

## 14. When parallel justice systems lack mutual recognition

### Negative impacts on the resolution of criminal cases among the Borana Oromo

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#### **Introduction**

In Ethiopia, the formal criminal justice system holds exclusive control over all criminal disputes. While civil and family cases can be handled in the legal forum of the conflicting parties' choice, the system bars customary justice systems from handling criminal matters, although in practice, they continue to be widely used for all kinds of cases in several parts of rural Ethiopia (Pankhurst and Getachew 2008). However, the lack of formal recognition for customary systems in the area of criminal justice is creating problems for justice seekers, perpetrators and legal practitioners. While there are numerous studies on customary conflict resolution in Ethiopia (see for example Dejene 2007, Donovan and Getachew 2003, Pankhurst and Getachew 2008, Gebre *et al.* 2012), not much has been written on the normative and institutional relationship between customary and state law in the settlement of criminal disputes. As this paper will argue, the two systems lack mutual recognition.

Among the Borana Oromo of southern Ethiopia, both customary and state law coexist side by side and assert their authorities. Their coexistence has undesirable effects for their users; for example, by subjecting offenders to sanctions imposed by both systems for the same crime. This paper explores the nature of the relationship between the state and customary legal systems with particular emphasis on the handling of criminal matters. It attempts to show the impacts of their coexistence on the Borana people, and to propose possible ways to improve the situation. By revealing the nature of the problematic relationship between the formal and the customary criminal justice systems in Borana, it will contribute to the growing literature on legal pluralism in Ethiopia, and hopefully serve to inform the Ethiopian government as it endeavours to reform the criminal justice system. The victims

of crime, offenders and the communities who often are subjected to two justice systems may also benefit from the findings of the research.<sup>1</sup>

Over the last years, the idea of engaging with and making productive use of customary justice systems has gained ground globally (Penal Reform International 2000, Wojkowska 2006). Thus, by showing the available but untapped potential of customary law to address the shortcomings of the formal criminal justice system, the research has practical relevance. Of course, all the diverse customary justice systems in Ethiopia and beyond are not equally user-friendly. In view of this, this study mainly focuses on exploring the possible ways of making use of the strengths of the Borana customary justice system.-

## Conceptual Framework

### Legal Pluralism

The term 'legal pluralism' is used to refer to the co-existence of two or more legal systems within the same geographical space or jurisdiction (Twinning 2010). In almost all parts of the world, legal pluralism is a reality that includes the formal justice system (national law, international law) and informal justice systems (customary law, religious law, and other normative orders).

The relationship between formal and informal justice systems may be harmonious and cooperative, or antagonistic, with divergent effects on the users of the systems. Where the systems compete with or undermine each other, the setting is usually unfavourable to the users, especially if there is a lack of clear guidelines about which system should deal with which criminal cases, as this often results in people being punished twice. But where the two systems operate in a regulated and mutually supportive way, users have no difficulty in knowing when and how to make use of each of the systems (Forsyth 2007, Penal Reform International 2000, Wojkowska 2006).

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<sup>1</sup> The study is based on extensive and mostly qualitative ethnographic fieldwork undertaken from February 2012 to May 2014. It was conducted in Borana Zone of Oromia National Regional State, where the indigenous justice system is prevalent and in competition with the formal criminal justice system. Data for this paper was mostly collected during interviews and focus group discussions with individuals living in the study area and who were involved in the customary criminal justice processes, or affected by the rivalry between the two. They included prisoners, victims or relatives of victims, clan elders and others familiar with the justice systems like the police, judges and prosecutors. For some of the informants I used pseudo names to protect their identity. Wherever that has been the case I marked it in the text.

Forsyth (2007:70) described seven models of relationships between the non-state and state justice systems:

- i) repression of non-state justice system by the state system;
- ii) tacit acceptance of the non-state justice system by the state without formal recognition;
- iii) active encouragement of the non-state justice system by the state without formal recognition;
- iv) limited formal recognition by the state of the exercise of jurisdiction by a non-state justice system;
- v) formal recognition of exclusive jurisdiction in a defined area;
- vi) formal recognition of the non-state justice system to exercise jurisdiction by the state, which lends its coercive powers;
- vii) complete incorporation of the non-state justice system into the state system.

In this continuum of relationships, there are two extremes. At one end, the non-state justice system is outlawed and suppressed; at the other end, the informal justice system is totally integrated into the formal justice system. In between, along the spectrum, there are different models of relationships (Forsyth 2007:69).

### **Restorative versus retributive justice**

The notion of restorative justice is underpinned by a worldview that places much more emphasis on post-crime communal harmony than on the particular criminal act in question. It refers to a process whereby parties with a stake in a specific offence collectively deal with the aftermath of the offence and its implications for the future (Marshall 1999:5). The central tenet of restorative justice is that damage caused to the victim of a crime is healed. It aims to restore the relationship between the victim, the offender and their communities, which has been disrupted by the wrongful act.

Retributive justice defines a crime as an act that violates state rules. The state is a victim against whom the wrongful act is committed. Retributive justice mainly aims to establish guilt and punish the offender. Zehr (1990) described the salient differences between restorative and retributive justice as follows:

Table 1: Crime viewed through retributive and restorative lenses (Zehr 1990 184–185)

Retributive	Restorative
Crime defined by violation of rules (i.e. broken rules)	Crime defined by harm to people and relationships (i.e. broken relationships)
Harm defined abstractly	Crime defined concretely
Crime seen as categorically different from other harms	Crime recognized as related to other harms and conflicts
State as victim	People and relationships as victims
State and offender seen as primary parties	Victim and offender seen as primary parties
Victims' needs and rights ignored	Victims' needs and rights central
Interpersonal dimensions irrelevant	Interpersonal dimensions central
Conflictual nature of crime obscured	Conflictual nature of crime recognized
Wounds of offender peripheral	Wounds of offender important
Offence defined in technical, legal terms	Offence defined in systemic terms: moral, social, economic, political

The traditional African view of crime is quite different from that of the western-based formal justice system. The traditional African perspective explains crime not as a violation of a state rule, but as a disruption of the spiritual harmony of the community. It offers a more communal approach in which priority is given to the community rather than the individuals involved in the criminal dispute (Jenkins 2004): crime 'consists in the disturbance of individual or communal equilibrium, and the law seeks to restore the pre-existing balance' (Driberg 1934:231). As it disturbs and harms both individual and social relationships, crime is not a mere act of law breaking. In indigenous and tribal societies, the dominant philosophy is that crime is a problem that causes harm to the society, which requires that members of the society be involved in seeking a solution to the problem (Melton 2004:1).

