



Graduate School of Development Studies

**Coping with scarcity in Northern Kenya: The Role of  
Pastoralist Borana Gada Indigenous Justice Institutions in  
Conflicts Prevention and Resolutions for Range Resources  
Managements**

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## **List of Acronyms**

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanisms
ASAL	Arid Semi-Arid Lands
AU	African Union
CEMRIDE	Centre for Minority Rights Development
FGD	Focus Group Discussions
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
NRM	Natural Resources Management
IK	Indigenous Knowledge
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UN	United Nations
VOM	Victim Offender Mediation
WHO	World Health Organization

## **Abstract**

Northern Kenya is an arid part of Kenya, inhabited by the pastoralists who traverse the vast region on seasonal migrations as they seek sufficient pasture and water for their livestock. The harsh weather conditions and the shrinking range resources base has made pastoralists inhabitants of the region go through severe hardships in their survival manoeuvres to protect their lives and that of their livestock from the threats of the drought. This survival manoeuvres has occasionally resulted in conflicts among the communities. The conflicts of late have had numerous casualties, due to proliferation of small arms and weapons from the neighbouring unstable countries like Somalia. Due to the regions marginalization most state institutions are not adequately equipped, staffed or facilitated to handle their respective service delivery to the people. In particular the judiciary is among the least developed state institutions in the region. The courts only exist at district headquarters and are poorly staffed, with cases of one magistrate being shared by two or more districts being common (personal experience). Hence the judiciary has little effect as deterrence to the perpetrators of conflict.

This study against all this odds facing the Northern Kenya region shows how the indigenous Borana community has alleviated these conflicts over the range resources through their institutions of range resources conflict management. These institutions which have checks and balances and defined division of roles have been preserved by the community and are active to this day. This is what has made their pastoralism livelihood viable and feasible despite the numerous challenges. The study further demonstrates how the justice regimes of the indigenous community appeals to their socio- political organization and demographic dynamics. Their justice system is restorative and seeks at all times to restore and repair the broken victim, offender and community relationships. The formal justice systems on the other hand is seen as alien to their value systems and does not take into account how the local pastoralist's communities understand and define crime and resolve disputes or conflicts.

This study demonstrates analytically the socio –political and socio –legal aspects that characterize the customary and formal justice institutions and shows the existence of tension between them that needs to be addressed through a legal framework that accommodates the two in one – legal pluralism. This is to allow the effective operations of customary justice systems without fear of contradicting the formal systems, and to have the customary restorative justice systems decisions of conflict resolutions and range resources management as binding upon the state.

## **Relevance to Development Studies**

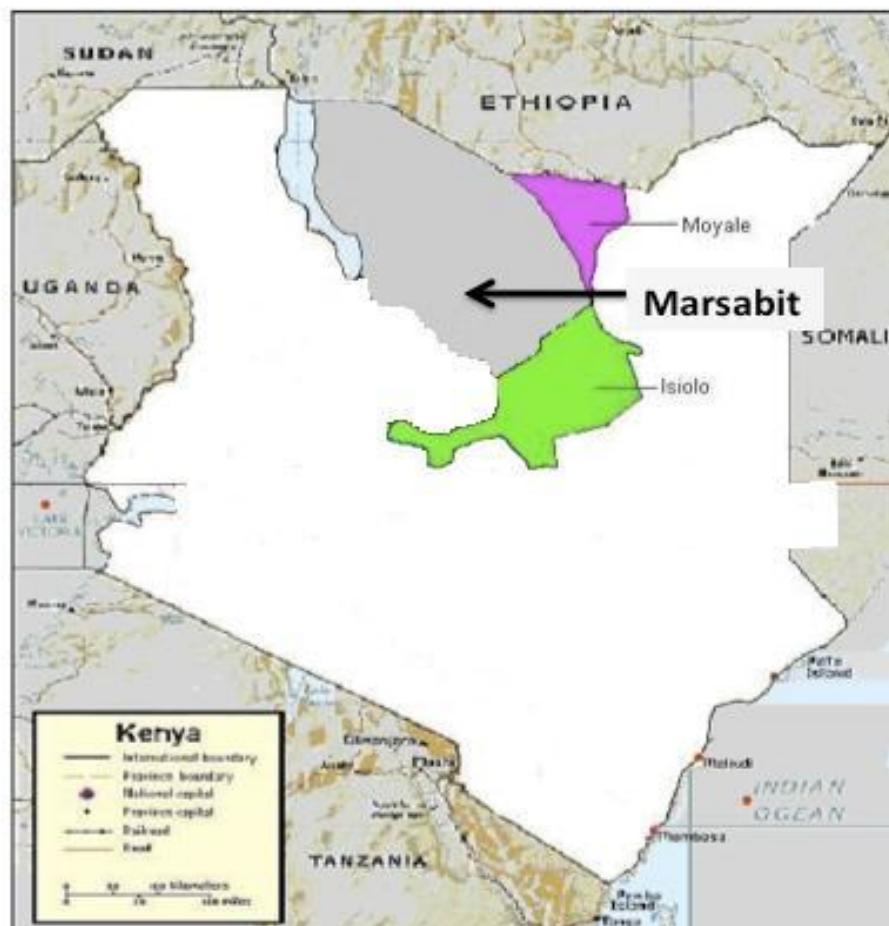
The notion of customary or traditional justice as Alternative Disputes Resolution is getting growing attention within the social – legal field of Development Studies. This study seeks to expound on this ADR, using one indigenous pastoralist community – the Borana of Northern Kenya. The study highlights how the community is using their age old justice institutions in mitigating conflicts over their shrinking range resources to ensure access and equity. Further, the study contributes to analyse the relevance of this customary justice for the community and explores the tension that might be there with the formal statutory justice systems. The paper stresses that the customary justice systems are viable and relevant for the community; only that appropriate legal framework needs to be put in place to anchor the customary decisions on conflicts resolution and management of the range resources as binding upon the state through a legal plural framework.

## **Keywords**

Indigenous people, indigenous institutions, Borana, Gada, Nagaa Borana, restorative justice, legal pluralism.

**Figure 1.1**

**Map of Kenya showing the locations of three Northern Kenya Districts of Isiolo, Marsabit and Moyale**



Source: Survey of Kenya, 2010. (Please note that the study focused on Borana as they are the dominant ethnic group. There are other pastoralists' ethnic groups in the three districts as well).

# Chapter 1 Introduction

## 1.1 Background to the research problem

Northern Kenya, the subject of this study falls in the category of the region classified as Arid and Semi – Arid Lands (ASAL) lands of Kenya. Hence, the region receives mean annual rainfall of between 200 – 450mm (Luseno et al, 2003). Due to this depressed rainfall the region experiences drought at higher frequencies which disrupts the pastoralist's livelihood. The depleted livelihoods lead to various mitigation measures, as intense competition for the scarce resources intensifies. The intense competition has led to conflicts as community fight it out to control the grazing or water points when the times gets tougher due to prolonged droughts.

The pastoralist's communities of Northern Kenya, who are identified as an indigenous people group, have fairly developed and customized traditional ways and means of coping with the harsh climatic conditions and to utilize effectively the available scarce resources, as much as it is possible within their limitations. Due to inevitable conflicts over the scarce water, pasture and land most pastoralists' communities have developed traditional ways and means of conflict prevention and resolution mechanisms. Among this is the Borana Gada systems of administrations which is the political, judicial, legal and ritual administrations of the Borana community who inhabit the 3 districts of Northern Kenya, namely Isiolo, Marsabit and Moyale (see map figure 1 of Kenya), as well as large part of Southern Ethiopia

As Waters – Bayer (1994: 9) observed, "Pastoralists make use of arid and semi-arid areas where climatic variability is large, meaning that the natural resources on which they depend are highly variable in space and time, also between years---". Hence as the range resources become scarce, competition is becoming stiffer and tensions are rising between states and communities sharing these common resources. As such a concerted effort or ways and means of addressing these conflicts before it degenerates into loss of lives and property is important.

Therefore the research problem that I want to address in this study refers to the ways and means of addressing these range resource related conflicts among the Borana of Northern Kenya through an indigenous justice systems as an 'Alternative Disputes Resolutions' (ADR). The relevance of the indigenous justice institutions to how the community understands and define crime in conflicts resolutions will be explored in relation to formal state justice systems. The study will seek to analyse the tension between customary and formal justice systems and how this will be overcome to have a legal plural framework that will accommodate both customary and formal justice systems to serve the community as an effective, relevant and reliable mediator for equitable access, and conflict resolutions over their range resources.

## 1.2 Relevance and Justifications

### 1.2.1 Personal/ Professional

In Northern Kenya ‘frontier’ districts of Isiolo, Marsabit and Moyale nearly every inhabitant in one way or another has been a victim of conflicts, banditry and cattle rustling that are rampant in the area. I know several cases of friends and relatives whose lives were cut short as a result of these conflicts. At a personal level, one recent incident comes to my mind among the many that I have experienced. In August of 2008, I received a call from family members that armed bandits have raided our cattle, which my younger brother and another man were herding. The raiders killed the other herdsman and took off with close to 75% of the cattle, but my brother managed to escape. However, in the panic and confusion of the raid, he lost his way and did not make it to the camp and spent the night in the wild. So my family thought he was either abducted or killed. I remember making a 12 hour nonstop agonizing trip from Garissa to Moyale, a distance of over 600 Kms, to help in the search and rescue. Luckily my brother managed to make it to the camp the following day. I attended the funeral of the man who was killed. As for the stolen cattle, though the suspected ethnic tribe which did the raid is known, we are yet to get them back as this was a kind of retaliatory attack against the Borana who raided their cattle and killed one of their herder just weeks before this incident.

Professionally I’m a trained water technical officer and have extensive work experience in the pastoralist’s communities of both Northern and North-Eastern Kenya. I have witnessed pastoralists sufferings during prolonged drought as water and other range resources become scarce and pastoralists resort to long distance migrations and sometimes across the borders from Kenya into Ethiopia, Somalia and vice versa. We have encountered incidences of conflicts, some extremely violent as the limited resources competition intensifies and communities make efforts to curve out survival territories of pasture and water for themselves. This study will help me to interact and engage the community as an observer and a participant in the realities of the Northern Kenya challenges.

### 1.2.2 Academic

There is no doubt that range resources play a central role in the lives of Borana pastoralists. For example, those who initiate water projects like a well or a pan, enjoy a social honour that even guarantees them some privileges in the society. They are bestowed with titles like *Aba Konfi* – literally father of the well or pan. Water, pasture and land all have an equally unifying role for the whole society, thus the Gada indigenous system has *Aada Seera Bissani* (Bassi, 2005, Legesse, 1973) - customs and laws of range resources to govern the range resources amongst the Borana and with neighbouring communities. For Borana water and other range resources also have significant ritual importance as a source and sustainer of life, hence during the ritual coffee ceremony prayer, all the water sources and the other range resources in Borana land are invoked in prayer and the divine power is beseeched to maintain peace around them. Thus

range resources are of such vital role to the fabric and harmony of the community that any form of disputes or conflict over water and other range resources have to be resolved within the shortest time possible.

While the Borana Gada systems has been studied and some literature on the same are available i.e Legesse, 1973, and 2000 G. Dahl, 1979, Bassi, 2005 and Leus, 2006, all this are anthropological records of the Gada, that generally dwell on either the judicial, legal, ritual or administrative aspects of the Borana Gada. This study approaches the aspect of the Gada that has not received much academic attention from the point of view that the Gada justice management system can effectively be applied to range resources related conflicts prevention and resolution mechanisms. Though some studies have done expositions on the Gada range resources governance institutions, no attempt has been made to argue for its relevance, particularly in relation to statutory range resources related disputes resolutions regime.

