

ADDIS ABABA UNIVERSITY COLLEGE OF LAW AND GOVERNANCE STUDIES



The Nature of Interface Between Ethiopian Formal State Structures and Borana Indigenous Gadaa Governance: Its Impact on the Rights to Self-Governance of Booranaa People

A Thesis Submitted to Addis Ababa University College of Law and Governance studies in partial fulfillment of a Requirement of master Degree of Law (LL.M)

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December, 2019

Letter of Declaration

I the undersigned, declare that this thesis is my original work, has not been presented for a degree in any other University and that all sources of materials used have been aptly acknowledged.

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Acronyms

ORS: Oromia Regional State

BIGI: Borana Indigenous Governance Institution

IGS: Indigenous Governance System

Ips: Indigenous Peoples

FDRE: Federal Democratic Republic of Ethiopia

BIPI: Borana Indigenous Political Institution

BGGS: Borana Gadaa Governance System

UNDRIP: United Nation Declaration on the Rights of Indigenous Peoples

ILO: Internatioal Labour Organizatio

OAS: Organization of American States

GG: Gumii Gaayoo

GC: Gadaa Councilors

FSG: Formal State Governance

HPR: House Of Peoples Representatives

SC: State Councils

NNPs: Nation, Nationalities and Peoples

Chapter One

Introduction

1.1 Background of Study

Prior to rise of formal governance system the exact time of which is difficult to be trace but probably be the Greece city-state, every society had been ruled and regulated by indigenous governance in form of tribal, clan administration, village head, religious leadership institutions and the like. Although the nature, structure and values of indigenous governance system (IGS) vary from the formal governance system, their role as a governing body of society has been almost the same. They have power and means of to coercion like formal government, but not by gun. They use kinship relation and religious power to win legitimacy of the ruled people. The rise of the formal governance system has substantially diminished the role of traditional and religious leaders and institutions though the degree may vary from society to society, from country to country and from continent to continent¹.

In African the IGSs have continued to play significant governance role in the political, social and economic lives of African societies particularly in rural and remote areas in parallel with the formal governance system². Although the indigenous governments played and continued to play vital role in the concerned society, along the formal governance system, the two had troubled relationship. In most states, the nature of relationship between the two has been unregulated. Rather it depended on informal negotiation between traditional leaders and the state. Such informal negotiation is often not based on full and free consent; it depends on power relation (particularly military and economic power). In most case the formal governance prevails over the indigenous governance. Using its power position, the formal governance usually makes

¹ Birgitte Feiring 2013, IP Right to Land, territories and resources, ILC, Rome, at 2, available at: <http://creativecommons.org/licenses/by-nc/3.0>

² Economic Commission for Africa, Relevance of African Traditional Institutions of Governance, 2007, Addis Ababa, preface.

indigenous government subordinate to the formal system, often without any recognition and protection³.

In a few scenarios where the relationship between two is formally regulated, indigenous governments are made subordinate to state, only with few recognition and independence in certain areas. In both cases, whether the nature of relationship between state and IGS is formally regulated or based on informal negotiation, the degree of subordination of indigenous governances to the formal governance system is by far worse than the subordination of local government to colonial power during colonial period. This would have immense impact on the right of the community. Inter alia it undermines the right to self-governance of the concerned society.

As usually stated and evident to many, Ethiopia is the home of many ethnic groups with ethnic, cultural and religious diversity. Before the rise of the formal governance system, all ethnic groups in the country had their own IGSs. These IGIs had full control over society they govern and territory their ethnic group occupy. The rise of modern governance system in the country has substantially changed that landscape. The successive rulers of Ethiopia considered the existence of IGIs as a threat to their legitimacy and authority. As a result of that, there had been calculated move to undermine the authority of indigenous leadership institutions with some degree of success.

In many areas, the move to undermine IGIs has been more or less successful since only a few elements of IGIs survived. But in some other areas, particularly rural, remote and pastoralist area of the country, IGSs have survived and operating to date. Where the IGIs have survived, the traditional leaders have significant control over their community, territories and natural resources. The traditional institutions operate in parallel with the formal governance system, some time with much more control and role of governance over the members of community and natural resources than the state.

One such instance is the Borana Oromo Gada governance system. Although Gada system is common to all Oromo, it has substantially been eroded in many parts of Oromiya, the reason being by large unbridled action of the successive rulers of Ethiopia to undermine Gada System

³ Ibid, at page 6.

and other indigenous political institutions in the country under guise of nation building⁴. Despite such action, Borana Indigenous Gada Governance (BIGG) system survived and has continued to play a significant role in social, political and economic lives of Borana people.

In this reality of parallel co-existence of the state and IGS, it became necessary to investigate the nature of relationship between two system of governance and analysis its implications in society. Determining the nature of relationship between two governance systems would helps to know how power are shared between two, if there is a possibility or actual overlap of power, competitions and conflicts, would be solutions. If relationship between two is that of harmony and cooperation, it also helps how to sustain and enhance such harmony and cooperation. Determination of this issue is often difficult when the relationship between two is not formally regulated as it is a case in Ethiopia. In this regard, investigating the nature of interface between two Systems of governance would helps to identify legal and policy gaps in regulating the relation between two governance systems and to forward potential recommendations that has policy implication for policy maker. The assessment of implications of the nature of relationship between two system of governance in society could also help to identify both positive and negative implications particularly from angle of Indigenous right and thus how to sustain positive implications and to find measures to evict or reduce negative one.

Though the area of nature of interface between formal state structures and indigenous governance need extensive study in Ethiopia, it remains largely unstudied. There are only few legal researchs which are often limited to establish the nature of interaction between formal and indigenous institution in dispute settlements⁵. In this regard the study narrows research gaps on the nature of relationship between formal state structures and Indigenous governance institutions in general and on the selected areas in particular.

1.2 Statement of Problems

In a setting like Borana, in which Indigenous governance institutions (IGI) have survived and continued to operate in parallel with formal governance system arises some issues of legal or

⁴ Chala, D. G. (2017). Indigenous Federation: The Case of Borana Oromo, Ethiopia, *the International Indigenous Policy Journal*, 8(1). Page 2, Retrieved from: <http://ir.lib.uwo.ca/iipj/vol8/iss1/2> DOI: 10.18584/iipj.2017.8.1.2

⁵ For example read Abera Degefa, The Impact on Offenders of Rivarly Between Formal and Criminal Justice System and Indigenous Justice System, Experiences Among Borana Oromo In Relation to Crime of Homicide

may be of constitutional concern. Some of these issues inevitable arise mainly because of communality of interests as each governance system subjects the same people and territory to its own authority. The state has strong interest to rule and govern using all its state machineries based on the constitutional mandate and responsibilities. On other hand IGIs also have strong interest to rule and regulate their members and govern natural resource in accordance with authority derived from their customary laws and tradition (indigenous constitutional order). At least they need certain recognition from state and to share power, if not to take all. Consequently there will be some problems in form of overlap of power which in turn may lead to conflict between two systems of governances unless sufficiently negotiated and addressed. Although IGS have strong influence by way of governing and regulating the people everyday life, the authority of the state obviously prevail owing to all its coercive state machineries.

Among the Borana, indigenous Gada governance system is more effective, efficient and have wider support than state institutions. The BIIs wants to make laws appropriate for the Borana ways of life, they need to administer land and natural resources and settle dispute among members of Borana. This quest of Borana among other thing raises the issues of self-governance or some kind of self-determination. In this context, the study will examine the nature of relationship between two system of governance and its implication on the ruled people of Borana. The study aims at revealing the impacts of the nature of relationship between the state and BIGG on the right to self-governance of Borana people from IP's rights perspectives.

1.3 Objectives of Study

This study is aimed at achieving two general objectives, the first being determination of the nature of relationship between formal Ethiopia governance system and the BIGG and the second is to determine the impacts of such relationship on the self-governance of Borana people. Within these two general objectives, the study is aimed at achieving the following specific objectives:

- ✓ To examine the nature of relationship between formal state government and BIGG in law making and law enforcement
- ✓ To examine the nature of relationship between the state and the BIGG system in administration of justice

- ✓ To examine the nature of relationship between Ethiopian government and the BIGG in administration of land and natural resource
- ✓ To find out measures that should be taken to better off the nature of relationship between two system of governance

1.4 Research Questions

Corresponding to general objectives, the study is aimed at addressing the following general questions:

- ✓ What is the nature of relationship between the Ethiopian formal Ethiopian government and the BIGG?
- ✓ What impacts does the nature of relationship between two has on self-governance of Borana people?

