws. The sanctions have also been fixed by the people with a view to punishing those who infringe the Borana *aadaa-seera*. For this reason, even if a criminal case has already been submitted to regular court, reconciliation has to be made to restore harmony among the members affected (EFGD1, August 2012, see Annex A).

The elders blame the FJS for disempowering them by depriving them of the opportunity to resolve their problems through reconciliation, which they think is restorative and constructive. They wonder why the functional Borana IJS is barred from handling criminal cases if that does no harm to others. The elders claim that their IJS is working well and their society has been kept peaceful by the system for ages.⁷ They contend that even in the particular context of homicide cases, the FJS should have left limited room for some cases to be settled out of court through reconciliation. The elders say that by devaluing their laws and institutions the state has disempowered them and lost their trust. They are using the FJS because they cannot defy the government. In their view, the strength of the FJS is attributable merely to the power imbalance between the state and the indigenous governance system (EFGD1, August 2012).

The elders maintain that the IJS as a system does not harbour recidivists; rather it despises them more strongly than the FJS does. The elders boldly argue that their IJS has an inherent mechanism of punishing or excluding habitual offenders from the usual protection given to law-abiding clan members. Since unruly

⁷ From what I have gathered from the police in the area and the justice officers, in those districts where the IJS is functioning well, very few crimes are reported. In the entire Borana Zone there is one prison at Yaballo, the zonal capital.

persons disrupt *Nagaa Borana*, they say, every clan withdraws its support from such an unruly member and the clan elders often refer the cases of such persons to the FJS (EFGD1 August 2012).

With regard to punishment, the elders contend that they have penalties to impose on a person infringing *Aada seera Borana*. The IJS does not leave the offender unpunished, but applies punishment in a constructive way so as to restore the disrupted social harmony. But their penalty does not aim at removing the offender from the society, but rather to reintegrate him into the society (EI3, EI5, EI1, August 2013). The elders don't see the removing of the offender from his community as a constructive way of applying punishment. In the elders' view, in removing and distancing the offender from his community, incarceration does more harm than good. They say punishment can be justified only if it brings about the intended result. The elders consider reintegrating the offender into his community as more constructive than removing him from his community. For them, incarceration is simply a vindictive move that is devoid of any restorative value (EI5, EI1, August 2013). Penalty in Africa "is directed towards a readjustment of the status quo" (1934:233).

Justice officers in Borana zone also expressed their views regarding the involvement of the two systems in the handling of homicide cases. The justice officers include personnel from the judiciary, the public prosecutor, the police and prison system. For the justice officers, the IJS is acting without legal authority to handle criminal cases. In their view, as law officers, they are required to discharge their official duties in strict compliance with the law. Because the law has not given the IJS authority to handle criminal matters, there is no way of recognising or entertaining decisions given based on IJS (JOI1, August 2012, see Annex C).

The justice officers have acknowledged that sometimes families of offenders and victims request them to accept out of court reconciliation agreements and to release offenders. But even if a case has already been settled out of court by the parties through a reconciliation agreement, the court has to proceed with the trial and give its independent verdict based on the law, provided the public prosecutor submits the charge. A case can be dropped only where there is lack of evidence or in cases provided by law (JOI1, August 2012).

Police and the public prosecutors have also told me that sometimes the parties ask the police and the prosecutor to withdraw the case to make a reconciliation out of court before trial. However, the officers stated that they have no legal authority to entertain such requests. Some of the judges say the reconciliation

agreement may be relevant during the sentencing for mitigating the punishment (JOI5 Pol1, JOI3, August 2013).

So far, we have looked at impacts of the rivalry between the two systems as explained by the informants. We have seen that prisoners and elders give a human rights dimension to the problem: the Borana elders think that they have the right to opt for justice systems of their own choice and the prisoners consider their subjection to double punishment to be a violation of their rights. In view of this, there is a need to address the issue of whether or not the prisoners are subjected to double jeopardy and whether the people have the right to make use of their IJS.