From the social, economic, ritual and territorial value of the range resources to the pastoralist communities livelihood and self-identity, this study is worthy project as it contributes to the existing literature and study on the indigenous Borana Gada governance systems.

### **1.3 Research Questions and Objectives**

#### ***1.3.1 The main research questions***

1.3.1 This study aims to make a contribution to the existing literature on indigenous Borana Gada knowledge, focusing especially on the justice aspects of the Gada system of range resources management regimes and resolutions of disputes or conflicts around the same. To realize this, the study poses one main question; How do the Borana of Northern Kenya realize justice through Gada indigenous institutions in resolutions of conflicts over range resources? The subsidiary questions are; what are the processes and procedures involved in enforcement of justice among the Borana? What are the main factors, historical and contemporary that has contributed to conflicts over range resources? What are the implications of the tension that may be there between customary and formal justice systems and how can they be overcome?

#### ***1.3.2 Research Objective***

This study aims to make contributions to the field of what has come to be conceptualized as Alternative Disputes Resolution (Kahane, D. and C, Bell. 2004:25) or Informal Justice, UNDP (2006:9), Oomen, (2005: 25) and Benda – Beckman, (1997) as Legal Pluralism. Further this study will critically examine the prospect of the Borana Gada justice system of conflict prevention and resolution for range resources disputes and realizations of justice under customary laws. The study will further seek to trace the historical and contemporary challenges faced by the pastoralists that are underlying causes of conflicts over the range resources.

## 1.4 Methodology of the Research

This is a qualitative study that makes extensive use of primary data. It is premised on Social - legal concept on how the 'indigenous justice are utilized to solve range resources conflicts, for equitable access and use. From a customary law perspective, and or what has come to be known in the current scholarly theoretical discourses as 'Alternative Dispute Resolution' (ADR). As Kahane expressed:

Given perceived deficiencies in adversarial, court-centered responses to conflict, there has been a search for forms of dispute resolution less costly in both social and economic terms. ADR denotes modes of problem solving, negotiation, conciliation, mediation, and arbitration less formalistic than conventional legal approaches to conflict, more attentive to underlying interests, and less likely to create winners and losers. (Kahane, D. and C. Bell, 2004).

The study was carried out in the Borana region of Northern Kenya which covered three districts namely; Isiolo, Marsabit and Moyale. The study focused mainly on the ethnic Borana people Gada systems as basis for the study, however it should be noted that other pastoralists group also live in this region. The study used snowballing sampling to get views from the younger elders to the senior elders. Also purposive sampling was utilized to get views from those residing in towns and those living in the villages. Semi structured interviews was conducted extensively with four elders, 2 very senior elders whom I designated senior elders A and B and 2 elders whom I designated Elders C and D. (see Annex A for all details of interviews done for the study). This was done purposely as Borana though not having a gerontocracy rulership, reveres elders as they are considered to be full of wisdom and custodians of the customary ways due to their experience of various cycles of community socio, economic, political and ritual phases.

Further semi structured interviews were conducted with 2 focus group discussions (FGD), one composed of 6 women and the other one was composed of 14 men. The women focus group discussion was done on purpose as due to cultural limitations women cannot be very expressive in the presence of men, hence a separate forum was ideal for them to fully express their views and to contribute effectively to the study. I also got an opportunity to meet and interview 3 district water officers, 3 peace committee chairmen and 4 NGO officials working with the pastoralist communities in the region. All these interviews was to back up the data I got from the elders and rural areas FGD, so as to establish if these government officials, civil society and NGO workers hold contrary views or support the indigenous justice systems of the Borana in the region.

I also did observation study as I visited 1 water well and 2 water pans – though one of the pan has dried up and there was no activity around it by the time I visited. Interestingly I encountered some local armed men at the one of the well .These are not regular police, but a village Para police popularly known as 'home guards'. I struck an informal discussion with them and they stated that they are there to provide security to the people and livestock coming to water at the well. During prolonged drought the few remaining water points

usually become very risky security areas as there is general fear of threats from other communities or even wild animals. One of the wells I visited was in Marsabit area and the guards were there to guard against the elephants that have been desperate as they have no water in the nearby Mount Marsabit forest, hence they come down to the wells, where they usually cause a lot of damage to the wells besides posing a big risk to the human and livestock dependent on the wells. To get the views of the state judicial officers on how they perceive the role of the Borana Gada customary justice institutions in conflict resolutions, I visited the Moyale district court offices, I did not get the magistrate but I managed to get a brief discussion with a senior court official concerned with the preparations of case files for civil and criminal cases that come before the court.

The study further engaged extensive literature study, especially to trace the historicity of the Northern Kenya region marginalization ‘policy’ pursued by the colonialist to the present governments that have made the communities to lose trust in the formal systems of the government and to continually embrace and rely on their indigenous systems. I should point out that in the process of the interviews attitudes and perceptions were also taken into considerations, besides the factual information to establish a narrative whether the indigenous justice institutions are still relevant, viable and vibrant in the community.

#### ***1.4.1 Difficulties and Limitations of the Study***

Among the difficulties encountered in the course of the study was the fact that the whole of Northern Kenya was experiencing serious droughts that was affecting most parts of the Horn of Africa. It was really a sad encounter when you talk to pastoralists who have lost between 80 – 90% of their livestock. To make the matters worse, you are coming to interview or talk to someone about water or other range resource when the same has lost his entire livelihood partly due to lack of the same for his livestock. Most villages I visited were depending on water tankering – this is NGO or government hired trucks or water bowsers that bring water to the villages on rotational basis. This is just for basic sustenance and hardly enough to afford any family a decent water supply requirement of minimum 15 liters per person per day (WHO). I encountered a village that gets 20 liters ration of water per family after 2 days. To be honest it was a bad time to discuss the range resources and specially water as one elder who is personally known to me told me in jest, “we only need water now, not to tell stories of how we used to manage our water, we no longer have water these days, people are scrambling for the little that is available, so young man we are not in good mood to tell tales, without water and pasture for our livestock, our lives is no longer the same” (Elder C)

Finally the interviews were conducted in the Borana local language and it was natural that the translations may lose the original deeper and richer expressions that the interviewees employed to stress or emphasize a point. This limitation was as much as possible limited as I speak the local language and did the best transcription possible, that is close to or the same as the original intentions of the speaker.

## **1.5 Organization of the paper**

The paper is organized into five chapters; the first chapter provides an overview and background to the research problem and the thesis research question. Chapter two provides a conceptual lens through which the indigenous justice institutions for conflict resolutions and range resources management can be analysed. Chapter three provides brief introductions of the Borana nation, their history, polity social organizations and resource management tenure. Chapter four based on primary and secondary data begins the in depth analysis of research findings with detailed narrative analysis around the main arguments of indigenous justice dispensation and the tensions between the formal and customary justice systems. The concluding chapter five answers the research question and offers reflections for the study highlighting the main argument in reference to research questions.

# **Chapter 2: Conceptualizing indigenous justice as ‘Alternative Disputes Resolution’ and how it is mobilised**

*Indigenous justice systems are based on a holistic philosophy. Law is a way of life and justice is a part of life process. (Ada Pecos Melton, 1995).*

## **2.1 Introduction**

This research seeks to understand how indigenous justice system is applied to ensure just and equitable distribution and management of the scarce range resources through timely resolutions of conflicts around them. Also the study will examine how the community frames, claims and realizes justice through the existing indigenous institutional set up. To do this, it is imperative that a framework for analysis that serves as a lens through which the indigenous justice systems processes and procedures in range resource distribution and management can be viewed and analysed. The following theoretical concepts are discussed; various definition and concepts of being indigenous, the theorization of institutions, restorative justice and legal pluralism all in relation to range resources management and how conflict around them are resolved. Please note that in this study range resources or natural resources are limited to water, pasture and land. (See Annex C)

## **2.2 Indigenous people defined**

The current Indigenous people’s discourses mostly fronted by UN according to Sally Merry frames them as nothing more than “Noble primitive close to the nature” (1996:69). These however, are people group or communities who identify themselves as indigenous and “demand recognition and protection of their fundamental rights in accordance with their culture, traditions and way of life” (ILO 169: 1989)

So far there is no universal consensus on the definition of the term “indigenous peoples”, however there are general criteria or special dynamics that can be used to determine or identify indigenous peoples, in order to ‘isolate’ them for the purposes of helping them frame, claim and realize their human rights within their realities. Since there is no generally agreed definition of the indigenous people, some consensus on what constitutes indigenous people have received some form of agreement among human rights groups. For example, the Kenya National Commission on Human Rights ( KNCHR) and an organization called Centre for Minority Rights Development ( CEMIRIDE), through a popular consultative forums among the indigenous communities of Kenya developed the following criteria that was purposed to help the indigenous communities in framing of their human rights discourse, this are:

Having a sense of collectivity /solidarity/belonging, Claiming rights to ancestral land in collectivity/common originality, Practicing and retaining cultural lifestyle, Retaining traditional institutions and social organizations, Depending on natural resources in their respective territories, Suffering exclusion and discrimination from and by mainstream systems, Possessing unique or common religion and spirituality and Utilizing unique means of livelihood and traditional occupation. (KNCHR/CEMIRIDE, 2006:4).

This unique circumstances of the indigenous people leads to a biased policy choice where the main means of indigenous peoples livelihood such as hunting and gathering and nomadic pastoralism “are looked down upon, putting their future survival and development in serious jeopardy” ( UN Special Rapporteur, Kenya- Para. 17). Indigenous people world over also lack adequate recognition before the law like other dominant community, as a result of which they continuously suffer from extreme forms of subjugation, marginalization and discrimination. This unequal treatment and discrimination suffered by the indigenous peoples according to the UN Rapporteur on indigenous peoples to Kenya, exacerbated by the fact that they are seen as “reluctant to assimilate and adopt modernity” (ibid: 22 -24)

From the characteristics criteria of the indigenous peoples group quoted above, we see a people with special attachment to their traditions and cultures, though more often than not, the dominant groups have negatively stereotyped this attachment and used it as an avenue for discriminations against them. Although the ILO convention 169, preamble calls for the indigenous peoples to be able to “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, language and religions within the framework of the states in which they live”, there is little evidence that shows the states have been keen to promote the indigenous peoples rights to exercise their self –determinations to their ways of life including traditions and customs.

However, as Gaventa ( 2002:5) pointed out the realities of differential power relations among communities to claim their rights will always disadvantage the less powerful, like the indigenous people as a report by African Peer Review Mechanisms pointed out, Most state laws does not or is doing very little to gear their respective laws, state directives and policies to correct the historical and prevailing marginalization, “against certain geographically and ethnically aligned communities that were left out of the mainstream development processes”( APRM 2006: 47).

By their resilience and sheer will power, indigenous people continued to influence the world agenda which climaxed in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted in the year 2007. Article 11 of the declaration – affirms “the rights of indigenous peoples to be free to realize and live their cultural traditions, which includes their rights to protect, develop and maintain “past, present and future manifestations of their cultures”. (UNDRIP, Art. 11)

It is still too early to say whether this declaration has improved the social, economic and political welfare of the indigenous peoples around the world, however understanding who the indigenous people are, how they perceive

themselves and the challenges they face is a very important concept that will inform this study.