While Africa is a vast continent of diverse peoples with distinct histories, traditions and justice systems (Malan 1997:8), the restorative aspect of their justice system is an important commonality of many African societies. Particularly in rural areas, many African societies are characterized by strong social ties. As disputes and conflicts are often viewed as concerning the entire community, customary justice systems give more weight to the restoration of social harmony in line with the beliefs, customs and traditions of the local people. In most societies, the customary justice process is not backed up by state coercion and relies on social pressure to secure attendance and compliance with a decision. In line with the principles of restorative justice, the procedures employed are informal and participatory. Decisions are 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 2000:15).

There are, however, a number of constraints to the value of African indigenous justice systems within contemporary society. The lack of predictability and coherency in decision-making is one such constraint. As there are no fixed standards to guide the elders, 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 2011:22, Wójkowska 2006:20).

In Ethiopia, the formal justice system and the various customary justice systems operate side by side, often competing instead of supporting and enriching each other (Macfarlane 2007:501, Tsegaye *et al.* 2008:64). The relationship between the systems is "co-existence and collaboration without mutual recognition (Pankhurst and Getachew 2008:258). Many studies have revealed that informal justice systems have continued to play a significant role in regulating the day-to-day lives of the members of various communities in Ethiopia (Dejene 2002, Pankhurst and Getachew 2008, Gebre *et al.* 2012) as they are '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). The people favour these justice systems, which are more easily accessible, flexible, participatory and relevant to their lives (Pankhurst and Getachew 2008, Tsegaye *et al.* 2008).

## **The formal criminal justice system**

### Court structure and judicial process

Although Ethiopia is a multi-ethnic and multicultural society with various indigenous systems, successive rulers have pursued a policy of establishing a uniform, centralized and monist justice system. In the 1950s and 60s, Emperor Haile Selassie I launched a sweeping codification venture, introducing codes that were meant to be applied across the whole country and designed to supplant the various indigenous justice systems (Fisher 1971). With the adoption of the 1957 Penal Code, the Ethiopian State consolidated its monopoly over all criminal matters.

The 1995 FDRE Constitution has given some room to customary justice systems: through Articles 34(5) and 78(5) of the Constitution, disputes relating to personal and family matters can be adjudicated by customary courts based on customary laws. However, when it comes to criminal matters, Ethiopia continues to pursue its earlier centralist policy, in which the state assumed exclusive control over the prosecution and punishment of criminal cases. The 1995 Constitution declared Ethiopia a multicultural federal state with powers constitutionally shared between the federal government and the nine regional states that are members of the federation.

The nine regional states are further sub-divided into sub-regional structures, such as *woredas* (districts) and *kebeles* (the smallest administrative unit). The judiciary maintains a dual system of federal and regional courts. There are three hierarchical tiers of federal court: the Federal Supreme Court, Federal High Court and Federal First Instance Court. Likewise, the regional courts are structured into Regional Supreme Courts, Regional High Courts (also known in the regions as zonal court) and Regional First Instance Courts (*woreda* courts) (Art.78 of the 1995 Constitution). The structure of the regular courts does not extend to the *kebele* level, which is the lowest administrative unit. This means that criminal matters have to be sent to *woreda* courts, which makes the formal criminal justice system inaccessible to the rural population of Ethiopia who reside in remote *kebeles*.<sup>2</sup>

In terms of the criminal justice process, since crime is considered an offence against the state, the parties to a criminal dispute are limited to the public prosecutor and the defendant. Hence, on receiving information from any source about a crime, the police will conduct a criminal investigation (Arts. 22 & 23 of the 1961 Criminal Procedure Code). Based on Article 13 of the Criminal Procedure Code, only offences punishable upon complaint are left to the discretion of the injured party. Article 42 of the Code outlines certain cases where criminal proceedings will not be instituted.<sup>3</sup> The Article does not mention cases where the victim and the offender settle the matter through reconciliation as one of the grounds for not instituting proceedings or withdrawing a case at any point of the proceedings.

In the sentencing process following conviction, the judge takes the maximum and the minimum penalty fixed by the law for the crime as a framework, and then takes aggravating and extenuating circumstances into account. But here again, reconciliation agreements between the victim and the offender made out of court under indigenous justice systems are not mentioned as part of the extenuating circumstances outlined under Article 82 of the Federal Criminal Code.<sup>4</sup> In short,

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2 Although social courts are found in urban centers, according to my informants, they are ineffective (interview with Borbor Bule, 2012).

3 According to Article 42 of the Ethiopian Criminal Procedure Code, no proceedings shall be instituted where: (a) the public prosecutor is of opinion that there is not sufficient evidence to justify a conviction: or (b) there is no possibility of finding the accused and the case is one which may not be tried in his absence: or (c) the prosecution is barred by limitation or the offence is made the subject of a pardon or amnesty; or (d) the public prosecutor is instructed not to institute proceedings in the public interest by the Minister or by order under his hand. 2) On no other grounds may the public prosecutor refuse to institute proceedings. 3) The public prosecutor shall institute proceedings in cases affecting the Government when so instructed by the Minister.

4 The general extenuating circumstances under which the court shall reduce the penalty are enumerated under Article 82, Sub-Article 1 (a-e) of the Federal Criminal Code. But reconciliation made between an offender and victims is not included.

the diverse customary rules, institutions and procedures seen in Ethiopia have no officially recognized jurisdictional space in the handling of criminal matters.

Before proceeding to the next section, let us look at some of the criminal matters covered by Article 538 of the Ethiopian Federal Criminal Code, which states that whoever causes the death of a human either intentionally or through negligence, no matter what the weapon or means used, commits homicide. Any person, who commits homicide, whether intentionally or negligently, shall be punished by a lawful judicial process and in accordance with decisions rendered thereby. The punishment to be imposed on a person guilty of intentional or negligent homicide shall be determined depending on whether the homicide was aggravated (Art. 539) or simple (Art. 540).

Article 539 of the Federal Criminal Code deals with aggravated homicide, stating that whoever intentionally commits homicide with such premeditation, motive, weapon or means, in such conditions of commission, as to show that he is exceptionally cruel, abominable or dangerous, or as a member of a band organized to carry out homicide or armed robbery, or to further another crime or to conceal a crime already committed, will be punished with rigorous life imprisonment or death. According to Article 540, the sentence for someone who intentionally commits homicide neither in aggravating circumstances nor extenuating circumstances as in Article 541<sup>5</sup> is rigorous imprisonment for between five and twenty years. The Ethiopian Federal Criminal Code also has a provision dealing with homicide by negligence.<sup>6</sup>

The Code also includes specific provisions that are relevant to the cases in this study dealing with bodily injuries. The Criminal Code categorizes bodily injuries into 'grave wilful injury' (Art. 555)<sup>7</sup> and 'common wilful injury' (Art. 556),<sup>8</sup> and anyone who intentionally or by negligence causes bodily injury to another or impairs his health, by whatever means or in any manner, is punishable.