Furthermore, the study also addresses the following specific questions corresponding to specific objectives of study:

- ✓ What is the nature of relationship between the Ethiopian government and the BIGG in law making and law enforcement?
- ✓ What is the nature of relationship between the state and BIGG in administration of justice?
- ✓ What is the nature of relationship between the Ethiopian government and BIGG in administration of land and natural resource?
- ✓ What measures should be taken to better off the nature of relationship between two system of governance?

1.5 Research Methodology and Methods of Data Analysis

The study mainly employs qualitative research methodology because the data gathered consists accounts of participant’s experiences regarding the nature of interaction between the formal state structures and Borana Indigenous Gada governance and its impacts on them. Qualitative research helps to explore and understand the meanings the participants ascribe to their experiences⁶. Since this study seeks to understand research problems from the perspectives of the local population

⁶ Creswell, J.W. (2009). Research Design: Qualitative, Quantitative and Mixed Methods Approach, Los Angeles Sage. Page 21

involved, qualitative research methodology was employed. To achieve its objectives the study uses both primary and secondary sources. To collect primary data, methods such as face-to-face interview (both unstructured and semi-structured) and personal observation were used. Interview and focus group discussion were conducted with leaders of BIIs, community's elders, administrators, members of police, judges and experts and heads rural land offices and other persons. Informants were identified purposively based on their knowledge and experience regarding the nature of interface between two system of governance and its impacts. Besides, relevant domestic legal and policy documents such as constitutions (both Federal and state constitutions) and international and regional legal instruments were consulted as primary source of data. Relevant Judicial decisions will be consulted also as primary source. Existing literature on area will be reviewed as the main source of secondary data. All primary data, except quantitative data obtained through questionnaires, will be transcribed and content analyzed thematically together with existing literature based on the objectives of the study.

1.6 Scope of Study

Considering time and other potential constraints, the scope of study was limited to explore the nature of relationship between Ethiopian formal governance system and BIGG and its impact on self-governance of Borana people. Site was deliberately selected because BIGG is relatively functioning well. The data required for the study were gathered from participants living in Yaballo and Arero districts of Borana Zone of Oromia Regional State. These two Woreda were also selected deliberately because of variation between two. Arero Woreda is a center of Gada Institution where many GCs and other indigenous organs usually settle. Thus BIGI relatively function well. On opposite Yaballo Woreda is the center of Borana Zone and thus formal state institution has relatively much control.

Since examining of the nature of relation between two systems in all area was hardly possible, the study is restricted only to law making and law enforcement, settlement of dispute and administration of justice, administration of land and natural resources. Assessment and investigation of the nature of relationship between two system of governance and its impact on self-governance begin with a brief introduction on historical background of subjugation of Borana by emperor Menelik II, which then followed by less detailed reflection on the nature of

relationship between BIGG and formal Ethiopia governance system and its impact on self-governance under emperor Haile sellassie and Derg Regime. The large part of study was devoted to critically analyze and examine the nature of relationship between BIGG and FSG system and its impacts on self-governance of Borana under current federal EPRDF regime.

1.7 Significance of Study

This study have many contributions, inter alia as it address widely unstudied area, it helps to develop initial ideas on the nature of relationship between FSG and indigenous governance system in the country. Furthermore since study cover theoretical and legal frameworks on the nature of relationship between formal and informal governance system and also divulge into some empirical insight, it will ease problems associated with lack of literatures on area which in turn encourage further studies. The study also serve policy maker, legislator, judiciary, administrators, leaders of indigenous political institutions, researchers, NGO, academicians and practitioners interested to work on the nature of relationship between formal and informal governance institutions and self-governance as reference and guidelines.

1.8 Limitation of Study

Lack of literatures (both theoretical and empirical) on the nature of relationship between Ethiopia formal government system and indigenous governance in the country is major limitation of study. Though there are many studies on indigenous institutions in Ethiopia, there are few studies on IGIs. Those few studies focus on describing the structure, values, scopes and procedure of how such indigenous political institutions operates. The area of relationship between indigenous political institutions and state remained widely unstudied. A few legal researches by academicians and legal practitioner on the nature of relationship between formal and informal governance system are often restricted to one aspect of governance that is judicial aspect of dispute settlement.

There are many researches on area in other African countries particularly in west and South African. However such works are of little help for this study because of two reasons. One is attributed to difference between the nature of IPI in Ethiopia and other African countries. In other African countries the nature of IPIs are substantially transformed by colonial rule and post-

colonial regimes. During colonial period, in many African states, institutions of chieftaincies were integrated as part of administrative hierarchy to serve indirect rule of colonial power⁷. That is not a case in Ethiopia. On other hand, those studies in many African countries did not give emphasis to impacts the nature of relationship between two systems of governance has on self-governance of concerned society. Beside lack of literatures, the fact that contact between traditional leaders and state are usually unofficial and unrecorded make difficult to access necessary data and event. Lastly, time shortage and budget constraint also posed barrier to study.

1.9 Organization of Study

The study is organized into five chapters. Chapter one address introductory matters, such as background and objectives of study, statement of problem, research questions and methodology, scope, significance, limitation and organization of study. Chapter two is allotted to theoretical and legal framework on parallel operation of FSG and informal IGIs. It begin discussion with conceptual matters such as definition of FSG and indigenous governance, the reality about parallel operation of two system of governances and some theoretical debates and controversies over that. Besides, this chapter also address legal framework on indigenous governance, the scopes and limitation of the IP's right to self-governance, constitutional design and legislative mechanisms on indigenous policy. Chapter three covers the BIGG and Ethiopian formal State structures. This chapter examined the Ethiopian laws and policy on Indigenous governances. Chapter four covers the main theme of study, as it deeply analyzed the practical nature of relationship between FSG and BIGG under current EPRDF regime. Finally, chapter five wind up discussion by forwarding concluding remarks and recommendations.

⁷ Fred Hendricks and Lungisile Ntsebeza, Cheifs and Local Government in Post-Apartheid South Africa, African journal of political science (1999), Vol.4 No.1, 99-126, Michigan state university, p.1. see also

Chapter Two

Conceptual and Legal Frameworks on Parallel Operation of the State and Indigenous Governance System

2.1 Introduction

Parallel operation of indigenous governance along with the state is a living reality in many societies. In Latin America there are more than 800 IPs accounting for a population of close to 45 million⁸. A number of studies have affirmed the resiliency, legitimacy and relevance of African traditional institutions in the socio-cultural, economic and political lives of Africans, particularly in the rural areas⁹. Such IGS had emerged from time immemorial. The situation in Ethiopia prior to emergency of modern state was not different from this. The history of country establishes existence of many IGIs organized along ethnic base before formation of modern Ethiopia state. Such indigenous political institutions had effective control over their respective members, territory and natural resource. In this chapter attempt was made to address conceptual and theoretical debates and legal framework of parallel operation of the state and indigenous governance. The Chapter begins by defining some basic concepts and then proceeds to theoretical framework. Discussion on conceptual and theoretical matter covers general approaches and the African perspectives specifically. Discussion about the legal framework involves analysis of international and regional human rights on the rights of IPs and their traditional governance, which then is followed by assessment of legal and policy reform made at national level by taking some countries with good experience.

2.2 Governance, State and the Indigenous Governance Defined

Governance: Governance is commonly defined as the exercise of power or authority by political leaders for the well-being of their country's citizens or subjects¹⁰. It is the complex process whereby some sectors of the society wield power, and enact and promulgate public policies

⁸ UN Economic Commission for Latin American and Caribbean, *Guaranteeing IPs Right's In Latin America, Progress in the Past Decade and the Remaining Challenges*, page 6

⁹ Economic Commission for Africa, *Relevance of African Traditional Institution of Governance*, 2007, p.v

¹⁰ Anne Mette Kjaer, "Governance," (Cambridge: Polity Press, 2004), p.
https://tamayaosbc.wordpress.com/2014/08/21/what-is-governance/#_ftnref1

which directly affect human and institutional interactions, and economic and social development¹¹. Governance also refers to the setting, application, and enforcement of rules¹².