### **2.3 Theorizing Indigenous Institutions for range resources management**

In communities prone to conflict, especially over the basic common resources in this case water, pasture and land, there are institutions that play critical role in managing this common resources as well as dispensing of justice where necessary for sustainable development and livelihoods. According to (Chambers, 1997, Crew and Harrison 1998), there is no problem with development just because of lack in technical know-how, but lack of institutional capacity as well. Hence the 'local organizational capacity' (Harris, 1997) has been identified as the missing link. Focus is of late shifting to understanding how institutions inter-link and there inter-relationships from the local, regional and national institutions (Leach, 1999). Further Watson, (2001: 3) argues that "Institutions are organizations, but they also include the rules and regulations that determine access to natural resources. They define the access that a group has to natural resources and they also define who has the rights within the group."

Institutions are not static; hence they change to both societal and environmental changes. As such institutions are dynamic and have the ability and potential to act upon and change or shape behaviour, while on the same breath individual actions and behaviour does shape the institutions within socially and mutually accepted or agreeable limits. As pointed out by (Leach *et al*, 1997), "the institutions into which a person is born and through which he or she lives and understands the world constitute that person, but at the same time the person is able to work and change the nature of these institutions". Institutions are pervasive and can influence different facets of social interactions, actions and organization, hence creating discourses for each 'realm of social action'. However, it is a fact that these discourses will be different as different people will have their discourses exercised differently, which more often than not has elements of competition. As Leach *et al* pointed out, "social actors do not exist outside of discourses but it is through discourses that they practise and experience reality" (1997: 36)

The control and domination of discourses by a social group over another group creates unequal power relations and makes the group that controls the discourse dominant over the other. This attained dominance affords the dominant group what I would call 'acquired legitimacy' that makes the group feel privileged to meet their desire to help themselves to the resources of the dominated groups.

Monique Nuijten in her discussions of the concept of power relations in the institutions introduces a concept she refers to as 'force field', according to her this "refers to a more structural forms of power relations which are shaped around the access to and use of specific resources" (2005: 2). To clarify further her argument of this 'force field' concept Nuijten goes deeper and suggests a thorough scrutiny of the existing structures within the socio-political context for informed decision making on ways and means of improving the same.

In order to analyse power relations in natural resources management, one should first of all come to grips with existing forms of organizing around the use and distribution of the resources, whether these be informal or formal, or ‘well organized’ or a ‘mess’. The ultimate aim of such a study is to understand the logics of these forms of organizing in the specific socio –political context and to examine existing power relations. Only when we understand the logic of existing situations, can we think about ways to improve the management around natural resources (2005:2)

However, power in reality is a complex issue for any institution as it breeds elements of what Barume (2001) calls ‘hegemony’ or domination unless proper checks and balances are put in place to ensure that the relational aspect of power is not in favour of particular people group. May be the solution to this ‘hegemony’ that power will eventually breed can be found in the work of Maarten Bavinck, who in one of his studies of concepts of institutional governance talks of ‘Interactive governance’ (2008:3), - as the term suggests, this concept places emphasis on interaction where governance become interactive and engages all facets of the governed. These interactions engage the actors – who Bavinck defines as “any social unit possessing agency or power of action” and structures “frameworks within which these actors operate” (ibid: 3).

Understanding and operationalization of indigenous institutions actors and structures of natural resources management can bring about local community empowerment and development that is sustainable. The study will analyse the justice institutions involved in conflict prevention and resolutions in range resources management from the actors and structures perspectives.

## **2.4 Restorative Justice Perspective in range resources conflict resolutions**

Restorative justice is a more victim centred justice system that seeks to restore victims as well as restoring offenders and restoring community (Braithwaite, J. 1996). In recent times there have been growing scholarly movements that is advocating for the Alternative Dispute Resolutions, this includes the Victim Offender Mediation (VOM) and the increased interest in informal disputes resolution and neighbourhood justice (Bazemore, 1996, 1998).

Restorative justice theory can also be viewed as “an overarching paradigm of public problem solving, citizen participation and collective responsibilities for building stronger communities” (Clear and Korp, 1999). Restorative justice generally, though having varied conceptualization depending on the cultures and traditions has a common meeting point, which is how people think about crime and respond differently to it, against the conventional formal court systems. In describing the focus of restorative justice, Zehr state that:

Restorative justice focuses on harm caused by offenders by seeking to repair harm to victims and communities and reducing future harm by preventing crime. Restorative justice requires offenders to take responsibility for their actions and for the harm those actions have caused. It seeks redress for victims, reparation by offenders, and reintegration of both within the

community as communities and government achieve restorative justice through a cooperative effort. (1990: 48).

Thus restorative justice allows for direct participation of offenders in the process of justice and holding them accountable so as to guide them to take responsibility for their actions that will lead to the repair of harm done to the community and victim. As such the focus of restorative justice is on 'communities and victims needs' and 'offender's obligations'. The process of restorative justice is obviously participatory and as Lemley, puts it, "Seeks to maximize information, dialogues and mutual agreement between victims, offenders and communities" (2001:46). Further restorative justice looks at the greater good of the society through an orientation that is future focussed – the offenders harm is balanced with "making things right" (Zehr, 1990), and through reconciliation and reintegration, the offender is restored back to the society.

The 'formal' justice through the courts, on the other hand is popularly seen to be of 'retributive' justice, it is punitive and its aim is to make offenders suffer as much as the victim if not more. The offender's accountability is to the state and not to the offended –victim or the larger community as is the case with restorative justice. Ada Melton in emphasising this difference between 'restorative' indigenous and 'retributive' formal justice points out that:

The retributive philosophy holds that because the victim has suffered, the criminal should suffer as well. It is premised on the notion that criminals are wicked people who are responsible for their actions and deserve to be punished. Punishment is used to appease the victim, to satisfy society's desire for revenge, and to reconcile the offender to the community by paying a debt to society. It does not offer a reduction in future crime or reparation to victims. (2004: 126)

On the other hand indigenous restorative justice working model is for problems to be addressed in its entirety. In case conflicts come up, under restorative justice there is no fragmentation or compartmentalizing of the case into "pre –adjudication, pre-trial, adjudication and sentencing stages" (Melton, 2004). Restorative justice sees this as hindrance to conflict resolutions and restoration of offenders, victim, community harmony and relationships. The justice process considers all factors that brought about the problem and the solutions to the problem to ensure justice becomes participatory as everyone affected is involved. "This distributive aspect generalizes individual misconduct or criminal behaviour to the offender's wider kin group; hence it is a wider sharing of blame and guilt. The offender along with his or her kinsmen are held accountable and responsible for correcting behaviour and repairing relationships" (ibid, 1989).

The study will analyse the indigenous justice regime from the restorative justice perspectives and how it is experienced in the community as they manage conflicts over their range resources.

## 2.5 Legal Pluralism framework perspectives for indigenous peoples range resource ownership and claim

A situation where different legal systems work or co-exist in the same geographical area is referred to as 'Legal Pluralism' (Pimentel, 2010). Other legal scholars (Merry 1988, Von Benda – Beckmann et al, 1997; Spiertz, 2000; Griffith, 1986) see legal pluralism as a legal alternative that "explicitly recognizes that multiple and normative frameworks co-exists". Legal pluralism recognizes several legislations including "National legislation, religious and customary laws, development project rules, and unwritten local norms that may all address who should get a resource from which sources and for what purposes" (Meinzen-Dick, and Randolph 2001:3) from this statement we appreciate the fact that legal pluralism accommodates a set of legal frameworks within which resources can be accessed and claimed proportionately. Other Natural Resources Management scholars like Jesse Ribot, call for "Decentralization" (2008) of judicial systems to have room for 'Alternative Disputes Resolution' mechanisms.

Barbara Oomen, (2005) who has done extensive research on the roles of chiefs and customs in contemporary South Africa, points out that among the surprises of the late 20th Century is the emerging reality that states are no longer a monolithic sites of 'uniformisation', but rather of 'organization' of diversity, where there is recognition of plurality as having a substantive role in the state. This is what Oomen (2005) calls "The myth of the mirror – The idea that the law of the state should and need reflect the diversity of culture and the alternative existence of governance and law expressed in terms of cultural differences still dominates the academic and political thinking on the legal recognition of cultural diversity as it did in the past" (2005: 22). It is indeed a reality that most indigenous communities are regaining their consciousness and demanding recognition for self-determination especially after the declarations of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007. Article 3 of this declaration reads; "Indigenous people have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments" (UNDRIP, 2007). But the important question remains, what does this self-determination entails? Daes in Barume sees this self-determination as the ability of the indigenous people to exercise control over their lives – though within a particular state jurisprudence,

[There is an] urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality. ... [B]ecause of the profound relationship that indigenous peoples have to their lands, territories and resources, there is need for a *different conceptual framework* (emphasis mine) to understand this relationship and a need for recognition of cultural differences that exist. Indigenous people have urged the world community to attach positive value to this distinct relationship, Daes (in Barume 2001: 102).

This ‘different conceptual framework’ Daes is alluding to in the above quote may point to the ‘legal pluralism’ as this is the avenue through which indigenous communities are able to exercise their customary laws.

Finally from the foregoing discussions there is a clear line of argument that indicates no state is holding the monopoly of ‘rights’ or ‘justice’ on its own term, but there is need for the states to recognize existence of customary laws and readiness to negotiate with the natural resources dependent communities as their framing, claiming and realizing justice over this resources derives legitimacy from their customs and traditions over and above the state statutory laws, not in a contradictory way but complimentary. This is legal pluralism in action. This legal pluralism discourse will provide the basis upon which the study will base its analysis of field data within the other analysis framework discussed above.

## 2.6 Summary

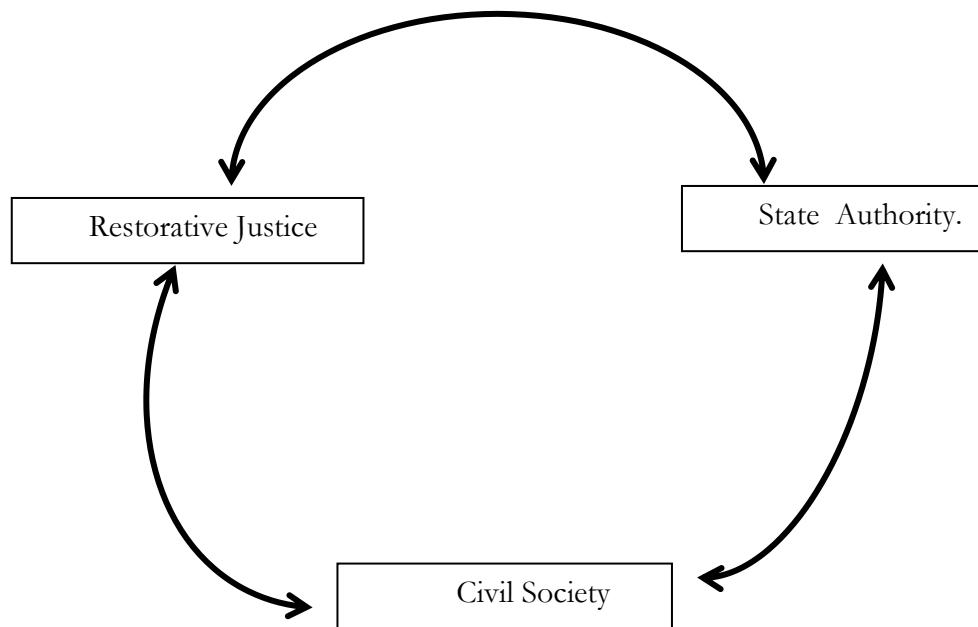
From the analysis framework above there is lively scholarly debate that is seeking to understand and appreciate the significant roles of the indigenous justice institutions in managing the range resources and conflicts that may arise around them. Extensive theorizations of legal plural framework that seeks to recognize the restorative justice of the customary ways in determining access and equitable range resources utilizations has been expounded by prominent range resources and various legal scholars.