To begin with the prisoners, regarding double punishment, Article 14(7) of the ICCPR provides that, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” This is based on the principle of *ne bis in idem*, which prohibits a person from being tried or punished twice for the same offence (Nowak, 2005). In the context of Ethiopia, Article 23 of the 1995 FDRE constitution also prohibits double jeopardy. But in the case of the IJS, its procedures and decisions are not recognised by Ethiopian law. Punishments are only considered double where two separate authorities acting in accordance with the law of a given country apply sanctions/punishments to the same person on the same subject matter.

But in view of the fact that we are looking at systems and their impacts, the rights of prisoners and of the Borana people to use their own justice system have to be looked at inseparably. For this reason, we need to examine other relevant international human rights instruments and conventions. Pursuant to Article 27 of the ICCPR and Articles 1 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007, a person has the right to enjoy his own culture in community with others. Based on these human rights normative frameworks, the right of people to maintain their cultural identity and make use of their own systems and institutions is justifiable.

Besides, when looked at from the perspective of the right of access to justice, which is a fundamental human right, a person has the right of access to justice. Access to justice is defined as “the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards” (UNDP, 2005). Hence, the right to have access to justice goes beyond mere access to justice and includes the right to have access to justice of one’s own choice. This would, in principle, make the claim of Borana elders to

maintain their cultural identity and use their IJS justifiable to the extent that they comply with the internationally-recognised human rights standards.

What is more, the Borana IJS and the FJS also have to be assessed from the perspective of the users. "Justice is what the community as a whole accepts as fair and satisfactory, in the case of dispute or conflict, not what rulers perceive it to be" (When Legal Orders Overlap, 2009: 35). Elechi maintains that "opportunities for achievement of justice are higher under African indigenous justice systems than with an African state criminal justice system, partly because, the empowerment of victims, offenders and the community is a central principle of African justice" (2004:1). This assumes that when all those affected by the crime take part in the justice process, they resolve their problem in the way they think fit. On the whole, although the Borana IJS restorative approach and its philosophy of criminal punishment has merits that cannot simply be dismissed, there seems to be no tendency to do away with the destructive rivalry between the Borana IJS and the FJS.

CHAPTER 8

8 CONCLUSION

All along, the problem in Ethiopia seems to be inability or reluctance to be receptive to the existing and well-entrenched indigenous justice systems. The FJS has been given the exclusive monopoly to handle criminal cases and the authority to punish offenders. The FJS has barred the Borana IJS from dealing with any criminal matter, without having the actual capacity itself to provide the required service to the rural poor. But among the Borana, the indigenous governance system known as *Gada* along with its IJS has survived and is still functioning with wide acceptance.

The data gathered from the informants indicate that the rivalry between the two systems has rendered the systems unable to satisfy the needs of the people. Rather, the situation has favoured those who are capable of resisting or manipulating the systems. If neither the IJS nor the FJS functions well, this will undoubtedly give rise to anarchy and lawlessness. The Gada elders contend that the Borana IJS addresses the problem of crime and its consequences in a constructive way. They attach great importance to the IJS's reconciliatory and restorative approach which has helped them to preserve *Nagaa Boorana* (peace of Borana). The Borana elders admit that *Gumaa* has a punishment aspect that is constructively applied.

According to the elders, the *gumaa* combines both the punishment and the civil remedy. Under the Borana IJS there is no category of civil and criminal remedy. The punishment is monetised (in the form of the 30 head of cattle payment) and is made part of the *Gumaa* to be paid by the offender. The Borana elders consider this monetised and non-punitive sanction to be a constructive way of using punishment. In their view, in addition to addressing the needs of the victim, their penalty aims at reintegrating the offender into the society.