State: State is a broad concept which is difficult to define. The multi criteria nature of concept, the tangled web of historically specific pathways of state development and difference in state form have all contributed to substantial theoretical difficulties in reaching agreement about how to define the state¹³. The fact that state is subject of study for many disciplines also has contributed for variation in defining concept. Black law dictionary define state as “

The political system of body of people who are politically organized, the system of rules by which jurisdiction and authority are exercised over such a body of people's¹⁴.

This definition consist mainly two elements. One is, state is political system and this political system is formed by the body of people who are organized politically as opposed to other kinds of human organizations. The second element is there should be the system of rules. This system of rules allows the political system to exercise jurisdiction and authority over a body of people who are organized politically itself. This element emphasizes the coercive nature of state, the feature that distinguishes state from other form of human organization.

Aware of the substantial theoretical difficulties in reaching agreement about how to define state, **Dunleavy** has grouped view on definition of state into two categories. The first is a philosophical approaches that adopted an organic view of state in which state is construed in term of some moral purpose, human drive or social function which requires coming into existence of specialized sovereign body, operating in the ways that characteristic modern state and unifying political control, instead of retaining the multiple independent or interleaved centers of political autonomy founded in feudal arrangement¹⁵. According to Dunleavy, the juridical literature influenced by Roman law, Marxist state theory and evolutionary theory have generally adopted

¹¹ Ibid, Page 4.

¹² Ebrahim Golshan, Sovereignty, Governance, and Government Performance (2006), Institute for Management and Planning Studies, page 4.

¹³ Patrick Dunleavy, The State, in Robert. E Goodin “et. al” (Ed) A companion to Contermopary Political Philosophy (Vol.2, 2nd ed. 2007) at 794

¹⁴ Black's Law Dictionary 1537 (9th ed. 2009).

¹⁵ Supranote 13, at 794

an organic view of state which tries to establish necessary quality of modern state¹⁶. The second approach is methodological individualist view which defines state as composite set of public institution or public official, most commonly those at the centre¹⁷. Having in mind the difficulties in defining state, in this study, the concept state refers to the formal political and legal system founded by and operates according to constitution and legal system of country as opposite to informal political and legal system.

To know what it means by indigenous governance, it is necessary to define IP. Like that of state it is hardly possible to get unifying definition of IP. Indeed given the diversity of IP, there is abroad international consensus that universal definition is neither necessary nor desirable¹⁸. Perhaps it is based on this general understanding that many international instruments including UN Declaration on the Right of IPs (UNDRIP) and American Declaration of Rights of IP and domestic law of several states did not provide the definition of IP. However the ILO indigenous and tribal people convention 169(1989) define IP as:

“in independent countries who are regarded as indigenous on account of their descent from the population of which inhabited the country or geographic region to which the country belong, at the time of conquest or colonization or establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own political, social, economic, cultural and political institution”¹⁹.

On other hand, the UN special rapporteur Jose Martinez Cobo has proposed a working definition of IP as:

“Indigenous communities, peoples and nations having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing on those territories, or parts of them. They form at present non dominant sector of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their

¹⁶ Id, 794

¹⁷ Id, at 794

¹⁸ Supra note 2, at 14.

¹⁹ International Labour Organization Indigenous and Tribal peoples Convention No.169(1989)

ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”²⁰.

Though there is no common definition, IP usually refers as original settlers (Native) peoples having distinct cultural identity from new inhabitants and having special tie to its land and territories. Native, tribal, aboriginal and similar name are used interchangeably with IPs. Indigenous governance is thus a traditional normative and institutional political and legal system of IPs as well as exercise of power and authorities by Indigenous political institution. The term traditional does not connate backwardness, rather it connate the deeply rooted system in custom and tradition from time immemorial with/without change as opposed to governance system imposed from abroad. In relation with the state Indigenous governance is defined as:

“The sphere of self-administration by IPs that, in harmony with applicable law and with IPs’ own organizational structures, contemplates: (a) the recognition of the special relationship that exists between the land and ethnic and cultural identity; (b) the recognition of the autonomy in the management of Indigenous lands within the States of which they are part; and (c) the effective participation of IPs within local, provincial, and national government”²¹.

2.3 Theoretical Framework

There are several theories that are relevant either directly or indirectly on the parallel operation of state and indigenous governance and how to accommodate different interest arise. Since exhaustion of all this theories and school of thought is neither possible nor desirable, only few of political and legal theories that are directly relevant to the study will be discussed.

2.3.1 Liberalism Vs Communitarians on Relevance of Indigenous Governance

Liberalism (together with its new version of neo-liberalism) and communitarians are the two contending political philosophy on parallel operation of state and indigenous governance.

²⁰ Tekuma Daba, the legal and practical protection of the rights of minorities in self administering nations of Ethiopia: The case of Oromia, Addis Ababa university, LL.M thesis’ 2010 (available at AAU, law library), pp.28-29

²¹ Gladys Jimeno Santayo, Indigenous Governance and Territory (Unpublished Policy Document of Canadian Foundation for Americas) p.7

Though liberalism as political theory cover a wide range of issues and involves many claims, its main tenet revolves around the freedom of individual. It argues freedom of individual as the highest political values by which institutions and practices have to be judged by their success in promoting it²². On other hand communitarians claim the necessity of attending community alongside if not prior to liberty and equality²³. The point of disagreement between liberalism and communitarians is on the value of community and collective interest. While communitarians argue for protection of collective interest alongside with individual liberty, liberal theorists on contrary argues that special rights for one group affect the freedom and equality of other in the same community²⁴. The liberal vision of politics before Second World War did not include any independent principle of community, such as shared nationality, language, culture, religion, history or ways of life²⁵. Communitarians criticizes liberalist for their assumption of considering human being as having no social tie, owning no allegiances and in one way or another entirely detached from societies²⁶.

Contextualizing the claim and arguments of both theories to the issue at hand, communitarians assumption underpin the relevance of recognizing and protecting indigenous governance, Since such measure promote collective interests of communities by preserving their values and norms. On contrary, liberalists do not see any advantage of recognizing and protecting indigenous governance. Inherent to liberal pessimistic view of granting special rights for one group and based on the nature of some IGS that is contrary to values and principle of western ideologies, some contends recognition and protection of traditional governance alongside state is inconsistent with the principle liberal democracy.

However, though liberal theorists have traditionally had trouble recognizing a plurality of political rights within the state, now there is a body of theory among liberals making a strong case for special rights to IPs within the nation-state. Kymlicka has argued that recognizing special rights for IPs is consistent with liberalism because equal participation within a single

²² Alan Ryan, What is Liberalism?, in Robert. E Goodin “et. al” (Ed) A companion to Contermopary Political Philosophy (Vol.2, 2nd ed. 2007) at 362

²³ Will Kymlicka, Community and Multiculturalism, in Robert. E Goodin “et. al” (Ed) A companion to Contermopary Political Philosophy (Vol.2, 2nd ed. 2007) at 463

²⁴ Duncan Ivison, Postcolonial Liberalism (2002) at 14-48

²⁵ Supra note 21, at 463

²⁶ Supra note 22, at 361

political community entails recognition of group difference and cultural affiliations²⁷. Accordingly, acknowledging cultural difference allows citizens a fuller and more equal participation in the political, economic, and cultural life of the state²⁸. On other hand, considering the role of participation in the political institutions of society as a sense of “being at home”, Ivison held that accommodating complex cultural and political differences within nation-state could allows IPs who might be skeptical about the role of the state and its institutions to trust through participation in the political institutions of society despite previous experiences of alienation²⁹.