This paper applies in its analysis these theorizations of legal plural concepts of range resources management and conflicts resolutions around them through the customary indigenous justice systems. These include among others: Oomen’s (2005) “the myth of the mirror” that the law of the state needs to reflect the diversity of the culture and alternative existence of cultural laws, Merry, 1988; Von Benda – Beckman, 1997 and Pimentel, 2010 ‘Legal Pluralisms’ that different legal systems in this case (formal state and informal customary) “can work or co –exist in the same geographical area, hence customary courts and customary laws can be effective guardians of traditions and rule of law and human rights in an atmosphere of mutual respect and recognitions of one another”. My analysis will also be based on Ribot’s (2008) ‘Decentralizations’ theory in the context of which the local disputes resolutions mechanism are “designed not to replace the formal judiciary but to supplement the judiciary effort” in governance of the environment and natural resources. Ribot also makes an important point that will help in the realization of this ‘Decentralization’ in that he calls for the support of NGO’s, donors and communities to support the ‘Decentralization’ process as ‘Alternative Disputes Resolutions’. This idea is equally supported by scholars like Melton, 2006 Van Ness, 1996; Zehr, 1990; and Benjamin, 2008, who recognize the role of various stakeholders in helping realizations of justice not only through formal state judiciary but also through alternative customary justice systems as well.

Finally, to overcome the tensions that may arise between indigenous justice as restorative and formal state justice the study applies Braithwaite and Strang (2001) theory of what they call ‘virtuous circle’ – “restorative justice needs state authority to prevent powerful fractions of the state from destroying

restorative justice, so that a virtuous circle of restorative justice, civil society and state authority is created" (2001: 9). As illustrated in Fig. 2 below, Restorative Justice taken positively supports the state and civil society initiatives to have harmonious society and sustainable range resources management.

**Figure 2.1: A 'virtuous circle' where restorative justice supports civil society and state authority**



Source: Braithwaite, J and H. Strang (2001) Restorative Justice and Civil Society, pg.10.

After these discussions of framework for analysis through the indigenous people defined, the theorizations of institutions, the restorative justice and the legal pluralism, the next chapter will introduce the Borana, their polity and discuss historical and contemporary challenges that they face as pastoralists that is underlying causes of conflicts in the region. There has been dispossession and appropriation of pastoralists range lands as according to the constitution of Kenya, the land is under 'Trust Land' Act (Cap 288) meaning the communal ownership the pastoralists hold on to is not recognized. This dispossession leads to shrinking resource base that in hard times like drought leads to conflicts over the range resources.

# **Chapter 3**

## **The Borana Nation – Pastoralism, Polity and the Socio – Political Context of the Range Resources Management tenure**

### **3.1 Introduction**

This chapter discusses the general introduction of the Borana and their ways of operationalizing their institutions. The chapter forms a discourse basis for the analysis of the research findings. Northern Kenya conflict over range resources has a historical dimension which has largely remained uncorrected to this day by successive governments of Kenya. Besides, there are also emerging challenges from local entrepreneurs and rich western aristocrats who are being allocated huge swathes of pastoralist's lands for private development, where wild animals are fenced in and used for sports and tourism against the pastoralist's wishes. The chapter also underscores how an indigenous community has resorted to their age old justice institutions to ensure that in the absence of effective formal justice regimes that regulates rule of law in their region, they uphold and revitalize their systems to have justice in equitable allocations and use of the scarce range resources, by resolutions of conflicts over the same through their indigenous justice systems.

### **3.2 The Borana**

The Borana are part of the larger Oromo speaking people of Ethiopia. Oromo is one of the most populous language groups in Africa. (Legesse, 2000, Bassi, 2005). The Oromo community who inhabit Ethiopia predominantly are considered among the largest and the most widespread “ethnic groups in Africa and are estimated to number between 25 -30 million people” (Doyo, 2009: 40). The Borana live to the South of the main ‘Oromia’ land in Ethiopia as well as in the Northern part of Kenya, ‘straddling the borders between the two countries’. In Southern Ethiopia, the Borana number over 500,000 while in Kenya they are over 300,000 people. Borana have two general moiety division known as Sabbo and Gonna, where Sabbo has three sub moieties and Gonna has 14 sub moieties (See annex A for the clan under each moieties). While the Borana generally co –exist as a unit irrespective of whether you are a Sabbo or Gonna, the only restriction is inter marriage from the same moiety is not allowed. Hence, Sabbo marries from Gonna and vice versa. The general community unity and pattern of life is ordered along the rules and regulations of the Gada system of administration, which has a structured chain of command with *Aba Gada* – literally father of the Gada at the top.

Every Gada remains in office for a formal eight years after which they are to hand over to the incoming Gada officials through a formal handing over ritual ceremony. “The scholars of Oromo history and ethnography have placed

a great premium on the Borana as the repository of the ‘gada’ system’ In contemporary Oromo, political, social and cultural dispensation, the concept of the Gada plays the central role as an indigenous and egalitarian form of democracy” (ibid: 16).

During the scramble for Africa by the colonialists in the 1890’s, the Borana land was divided between the British East African Protectorate (later Kenya) and the Abyssinian Empire (later Ethiopia) (ibid: 16) The Kenya Borana currently occupy the upper part of the Eastern Province to the North of the country and occupy three districts namely; Isiolo, Marsabit and Moyale. This partition of course did not come or happen without consequences to the unity, harmony, polity, and psych of the Borana nation.

### **3.2 Pastoralists and the challenges to pastoralism**

Pastoralists according to the available records have been in Kenya from the third millennia BC (ibid: 27). There was huge social diversity, where different communities of different cultures developed dominance over particular regional niches. At present pastoralists occupy most of the 80% of Kenya’s total dry lands, alternatively called – Arid and Semi –Arid Lands (ASAL’s). Further, the pastoralists are 20% of Kenya’s national populations. (ASAL, 2007) “Like other indigenous populations across the globe, the pastoralists share land and utilize kinship ties for mutual social solidarity. Pastoralists are generally defined as people who rely heavily on production of domestic herds, whose sustainability is based on mobility and the availability of pasture and water” (Doyo 2009: 28)

Below I discuss briefly the historical consequences of the Borana encounter with the colonialism and also the current challenges the pastoralists are facing after which the Borana range resources management regimes are discussed. The purpose of this is that, in the process of interacting with the community and especially the senior elders and my own personal experience and readings of various literature on Northern Kenya, including a KNCHR report of the 2000, that was titled the ‘Forgotten People’, there is a link between what happened in the past and what is being experienced at the moment. The current lack of development and marginalization is indeed a historical incident that has been perpetuated to date. Left with minimal government interventions the community resorted to preserve their indigenous institutions to govern and manage their socio, economic and political lifestyle to cope with the realities of their circumstances.

#### ***3.2.1 The historical challenges that inform the present***

There was evidence that Borana rose to have some dominance in the South of Ethiopia and Northern Kenya, which by early 19th Century was a borderless land, where the pastoralists roamed freely, (Leys, 1924: 103). To this rise to power beginning of 19th Century, Bassi (2005: 6) states that; “They created a network of alliances with other pastoral groups – the Gabra, Sakuye, Garii, Ajjur and Wardaha – over which the Borana held a position of hegemony”

This hegemony was not to last long as at the second half of the 19th century, three colonial powers came on the scene of Borana land. The Italians from the East, the British from the South, and the Abyssinians from the North. As Schlee points out;

In Northern Kenya the domination of the Borana who had been under pressure from the westward advance of Somali groups from the second half of the 19th Century, ended with British colonization which was roughly contemporary with the military annexation of Borana territory by Ethiopia. The imposition of colonial order made possible in both Kenya and in Ethiopia by the use of fire arms and the consequent division of the Borana of Kenya and those of Ethiopia made it impossible for the Borana to resist and defend their territories.”(Schlee 1989:47)

Further observation was made by an American traveller, who was among the first non-British to traverse Borana region - Dr. Donaldson Smith, who made a scathing remarks against the British “For allowing Ethiopians and Italians to unleash havoc in the Borana land” ( Huxley, E. 1935: 39). The British directives that the Borana should not use mounted horses in war fare to check the encroachment of their land resources really put Borana at a disadvantage against their expanding enemies. (Doyo: 2009).

When the British and Ethiopians (Abyssinians) signed the partition agreement between themselves, the now weakened Borana were not even consulted, but there was a guarantee that Borana on both sides of the borders should have unfettered access to either side of the border to access the range resources as need may arise. This agreement was not to live long as the Ethiopians “flouted the spirit of the agreement by stopping Borana from the British side to access pasture and water on the opposite side” ( Oba G, 1996: 42) These restrictions of course had a devastating impact on the perpetually held communal social networks and shared resources among the Borana. Doyo in commenting on this scenario states that:

Access to resources was the bedrock of their livestock based economy, which in turn was the source of livelihoods. The partition of the community under the Ethiopia and British territorial superstructure altered their resource governing system, as the decision no longer resided with them. The acclaimed territorial powers affected the local institutions and governance systems, especially weakening the responses to such issues as conflict between antagonistic ethnic groups. (2008: 42).

The advent of colonialist in the Borana region led to proliferation of arms, which began to play a critical role in determining who controls what in the region. The Borana were not able to get access to ‘modern’ weaponry until much later due to the skewed colonial policies against them. However, from the quote above we realize that this situation set in motion a kind of ‘armed race’, as every community in the Northern region realized the power of the ‘modern weaponry’, to determine who gets the best or most of the ‘commons’ resource, that is the range resource of the Borana land.

This sad historical precedent planted the seed of discord among the pastoralist of Northern Kenya, who ever since have come to be identified with war fare and conflict over access to range land resources – land, pasture,

saltlicks and water instead of the harmonious dialogue based mutual co-existence that was in place before the advent of the colonialists – Abyssinians in Ethiopia side, Italians on Somali side and British in the Kenya side. This rather unfortunate policy choice by the colonialist for the pastoralist communities of Northern Kenya is what made the American writer James Negley Farson, who made a maiden journey through the Northern Kenya region to state rather succinctly that the region is “One half of Kenya about which the other half knows nothing and seems to care even less” (Farson J.N, 1950: 260)

### ***3.2.2 Contemporary challenges that perpetuates the past***

Pastoralists are generally defined as people who rely heavily on production of domestic herds, whose sustainability is based on mobility and the availability of pasture and water (Doyo 2009: 28) Though the pastoralists lands exhibit such main features, that is; receives little rains, has high evapo transpirations, vegetation is sparse and soils are shallow – nevertheless it is suited for livestock production, which includes cows, shoats, camels, donkeys and supports huge wildlife populations.

A geographer who carried out pastoral areas survey, points out the obvious, by stating that this harsh climatic conditions have not stopped those keen to exploit the resources of the pastoralists dry lands. He comments that; “In spite of the harshness and ecological limitations, this drylands are now the destination of substantial stream of migration” (B, Frank 1985: 62).

In Northern Kenya, this phenomenon has already been witnessed in Isiolo and Marsabit area where the remnants of former colonial settlers rich and powerful western and European aristocrats are hiving off huge chunks of pastoralists lands and turning them into private ranches or the so called ‘conservancy’ – where wildlife is fenced in for sports and tourism. These lands once given out are formalized through registrations, while the pastoral lands are left without any form of identifications or regulations as it ‘does not belong’ to ‘anyone’. The taking of these pastoralists’ lands is in connivance between the aristocrats, the state or local authorities. Hence as the pastoralists lands shrinks so is the already limited resources of pasture and water. So, this uncontrolled ‘taking over’ of the pastoralists lands has a very negative impact on the mainstay of the pastoralists as it seriously jeopardizes the production systems of the community, as livestock depends on the ‘extensive grazing of native pasture’ ( Doyo, 32) and range water sources.