The 30 head of cattle cannot actually be considered compensation in a strict sense since the payment is not equal to the loss. Surely, human life does not have monetary value. But from the perspective of a prisoner who has already been convicted and punished by way of incarceration, the payment of 30 head of cattle seems to be more than compensation for civil remedy. Addressing this

problem of disproportionality of what is paid and the loss would require some kind of response from the IJS and the FJS.

The very sustainability of the Borana governance system, including the IJS, is an issue that has to be looked at in this study. The Borana have put in place indigenous territorial administrative structures appropriate for their pastoral way of life that reach right down to the village level. They have also been able to create environment-friendly laws for the use and management of the scarce natural resources. Apart from enabling them to survive the harsh climatic conditions of the area, the Borana indigenous governance system has facilitated the use effective use of these scarce resources.

So long as the current pastoralist and clan-based social structure remains intact, the Borana IJS will remain relevant to the society. In this regard, the state should stop undermining and disestablishing the authority of the Gada governance system. The principle of collective responsibility would always apply in the clan-based Borana community, where the clan is expected to discipline its members and every member seeks the support of his clan. Every member is kept within the bounds of the norms of society because of the fear of being deprived of his social connection, which is a severe kind of punishment.

Another important fact that has to be taken into account is the power imbalance between the IJS and the FJS. Where the FJS has full support of all state resources and institutions, through which it can enforce its decisions, the IJS obviously lacks resources and the required coercive power to enforce its decisions. The values embedded in the Gada system are also being eroded because of different factors. In view of that, the IJS may possibly face increasing difficulty to enforce its decisions without some kind of coercive support of state institutions.

In general, considering the harmful impacts of the rivalry between the two systems and in order to make both systems user-friendly, the situation in Borana would necessitate allowing some degree of autonomy or self-regulation to the people by way of recognising and allowing their IJS to handle some criminal matters. Borana IJS is still governing and maintaining significant aspects of the peoples' affairs. The peoples' social, economic, political and cultural practices, and their environmental and spiritual well-being, are regulated by the IJS.

In view of this fact, the total dismissal of the well-functioning IJS is adversely affecting the people making use of the system. Some degree of recognition of pluralism could be expected to uphold the rights of all groups and facilitate the opportunity to enjoy the right of access to one's choice. From a human rights perspective, in as far as justice can be delivered in a way that does not violate

human rights of others, there is no justifiable ground to deprive a people of the right to get justice from IJSs.

This would call for changes in the approaches of the two systems by way of being more accommodating. The concerned authorities have to agree on jointly exploring ways of avoiding the adverse effects of the rivalry and building on the strengths of the two. Such an agreement will pave the way for removing the existing mutual suspicion and rivalry between the two and creating justice systems responsive to human rights.

The current mutual suspicion and competition between the two has to be changed into mutual support with a view to meeting the needs of the users. The leadership in the two systems has to aim at identifying and reducing the weaknesses of both systems, and making effective use of each system's respective strengths. The two systems can coexist and be user-friendly only where there is a strong and clear institutional linkage. The linkage has to be legally defined and regulated by way of determining the range of criminal matters to be handled by the IJS. The possibility of IJS or FJS being manipulated by the powerful at the expense of the marginalised (forum shopping) will be lessened if a well-regulated linkage between the FJS and the IJS is established. Such a defined interface will enhance the possibility of determining issues of jurisdiction and referral of cases.

As a matter of law, given its seriousness and possible complexity, all homicide cases should be under the exclusive jurisdiction of the FJS but there may possibly be exceptional circumstances where courts may divert certain homicide cases to the IJS. Apart from that, for the majority of minor crimes, the IJS will be more appropriate and generally effective. Except for appeal proceedings, cases validly decided under the IJS should not be seen all over again in regular courts.