2.3.2 Conservatism and Traditional Political Institutions

Another political doctrine that is relevant to the debate about relevance of traditional governance system is conservatism. David Hume and Edmund Burke is the leading philosopher of political conservatism. Conservatism is build on three central doctrine, which are traditionalism that support continuity in politics, the maintenance of existing institution and practice, the skeptical view about the political knowledge and lastly perception of human being and society as organically and internally related³⁰. These three doctrines of conservatism are closely related to the argument about relevance of traditional governance system. If we take the first doctrine of traditionalism, it supports recognition and protection of traditional institutions and practices since it advocate continuity in politics and the maintenance of existing institutions and practices. Almost all IGIs had existed before the formation of modern state and continued to operate in parallel with the state *Defacto* and *Dejure* later in some states. Pertinent to the argument of conservatism, based on the doctrine of traditionalism such reality should be upheld. This argument could justify the limit in African democracy in post colonial which have disregarded the traditional governance system only with a few exception. But there could be counter argument which hold since many of IGIs are almost replaced by modern bureaucracy, swift measure to recognize IGS is dangerous and suggest changes to the existing system to be made gradually.

²⁷ Will Kymlicka, *Liberalism, Community and Culture* (1989) at 135

²⁸ *Id.*, 151

²⁹ *Supra* note 22, at 16

³⁰ Anthony Quinton, *Conservatism*, in Robert. E Goodin “et. al” (Ed) *A companion to Contermopary Political Philosophy* (Vol.2, 2nd ed. 2007) at .286

The second and third doctrine of conservatism obviously supports continuity of IGS along the state and the necessity of policy and legal reform to regulate the nature of relationship between two. Intellectual political knowledge in liberal thought such as freedom of individual, justice, human right principle, equality and democracy which argues universal applicability of those principles can be challenged by conservatism skeptical view about political knowledge and indeed empirical tested limitation of such values in the third world and even in the western world. Since IGS are deeply rooted in society, the third doctrine of conservatism inherently underpin preservation of traditional governance system as it contends human being and society are organically and internally related, the argument which is closely related with the view of communitarians.

2.3.3 Democracy and Traditional Governance System

The nexus between democracy and traditional governance is among the issues that has provoked hot debates particularly in Africa. The complex and contested nature of concept of democracy has vitally contributed for disagreement. While some argue in favor of harmonious relationship between two, other counter argue against the recognition of traditional political system. One area that traditional political system is highly criticized is the manner by which traditional leaders assume power, the tenure and of leaders for their action. The critic forwarded against traditional system from this angle among other thing is based on the minimal and least aspiring understanding of conception of democracy, i.e. “the Schumpeterian democracy”. According to Joseph Schumpeter (after whom this conception of democracy was named) democracy is “an institutional arrangement for arriving at political decisions, in which individuals acquire power by means of competitive struggle for political votes³¹. Setting aside the critics and problem with this conception of democracy, traditional governance system and measure to recognize and protect them is criticized as undemocratic based on Schumpeterian conception of democracy because in most societies traditional leaders are unelected and power is transferred hereditary and there is no fixed tenure(power for live).

Even though above argument could work for most traditional system specifically, generalization to all traditional system negates its validity, as there are significant numbers of societies in which

³¹ Amy Gutmann, in Robert. E Goodin “et. al” (Ed) A companion to Contermporary Political Philosophy (Vol.2, 2nd ed. 2007) at.522

traditional leaders are elected and assume power for fixed tenure. Oromo Gada system is one good example. Besides there are also several other grounds by which Traditional political system (particularly African Traditional political system) is criticized as undemocratic gender bias, have no respect for individual rights at the cost of collective interest etc. Though there are some valid grounds, the criticism against traditional system from the western is much influenced by Eurocentric view that put western culture superior to and as criteria by which all other as culture is to be evaluated.

Despite above grounds on which traditional system is criticized as undemocratic, there are several other areas on which traditional political system promotes democracy either directly or indirectly. Some natures of traditional democracy by which traditional political system and the measure to recognize them could potentially contribute for promotion of democracy inter alia includes direct participation of community members in decision making process through deliberative or consensus based process, promotion of self government etc. In Africa some imperial finding has firmly established democratizing state-society relation as one potential contribution of traditional governance system³².

2.3.4 African Perspectives on the Relevance of Traditional Governance System in Post-Colonial Period

Immediately after independency, many African leaders were faced with issues such as what types of state (unitary or federal), what types of government (presidential or parliamentary) suit new independent African states. Related to these issues, the question about relevance of African traditional governance system to the newly formed African states had been a vital concern that divided African leaders to hold different views. This issue has provoked hot debate which was certainly marked by three rivalry positions, modernist, traditionalist and balanced view. Highly skeptical of African traditional governance system, modernist view contends that indigenous governance is anachronistic, a hindrance to development and transformation, undemocratic, divisive and costly³³. Some elites who assume power thought that traditional system were against

³² Markos Tekle Rike, *State-Society Relations and Traditional Modes of Governance in Ethiopia: A Case Study of Sidama* (2014) (unpublished PhD Dissertation submitted to the Department of Political Science and International Relations, Addis Ababa University) at.50

³³ *Supra* note 2, at.10

the unity and divided nation in steady of bringing together³⁴. Besides, modernist viewed traditional governance institution as facilitators of colonial rule and inimical to the goal of the first wave of democratization and nation building³⁵. In addition to the negative features of African traditional governance system and their historical alliance to colonial power, the personal affiliation of leaders to the western liberal view and their dictatorship of unwillingness to share power and form central state may had also influenced some leaders to take modernist stand.

On other hand the traditional view which support recognition of traditional system asserts traditional institution are indispensable for political and economic transformation in Africa³⁶. According to traditionalist, indigenous institutions have proved to both acquiescent and adaptable to the changes without losing their original underlying values and principles³⁷. Some argues that traditionalist view was influenced by the nationalism which took some countries to the extreme position of “turning back everything into its origin³⁸. The proponent of traditionalist view argues restoring African IGS has several benefits such as it promotes internal legitimacy, give due respect to African identity, restore African correct version of dispute settlement and effective legal institution and promotion of desired social, economic and political development³⁹. Though not acknowledged by any literatures, the conservatism and communalist tendency of each leader may have contributed for this view.

The third view which took middle/balanced position recognizes the potential roles of traditional institution to promote democratic governance and to facilitate access to rural communities to public service while at the same time acknowledges the limitation of traditional institution and suggest a kind of mixed governance structure. Even though modernist view has dominated the political discourse at the beginning, the limitation observed in building viable political and sustainable economic progress a few decades after independency in many state has obliged some states to re-consider their decision on relevance of traditional governance that leads state like

³⁴ Murado Abdo & Gebreyesus Abegaz, Customary law (2009) (Teaching Material of Law school prepared by the Justice and Legal System Research Institute), at.84

³⁵ Supra note 22, at.48

³⁶ See supra note 2, at.11

³⁷ Id, at 11

³⁸ Supra note 32, at. 85

³⁹ Ibid, at 85

Botswana to constitutional and legal reforms. Despite divergent view African commission has reported some area on which traditional institution can potentially contribute such as state building⁴⁰.

2.4 Legal Framework on the Right of Indigenous Peoples

Though recent and inadequate comparing to the birth and development of general and some specific human right systems, human right system on the right of IP has shown significant progress in past few decades. Without undermining the applicability of general and some other specific human right norms, however the birth and development of human right system of IP seems from bottom-up as opposed to some other human right system. In what follow attempt is made to evaluate achievements attained at international, regional and national level in protection and promotion of rights of IP and identify challenges at fore. The discussion at international legal framework involves analysis of applicability of general and some specific international conventions to indigenous and assessment of conventions that is specific to IP. Whereas the discussion on regional system thoroughly highlights progress achieved in Africa and America regional human rights system, the discussion of national human rights system is elaborated by taking three countries with better experience.