Elliot Fratkin, in describing the prevailing circumstances in pastoral regions of the world state that; “Pastoralists societies face more threats to their way of life now more than any previous time. Population growth , loss of herding lands to private farms, ranches, game parks and urban areas, increased commoditization of livestock economy, outmigration by poor pastoralists , and period dislocation brought about by drought, famine and civil war are increasing in pastoralists region of the world” ( 1997:246).

However what Eliot Fratkin, did not point out or over looked is the fact that these threats he mentioned will obviously have an impact on the social cohesion of the pastoralists community, their way of life, their way of

interacting, the kinship and above all their way of dispensing justice and handling of emerging issues. These challenges are very real; hence a strong indigenous institution is required to manage the shrinking resource base if pastoralism is to remain a viable enterprise. Hence the Borana of Northern Kenya and Southern Ethiopia have preserved their Gada resource management institutions which as Doyo observed is “ a long history of preservation of cultural and social systems within which communal resources were governed” (Doyo, 14).

After this introductory chapter to the Borana, their polity and institutions for range resources management, the next chapter continues to expound on the analysis of the field data on how the Borana manage the conflicts over their range resources through their indigenous justice institutions.

# **Chapter 4**

## **Realizing Justice through customary laws; Embracing Opportunities and Overcoming Tensions through Legal Pluralism**

*Laws and justice are part of the fabric of community, however, justice not only envelopes the individual and society, but also resides within the individual. - (Buckley, 2006).*

### **4.1 Introduction**

This chapter focus on in-depth study findings analysis by extensively expounding on the conceptualizations and realization of justice among the Borana. The study through FGD and interviews with senior elders and other informants formed a narrative from their narrated experiences on how justice is dispensed, regulated and what factors make the community to rely on their indigenous justice over the formal judiciary. The policy and legal tensions that are there between state and customary systems are analysed and 'Legal Plural' framework comes out as an alternative that connects the two systems. Through the theory of 'Virtuous Circle' customary restorative justice contrary to conventional thinking is actually a support to state authority and civil society in conflict resolutions and management of the pastoralists range resources, once proper 'Decentralization' of justice systems is done.

Please note that the terms indigenous, customary, informal, restorative and Alternative Disputes Resolutions (ADR) are used interchangeably to refer to Borana Gada traditional justice regime, while formal, statutory, judicial, state are also used interchangeably to refer to official Kenya systems of justice.

### **4.2 Relevance of Indigenous institutions for range resources management and conflict resolutions**

Indigenous institutions play a crucial role in shaping community identity, values and norms. Institutions are not only organizations within a society, but also rules, regulations and positions that determine who gets 'what, when and how'. To determine if community systems are effective it is good starting point to determine the organizations around the institutions that shape the community. According to Leach et al., institutions are broadly defined as practises and all structures that "influence who has access to and control over what resources, and arbitrate contested resource claims" (1999:226). Further Watson argues that indigenous institutions include "organizations, conventional knowledge, 'regularized practises', customary rules and practises" (2003: 289).

There is increasing appreciation of the role of the indigenous institutions previously seen as retrogressive and of insignificant contributions to the 'modern' development practises or processes including the judicial systems. Development practitioners and policy makers are coming to make sense of

what Citchley (2008) called 'Indigenous Knowledge' (IK), which according to (Chambers, 1997), is "risk minimizing, sustainable and adapted to precarious micro –environments." Customary rules have been effective in ensuring equity for the society at all levels including those who are perceived as vulnerable in the society unlike the modern day structures where power relations determines who gets 'what, when and how'.

Indigenous institutions that include the Gada Borana, continue to be popular among especially the communities that consider themselves as being marginalized due to their small populations or attachments to their traditional systems. These institutions have served the community well and gave them identity and ability to overcome and manage their socio – economic, cultural, ritual and political challenges. These are the reasons why Warren et al., sees these indigenous organizations as; "a ready- made set of power structures that enable a group of people to organize themselves to take decisions, to enforce regulations and to resolve conflicts" (1995). The Borana of Northern Kenya and Southern Ethiopia have common institutions that govern them as a nation. The difference of the two government's political systems seems to have very little effect on the way they have organized themselves at least on the management of their natural resources and conflict resolutions structures. Gada institutions provides for the Borana what Uphoff summarizes as "a universe of experience that could provide many valuable lessons for mobilizing and sustaining collective action for self –help and self – management in the modern world" ( 1996: 8)

#### **4.2.1 Administrative and social units institutions of the Borana**

The Borana have defined distinct administrative and social units. These units help the community to assign important communal roles like, range resources governance, security, ritual performances and disputes and conflict resolutions. The institutions are structured in such a way that they are represented from the lowest social unit - *Olla* to the highest pan Borana assembly – *The Gummi Gayyo*. Generally as Doyo, sums it "The defining features of Borana range management institutions are indigenous knowledge, equitable access, and decentralisation of governance, principles of subsidiarity, distributive and redistributive mechanisms and environmental sustainability" (2009: 33)

Watson in summarizing the role of key administrative and social institutions or units in range resources management and conflict resolutions observes that:

The *abbaa Gadaa* is seen as the figurehead of the whole of Boran, and is often described as the President. As well as performing rituals, matters are referred to him and his council when a decision cannot be reached at a lower level. When conflict breaks out between *olla*'s (the smallest unit of settlement consisting of 30 to 100 *warraas* households) or *arrrdaas* (small group of *ollaas*, usually two or three only, who may cooperate together on their grazing pattern), or *maddaas* (area surrounding one water source), then the *abbaa Gadaa* will rule on the case. If there is conflict between ethnic groups, then he will be called in to help make peace. As the *abbaa Gadaa* is responsible for dealing with matters of concern to the Boran, and as matters of concern are

often related to access to the resources (water, land, and forests), the *abbaa Gadaa* is the highest level of institution of natural resources management in Borana.(2001:13 )

As much as I agree with Watson, in her observation, I however, disagree that the highest level of institution in resource management is the *Aba Gadaa*. I confirmed this with the Senior Elders, A and B respondents who confirmed that the highest institution of Borana in all aspects of social, political, economic and ritual affairs is the *Gummi Gayyo*. This is a Pan Borana 8 year cycle assembly that has the mandate to amend and make new rules and laws that become binding upon all Borana. The *Aba Gadaa* himself is subject to *Gummi Gayyo* as the assembly has authority to subject his leadership to scrutiny and hand down verdict as necessary. As Wako who is Borana himself and literature professor at a Kenyan University pointed out in elaborating on the role of *Gummi Gayyo*:

This assembly of multitudes *Gummi Gayo* is vested with the powers of legislature, undertakes law reforms, reiterates old laws and enacts new ones. Convened by high –ranking gada officials, the assembly serves as a dominant authority uniting the Borana into a political and social entity. Noted for its freedom of expression and attendance, the assembly tends to curb the excesses of all members, be they high and mighty or lowly and ordinary. Persistent disputes, which were unsettled for their gravity or complexity, are brought before an open air court for the community to contribute their wisdom towards its solution. (1997:647 -648).

However as Arsano pointed out in most cases:

The Borana handle the issue of justice at various levels. Issues may also vary from breach of smallest taboo to serious offences. Cases are usually settled by clan elders at two levels; *Qae Millo* (lineage level court) and *Qea goossa* (clan level court). With the exception of a few, most cases are not taken beyond clan level courts... (1997: 45).

This administrative and social institutions are linked from the lowest to the highest through an elaborate inter clan and *Gonna/ Sabbo* Moiety relationship and mutual inter dependence systems.

Borana do regulate their justice institutions to ensure that at all times credible elders are the ones adjudicating over the cases that may arise. Also all Borana are equal before the Gada laws irrespective of once position in the community, as Bassi Reports “The *Aba Gada* himself is subject to the same punishment as all other Borana if he violates the laws; same laws, same punishments. This is the evidence that shows us that the law is above everybody including the *Aba Gada*” (2005: 200). For the elders who engage in forms of malpractices that compromises the resolutions of cases, they face a form of punishment referred to as *Murra Harka Fuudhani* or *Buqissu*. This is like impeaching and once this punishment is declared on someone he will no longer adjudicate over any case. According to Wako:

The term *Buqissu* is not without serious imports. In Borana not only is the culprit concerned impeached and barred from holding any public office but this punishment is extended to his offspring. For this reason, leaders desist

from any form of immorality as conventionally deemed by the culture; corruption in public office, unorthodox marriages, un procedural wife inheritance of dead relatives, defiance to elders and sex related misconducts. (1997: 650).

An example of how *Murra Harkafuudhani* or *Bugissu* is declared or decreed on errant public official or elder as recorded by Bassi (2000) is as follows:

<i>Eella hinmurin</i>	Make no decision about well
<i>Haara hinmurin</i>	Make no decision about dams. (Pans)
<i>Biyya mandubattan</i>	Call no meetings of communities.
<i>Daaba ilma –niti hinmurin</i>	Make no decision about welfare of women and Children.
<i>Daaba buusa gonofa hinmurin</i>	Make no decision about the welfare and protection of clansmen <sup>1</sup>

This severe punishment for errant officials is to ensure that morally upright elders and officials are the ones who adjudicate cases as they set a good example and represent the ideals of virtue that uphold the aspirations of all Borana to be at peace in a just and secure environment. The importance of the community, family, clan and water as a resources and by extension pasture and land can be discerned from this decree, as to be denied any decision making power or judicial authority over this social units and resources is to be completely cut off from the affairs of the community.

### **4.3 Customary indigenous justice is communally realized**

The underlying principle of indigenous justice is that it is communally realized, it is reparative and restorative.

#### ***4.3.1 The Reparative aspect of indigenous justice***

*Wallaala kenna, ka wallaallen kenna!* (The offender is ours and the offended is ours) These were the words of one of my respondents Elder C, when I wanted to know from him why the community still trusts more there indigenous justice institutions than the formal justice systems. What he meant was that in case of conflicts, disputes or any form of disharmony in the community, the perpetrator and the victim are still part of the community and they have a right to benefit from the social support that the community structure affords any member of the community, until the case is settled and appropriate reparation or restitution is instituted through the customary justice systems.

When conflict occurs that needs arbitration of elder's parties, the defence and the claimant have to be present for the case to proceed to trial. The only

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<sup>1</sup> Marco Bassi, 2000.

exception according to the elders is where women are involved; they are not supposed to be present if the woman is married. Her husband automatically assumes all responsibilities on her behalf, but if her husband is dead and she is not under any levirate marriage and has no grown up sons who have assumed age of responsibility, then she is allowed to represent herself. All the disputes resolution cases always begins and ends with a prayer, where the senior most elder invokes the divine – *Waq* – God to bless the meeting and guide the elders to reach amicable and just verdict.