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5 Whoever intentionally commits homicide: a) by exceeding the limits of necessity (Art. 75), or of legitimate defence (Art. 78); or b) after gross provocation, under the shock of surprise or under the influence of violent emotion or intense passion made understandable and, in some degree, excusable by the circumstances, is punishable with simple imprisonment not exceeding five years.

6 Whoever negligently causes the death of another is punishable with simple imprisonment from six months to three years or with a fine of between two thousand and four thousand Birr.

7 Whoever commits grave wilful injury as provided under this Article is punishable, according to the circumstances of the case and the gravity of the injury, with rigorous imprisonment not exceeding fifteen years, or with simple imprisonment for not less than one year.

8 According to this article, anyone who commits wilful injury is punishable, according to the circumstances of the case and the gravity of the injury, with rigorous imprisonment not exceeding fifteen years, or with simple imprisonment for not less than one year.

## The Borana indigenous justice system

### Institutions, norms and dispute processes

The land of the Borana Oromo is an extensive territory straddling the Kenya–Ethiopia border (Leus 1995). In Ethiopia, the Borana Oromo belong to the larger groups of Oromo people with whom they share a common language and basic cultural values. Borana Zone is one of twenty-one administrative zones of the National Regional State of Oromia. While the Borana and Guji Oromo constitute the two major groups in the zone, smaller groups include the Gabra, the Burji and the Garri. The population of Borana Zone is approximately 1 million (CSA 2008). Most of the Borana are followers of the indigenous Oromo religion known as *Waqeffannaa* (Lasange *et al.* 2010).

The Borana land is covered with light vegetation/grass that favours pastoralism more than farming. Water and pasture are the two most important natural resources among the pastoral Borana. The study was undertaken in the semi-arid parts of Borana Zone where the informal justice system is functioning relatively well.

At the highest division in the Borana social system are the two exogamous halves of the society known as Sabo and Gona. These moieties are further subdivided or segmented into *gosa*, often translated as 'clan' (Asmarom 1973:39). The Borana constitute a corporate group, sharing many collective rights and obligations. Among the Borana, a clan is an enduring group that has considerable influence over the lives of individual members. Much of the social privileges, rights, duties, seniority position, and social identity of a person are based on clan membership. The clan is also the most important descent structure for 'disposing of a regular general assembly whose members recognize a common elder, *hayyu*' (Bassi 1994:19). While a person's clan comes to his assistance in times of difficulty, every member is also obliged to fulfil their obligations to the clan, which may include the digging and maintenance of water wells and providing contributions to the needy (Asmarom 1973:38).

### The *gadaa* system

The Oromo are distinguished from many other Ethiopian people by their age- and generation system known as *gadaa*. As an indigenous governance system, *gadaa* has its own leaders who conduct political, economic, social, legislative, judicial, military and ritual responsibilities. Many authors have written about the complex *gadaa* system, emphasizing its role in recruiting warriors (Asmarom 2000), keeping the *nagaad boorana* – the ideal of keeping peace among all Borana groups (Dahl 1996:174, Aguilar 1996:191, Bassi 1996:157) – which is believed to be linked to the supernatural.

Other writers have praised the *gadaa* system as an example of egalitarian African democracy (Asmarom 2000).

The Borana *gadaa* system organizes and governs 'the life of every individual in the society from birth to death' (Asmarom 1973:8). At birth, every male becomes a member of a generation class (or set) called *luba*, which is determined by the generation class of his father. Every eight years, these classes climb up the 'gerontocratic ladder' and, as they reach the different age-grades, 'succeed each other every eight years in assuming military, economic, political and ritual responsibilities' (Asmarom 1973:8). The politically most powerful grade is the *gadaa* grade, which every generation set reaches after forty years and retains for eight years. The generation in power elects the *abbaa gadaa*<sup>9</sup> who, with his councillors, comprises the legitimate leadership of the Borana. Members of this leadership group are 'nurtured starting from the third *gadaa* grade to become leaders during the sixth *gadaa* grade when they reach the age of forty' (Ibrahim 2005:18). Women are not elected to participate in the *gadaa* governance system (PCDP 2005:26). Some authors seeking change have criticized the exclusion of women from the forums and processes of the customary justice system (Pankhurst and Getachew 2008:8).

Among the Borana, governing power is vested in the assemblies at various levels, at the apex of which is the *gumii gaayoo* (assembly of the *gaayoo*-public meeting place).<sup>10</sup> As an assembly formed from representatives of the major Borana clans, the *gumii gaayoo* is a pan-Borana assembly, which takes place every eight years at the mid-point of an *abbaa gadaa* period (Shongolo 1994:30). The *gumii gaayoo* has supreme authority over law-making and enforcement. During its sessions, the assembly proclaims new laws, amends old ones, and evaluates the *abbaa gadaa*. As a supreme judicial body, the *gumii* also resolves all disputes that could not be resolved at lower levels. No other Borana authority can reverse decisions made by the *gumii gaayoo* (Asmarom 1973, Bassi 2005, Shongolo 1994).

In addition to the *gumii*, several clan assemblies (*kora gosaa*) operate at clan levels. The clan assemblies meet annually and have the power to make decisions on all matters concerning the clan. They also resolve both criminal and civil disputes concerning clan members. Both *gumii gaayoo* and the clan assemblies have similar procedural rules. Every Borana assembly opens and closes with blessings (Bassi 2005:176).

Since the *gumii* meets only every eight years, the duty of enforcing laws and handling conflicts are left to the executive and the council of elders at each level. Executive power is in the hands of the *adulaa* council, which is composed of six elders – three from each moiety. The *abbaa gadaa* – who is in power for only eight

<sup>9</sup> *Abbaa gadaa* (lit.: 'father of *gadaa*') is the head/leader of the *gadaa* governance system.

<sup>10</sup> The term *gumii* refers to the assembly while *gaayoo* refers to the place where the assembly meets.

years – presides over the council. The *abbaa gadaa* and his councillors have attendants called *maakkala* (messengers) to enforce decisions. Each clan also elects *jaal-labs* (representatives of clan assemblies) to enforce the decisions of the *gadaa* leaders (Homann *et al.* 2004:89).