2.4.1 The International Legal Framework on the Right of IP

A) Applicability of General and Specific Human Rights Conventions to the IPs

The inherent universal nature of human rights makes general and specific human right instruments automatically applicable to all individual and groups without indication to this effect. Stated in other word, the universal nature of human rights impliedly confers all human being rights that are recognized in general or specific human right instruments without expressed assertion that shows applicability to specific individual and groups. Relying on this general norm and principle of human right there are several human rights instruments that are applicable to the IP even before birth of specific human right instruments on IPs. Some of rights that are recognized and protected by International general and specific human right instruments are right to self-determination (art.1 of UN charter, ICCPR and ICESCR and Vienna declaration and

⁴⁰ See supra note 2, at 11-15

program of action Art), the right against discrimination and equality before the law, right to adequate standard of live, right to religion, right to culture, language, history and collective identity, right to political participation etc. Based on the universal nature of human right which is frequently expressed in each instrument by equality and non-discrimination close and the inclusive nature of provision which is usually qualified by “all persons or “all peoples” obviously includes IPs collectively and/or the members of indigenous communities individually. IPs equal Enjoyment of all human rights entitled by all human rights conventions either individually or collectively is expressly provided by under Art.1 of UNDRIP.

The Convention on the Rights of the Child is the only global UN human rights treaty to specifically mention indigenous children⁴¹. It provides, in societies characterized by diversity children belong to minority and IP shall not be denied to enjoy a right in community with other members of his or her group and to confess and practice her own religion and culture or to use his/her own language⁴². Furthermore, the convention provides the education of a child shall be directed to preparing the child for responsible life in “friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin⁴³.

B) Specific Human Rights Instruments on the Rights of IPs

Though all human beings can benefits from general human right instruments, the generality and gaps within such human right instruments and the special circumstances of some marginalized groups makes general human rights systems inadequate and necessitate the adoption many specific human right instruments and institutions. Even though the struggle of indigenous communities to have specific human right instruments had long lived, such desire is partly realized only very recently. It is to be noted that Latin American countries played greatest roles in this struggles⁴⁴.

I) The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169)

⁴¹ UN Human Right, Office of the High Commissioner, IPs and The UNs Human Right System (2013) (unpublished Fact sheet No. 9/Rev.2), at.21

⁴² UN Convention on the Rights of Children (CRC), art.30

⁴³ Id, art.29

⁴⁴ Supra note 21, p.5

ILO Convention No. 169 and its predecessor, ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (No. 107), are the only conventions specifically dealing with IPs rights. It becomes legally binding upon ratification and has thus far been ratified by 22 countries (15 in Latin America and the Caribbean, four in Europe, two in Asia-Pacific, and one in Africa)⁴⁵. The Convention No. 169 fundamentally concerned with non-discrimination⁴⁶. The convention covers IPs' rights to development, customary laws, lands, territories and resources, employment, education and health⁴⁷. Moreover, it signaled, at the time of its adoption in 1989, a greater international responsiveness to IPs' demands for greater control over their way of life and institutions⁴⁸.

II) The UN Declaration on the Right of Indigenous Peoples

The United Nation Declaration on the Rights of indigenous peoples (UNDRIP) was adopted by the UNs General Assembly on 13 September 2007 with 144 votes in favor, 11 abstentions and four States against⁴⁹. The Declaration is the most comprehensive instrument detailing the rights of IPs in international law and policy, containing minimum standards for the recognition, protection and promotion of these rights⁵⁰. Though it is not binding, the declaration guides states, international human rights institutions and other actors on indigenous policy. Some argue that the Declaration could come to reflect international customary law as its principles are injected into domestic judicial rulings and legislative acts. Some argue that the Declaration could come to reflect international customary law as its principles are injected into domestic judicial rulings and legislative acts⁵¹. For illustration let us see a few rights recognized by UNDRIP that are very essential to the IPs.

a) **The Right to Self-Determination:** Right to self-determination is among the most important right of IP. Besides essentiality by itself which is for granted, its inclusive nature to

⁴⁵ Supra note 8, at.16

⁴⁶ Report of the Commission on Human Rights on its eighteenth session, (E/3616/Rev.1), para. 105

⁴⁷ Supra note 41, at 9

⁴⁸ Id, at 9

⁴⁹ Id, at 4

⁵⁰ Id, at 4

⁵¹ Badger, Austin, *Collective v. Individual Human Rights in Membership Governance for IPs*, at 487, *American University International Law Review* 26 no. 2 (2011): 485-514

encompass and potentially promote several demands of IPs makes the right of self-determination the most fundamental right of IPs. Cognizant of this, UNDRIP has many provisions which provides for recognition, protection and promotion of indigenous right to self-determination. Some these provisions includes Art.3 and 20 which provides indigenous right to freely determine their political status and pursue their economic, social and cultural development, Art.4 (rights to internal autonomy /self-governance), Art.5 and 18 (the right to maintain and strengthen their distinct institutions), Art.14 (right to establish and control their educational systems and institutions), Art.16 (the right to establish their own media) and Art.26 (the right to own, use, develop and Control the lands, territories and resources that they posses). These are only illustrative lists and there are another several provisions in the declaration which are concerned with the indigenous right to self-determination in one way on others. The details views about scopes and limitations of IP's right to self-determination will be discussed later.

- b) **The Right to equal participation in decision making:** Adequate representation of IPs in policy and decision-making is instrumental in breaking the cycle of discrimination and exclusion suffered by IPs in a number of countries⁵². The right of IP to participated in make decision recognized by UNDRIP has both internal and external dimensions. Whilst Internal dimension is the right of IPs participate in decision making affecting which would affect them as stipulated by Art.18, external dimension, external dimension is the right to participate in political, economic, social and cultural life of state as stipulated under Art.5.
- c) **The Right to Equality and Non-Discrimination:** The colonial policies in most countries had subjected members of native peoples to discriminations on different grounds. This has negatively affected the members of indigenous communities in political, economic, social and cultural affairs. The recognition, protection and promotion of IPs right to equality and non-discrimination by UNDRIP *inter alia* under Art.2, 9, 16(1), and 17(3) could potentially benefits members of indigenous communities individually and/or collectively by safeguarding them from unequal treatment and discrimination of different kinds they faces in public live.

⁵² Inter-parliamentary Union, *Implimenting the UN Declaration on the Rights of IPs (2014) (unpublished Handbook for Parliamentarians) (IPU)*, at,18

- d) The Right to Culture, Language, History and Collective Identity:** in most societies the colonial power had disregarded and suppressed the culture, history and language of indigenous communities. As a result the cultures of IP were assimilated to the foreign cultures which have threatened the collective identity of IPs. The impacts of globalization even after the end of colonization are also significant in this regard. The UNDRIP's stipulations for recognition and protection of IP's right to preserve and develop one's own culture, language and history under its provisions such as Art. 11, 12 and 13 is a great achievement for IPs to regain, preserve and develop their collective identity.
- e) The Right to land, territory and natural resource:** by definition, IPs are closely tied to their land, territory and natural resources. The fact that IPs are original settlers of the land they occupy and have closely tied to their land and natural resources justify granting special entitlements to IPs collectively and to the members individually over their land and natural resources. Nevertheless, subsequent to colonial invasions, most of IPs were displaced from their lands which have devastating impacts on IPs. The Secretary-General of UN recognizes that "millions of IPs continues to lose their lands, their rights, and their resources"⁵³. The effect of globalization and expansion of investments through Multi-national Corporation is paramount here. The UNDRIP's guarantee of IPs right to land, territory and natural resources under Art.25, 26, 27, 28 and other which has many spillover effects.
- f) The Right to adequate standard of lives:** enormous studies shows IPs and their members are the most disadvantageous in their respective societies in the world. Even the most developed countries are not exception to this reality. After indicating that they are the wealthiest countries, one study has firmly established the members of indigenous communities in USA, Canada, Australia and New Zealand as the poorest citizens⁵⁴. In USA, more than a quarter of Indian people continue to live in poverty and unemployment rate are more than double the population at large 13.6% on average and as high as 80% in some indigenous communities⁵⁵. Indigenous communities are characterized by lowest standard in infrastructures facilities in education, health and other development sectors⁵⁶. The guarantee

⁵³ Id, at 9

⁵⁴ Stephen Cornell, 2006, IPs, Poverty and Self-Determination in Australia, New Zealand, Canada and the United States, (unpublished Joint Occasional Paper of Nation Natives Institute for Leadership, Managment and Policy and The Harvard Project on American Indian Economic Development on Native Affairs), at. 1

⁵⁵National Congress of American Indians, An Introduction to the Indian Nations in United States, at.7

⁵⁶ Id, at.7

to adequate standard of life by UNDRIP under Art.20-24 could potentially improve the life standard of all indigenous communities and their members.