After the deliberations and all sides have given their side of the cause of the disputes or conflict, the elders after extensive interrogations of both parties to establish and understand circumstances around the case, issue their verdict and the guilty party is informed accordingly and urged to accept the guilt by actual verbatim affirmations. As Allot, et al observed “The case of Borana confirms a situation common in customary law, where the determination of wrong must be arrived at to the satisfaction of both parties and the public with redressive measures, which however occur after the admission of guilt” (in Bassi, 2005: 213). This verbal admission of guilt is the starting point of the justice process as the claimant is assured that at least he/ she has received justice by the offender affirming his/her guilt – *Wallaalla*. This phase of the proceeding is so important that the case cannot proceed to the next stage until guilt is acknowledged by the party found guilty by the court of elders or officials. As Melton rightly observed:

Verbal accountability by the offender and the offender's family is essential to express remorse to the victim and the victim's family. Face-to-face exchange of apology and forgiveness empowers victims to confront their offenders and convey their pain and anguish. Offenders are forced to be accountable for their behaviour, to face the people whom they have hurt, to explain themselves, to ask forgiveness, and to take full responsibility for making amends. Observing and hearing the apology enables the victim and family to discern its sincerity and move toward forgiveness and healing. Forgiveness is strongly suggested, but not essential for the victim to begin healing. (2006)

After the offenders affirmation of guilt and verbalizing the same, the elders now decide the appropriate restitution for the verdict, which is usually in form of livestock. These fines are imposed on the guilty mostly as per *Addaa Serra*- Custom and laws of the Borana and mostly it turns out symbolic as when the guilty party becomes truly remorseful and pleads for forgiveness and makes genuine effort to reach out to the offended victim and the larger family and clan, they can easily forgive and even decline from collecting the fine imposed on the offender. The logic of all this is that according to the Elders:

As much as we do not encourage conflicts in our midst, we also are not encouraging people to collect fine from one another whenever it is handed down to the offender, we usually prefer forgiveness, as that is what will create genuine bonding of the society and maintain the *Nagaa Borana*,- *the peace* as per our culture it is better to forgive and foster relationships than collect a fine. Usually after the offender is forgiven, he can as gratitude voluntarily give a cow or a goat or anything he considers valuable even after 5 years, to the person he offended because of the forgiveness he received when he was

found guilty. Also because as a community we are all interdependent and even if we disagree today we would definitely need each other in the near future, hence there is need to maintain a relationship even after very serious conflicts" ( Senior Elder B)

The community values such initiatives "Because crime is viewed as a result of a breakdown in social bonds that link individuals and communities and is, in addition a cause of a further weakening in these bonds, the justice response to crime at the community level must also involve citizens and community groups in repairing damaged relationships or building new relationships" (Van Ness et al, 1989). Crime does cause more than just breaking of relationships, more often it also causes harm to the victim and this too must be dealt with in a way that will also take care of this harm caused to the victim "if the crime is in fact about harm, justice cannot be achieved simply by punishing or treating offenders. Rather justice process must promote repair or an attempt to heal the wound crime causes" (Ibid; 1989). The Borana basis for their justice is their culture, which all Borana are expected to uphold and cherish as it is the foundation of the society and it gives them their identity as a people group. In stressing the importance of culture, Braithwaite, J. aptly sums it; "Cultures value repair of damage to our persons and property, security, dignity, empowerment, deliberative democracy, harmony based on a sense of justice and social support. They are universals because they are all vital to our emotional survival as human beings and vital to the possibility of surviving without constant fear of violence". (2006:64).

Finally the Borana value the reparative aspect of their indigenous justice as the idea they have of it is in line with how Melton explained its principles:

Reparative principles refer to the process of making things right for oneself and those affected by the offender's behaviour. To repair relationships, it is essential for the offender to make amends through apology, asking forgiveness, making restitution, and engaging in acts that demonstrate a sincerity to make things right. The communal aspect allows for crime to be viewed as a natural human error that requires corrective intervention by families and elders or tribal leaders. Thus, offenders remain an integral part of the community because of their important role in defining the boundaries of appropriate and inappropriate behaviour and the consequences associated with misconduct. (2006).

The two FGD discussions of men and women variously in narrating or explaining the relevance of the customary justice, point out the fact that unlike in the formal courts systems, the offender does not have to be jailed and locked away from his/her responsibilities as a parent or other duties. But still remains part of the community after he/ she is fined or forgiven and continues with life as member of the community.

#### ***4.3.2 The Restorative Aspect of the Indigenous Justice***

According to Lemley and Russell ( 2002), "Restorative justice is a relatively new paradigm that is gaining increasing support from criminal justice practionaires and the attention of researchers" while as a 'policy paradigm' it

may be new, especially to the states, that are rediscovering the significance of the restorative justice, in some cases mostly to ‘decongest the prisons due to costs of keeping misdemeanour offenders in prison’( *ibid*, 2002), restorative justice has been a way of life for traditional and indigenous societies around the world for centuries, in resolving conflicts and crime in their midst to maintain communal cohesion and harmony.

The retributive systems usually associated with the formal justice systems sees crime as offence against the state and “the state has an active role in ameliorating the effects of crime and its causes through incapacitation, deterrence and retribution. Offenders have a passive, defensive role, with victims and communities generally playing no direct or active role” (Lemley and Russell, 2002) on the other hand, “Restorative justice, views crime as an offense against people and relationships and an offence creates an obligation to make things right” (Zehr, 1990). Restorative justice engages actively the offender, the victim and the community to have participatory solutions to the crime and have joint – communal understanding of the obligations of the crime. This participatory approach is meant to address “reparations for victims from offenders and reintegration of both within the community” (Van Ness, 1996; Zehr, 1990), through mediation that helps foment reconciliation between the victim, offenders and the community. “The community had an interests in and responsibility for addressing wrongs and punishing offenders. Offenders and their families were required to settle accounts with victims and their families” (Lemley and Russell, 2002). As such the overall purpose of seeking restorative justice in the community is through “vindication and reparations to restore a disunited community” (Van Ness and Strong, 1997).

The Borana as a community value the structure of their relationships and continued cohesion of the wider community, hence any form of threat to the *Nagaa Borana* is dealt with amicably and jointly as a community through a reparative and restorative justice, which according to Bazemore and Walgrave is “an overarching paradigm of public problem solving, citizen participation and a collective responsibility for building stronger communities” (1999). According to the formal justice systems, the verdict of imposing a monetary fine or committing to jail sentence of the guilty serves only to remove the criminal from the society for a while or the fine imposed will be deterrence for future criminal activities. However this may “appease the victim, but it is not clear how it benefits and heals the victim or the community... retribution whether it is monetary or otherwise, lacks a rehabilitative quality and fails to address the pain and suffering of the victim that was inflicted on them by the perpetrators” (Buckley, 2006: 14). It is interesting that some western countries are also beginning to see some value in the restorative justice systems as the formal retributive systems which are deemed to be ‘correctional’ may in fact not actually be yielding these desired corrections of the offenders. Thus some scholars are calling for considerations of these customary indigenous justice systems:

In American society, there is no remorse. Remorse appears to be left to the victims and their families. A civil judgment is paid and business goes on; a punishment is meted and the remorseless criminal ferments his hatred in prison for years. How the remorselessness and the victimization collectively

affect America is something worthy of exploration. emphas[is] on group unity, reconciliation of individuals or groups, and peaceful reintegration into the community. This process aims to achieve a “return to social harmony.” (Shinn, 2005).

The return to ‘social harmony’ Shinn refers to is what the indigenous institutions have sought to maintain through their restorative justice system, which sought to reintegrate and restore the offender back into the community, through consensus, admission of guilt and apology. The restorative justice ensured that the offender, the victim and community are all engaged so that the mutual cohesion is restored, while at the same time the offender has been made to accept guilt. Restorative justice also ensured that the burden of shame and guilt is shared among the community and the victim suffering and pain also becomes a communal pain:

In contrast to the one – dimensional focus on punishment or treatment, restorative justice is best served when there is a balanced response to the needs of citizens, offenders and victims. It is based on the assumption that basic multiple community expectations - to feel safe and secure, to ensure that crime is sanctioned and to allow for offenders to be reintegrated – cannot be effectively achieved by an insular focus on the needs and risk presented by offenders. Rather, to meet these needs and repair the harm crime causes, victim, community and offender must be viewed as clients of the justice systems and must be involved meaningfully as co participants in a holistic justice process. ( Zehr, 1990)

Finally the customary indigenous justice as a communal system that seeks to maintain mutual coexistence in the society does not just let the offender free after his apologies or payment of imposed fines. But checks and balances are put in place to ensure that the offender is integrated and as much as possible desists from committing the crime again. “For the offender, restorative justice requires accountability in the form of obligations to repair the harm to individual victims and victimized communities and it provides opportunities for the offender to develop new competencies, social skills and the capacity to avoid future crime” ( Bazemore, 1996). Every adult man and woman of the community is expected to at least have knowledge of what has potential to disrupt *Nagaa Borana* and desist from the same or seek amicable redress before engaging in acts that violates the customary norms. As one tribal judge recounts, “we would involve different elements of our society—the chief, the warrior societies, the families, the clan, the medicine man, and so on—in the resolution of the problem. Laws were not made by an institution such as a legislative body but by the normative power of the entire society. Each individual knew what was prohibited...” ( Vicenti, 1995).

According to the Senior Elder A, the checks and balances of the customary justice include the fact that repeated offences can lead one to be banished from the Borana. This is to be cut off from society if one has proved to be deviant and is not working towards promotion of *Nagaa Borana*. The consequences of the banishment can be very severe in that, this deviance trait in one person will affect the entire clan lineage of the offender as they have to live with the embrassement, shame and guilt of the deviant, hence compromising integrity of so many people related to or close to him/her. Thus it becomes the

responsibility of every responsible Borana to make sure that at all times the offender does not get back to the crime again.

#### **4.4 Tensions between customary justice systems and formal statutory systems of justice**

This section continues the study analysis and will focus on the tensions that are apparent between the customary justice and formal statutory conceptions of justice and how these conceptions have affected policy choices of the states towards the indigenous people. The analysis also on the basis of secondary data and interviews with the study respondent's analysis what middle ground or a balance between the two justice institutions can be there that can be navigated to promote a 'legal pluralism' that serves to promote the interests and aspirations of the indigenous people while at the same time meeting the state's constitutional thresholds of rule of law that applies to all citizens of the state.

##### ***4.4.1 Some government policy choices are in tension with indigenous customary ways***

How the state conceives the indigenous people has direct correlation to the policy choices they make to improve their welfare and provide legal framework that guarantees them the entitlements of being citizen within their particular realities. However the reality is that all the conventions and treaties at international, regional and national levels as concerning the indigenous people may just be 'the paradox of empty promises' ( Hafner and Tsutsui in Morgan 2007: 109). Though the approach may be changing of late, the government and even some development organizations have been working to change the ways of the indigenous lifestyle, their socio –economic dynamics to conform to what has been considered a 'progressive modern' culture. The enforcers of this 'modern' culture see the indigenous ways as not being in tandem with the times, hence there is not adequate legal frameworks that identifies who this indigenous people are and what legal frameworks will serve there circumstances better. It was this lack of legal recognition that made an East African Pastoralists representative before a UN Working Group on indigenous populations in May 2000, to sum up the general lack of recognition of pastoralist property and ways of livelihood:

In our societies the land and natural resources are the means of livelihood, the media of cultural and spiritual integrity for the entire community as opposed to individual appropriation. The process of alienation of our land and its resources was launched by European colonial authorities at the beginning of this century and has been carried on to date after the attainment of national independence. Our cultures and ways of life are viewed as outmoded, inimical to national pride and a hindrance to progress. (In Parkipuny, 1997: 46)

For any development policy to be meaningful, it has to begin with the understanding of who the indigenous people are, what are their aspirations and values and how these value systems can be integrated into the state

development policies that is not necessarily counterproductive to these values that indigenous people cherish. It is lack of appreciation and understanding of this indigenous dynamics that make the unpopular impressions that indigenous people are opposed to development or any meaningful progress and are occupied with the preservations of status quo. While in fact the indigenous want a development that identifies and addresses their peculiarities as Seton observed:

Indigenous nations do not simply oppose modernization or progress. Instead, they assert the right to define and pursue development and progress in a manner compatible with their own cultural contexts. They champion the right to choose the scale and terms of their interaction with other cultures. In order to achieve and secure cultural, political and economic rights, sovereignty and self-determination ... have become some of the most important values sought by the international movement of indigenous nations. (1999).