The Borana clan-based social structure integrates cultural and territorial administrative arrangements that differ from the formal territorial administrative structures of the state. The localities are built into wider territorial units starting with the *olla* (village), the smallest family-based administrative unit comprising of about ten households. Next is the *jaarsa dheeda*, responsible for regulating seasonal access to grazing and water, and the *jaarsa madda*, responsible for grazing and water management at the local level. Finally, comes the *rabba gadda*, which has overall, customary jurisdiction over land, social and cultural issues, including conflict resolution (Muir 2007: n.p.).

### ***Aadaa seeraa: The Borana normative system***

According to Borbor Bule, a well-known Borana oral historian (*argaa dhageetii*), the embodiment of Borana codes of conduct for social relations, natural resource management, food and dress are referred to as *aadaa seeraa*. The body of customary norms and laws are recognized by every Borana as binding, and they believe that the laws have maintained their well-being.<sup>11</sup> Depending on the context, *aadaa* (custom) has different meanings. In its broader sense, *aadaa* refers to a way of life that can be comprehended and reflected through and by one's daily practices (Bassi 2005:100). The term *seeraa* specifically refers to authoritative rules that serve as the basis for judgments given by the *hayyuu* (elders) in disputes. As Borana laws were made by the *gumii gaayoo* at some time in the past and are regularly restated, the elders can easily recall the laws applicable to a given case.<sup>12</sup> The Borana have specific laws dealing with physical injuries, personal property, theft, fines and punishment, among other things (Asmarom 2000:201).<sup>13</sup>

In general, among the Borana, the totality of the unwritten laws embedded in the *gada* system serves as a tool to determine rightful and wrongful acts and prescribe the measures to be taken when the laws are violated. As the Borana elder Jaatani Dida stated, the Borana consider their laws as the strongest instrument for the safeguarding and maintenance of the *nagaya borana* (peace of the Borana).<sup>14</sup> According to Asmarom (2000:27), 'how deep the sense of order is among the Borana can be gleaned from the fact that homicide – within their society – is virtually

<sup>11</sup> Summary of an interview, August 2013.

<sup>12</sup> As every single law gets discussed and repeated at *gumii gaayoo*, Borana elders know which laws are still operating and applicable (Asmarom 1973).

<sup>13</sup> Interviews made with Borbor Bule and Waaqo Guyyo, two Borana elders, August 2013.

<sup>14</sup> Interview, August 2013.

unknown'. Nowadays, although homicide is still rare among the remote pastoral Borana communities, it is on the increase around the towns and among the settled farming communities.

### Borana indigenous dispute processes and outcome

The Borana believe in a cosmic order in which human beings live in harmony with one another, all beings, earth, nature and heaven (Gufu 1996). In Borana society, every day greetings constitute a form of preaching peace, and 'a sustained feud between groups or individuals is unacceptable' (Mamo 2008:48). As attested by Bassi, 'revenge, internal war and reciprocal fear do not have an institutional place' in the Borana social system (1994:27). In order to prevent the disruption of social harmony, the Borana resolve their disputes without any delay (Bassi 2005, Dejene 2002, Tena 2007).

The institution of *jaarsummaa* handles all kinds of disputes ranging from simple quarrels to the most serious criminal cases, such as homicide. The term *jaarsa* means 'elders', and *jaarsummaa* refers to the 'process of settling disputes by elders by way of reconciliation or negotiated settlement' (Arebbha and Berhanu 2008:169). During *jaarsummaa*, the elders mainly aim to reconcile (*araara*) the parties and repair their severed relationship (Tarekgn and Hannah 2008:12). Since Borana laws do not distinguish between criminal and civil law, the judicial authority of the elders embraces all matters (Leus and Salvadori 2006). As Borbor Bule explained, disputes are resolved by the clan elders at the lowest possible level and only moved to a higher level if things cannot be settled.<sup>15</sup>

The formal dispute settlement process starts with the complainant submitting his case to the local elders. Every Borana believes that the *gaaddisa* ('shade where the elders sit') is a dwelling place of *Waaqa* (God), where only truth is spoken. As Jaatani Dida, a Borana elder, told me, for the Borana, the most detested act is lying (*soba*).<sup>16</sup> Having heard from the complainant, the elders ask the defendant to respond. The elders make sure that both parties have exhausted their submissions by asking them whether there are still things they want to add. Having obtained the required evidence, the elders discuss the facts and finally give their verdict based on the rule relevant to the case. If the defendant initially claims innocence and the evidence produced does not prove his guilt, the elders will declare his innocence. If the evidence proves the guilt of the suspect, the elders will hand out the appropriate sentence. Depending on the level at which the case was first heard, any party

<sup>15</sup> Interview, August 2013.

<sup>16</sup> Interview, August 2012.

dissatisfied with the decision may appeal to the next appropriate level, for example, the *kora gosaa* (clan assembly).<sup>17</sup>

Among the Borana, the worst sin against *Waaqa* and human beings is the intentional spilling of human blood. If a person kills or spills Borana blood, he makes himself impure (*xuraa'a*), and he will be expelled from the community to which he belongs unless cleansed through a reconciliation ritual (Bassi 1994:27). According to Waaqo Guyyo, a Borana elder, this embedded belief makes intentional killing rare among the Borana.<sup>18</sup> Borbor Bule explained that, if a homicide is committed, the common practice is that the killer will immediately report to his near relatives what has happened and go to a temporary sanctuary within his own clan, often with the clan leader. He will remain at the sanctuary until the victim's relatives are approached and the reconciliation process begins. No Borana clan will shelter anyone who has killed a fellow Borana with a view to hiding them from justice. Every Borana and every clan collaborates in discovering a killer. With the help of elders, the relatives of the offender approach the relatives of the victim asking for reconciliation, after which the elders may proceed to handling the case through Borana customary law.<sup>19</sup>

As I was told during a focus group discussions in Borana (July 2013), killers in Borana rarely deny that they have committed a crime. They usually admit their crime and ask for pardon and purification, so there is little dispute about the facts of the case. In most cases, the elders decide that the killer should pay a fixed number of heads of cattle as compensation (*gumaa*) to the victim's family. *Gumaa* is an indigenous institution that is part of the *gadaa* system used for settling blood feuds between persons, families, groups, clans and communities (Dejene 2007:59). The process of *gumaa* has ritual and material aspects. Paying compensation in the form of a fixed number of heads of cattle takes care of the material aspect of the reconciliation. Ritually, the offender provides a sheep for slaughter (*ijibbaata*), which symbolically washes away the blood of the deceased shed by the offenders' actions, and with this any feud between the parties is removed or avoided. According to my informants, the Borana have less interest in the material aspect of reconciliation and do not insist on receiving the whole amount of compensation since there is a belief that accepting the entire amount may lead to misfortune. According to Borana customary law, when a member of a clan commits a crime, his clan will pay the required compensation collectively. When the killer and the deceased belong to the same clan, there is a tradition of paying less compensation than is normally paid when the deceased and the killer belong to different clans. The Borana give