2.4.2 The Regional Human Rights Instruments on Right of Indigenous Peoples

Regional human rights systems have prominent roles in protection and promotion of human rights by supplementing and strengthening international and national human right system. While the proximity of regional human rights system to states and ultimate beneficiaries could helps to adapt international human rights norms and practices to the special circumstances of each region, the generality can serve to attain certain degree of uniformity. By doing so regional human right systems builds Bridge between internationals and national human right systems. Although there is European Human right system and other new regional initiatives, given the attention they have devoted to IPs, Inter-American and African Human rights system are more relevant worth discussion.

The Organization of American states (OAS) is the only region that has specific declaration on the rights of IPs. The OAS has adopted the American declaration on the rights of IPs on June 15, 2016. Imitating the UNDRIP, the declaration confers IPs in America a numbers of rights such as right to self-determination, right to equality and non-discrimination, right to cultures, language, history and collective identity, right to land, territory and natural resources. Besides having specific declaration, the OAS is also well known for its pioneer jurisprudences on the rights of IPs. The inter-American commission and inter-American court on human rights has decided on a number of petitions alleging violations of the human rights of indigenous individuals and peoples under the American declaration on human rights and the American convention on human rights⁵⁷.

While the African Union has no specific standards devoted to IPs, the innovative and distinct reference of African Charter on Human and Peoples' Rights to "the peoples" and "collective rights" as well as its very name "The African Charter on Human and Peoples' Rights" makes later appealing on rights of IPs. The Charter expressly recognizes and protects collective rights which should be available to sections of populations within nation states, including IPs by the

⁵⁷ The Case of the Mayagna (Sumo) Awas Tingni Community vs Nicaragua.

term ‘peoples’ in its Preamble and substantive provisions⁵⁸. The provisions of the African Charter are thus highly applicable to the promotion and protection of the human rights of IPs, and the most relevant articles include articles 2, 3, 5, 17, 19, 20, 21, 22 and 60⁵⁹. Furthermore, establishment of distinct body “*Working Group on Indigenous Populations/Communities in Africa*” In 2000 by the African Commission on Human and Peoples’ Rights, with mandates such as country visits to review IPs’ issues, publication of jurisprudence on IPs’ rights in Africa and awareness-raising and the willingness of the ACHPR to consider cases of alleged violations of IP’s rights and its groundbreaking jurisprudences in this regard⁶⁰ shows relatively fair consideration of African IP’s rights concerns by African Regional human right system. The recent decision of ACHPR in 2017 on case of Ogiek people (represented by African Commission of Human and people’s rights) vs. the Republic of Kenya is the most appealing precedent for the right of indigenous peoples in the region. Initiation to adopt specific declaration on the rights of IPs which is interrupted for unknown reason.

2.4.3 Recognition and Protection of the Rights of Indigenous Peoples by National Human Right system

There are several ways of recognizing and protecting indigenous right, particularly right to self-determination, at national level which can be broadly categorized into two. The first one is treaty based, in which state made agreement with specific IPs recognizing indigenous sovereignty and legitimacy of their political institutions. The second is law-based by which the right of IPs is provided in national laws, inter alia in constitution. The first method appears to be more democratic and essential to IPs as it inherently recognized autonomy of later from its very inception. the constitutional designs and legislative mechanisms of addressing, recognizing and protecting parallel operation of formal and informal politico-legal systems through law-based methods general has two approaches which are integration and parallel approaches. Whistle

⁵⁸ African Commission on Human and People’s Rights and International Work Group for Indigenous Affairs, *IPs In Africa: The Forgotten Peoples?* (2006),(Booklet on The African Commission’s Work on IPs in Africa) at. 20

⁵⁹ *Id.*, at. 20

⁶⁰ Some of relevant Cases brought before the ACHPR on the IP’s rights are; the the cases of *Katangese Peoples’ Congress v Zaire*, which involves allegation of state violation of Katangese people’s right to self-determination, *the Nigerian cases* involving the social and economic rights of the Ogoni people and *the case of black citizens of Mauritania*.

integration approaches allows mixing of two systems, the parallel approach facilitate independent and parallel operation of two systems. Integration approach is often criticized.

2.5 Scope and Limitation of IP's Right to Self-Determination

Self-determination is the broad concept that is closely related to the demand of IPs. In international human right law, it constitutes both a general principle that guides construction of several rules and specific right by itself. Broadly defined self determination is the principle by virtue of which people freely determine their political status and freely determine their economic, social and cultural development⁶¹. Self determination grants people the autonomy to control and freely decide their own matter by their own self. Self-determination to have two broad dimensions, i.e. Internal and external self-determination. while external self-determination is the right of people to separate from existing state of which the concerned group in a part and set up a new independent state⁶², the internal self-determination includes the right of people to have certain degree of autonomy within the state and the right to fair representation in center. The right of self-determination has also been recognized in many international and regional human rights instruments. In addition to being a right under international law, peoples' right of self-determination should also be regarded as *Jus cogens*, a peremptory norm of general international law from which no derogation is permitted⁶³. Among this the common art.1 of UN, ICCPR and ICSPCR provides:

- a. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
- b. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.*

⁶¹ Wondossen Wakene, Self governing Addis Ababa, the federal government & Oromia: bottom lines and limits in self governance (2010), (Unpublished LL.M Thesis, Addis Ababa Univerisity, Faculty of Law), at.15

⁶² John B. Henriksen, Implimentation of the Right to Self-Determination of IPs, Christian Erni and Marrienne Jensen ed. Indigenous Affairs, Self-Determination, 9

⁶³ Id, at. 7

c. *the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the UN.*”

There is international consensus on the importance of IPs right to self-determination. In USA the research finding of national congress of American Indians indicates that, self-governance is essential if tribal communities are to continue to protect their unique cultures and identities⁶⁴. It insures that Indian nation remains viable as distinct group of people⁶⁵. Similarly self-determination and self-governance are essential for improving the socio-economic condition of IPs⁶⁶. Most of IP’s claims on land and natural resource and territory are closely related to indigenous right to self-determination and can be resolved progressively by promoting later. The struggle for self-determination is the fundamental pre-requisite for IPs to be able to enhance their rights and improve their situation⁶⁷. Although there is international consensus on importance of the right to self-determination to the IPs and move to recognize, protect and promote it through international, regional and domestic legal system, there is certain disagreement on scope and limitation of indigenous right to self-determination. Indeed there is also controversies whether IPs are beneficiaries of right to self-determination.

Despite all above and other international and regional human right instruments that guarantee all peoples including IPs right to self-determination, at national political discourse many states tends to limit the scope to IP’s right to self-determination. For example while Canada has been reluctant to engage the issues of self-determination, in Australia self-determination has been rejected as active federal policy recently⁶⁸. It is often said that an explicit recognition of the right of self-determination of IPs could potentially threaten democracy, stability, peace and the political and territorial unity of existing States⁶⁹. But IPs have seldom sought complete separation from encompassing societies, rather the generally have envisioned what is called

⁶⁴ Supra note 45, at.2

⁶⁵ Id. At.2

⁶⁶ Supra note 44, at.1

⁶⁷ Id, at.5

⁶⁸ Id, at.9

⁶⁹ Supra note 52, at.14

“Nation within status”⁷⁰. This act of states at national discourse has also influenced international debates. One of such instance was evidenced on the drafting process of UNDRIP in which Art.3 draft of declaration that provides IPs right to self-determination was challenged by several state’s representatives. Many governments are of the opinion that Art.3 should be redrafted in order to strictly qualify indigenous self-determination as meaning arrangements such as self-government and autonomy⁷¹.