The international movement Kathy Seton refers to above have made at least the awareness of indigenous peoples plight to reach the international stage which was climaxed by the ratifications of the Declarations on the Rights of Indigenous Peoples ( UNDRIP) in 2007. This declaration has spurred other major regional and national frameworks for indigenous people's rights recognitions, though of course the reality on the actual operationalization of the treaties and conventions is debatable. Though the states may not actually be translating the rights of the indigenous peoples as they should, an encouraging development is that the indigenous people have become self – conscious and are demanding the recognition of their customary ways and appropriate development designed on those understanding. This is what was described by Oomen as, "It was an era which saw the new global systems described as 'a culture of cultures', in which culture – cast in rights discourse – became the prime language in which a multifarious mix of sub and trans – national polities took on the nation –state and saw its demands for 'group rights' and 'cultural rights' met by it". (2005: 21) She goes ahead to qualify her observation by stating that,

Of late there is an increasing consciousness of the tribal people, first nations – others say indigenous peoples, chiefdoms, unrepresented people or even minority nations asserting their claims to have 'sovereignty' in the exercise and expression of their own culture, language, and chieftainship. Most of the states and at least the democratic states are responding to them. (ibid: 21)

Kenya in her new constitution of 2010, recognized for the first time the protection of the 'minorities and marginalized' people, a term that Kenya prefers to use to refer to the 'indigenous people'. Article 56 of the new constitution states that:

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups— (a) participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure. (Constitution of Kenya, 2010; Art. 56).

One thing that this article still does not seem to address is the issue concerning claim to property which for the ‘minority and marginalized’ people includes the natural resources. Granted that every progressive constitution has to guarantee the property of citizens, however the collective rights that is the understanding of indigenous people’s property ownership is not included. As Makoloo stated “Most of the laws in Kenya are modelled to allow individual claim but not collective rights yet group identity is an essential feature of the indigenous identity” (2005: 20). These are the issues that cause tension as policies based on this understanding will obviously contradict the tenets of communal obligations and ownership claim principles of indigenous peoples.

Just like any other indigenous people group the Northern Kenya Borana “... don’t see two legal codes at all. The ‘customary’ legal framework is not seen as law at all, but as a way of life, how people live — State Law on the other hand is something imposed and foreign. ... It is remote, in a foreign language and has little to do with most people’s lives ... Legal pluralism isn’t about different laws — it’s about a different world view.” (J. Adoko and S. Levine, 2009:102). This different ‘world views’ is the cause of the tension and it is the one that makes the indigenous communities feel some government interventions are more of an interference than a form of solutions to their problems. An example is the range management tenure, while the government considers the land a ‘Trust Land’ and can thus appropriate it at will, for the community it is their rightful inheritance over which they should have unchallenged rights and claim as their Communal NRM regimes are based on “rights that are transformed through social rather than legal mechanisms, the legitimacy of which is rooted in tradition rather than legal statute” (Grigsby, 2002:152).

The other contentious range resource based policy that really surprised them when I brought it to the attention of the FGD just to get their reaction was the section 3 of the Water Act 2002. The Act in an apparent lack of appreciation or considerations of different understanding and conceptualizations of ownership concept, that almost all rural Kenya community and especially the indigenous communities ascribe to, bestows the ownership of the water to the state and the right to use water in the minister, (Mumma, 2005:22). Granted that water is a scarce commodity in Northern Kenya, it is however a very emotive issue due to the cultural significance attached to water and the fact that pastoralist life literally revolves around water. To control water just like anywhere else in the world is to wield immense power between life and death. This subject generated a lot of debate in the 2 FGD. One woman in the female FGD retorted “How can someone sit in Nairobi and claim the right to manage all the water?” (FGD 1) In the second FGD of men, one man pointed out rather amusingly “let the minister come here and say all the water of the wells and pans are mine, we shall ask him where he was when our fore fathers fought to defend this wells” (FGD,2)

Granted that some of this statements from the FGD, point to some limited understanding and ignorance of what exactly is the legal meaning and implications of the ‘The right to use water from any water resource is vested in the Minister’ statement, it nevertheless shows how the community perceive any form of imposed legislations that attempt to deprive or challenge their rightful

ownership and claim. Such arbitrary legislation without the input of the local communities is the causes of conflicts as observed by Constantinos:

Conflicts also arise when local traditional practises are no longer viewed as legitimate or consistent with national policies or when entities external to a community are able to pursue their interests, while ignoring the needs and requirements of local people. In the conflicts that ensue often between parties of very uneven power, it is not only the environment that suffers but also the whole society. (Constantinos, 1999: 24)

Finally the process and procedures of justice too is conceptualized differently, hence a possible source of tension with the indigenous people. “Because one of the principle objectives of customary justice systems is governance rather than dispute resolution, they do not administer justice through a specialized system of rules, but as part of a process where politics, law and other factors blend in ways that would be unthinkable in a state court”. (AU: 23). This position is true for the Gada indigenous justice where elements of divine intervention and preservation of *Nagaa Borana* is among the key principle reasons why the disputes or conflicts have to be resolved as soon as possible, but the severity of the case or the harm caused to the victim is often of secondary importance. This is obviously a position that any statutory court will challenge.

What I have discussed in this section is an analysis of how the state has failed to understand the identity, uniqueness and socio –political dynamics of the indigenous peoples, hence formulations of policies that contradicts their unique ways of life. The state has to engage them meaningful in any developmental interventions to reduce the chances of tensions that may arise so as to make the indigenous customary justice systems of conflicts resolutions and range resources management relevant and meaningful to their self-identity as a nation.

#### **4.4.2 Legal Framework Tensions**

Following the above section analysis that highlighted the tensions that may arise due to state policy choices that may not adequately represent the indigenous customary ways, the study will now narrow down to what has actually informed the study; the possibility of indigenous justice institution functioning within the formal statutory justice regimes. The answer to this can be yes and no, this must be baffling as the law is not supposed to be ambiguous. The reality however is that whether the formal statutory systems accommodate the indigenous justice systems or not, they are both very active and operational. So this section intends to bring the two together, analyse the common aspirations, the divergent points and how to marry the two to have a balanced middle ground approach that accommodates both formal and indigenous systems to address the special circumstances of the indigenous people without compromising the importance of the national legal frameworks to them.

For a start, there has been a form of failure by the states to understand the dynamics of the indigenous people of Northern Kenya and their pastoralism ways of livelihood. These failures to understand their ways is mostly behind the

formulation of policies and legislation that is often in conflict with their customary ways. The misunderstanding started with the colonialist as the African Union policy paper on pastoralism reported;

Pastoral development policy in British colonies, mainly Kenya, was influenced by the widely held view that pastoralism using communal rangelands was inefficient, with low productivity, and perceived environmental degradation. Thus, a sedentary life was imposed on pastoral communities, confined on permanent rangelands where they were supposed to benefit from public services more easily. Pastoralists were stripped of their property rights on large portions of rangelands, which were given to the British colonial administration for ranching. These negative views on pastoralism were misguided but proved to be remarkably persistent, with apparently unproductive pastoral land still being appropriated up to the modern day. (AU, 2010: 13 -14).

For the Northern Kenya Borana this lack of recognition of their customary ways of governing and managing their resources and specially conflict resolutions is coupled with lack of development in the region, as pointed out by Chopra: “The state apparatus in the region is weak and largely unable to prevent, respond to or resolve these conflicts. In particular, judicial institutions lack the capacity to try perpetrators and the presence of courts has little deterrent effect. The most prevalent problem which undermines their work is the failure of official laws and legal processes to reflect an understanding of the local population in defining crimes and resolving conflicts.” (2008:12). The understanding of what constitutes a crime and how it should be adjudicated within a particular society is an important basis for effective justice. But when “Legal framework treats all acts of violence as crimes against the state, and by doing so gives minimal attention to the needs and conceptions of justice that the victim or victims have”( *ibid*: 32), then the understanding and conceptualizations of justice by the indigenous people is obviously not taken into account.

This apparent lack of inclusive legal frameworks goes against the local understanding of justice and how they execute the same through their customary ways. This has of course occasionally led to a collision with the state laws as “The state promulgates laws that are not compatible with local livelihood patterns and practices, while simultaneously rendering many of those practices illegal. Caught between what is authorized by the state and what is necessary to survive, local resource managers continue to do what they perceive as necessary, yet they are exposed to state repression or predation.” (Benjamin 2008: 2256). This scenario described by Benjamin plays itself in the Northern Kenya region, where the land which the community claim to have rightful ancestral rights over has been placed under ‘Trust Land’ legislation and the government has the sole authority to appropriate it at will without consultations of the locals.

The judiciary official with whom I had brief discussion confirmed as much to me when he stated that:

If the community uses their customary systems to resolve conflicts and determine how to utilize their range resources we do not interfere, but if the

case comes to the court, we follow the spirit and letter of the law to determine the case. We do not have provisions to refer cases to customary elder's courts. However, we have had occasions where the parties agree to withdraw the case after pressure from clan members or elders to have the case withdrawn from the court so as to settle them through their customary ways, which we do not object unless the crime involved is of serious security threat ( Moyale, Judicial official )

The NGO's and civil society actors in the region on the other hand support the customary justice systems and see it as a sustainable and more relevant conflict resolutions regime that sufficiently represents the communities conceptualizations of justice that serves as efficient and cheaper Alternative Disputes Resolutions options for them.

#### ***4.4.3 Easing the Legal frameworks Tensions- towards a balanced legal plural approach***

Among the Borana of Northern Kenya, there is still active reliance on the customary means of conflict resolutions and preventions. The customary justice regime enjoys much support and trust of the community than the formal justice systems. At the men and women FGD, I posed questions on what are some of the reasons that are making them still rely on their customary means to claim justice in case of disputes or conflicts. Among the reasons given are; that the formal courts process is alien to them, is not easily accessible, they don't understand the language and ways of the courts, it is time consuming and very expensive, it is subject to corruption and justice can be compromised by the highest bidder, we have our elders who resolve cases hence going to court is undermining our institutions and finally the courts don't help to restore the broken relationships, the jailing of the offender make the situation even worse as it can cause more suffering to the family of the jailed person. One woman from the female FGD, gave an example of a bread winner man who is jailed and paused "the sufferings of the children and family because of the bread winner serving jail term, will be blamed on the person who took him to court" ( FGD, 1).

From this situation, we see a community who will look up to their customary justice institutions for a long while to come as the conceptualization of justice by the two systems are radically different as observed by Melton in giving reasons why indigenous community in the America may not embrace the formal justice soon:

Conversion to the American justice paradigm is a difficult choice for tribes, particularly those with a functional indigenous justice system. For many, full conversion is not possible because the indigenous justice paradigm is too powerful to abandon. The strong adversarial features of the American justice paradigm will always conflict with the communal nature of most tribes. For this reason, the inherent restorative and reparative features of the indigenous justice paradigm will continue to be more appealing to the majority of tribal people. (2006)

Both formal and customary justice are serving their respective constituents well depending on how each conceptualize justice, hence there is need for both

to accommodate one another and co-exist for necessity. It is to bridge this challenges that scholars have proposed different approach that will help ease the tension between the two frameworks and allow co-existence. Different theorization on 'Legal Pluralism' (Pimentel, 2010 Von -Beckaman, 2001) 'Decentralization' (Ribot, Benjamin), 'Nesting' (Ostrom, 1990) have all been debated upon so as to have a legal framework that accommodates both of this to help in realizations of justice and management of natural resources.