17 Summary of an FGD with Borana elders, July 2013.

18 Interview with Waaqo Guyyo, July 2013.

19 Interview, August 2013.

more weight to the ritual aspect of reconciliation, seeking a genuine apology from the offender with a view to pardoning him and restoring the disrupted harmony.<sup>20</sup>

In the rare cases where an accused refuses to admit guilt but is proved to have committed a crime, '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 *nagaya borana* is through cursing (*abaarsa*) by the *gumii gaayoo*. The *abaarsa* excludes the recalcitrant offender from receiving blessing and prayers and any social and ritual support from all Borana, and even from exchanging greetings with them. In a pastoral life where everything, including water, is collectively used and administered through the clan system, a person cannot survive alone (Bassi 2005:110).

Criminal responsibility is individualized in the formal criminal justice system but, among the Borana, the principle of collective responsibility operates. Based on this principle, when a wrong is committed, the wrongdoer's clan is collectively held liable and has the responsibility to discipline him. In such a setting, the material costs of repeated wrongdoing by a habitual offender will generally be 'too great a strain on the resource of the clan' (Driberg 1934:239). To avoid such costs, the clan will withdraw the privileges and protection that flow from clan membership if a member repeatedly commits crime.<sup>21</sup>

## The impacts of parallel justice systems with no mutual recognition

As mentioned above, both state law and customary law coexist in Borana, and both are applied not only in civil and family cases, which are supported by the Constitution, but also in criminal cases. As a rule, the police take every criminal case except upon complaint crimes<sup>22</sup> to the regular court, regardless of the preferences of the victim, the offender and the concerned community. Disagreement arises when the victim, the offender and the concerned community want their dispute to be settled out of court through customary law and the police insist that it be settled in the regular courts. In cases when the victim wants the case to be settled in the formal court, the community usually does not insist on having it resolved locally. However, since there is always a need for reconciliation under customary law, the offender may still be required to carry out the necessary conciliatory rituals and pay some compensation (*gumaa*) to the victim or their family (Pankhurst and Getachew 2008:30, Bassi 2005:209).

<sup>20</sup> Summary of an FGD with Borana elders, July 2013.

<sup>21</sup> Summary of an FGD with Borana elders in Gaayoo, August 2012.

<sup>22</sup> In an upon complaint crime, the public prosecutor institutes proceedings against the offender at the request of the injured party.

To understand the impacts of the parallel operation of the Borana indigenous justice system and the formal justice system, it is necessary to look at some actual criminal cases. The cases presented here range from serious bodily injury to homicide. They are categorized broadly into cases settled exclusively outside the regular court, which did not lead to incarceration of the wrongdoers, and cases settled by the regular court, which led to conviction and imprisonment.<sup>23</sup> Cases settled by the state court were also handled by local elders arranging reconciliation between the parties in accordance with Borana customary law.

### Cases settled outside court

The criminal cases discussed in this section were resolved exclusively through customary law. They include two cases of accidental homicide and one of serious bodily injury. In the case involving serious bodily injury, both the victim and the offender were interviewed. In the accidental homicide cases, one offender and two relatives of the victims were interviewed.

#### Case 1a: Serious bodily injury

The incident took place in Yabello town in the year 2012 as a result of a fight that broke out between two families. In that fight, Areero Dida was beaten and seriously injured by Kebede's<sup>24</sup> sons. Kebede's family members had originally came from Wollo and are Gurage and Amhara mixed ethnically (interview with Areero and W/o Yeshihune, Kebede's wife, May 2014).

According to Areero, after the beating, the police arrived at the scene and arrested Kebede. Areero's family took the case to court but, immediately after the incident, Kebede's family sent elders to Areero's family with a view to settling the case outside court through *araara* (reconciliation). In the beginning, Areero's family refused to accept the proposal, since the elders had failed to bring certain items needed when asking for forgiveness: *daraara* (tobacco used to signify a flower used for ritual purposes) and a sheep. Negotiations resumed once the elders returned with what was necessary under Borana *aadaa-seeraa*.

According to the victim, Areero, the elders from both sides wanted to know the scale of the injury he had suffered before a fair judgment and reconciliation could be made. Kebede's family took Areero to Hawassa for treatment and took respon-

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23 The cases were gathered through interviews and focus group discussions with Borana elders, convicted offenders found in Yabello Zonal Correction Centre and victims of crime or their relatives.

24 Pseudonyms.

sibility for covering all the hospital and transport expenses.<sup>25</sup> After Areero had received medical treatment at Hawassa Hospital, Kebede's family gave his family a sheep (*hoolaa buula*) to slaughter for his recuperation. After the reconciliation, the elders who had participated signed a written confirmation of the reconciliation agreement and sent it to the court (interview with Areero, May 2014). When asked about the reconciliation and its outcome, Kebede's wife<sup>26</sup> expressed her satisfaction. She stated that the court procedure could have taken a very long time and its outcome could have been much more severe. In her view, by resolving the case through *araara*, her husband not only avoided imprisonment, but a friendship with the victim's family was also established (interview with Yeshihune, May 2014). Although the offenders were ethnically, culturally and religiously different from the victim's family, they clearly emphasized the merits of Borana ways of resolving disputes. The victim was also pleased with the outcome of the reconciliation process. (Interview with Areero, May 2014)

In this case, although the parties to the dispute belonged to different cultural and ethnic groups, they both appreciated the process and outcome of settling their case out of court. Regardless of their ethnic background, the reconciliation process and the restorative outcome worked in favour of both parties: the harmony disrupted by the act of the offender was restored through the reconciliation; and the family of the offender covered all medical and other expenses thus avoiding his imprisonment.

#### Case 1b: Accidental homicide

This case took place in Areero Woreda of Borana in 2004. The perpetrator was a man called Galmo, who killed a fellow Borana, called Bona, from the Dambitu clan. The families of the two men were very close, so one day Galmo and Bona went out together in search of the wild animal that had killed and devoured three of their cows and escaped into the nearby bush. While in the bush, they spotted the animal and took cover to shoot it. Galmo thought he saw it behind a bush, and took aim and fired. Thereby, he accidentally killed Bona.