2.6 The Nexus between IP’s Rights to Self-Determination and Recognition of Indigenous Governance System

Recognition of traditional governance system is one of the most effective means of promoting IP’s right to self-determination. Cornell is right when he argue right to self-determination is a right to shape political order encompassing the right to determine the institution by which they govern themselves and the law to which they and other are subject in their own land⁷². From indigenous right perspective one can categorize this as institutional and normative aspect of IP’s right to self-determination. While institutional aspect is all about recognition of traditional institution of governance such as institution of traditional leaders, customary court, traditional legislative organ etc the normative aspect encompass recognition of indigenous norm, mainly law by which to govern. The more recognition and powers granted to indigenous institution, the more right to self-governance guaranteed. Cognizant of this Art.5 of UNDRIP stipulates that IPs have the right to maintain and strengthen their distinct institution.

2.7 Experience of Some Countries on the Rights to self-Governance of Indigenous Peoples

2.7.1 Canada

Canada has experience of both treaty and legal mechanism of addressing the parallel operation formal and informal politico-legal systems. The political history of country indicates existence of several treaties the government of Canada signed with IPs in the country. Since 1980 only Canada has concluded and implemented self-government and treaties with about more than 20

⁷⁰ Supra note 44, at. 8

⁷¹ Ibid, a.9

⁷² Id, at.8

first nation and Inuit communities⁷³. Treaties and self-government agreements are intended to provide how Aboriginal people and the federal and provincial or territorial governments relate to one another and foundation for ongoing and stable intergovernmental relations⁷⁴.

The first legal document adopted by Canada was the Royal Proclamation of 1763. This Act prohibited the occupation or sale of land specifically reserved for Indians without the direct consent of the Crown and also stipulated that the Crown would maintain its protection over Indians from being disturbed by external governing bodies or citizens⁷⁵. In 1876 the federal government instituted the Indian Act which was intended to provide greater protection from abuse and obtrusive settlers and to implement the obligations of treaties, royal instructions and the Royal Proclamation into federal law⁷⁶. The 1982 constitutional act also recognized inherent right of self-government of aboriginal peoples in areas that are internal to their communities and integral to their culture, languages and institutions, and with respect to their special relationship to their lands and resources⁷⁷. The constitution protects aboriginal treaties rights by stipulating that the newly adopted Charter of Rights cannot supersede Aboriginal treaty rights⁷⁸. In addition to federal laws, aboriginal rights are also recognized by provisional laws. Among this the Charlottetown has entrenched Aboriginals' inherent right to self-government in the Constitution and established a third order of government within Canadian federalism.

2.7.2 Bolivia

In Bolivia following the 1994 constitutional amendment many right of IPs were recognized by law and decrees⁷⁹. However indigenous movement achieved significant feat in 2005, when Evo Morales, the country's first indigenous president ascended to power⁸⁰ his election promised among other government adherence to its indigenous demands that lead to establishment of new

⁷³ Aboriginal Affairs and Northern Development Canada, *Toward a New Approach to Aboriginal Self-Government Fiscal Arrangements in Canada* (2012) (unpublished Discussion paper), at.4

⁷⁴ *Id.*, at 4

⁷⁵ Gina van den Burg, *The Absence of Democracy in Aboriginal Self-Governance Policy* (McMaster University) at.2

⁷⁶ *Id.*, at 3

⁷⁷ 1994 Bolivian Constitution Art.35

⁷⁸ *Ibid.*, Art.25

⁷⁹ Almut Schilling-Vacaflor, *Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?* *European Review of Latin American and Caribbean Studies* 90, April 2011 | 3-22 Page, 7

⁸⁰ Camila Acosta Varela, 'Decolonizing the nation-state': Indigenous Autonomy, Extractivism, and Consultation in Contemporary Bolivia (2016), page 3

platform for manifestation of indigenous rights and claim in 2009⁸¹. Following election of Morales new constitution which granted indigenous group's right to establish control over their primordial territories was enacted⁸². The constitution granted them to right establish institution and political administration in accordance with their own norm and procedure⁸³. This new innovative of Bolivian new constitution facilitates exercise of communitarian democracy in self-governed indigenous entities⁸⁴. Beside right to self-governance, the constitution also guarantees IPs the right to fully participate in state institution in the dominant society⁸⁵. As part of this, art.144 of constitution stipulates proportional representation of IPs in the legislative branch and foresees quotas providing a certain number of indigenous representatives in the same. According to 2014 survey report of the inter-parliamentary, Bolivia is among the few states where the parliamentary proportional representation of to the share of indigenous population representatives the critical mass they need to effectively influence parliamentary debates and ensure that indigenous interest are effectively addressed⁸⁶. To realize meaningful representation of IPs in parliament Bolivia's Commission on IPs was established inter alia with mandate of drafting laws and representing the interest of IPs in parliamentary debates⁸⁷. With regard to administration of natural resource, even though state has maintained control, the 2009 constitution promised IPs access to free and informed consultation processes⁸⁸.

2.7.3 South Africa

Legal recognition of indigenous right in SA goes to the Apartheid era. In 1959, the apartheid government adopted the promotion of Black self-government act which give power of self-administration to homelands. But Black self-governance under apartheid was not reflection of African culture and traditional leader were accountable to the apartheid government⁸⁹. SA has shows prominent progress in recognition, protection and promotion of indigenous right after independency. The federal constitution of SA and several statutes provides for indigenous right

⁸¹ Ibid

⁸² Ibid, at, 5

⁸³ Ibid

⁸⁴ Ibid

⁸⁵ Bolivian 1994 constitution, Art 30

⁸⁶ Inter-Parliamentary Union, Beyond Number: The Participation of Indigenous Peoples in Parliament (2014) page 8

⁸⁷ Ibid, at 9

⁸⁸ Supra note 80, p.9

⁸⁹ Kimberly Condon, A SUMMARY OF COMPARATIVE STATE RECOGNITION OF INDIGENOUS GOVERNANCE (2011) page. 10

and regulates the nature of relationship between state and traditional system. Among other things the SA legal system recognizes traditional governance system. The 1996 constitution gives recognition to customary laws, institution of traditional leadership and customary court⁹⁰. This is elaborated by many legislations. The Most important the traditional leadership and governance framework act which provides for establishment of traditional council. Based on section 27(7) of SA constitution and 1994 restitution of land right acts SA has restored lands to the peoples who were dispossessed from their land during apartheid era⁹¹. The government has created land restitution program to remedy and some group have regained traditional lands⁹². The act also provides traditional council to act as land administration committee for communal land⁹³. But later on the act was declared unconstitutional. To allow political representation of IPs the 1996 constitution has established House of Traditional leader as advisory board to national and provincial governments⁹⁴. Art. 5 and 6 of constitution recognizes the importance of traditional language and established the Pan South African board which is charged with promoting multilingualism and developing 11 official languages and SA sign language and the Khoisan Language.

⁹⁰ South Africa federal constitution, section 39 & 211

⁹¹ Ibid, 4

⁹² Ibid, 4

⁹³ Ibid

⁹⁴ Ibid

Chapter Three

Borana and the Ethiopian State

3.1 Introduction to Borana and Borana Indigenous Governance

3.1.1 Borana: Ethnography and Demography, economic life, Religion

Borana is a part of large Oromo ethnic group of Cushitic family that occupies Ethio-kenya Border. They speak Borana dialect (locally called Afaan Borana) of Afaan Oromo. Oral Tradition indicates historically Borana come from Tullu Nama Duri, a place around Mada-walabu of current Bale Zone⁹⁵. Borana migrate southward from Tullu nama Duri and settled in Liban (Current Gujii Zone) and later on to Dire and cross Kenyan border in Gada of Abayi Babo (1667-1674)⁹⁶. The reason for migration was mainly organic. Despite conversion of some into Christian and Islam (particularly those in urban settlement) most of Borana are Waaqefataa⁹⁷. Economically, Borana is predominantly pastoral. Currently, significant number of population exercise farming and business along pastoral activities.