There are of course challenges to the validity of legal pluralism, it is not to be assumed that it has gained acceptance across all the states of the world, though definitely progress is being made to make this recognition a reality – especially after the adoption of the UNDRIP in 2007. To stress this challenges to the 'legal pluralism', Pimentel points out that "--- the reform and development winds are blowing against them, particularly on what have become non-negotiable issues of human rights and rule of law" (2010:36). Almost on the same note as Pimentel, a legal pluralist scholar Von Benda – Beckman raises a very important concern to set in motion a discussion among the legal academia:

In my view, the crucial issue in discussions about legal pluralism, and the one distinguishing it from the common discussions over the concept of law, is whether or not one is prepared to admit at the conceptual level the theoretical possibility of more than one legal order, based on different sources of ultimate validity and maintained by forms of organization other than the state, within one political organization (Benda-Beckmann 1997).

As if in response to Von Benda –Beckman concern, Pimentel while rooting for 'limited judicial enforcement of constitutional guarantees' for customary laws argues that; "Legal pluralism regime, customary courts and customary law can become guardians not only of traditional culture, but also of human rights and rule of law principles. And they will be all the more effective in this later enterprise because the systems are home-grown, culturally appropriate and embraced by the communities they serve" (2010:36). At times of course the reality may be different as conflict between the state law and indigenous customary law do occur especially when it comes to rights over natural resources allocations. In such circumstances, Benjamin, E. offers a compromise when he suggests that "From this perspective, apparent incompatibility of state law and customary law is not sterile; individuals and communities regularly navigate the space between them and find workable solutions" (2008: 2265)

For indigenous communities to be fully in charge of their local resources and management NRM scholar, Jesse Ribot proposes a concept of 'Decentralization' as he believes that this decentralization serves well as a form of 'Alternative Disputes Resolution' in resources management. Though, he is of the idea that this ADR institution is to be only an 'alternative' but not to replace the central government judicial systems.

Local dispute-resolution mechanisms, accessible courts, and Channels of appeal outside of the government agencies involved are needed to facilitate a smooth transition from central management to decentralized systems of environmental governance. Setting up official adjudication systems is the

responsibility of central government. Alternative dispute resolution mechanisms designed to supplement, but not replace, a fair judiciary can also be enabled by central government and supported by communities, donors, and NGOs ...." (Ribot, 2008: 2256)

There is need for mutual co-operation and understanding to create linkages between the statutory and customary institutions that will create a synergy between the state institutions and local populations. This synergy will eventually lead to improved effectiveness of the natural resources management (NRM), which will eventually address the gender, ethnicity and social status based inequalities in terms of framing, claiming and realizing justice for access and utilization of the range resource.

The study has shown that the Borana of Northern Kenya have continued to depend on their customary systems for dispensation of justice and it has served them well. The formal justice system of the state, in this case Kenya need to engage this customary justice institution constructively and meaningfully to provide a formal recognition framework for it, so that its decisions on resources management tenure and conflict resolutions are binding upon the state or any other party.

Finally the ideal engagement of the two justice systems through Legal Pluralism is because to use the words of Pimentel:

legal pluralism continues to offer great promise, both for the preservation of cultural values and institutions, and ultimately for the establishment of the rule of law, but only if the indigenous legal systems can be engaged in a spirit of mutual respect ... customary law can and will evolve, not through amendment - the way western law is changed, but influence from both inside and outside the community. This flexibility should be embraced not extinguished (2010: 36).

This engagement proposed by Pimentel is to foster a working relationship between the two legal systems. Failure to bridge this relationship gaps will undermine the roles of the two legal systems in discharging their respective justice dispensations as "The unresolved relationship between rule systems with different sources of legitimacy—legal pluralism—undermines both the authority of nascent local governments and the performance of customary institutions. The manner in which legal pluralism is resolved plays a central role in shaping state-society and human-environment dynamics that emerge from decentralization" (Benjamin, 2008: 2256).

The concluding chapter will summarize all key arguments of the study and answer the research question that informed the study.

## Chapter Five: Conclusion

*"Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws." (Plato in Buckley, K. 2006:9).*

This study sought to answer the question; how do the Borana of Northern Kenya realize justice through Gada indigenous institutions in resolutions of conflicts over range resources? The study has shown that conflicts over range resources among the pastoralists of Northern Kenya has historical and contemporary dimensions of policies that has contributed to shrinking range resource base. This has led to conflicts becoming more frequent as competition among the communities intensifies. In the absence of efficient government services including the judicial services in the region, the Borana community has continued to rely on their age old indigenous institutions in resolving conflicts over the scarce range resources. The indigenous justice institution ensures restorative justice is dispensed timely and in ways that are acceptable and understandable to the community. The justice institutions have checks and balances, where disputes can go from lower level lineage or clan courts to the highest possible level the *Gummi Gayyo*, where the highest official, the *Aba Gada* and his senior councillors adjudicates over the case. Another feature of the customary justice system the study found, is the fact that the customary laws keep evolving as during the eight year pan Borana assembly of *Gummi Gayyo*, the laws are revisited and amended or remade as is necessary, hence reflecting the reality of the contemporary challenges. Besides, to uphold the integrity of the customary justice regime, errant customary officials or elders who engage in malpractices that undermine the course of justice are removed from offices through public decrees popularly known as *Murra harka fundhani* or *Bugissu*. The person over whom this decree is made is not allowed to arbitrate in any case until he mends his ways and seeks community forgiveness for his errant deeds and settles the required penalty.

Further the community choice to continue to rely on their indigenous justice regime is because, it is reparative, is obligated to be holistic to include victim, offender and the community to restore relationships through acknowledgement of guilt, forgiveness, restitution and compensation as necessary to restore the broken relationships as "the idea is that the value of healing is the key because the crucial dynamic to foster is healing that begets healing. The dynamic to avert is hurt that begets hurt" (Braithwaite and Strang, 2001:7). This is based on a principle Pranis, terms "earned redemption – an approach that allows offenders to make amends to those they have harmed to earn their way back into the trust of the community" (in Bazemore, 1998:770). The indigenous justice upholds the community values and promotes their ways of resolving the conflicts and managing their range resources.

To the community the formal justice systems is seen as mostly adversarial, focussed on the individual, is punitive, retributive and does not uphold collective consensus justice but imposed justice based on written statutes which is completely out of sync with the community used to be guided by customary traditional justice dispensation regimes.

The different conceptualizations of justice and what constitutes a crime between the customary and state institutions has led to some tension which needs a form of legal framework that supports these different conceptualizations. The concept of communal range resources ownership is also not supported in the Kenya constitution which has led to continuous appropriation of pastoralists lands without their consents. This continues to deplete their range resources base which escalates conflicts among the Borana themselves and between them and other pastoralists communities in the region. To overcome these tensions the study findings indicate that the government needs to consider the legal plural framework legislations that will legitimize and uphold customary resolutions and the common range resources ownership rights of the community.

This recognition and grounding of the same eventually in a legal pluralistic paradigm will forestall an eventuality which Hardin (1968) calls “The Tragedy of the Commons”. As the range resources of the pastoralists will be governed and managed within a legal framework of the state in recognition of the customary ways of conflict resolutions, range resources ownership and governance with decisions and resolutions over the same that are binding upon the state in this case Kenya.

The legal pluralism framework from the study findings, will hopefully be made possible through ‘Decentralization’ (Ribbot, 2008) which will eventually complete the ‘Virtuous Circle’ (Braithwaite, J. and Strang, H., 2001), where the indigenous restorative justice institutions as ADR, the state authority and civil society will work together for a just, sustainable and conflict free utilizations of fragile pastoralists ecological range resources.

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## Appendices

### Annex A: Study Participants and Activity details. (July – August 2011).

No. Participants.	Background.	Interview Date
2 Senior Elders, A & B	Very Senior Elders – one from South Ethiopia, one from Moyale Kenya. Both interviewed in Moyale – Kenya.	12 <sup>th</sup> July, 2011
2 Elders C & D	Elders – Not as old as the first two, but relatively mature experienced elders. ( one in Marsabit and one in Isiolo)	Elder C, 16 <sup>th</sup> July. Elder D, 14 <sup>th</sup> August.
2 FGD FGD 1 & 2.	Focus Group Discussion ( FGD) 1 of 6 women in Moyale (FGD,1) 1 of 14 Men in Marsabit (FGD,2)	Women FGD -18 <sup>th</sup> July. Men FGD 15 <sup>th</sup> August.
3	District Water officers – Marsabit, Moyale and Isiolo	Moyale, 19 <sup>th</sup> July. Marsabit, 16 <sup>th</sup> August. Isiolo, 22 <sup>st</sup> August.
3	Peace Committees chairpersons – Moyale, Marsabit and Isiolo. ( all men)	Moyale, 19 <sup>th</sup> July. Marsabit, 19th August. Isiolo, 22 <sup>nd</sup> August.
4	NGO officials – 2 in Moyale and 1 in Isiolo and 1 in Garissa.	Garissa, 12 <sup>th</sup> July. Moyale, 16 <sup>th</sup> July. Isiolo, 23th August.
1	District court official - Moyale	14 <sup>th</sup> July, 2011.
2	Home guards security – informal discussions in Marsabit.	Marsabit, 20 <sup>th</sup> August.
Personal visits	1 water well in Marsabit 2 water pans in Moyale.	Well visit 18 <sup>th</sup> August. 2 Pans visit, 20 -21 July.

## Annex B: Borana Clan Structure

Moie- ty	SABBO				GONNA		
Sub - Moie- ty	DIGALU	KARRYAYU		MATTARRI	FULLELLE	ARORESSA	
Clan	Nurtu Tuftu Udumtu Walaji Daddo Aru Ilu Molu	Barre Godi Didimtu Mante Danka Hiyyeyye Sibu Salalu Bokku Gambura Dano- Wale Gaguru Junno Libano	Wate Walabu Jartu Wayyu Maye Umuru Holle Gaddu Obole Mulata Kula- Korme Badi Itu	Norro Rasa Kojeja Kodelle Sunka- na Abbole Hajeje Siba Konso- ta Uchota Currota Wamaji Kollitu	Metta Gadulla Dorrani Mankata Karaza Kuku Garjeda	Dachitu Oditu Machitu Galantu Sirayu Bachitu Konitu	Arusi Awatu Karchabdu Warra Jidda Maliyu Dambitu Nonitu

Source; Legesse, 1973: 34 -44, Arsano, 1997:28

## Annex C: Borana Common Property Range Resources.

Common Property Range Resources.	Access, Use, Obligations, conditions.
Water	Obviously a vital resource for pastoralists' survival. The water tenure of the Borana is well structured and everyone knows his/her rights and obligations on access, care and maintenance of the water sources. Sources include wells, pans, and natural collections in pools during rains. <i>Aba herega, Konfi, well councils</i> manage the sources as per <i>Aadda Seerra Bissani</i> . Every water user is obligated to communal routine maintenance works of water sources.
Pasture	All Borana are entitled to the access and use of pasture on equal basis in any part of the Borana land. The only limiting factor is that there must be an assured source of water supply in the same area as where pasture is accessed. If water is not assured then one may not access the concerned pasture zone. There are also wet season and dry season grazing rules governed by the <i>Dheedha Council</i> . Violators of course face the law. A private small pasture fencing around the homestead for young calves and sick animals called <i>Kallo</i> is allowed.
Land	Land is a collective communal property for all Borana. The Gadaa, upholds this virtue and emphasis at all times that this should be the case. The Borana land, has of course shrank over the past two centuries, due to expansions of other pastoral communities with covert support of the colonizing powers and incoming government regimes who carried out hapzard demarcations that did not consider the Borana territorial rights.