Immediately after the incident, the elders from Galmo's clan were sent to Bona's relatives. Bona's family accepted their request for *araara*, and the necessary rituals were performed. Although the offender's side was prepared to pay compensation, Bona's family declined it, as they viewed their son's death as an act of *Waaqa* (God). As such, making the offender responsible would be unjustifiable. In the meantime, the zone's police had heard about what happened and they arrested

25 The distance between Yabello and Hawassa is 298 km. Transport costs for an emergency patient are based on the agreement of the parties involved and the time taken, but are roughly between 750 and 1000 ETB (about 30–40 US Dollars at the time of the research).

26 Kebede's wife, Yeshihune (the mother of the young boys), was interviewed because Kebede was not around.

Galmo. They took him to Nagelle town and kept him under detention for more than sixty days. When the police came to the area to investigate, both families stated that, since God took the life of the deceased, there was no need for further investigation. They asked that Galmo be released, stating that the families had already reconciled. Since the police saw no point in continuing the investigation in the absence of witnesses, they set the offender free.<sup>27</sup> In the offender's view, the outcome of the *araara* process was the restoration of harmony between the two families, which was pleasing to both sides. (Summary of an interview with Galmo, May 2014)

In this particular case, the facts that the killing was purely accidental and the two families are closely related were important elements. The killing of Bona was viewed by his family as an act of God that was not intended by Galmo. With regard to unintentional killing, the Borana believe that making a person responsible for such accidental acts would anger God and result in some kind of disaster. Conversely, the Borana consider the intentional killing or spilling of human blood the most deplorable act, and believe intentional wrongdoing against another human being is a wrong committed against God. In intentionally disrupting harmony between human beings, the wrongdoer disrupts human relations with God (Summary of interview with Jaatani, August 2013).

#### Case 1c: Accidental homicide

One late evening in 2011, Teklu (who is a Borana), was driving his car at high speed towards Yabello town. Just before reaching the town, Teklu's car hit and killed Dawit (who is a Burji), who was walking back to Yabello. Immediately after the incident, elders from Teklu's side came to the deceased's family to ask for reconciliation (*araara*). Since it is against customary law to refuse *araara*, the elders' request was accepted. The two sides selected elders and formed a council to handle the matter outside the formal court. The offender took responsibility for covering all the expenses of the funeral and installing a gravestone at the burial site, and to cover the costs related to the visitors who arrived during the period of mourning.

When asked about their view of the reconciliation, Dawit's (the victim's) two sons said that *araara* mainly aimed to heal the wound caused by the act of the offender and to restore the harmony that has been disrupted by the offender's act. Because of the reconciliation, Teklu (the offender) was able to continue living with his family and avoid incarceration. Had the case been taken to court, Teklu himself and his family could have faced difficulties. The brothers stated that the reconciliation removed the feeling of insecurity and animosity between the two

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<sup>27</sup> Interview with a police officer, July 2013.

families. (Summary of an interview with Yonas and Yoseph,<sup>28</sup> sons of Dawit, May 2014)

In this case, the compensation paid by the family of the offender was limited to those expenses required to cover the expenses required for the mourning period and the building of monument on the burial site. The family did not give heads of cattle as *gumaa* as is normally the case.

All three cases discussed here were resolved through reconciliation (*araara*) between the parties involved and relatives from both sides. Where demanded, offenders genuinely apologized and paid compensation to the relatives of the deceased or to the victims for the harm they had caused. In return, they were pardoned, avoided incarceration and were reintegrated into their communities, which allowed them to live in harmony with the victim's relatives. The interviewed victims and/or their relatives acknowledged the importance of reconciliation in avoiding possible revenge and thus future conflict.

Once reconciled, the Borana are usually reluctant to appear and act as witnesses for the police. This is because appearing as a witness before a court of law and testifying against an offender is seen as disrespectful towards the elders who facilitated the reconciliation and as contrary to Borana customary law. Such a person would lose the support of their clan. Therefore, the Borana rarely act as witnesses in court after reconciliation, leaving the police unable to prove the guilt of a suspect and forced to release them.

### Cases settled inside and outside the court of law

While the above-mentioned cases dealt with bodily injury and accidental homicide and could be settled exclusively outside the law courts, the following three cases deal with homicides brought before and resolved in the law courts. All the offenders were convicted and imprisoned. In addition, reconciliation rituals were performed and compensation paid in accordance with Borana customary law.

#### Case 2a: Murder

In the year 1993, a man was killed in a fight between two men. Raji,<sup>29</sup> the brother of the victim, told me that the offender, Malicha, was charged for murder, convicted and sentenced to six years imprisonment by the court. Raji claimed that the killing of his brother, Kutu, had been intentional and therefore Malicha deserved life imprisonment. But, in the eyes of the law, the crime committed by the offender was an ordinary homicide under Article 540 of the Federal Criminal Code.

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<sup>28</sup> Pseudonyms.

<sup>29</sup> Pseudonym.

The two families also went through reconciliation, with a view to avoiding animosity and revenge. The family of the offender accordingly paid twenty-seven heads of cattle as *gumaa*. (Summary of an interview with Raji, May 2014)

Both the formal justice system and Borana customary justice system were involved in handling this case, and this led to the offender being incarcerated and his family paying compensation. The offender and his family were dissatisfied with this, as among the Borana, the total number of head of cattle to be paid as compensation for a serious crime (*qakee*) such as killing a fellow Borana is thirty (Bassi 2005:109); in accepting twenty-seven heads, the victim's family had not been particularly generous.<sup>30</sup>

#### Case 2b: Ordinary homicide

Xadacha was 56 in 2014 when I interviewed him at Yabello Correction Center. He was from Yabello Woreda Carri *kebele*. He was accused of killing a woman whose name was Lokko B., for which he was convicted and sentenced to eighteen years imprisonment. During the interview, he claimed that he did not know anything about what happened at the time of the incident. There was contention over whether he was mentally well, and he was taken to a mental hospital in Addis Ababa, where he was given some kind of medicine and declared normal. From my own observation, Xadacha had some kind of disorder affecting his speech and acts. Nevertheless, he was found guilty and incarcerated. A letter<sup>31</sup> was written from the offender's *kebele* to Borana Zone High Court stating that reconciliation had been made according to Borana customary law. The letter indicated that approximately Birr 113,000<sup>32</sup> worth of Xadacha's assets, including cattle and goats, had been paid to the deceased's family. The letter was written to the Court with a view to securing the release of the offender, who had eighteen family members to take care of. Xadacha submitted the letter from his *kebele* to the court but the release request was rejected. (Summary of an interview with Xadacha, May 2014)<sup>33</sup>

Although within the range given for ordinary homicide, the eighteen years of imprisonment – just two years short of the maximum sentence – given to Xadacha

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<sup>30</sup> Although thirty heads of cattle is the normal amount of compensation to which the family of the deceased is entitled in murder cases, they usually receive less than the fixed amount.