With regard to the effectiveness of the IJS, since the power and resources that are at the disposal of the state are lacking in the IJS, it is necessary that there be cooperation in the area of enforcement of decisions. The state should lend its coercive support to IJS, allowing it to enforce its decisions. Concerning punishment, as it stands now, the *Gumaa* paid under the IJS seems to combine both civil remedy and criminal remedy. If the state is given the legal authority to punish homicide offenders, the IJS has to be limited to the civil aspect of the remedy. Hence, the 30 head of cattle should be reviewed by the IJS by way of differentiating the amount. Rather than fixing one single amount for all cases of homicide, depending on the income status of the slain person and/or number of his dependents, a differentiated payment should be fixed.

The FJS should give recognition to the decisions handed down by the IJS where the decisions have been made in full compliance with the law. The element of reconciliation and restoration is missing in the FJS. The FJS has to embrace the restorative approach used by the IJS in its handling of crime and its consequences.

Finally, by dismissing well-functioning IJSs and imposing a uniform legal system, we risk the alienation of all the people making use of the system and the loss of a diversity which needs to be cherished. We would rather make effective use of each system's respective strengths and reduce their weaknesses. The strengths of FJS and the IJSs have to be appreciated and used for the benefit of the users of the systems. The total dismissal of IJS would amount to throwing out the baby with the bath water.



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ANNEXES

STUDY PARTICIPANTS AND ACTIVITIES

ANNEX A: INTERVIEW AND FGD WITH ELDERS

Number of participants and the type of activity	Designation used in the study	Interview places	Interview date
1. Borbor Bule	EI1	Dubuluq	Aug 2012/2013
2. Kanu Jilo	EI2	Didaraat	Aug 2013
3. Waaqo Guyyo	EI3	Gaayyo/Yaaba llo	Aug 2012/2013
4. Elias Galgalo	EI4	Gaayyo	Aug 2013
5. Jaatanii Diida	EI5	Gaayo /Yaaballo	Aug 2012/2013
6. Guyyo Halakee	EI6	Haroo	Aug 2013
7. Dula Waariyyo	EI7	Haroo	Aug 2013
8. Badaja Waariyyoo	EI8	Haroo	Aug 2013
9. Malicha	EI9	Didarat	Aug 2013
1 FGD with Elders	EFG1	Gaayyo	August 2012

ANNEX B: INTERVIEW AND FGD WITH PRISONERS

Participants Names⁸		Place⁹	Date of Interview¹⁰
1. Kuse Guutama	P1		
2. Sora Guyyo	P2		
3. Ana adola	P3		
4. Areerii Jaldo	P4		
5. Boba Buke	P5		
6. Waakala Uka	P6		
7. Guyyo Jaarsa	P7		
8. Racho Borana	P8		
9. Satana Boyya	P9		
10. Hala Galabu	P10		
11. Lencho Ashkara	P11		
12. Triku Waqo	P12		
13. Ulo waariyo	P13		
14. Saar Bonaya	P14		
15. Halo Quxana	P15		
16. Buku Edema	P16		
17. Kanato Jilo	P17		
18. Dulacha Jarsa	P18		
19. Boba Dula	P19		
20. Ture Safi	P20		
1 FGD	PFG1		
2FGD	PFG2		

⁸ Changes have been made to these names in the body of the paper.

⁹ All the interviews were conducted at Yaballo Prison located in Yaballo town.

¹⁰ All the interviews were carried out in August 2013.

ANNEX C: INTERVIEW WITH JUSTICE OFFICERS

Participants	Designation	Place of Interview¹¹	Date of Interview
1. Taaru Seyoum	JOI1		August 2012
2. Tola Moti	JOI2		August 2012
3. Solomon Seyuom	JOI3		August 2013
4. Mohammad Kadir	JOI4		August 2013
5. Hunduma Police	JOI5		August 2012
6. Gudata Mamo	JOI6		August 2012
7. Guyyo Huqaa	JOI7		August 2013
8. Maalicha Nura	JOI8		August 2013

¹¹ All the interviews were held in Yaballo which is the name of the district and the capital of the zone.

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