<sup>31</sup> This official letter Ref/No. W/B/G/C 013/06 dated Miyaziyaya 16, 2006 Ethiopian Calendar was written by the chairman of Carri Kebele, Yabello Woreda.

<sup>32</sup> This will be approximately between 4,500 and 5,000 in USD.

<sup>33</sup> Out of the more than twenty prisoners I interviewed, six claimed that reconciliation agreements were made between the families in writing, but when presented to the court to seek release, the requests were rejected (summary of interviews made with prisoners on 29 July 2013 and 12 May 2014).

show that he did not have credible extenuating circumstance to lessen the punishment. Besides, the fact that the letter from the *kebele* did not mention anything about his mental state and records that he was able to pay a large sum of compensation suggests that the community considered Xadacha to be a person of sound mind, able to take full responsibility for his criminal act.

In this case, the offender's claim that he was of an unsound mind was disregarded by both systems. Similarly, the punishments imposed on the offender indicate that both systems considered his crime to be serious. This means that with regard to intentionally committed crime, both systems impose similar sanctions.

#### Case 2c: Ordinary homicide

In 2003 in Dirre Woreda of Borana Zone, two Borana men got into a fight that ended in homicide. Huqa and Galagalo went to a deep well (*eela*) – among the pastoral Borana, water drawn from such deep wells is used for watering animals and drinking and domestic purposes. According to Kashane, Galagalo's wife, there was a disagreement during which Huqa warned Galagalo that he would kill him. On their way home from the well, Huqa waited in a roadside bush and killed Galagalo. Huqa was soon arrested, charged, found guilty of homicide and sentenced to eight years imprisonment because he had admitted his guilt (summary of an interview with Kashane, May 2014).

While Huqa was in prison, his family sent elders to the family of the deceased to make the necessary reconciliation. Huqa's family paid eighteen<sup>34</sup> heads of cattle to Galagalo's family as *gumaa*. Kashane's view regarding the punishment imposed on the offender by the court was that, since Huqa had killed Galagalo with full intention, he should have been sentenced to life imprisonment (summary of an interview with Kashane, May 2014).

In this case, the offender was convicted by a court of law for the crime he had committed. But all the same, since restoring the harmony disrupted by the criminal act was necessary, reconciliation between the two families was made and *gumaa* was paid to the family of the deceased. (Summary of an FGD with Borana elders, July 2013)

While the family of the deceased agreed to have the case dealt with in the formal court, they were dissatisfied with the length of imprisonment imposed on the offender. Arguing that that the crime was committed intentionally, they wanted the court to impose a harsher punishment on the offender. On the other hand, the compensation (*gumaa*) Huqa had to pay locally was relatively low, as he and his victim

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34 Among the Borana, the number of cattle to be paid as compensation is determined by elders who take into account the nature of crime, for example, the degree of cruelty. When it comes to the number actually received by the family of the deceased, depending on how they view the crime, the number may increase or decrease.

belonged to the same clan. Since the Borana believe the whole clan is responsible for a crime committed by its member, if a killer and the deceased belong to the same clan, the compensation is paid by their clan to the family of the deceased. If the crime was unintentional, compensation may not be received at all, or will be less.<sup>35</sup>

When one looks at the cases in both categories, the impacts of the cases settled outside the courts and those settled both inside and outside the courts are different. In the cases settled exclusively outside the court, the offenders paid only the customarily imposed sanctions and escaped incarceration. In the cases settled both inside and outside the court, the offenders were subject not only to incarceration but also to the compensation payment.

The study participants – prisoners, *gadaa* elders and justice officers – had divergent views on the parallel functioning of the two systems and their outcomes. The prisoners shared a feeling that they were victims of two competing legal systems. They maintained that the payment of *gumaa* in addition to imprisonment was an unjustifiable punishment. As mere addressees of the two normative orders, with no liberty to choose their preferred justice system, they felt powerless. They also expressed that being kept in isolation from their family caused them moral and material damage. Moreover, since compensation was paid by their families and clans, it could be seen as a kind of collective punishment and, in the prisoners' view, the cattle given as *gumaa* could instead have sustained their families while they were imprisoned and unable to take care of them.<sup>36</sup>

Borana elders blamed both the Oromia Regional State and the Federal State for failing to give some degree of recognition to their justice system. They maintained that reconciliation is user-friendlier in its process and outcome, and that, since the offender, the families from both sides and the community take part in resolving disputes, their justice system is participatory. In addition, they claimed that the material aspects of the injury are taken care of by compensation payment and the spiritual aspects needed to restore the harmony disrupted by the offender's wrongful are addressed through the reconciliation ritual. As the ritual of reconciliation requires a genuine apology, the offender is pardoned and continues to live in his community with no need for incarceration. They see their way of sanctioning as more constructive than incarceration, which has immense personal and social costs. The removal and distancing of the offender from his community for a long period of time is viewed as a vindictive measure with little socially constructive value.<sup>37</sup>

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35 See case 1b above.

36 Summary of a FGD with offenders, August 2013.

37 Summary of an FGD with elders, August 2012.

When I asked whether the Borana justice system was effective in sanctioning criminals, the elders assertively stated that their system was highly functional, as it has its own mechanisms for punishing or excluding habitual offenders from the usual protection given to law-abiding clan members. They emphasized that all Borana share and value the *nagaya borana*. Since an unruly person disrupts *nagaya borana*, no clan wants to harbour a disruptive person. Therefore, generally every clan sees to it that all its members remain law-abiding in order to avoid compensation payment. To enduringly enjoy all the privileges and support offered by the clan, every member usually respects Borana laws. If a clan member becomes a habitual offender and disruptive, the clan simply withdraws all the privileges and support of clan membership. Nowadays, elders refer cases involving such people to the formal justice system.<sup>38</sup>

Representing the perspective of the justice officers, the President of the Borana Zone Justice Bureau remarked that the relationship between the two systems was not defined and regulated properly. Owing to this, he said, both the formal criminal justice system and Borana customary justice system were settling criminal disputes, including homicide and physical bodily injury, separately on the basis of their respective laws, procedures and institutions. As I was informed by a Justice Bureau officer, some converts to new religions and some individuals living in towns are now going to court when they think that the prosecutor or the police do not have the evidence to prove their guilt.<sup>39</sup> If the prosecutor fails to prove the guilt of the offender, she/he will be acquitted.<sup>40</sup> Such individuals, one justice officer from Borana Zone High Court, said, often try to make use of both systems opportunistically.

When asked when and why, in their opinion, the Borana preferred their own customary justice system, the justice officers stated that reconciliation based on customary law was preferred in all cases of accidentally committed homicide or physical injury. This is mainly because the people are more familiar with the rules, institutions and process, and because the outcome usually satisfies both parties.<sup>41</sup> Mangasha, Taaju and Tosha, three justice officers from Borana Zone High Court, reported that the families of offenders and victims often submit written requests

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38 Summary of an FGD with elders, August 2012.

39 Individuals prefer the formal justice system not just because it is perceived as better but simply because the prosecutor may not have sufficient evidence to prove their guilt or the accused can produce false witnesses.

40 As Borbor Bule confirmed in an interview in August 2012. The prisoners also stated that there were some rich individuals who had escaped imprisonment by bribing judges or simply paying compensation (FGD with prisoners, July 2013).

41 Although some of the officers came to Borana from elsewhere, they are familiar with the Borana customary justice system (summary of interview made with justice officers, July 2013).

to the courts, asking that they accept the reconciliation made out of court, discontinue proceedings and release the offenders. In the justice officers' view, where the state law has not given the customary justice system the authority to handle criminal matters, there are no legal grounds for recognizing criminal dispute settlements made under customary laws.<sup>42</sup> The police and the public prosecutors gave the same reason for not accepting the written requests submitted to them with a view to seeking the withdrawal of cases. In short, based on the criminal law of Ethiopia, the officers stated that they had no legal authority to entertain such requests.<sup>43</sup> According to Ethiopian criminal law, a criminal case can only be dropped when there is a lack of evidence.<sup>44</sup> Thus, the only possible escape (if fortunate) from going to court, and the practice usually adopted by the Borana, is to encourage witnesses to refuse to appear or, if they are forced to appear, to withhold the necessary evidence. In such cases, the court will wait for some time before eventually closing the case file.<sup>45</sup> Although, as lawyers, the justice officers contended that their duties were to strictly adhere to the provisions of the law, some acknowledged the user-friendliness of the process and outcomes of Borana customary dispute settlement system, albeit while voicing some concern about its viability.<sup>46</sup>

In some cases the two systems overlap. For example, statements from both the families of victims and Borana elders show that, in cases of intentional homicide, they prefer the offenders to be incarcerated.<sup>47</sup> According to the elders, if those who intentionally kill others are allowed to avoid incarceration by paying *gumaa*, wealthy individuals might be encouraged to commit homicide. Because of this belief, criminals who intentionally commit homicide rarely evade court and escape incarceration, and – as seen above – victims' relatives may even express dissatisfaction with the term of imprisonment imposed by the law.<sup>48</sup>

In general, the cases presented above have shown that the Borana customary justice system recognizes the jurisdiction of the formal criminal justice system over cases of intentional homicide. In such cases, reconciliation between the families based on Borana customary law may help to create harmony. With regard to accidental or unintentional homicide, however, the lack of mutual recognition between

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42 Summary of an interview with Taaju, February 2012.

43 Summary of interviews with Tariku, a police officer in July 2013 and with Abdub, a prosecutor in May 2013).

44 Article 42 of the Ethiopian Criminal Procedure Code.

45 Summary of interviews with police officers, Tariku in 2013, Tossa in July 2013 and Taaru, July 2013.

46 Lack of resources and strong enforcement mechanisms were some of the challenges mentioned by the officers.

47 Summary of interview with elders, August 2012.

48 See cases 2a and 2c above.

the two systems is viewed as a problem, particularly where the families of the offenders and the victims settle their cases out of court and the court disregards these settlements. With regard to unintentional homicide and physical injury, the benefits and costs of totally dismissing settlements made out of court have to be properly evaluated.

## Summary and conclusion

Since Ethiopia is a society with pluralist normative orders, the Ethiopian justice system should be reflective of this reality. Yet, successive Ethiopian rulers have been reluctant to officially recognize the diverse customary justice systems, and the formal justice system continues to have exclusive control over the handling of criminal matters. However, even more than half a century after the sweeping codification that was meant to do away with normative diversity, the formal justice system still has not displaced Ethiopia's diverse customary justice systems.

The Borana community is one of many communities in Ethiopia whose customary justice system has survived, and the Borana continue to use it alongside the formal justice system, even in criminal matters. Due to its effectiveness in resolving disputes and maintaining peace and harmony, the Borana want their customary justice system to be given some degree of formal recognition and be supported by the Oromia National Regional State. They consider their justice system socially and culturally most appropriate for their distinct social setting and ask that the people's right to choose between the two systems should be extended to criminal cases, such as manslaughter (accidental homicide) and bodily injury.<sup>49</sup>

By giving limited space to the Borana customary justice system, the negative effects that result from the current lack of mutual recognition would be minimized. In addition, a reduction in the number of cases going to the courts and in the number of prisoners would ease the case backlog in the courts of law and reduce pressure on the prisons. What is more, giving some degree of recognition to the Borana customary justice system in cases of unintentional homicide and bodily injury would mean gaining the trust and support of those who want to settle such cases out of court.

Criminal justice reform would allow the Borana to resolve specified criminal disputes with Borana customary law. In order to do that, the leadership from both systems would need to work in partnership to determine the circumstances

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49 In the negotiation, they can provide for the possibility of appeal to the regular court, determine the when and how of appeal of the appeal. Even in such cases the parties' freedom to opt for justice system of their own choice has to be respected.

in which the Borana customary justice system handles cases involving accidental homicide or bodily injuries. A defined partnership between both systems could help regulate their relationship and help establish certainty around when decisions made under Borana customary law in cases of unintentional homicide or bodily injuries can be rejected or accepted by the court of law.

Through negotiation, the leadership of both systems could specify how cases can be referred from one system to the other, and determine the nature of the relationship with the police and courts. They could also determine and agree upon the circumstances under which cases in the courts of law might be diverted to the customary justice system. When there is a defined and effectively regulated relationship between the two systems, the courts of law should have no difficulty in determining the particular criminal disputes over which Borana customary law has jurisdiction.

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