The climate condition of Borana land is characterized by a semi-arid environment and lies in an altitudinal range of 1,000 to 1,500m above sea level⁹⁸. The current territory of Borana land is political divided into two and administratively into four. Politically, it is divided into Ethiopia and Kenya. Administratively, Ethiopian Borana occupies Borana and Guji Zone of ORS, while Kenya Borana occupies Isiolo and Marsabit County. This current administrative structure of Borana territory into four administrative units under Kenya and Ethiopia correspond to the ways Borana traditionally demarcates its land. Traditionally Borana divided its land into four. This includes Liban, a land located northern to Dawa River (Liban and Gumi Eldallo of Gujii Zone), Dire (land stretched southern of Dawa river to Ethio-Kenyan Border, current Borana zone of Oromia regional state), Saku (Marsabit county) and lastly Waso (Isiolo county) of Kenya. Borana consider Liban as the most sacred and cradland of all Borana land and it was a place

⁹⁵ Interview with Wako Guyo, Nov 2017

⁹⁶ Interview with Dr.Borbor Bule Dire and Wako Guyo, Nov, 2017

⁹⁷ Traditional Oromo Religion of belief in One God without any intermidier

⁹⁸ Abera Degefa, The Impact on Offenders of Rivarly Between Formal and Criminal Justice System and Indigenous Justice System, Experiences Among Borana Oromo In Relation to Crime of Homicide, The Danish Institute of Human Rights, 2013, Page 22

where many ritual ceremonies were held and Many Ardajila⁹⁹ were found. Dire is the widest of all Borana Lands division is further divided into five (Goolboo, Goomolee, Malbee, Wayama and Tula)¹⁰⁰.



Regarding social organization, Borana is divided into two major moiety called Sabo and Gona. While Gona Moiety is divided into two sub-moieties of *Fullelee* and *Arooessa* which each again divided into seven clans, Sabo moiety is divided into three clans called Karrayyuu, Digaluu and Maxxarrii. The two moiety of Borana are not territorial divided and are approximately equal in number¹⁰¹. This division of social structure continues and clans are further divided into Mana, mana divided into Balbalaa and Balbalaa into Moonaa. On other hand depending on Generational governance of Gada system, Borana is divided into five generational classes called

⁹⁹ Ardajila is specific place where cultural and ritual ceremony are held periodically

¹⁰⁰ Interview with Dr. Borbor Bule, Nov, 2017

¹⁰¹ Asmarom Legesse, *Three Approaches to The Study of African Society*, 1972, The Free Press, Collier Macmillan Publishing Com.,inc ,newyork, library of congress catalog Card Number: 72-87783, page 39

Gogeessa, Gogeessa Adii Dooyyoo, Gogeessa Boruu Galma, Gogeessa Liiban Kusee and Gogeessa Bulee Dabbasaa. Furthermore based on political status Borana are divided into Ilmaan Jaarsaa and Ilmaan Kormaa, and again waarra Kalu and Waarra Bokkuu.

Such division of social organization has immense social, political and cultural importance in life of Borana People. One social importance of division into two major moieties of Sabboo and Goonaa is that, a person cannot marry a member of his own moiety. A man belonging to Goonaa Moiety can marry only women from Sabboo and vice versa save for the case of Kalu of Karrayyuu who should Marry Qaallittii from Maxxarrii clan of his own moiety. The social division into waarra Kalu and Waarra Bokkuu and Ilmaan Jaarsaa and Ilmaa Kormaa has much implication on the level of political participation in live of Borana. Waarra Kalu and Ilmaan Jaarsaa have very limited role in political life. These divisions of social structure also help to determine seniority in different ritual ceremonies.

3.1.2 Borana Indigenous Governance System: Normative and Institutional Components

3.1.2.1) Institutional Components: The Borana is famous among Oromo, Ethiopia and Africa for having strong IGS called “Gada”. Gada is a totality of institutional and normative set-up that govern Borana people and responsible for keeping Peace of Borana (a Primary Value). In indigenous Gada governance system, there are many institutions and normative framework by which those institutions govern the people and regulate the nature of interface among each other. Although Gada system has weakened by incorporation of Borana lands to Ethiopia and British Empire, it has continued to play substantial roles in the social, cultural and political lives of Borana. This study will consider some major institutions in Gada Governance system, how they are related to one another and normative framework by which they govern people and regulate nature of interface between each other.

A) Gada Councils: The GCs are the highest executive organ in BIGG. In general there are three GCs which includes; Gada Arboora (the Arboora Council, prime), the highest council, Gada Awaxxuu (the Awaxu GC) and Konnituu GC (the Konitu GC), the last two commonly called Gada Kontomaa. In each GCs there are councilors (Hayyuu) which are elected and assume

power for eight year. There are three categories of councilors in GCs which are Adula Councilors (Hayyuu Adulaa), Garba councilors (Hayyuu Garbaa) and Medicha councilors (Hayyuu Meedhichaa). Adula councilors are the senior of all and are six in number. Arboora council has four Adula councilors, while both Awaxu and Konitu Council each have one Adula councilor. Adula Councilors are elected earlier many years before their class assumes power at stage called kuusa in Gada grade. Among six Adula councilors three bear Name Abbaa Gada each of them being head of three councils. Of all three Abbaa Gada, the Abbaa Gada of Arboora council is senior and called Abbaa Gada Fiixee (prime Abba Gada) of all Borana for eight year. Garba councilors are the second senior while Medicha councilors are the junior of all GCors. Unlike Adula Councilors which each council have at least one member, Garba councilors are elected only to Arboora council, while Medicha councilors are elected only to Kontoma councils. The number of Garba and Medicha councilors is not fixed and they are elected shortly after their class assumes power. Each councilor appoints Makkala (deputy and messenger). In addition to above councilors, GCs have Abbaa Bokkuu, an official who is elected with six Adula councilors and lead ritual ceremony. Lastly, there are officials called Jallabaa which are elected by clan and GCto enforce the decision of Abbaa Gada and his councilors. This GCs lead by Abbaa Gada and his councilors assumes highest executive powers for eight year. In addition they have also significant judiciary powers.

B) Kalu institutions: Kalu are religious leaders whose office is hereditary. In general, Borana has five Kalu which includes; Kalu of Oditu (senior Kalu), Kalu of Karrayyuu, Kalu of Maxxarii Kararaa, Kalu of Maxxarii Garjeeda and Kalu of Maxxarii Kuukkuu. Kalu institutions have also councilors (Hayyuu) which are elected and assume powers for eight year just like that of GCors. Their position is equivalent with Garba councilors of GCs. Besides religious power, Kalu has also significant executive and judiciary powers particularly each on their own clan. In relation with Gada, Kalu is considered as senior. Indeed oral tradition indicates that Gada was established by Kalu¹⁰². At that time he was Kalu that made law for Borana. Until the time of Derg, the institution of Kalu had very decisive role in election of GCors. GCand Kalu meet each eight year at Muda ceremony to honor Kalu and take bless from each other.

¹⁰² Interview with Dr. Borbor Bule, Nov, 2017

- C) Gumii:** Gumii is the highest legislative and Judiciary organ of BIGG. Gumii is an assembly which is held each eight year at place called Gaayoo. The powers and function of Gumii includes making of new and amendment or repeal of old laws, evaluating Abbaa Gada on powers, his councilors and taking necessary measures against them, resolving disputes which could not be resolved at lower level. Gumii is the most inclusive event and any individuals have right to attend¹⁰³.
- D) Gosa (Clan) institution:** Clan is the second organizational unit of Borana next to moiety. Clans have some autonomy over matters that exclusively concern clan such as matter concerning Eelaa Gosa (clan water wells), Buusaa-Gonofaa (welfare), dispute between couple etc. Clan decides issues through kora Gosa (clan Meeting) and officials such as Qa'ee and Jallabaa.
- E) Hiriya institutions:** Hiriya is an age-sets institution of all male persons of similar age (born in one Gada period). Persons begin to constitute Hiriya probably at age of 16. At this age sons enter the stage called kuuchuu and they are called *Ijoollee kuuchu*. The stage begin with ritual ceremony called "*Biyyee Kuusomaa*" in which all sons of similar age go to places specified for this purpose to take Biyyee Kuusomaa that marks entering kuusomaa stage. This ceremony helps them to know each other and they will conduct different ceremonies for the next eight year. After eight year all these sons come again at one place to conduct ceremony called biyyee cinnaa. On this ceremony, they select one persons among them as Hayyuu Hiriya (Hiriya councilor) after whom their age-set is named and they constitute one age-set. Age-sets have some ritual and military responsibilities. Nominally, the councilor of age-set is considered as senior of all Borana Councilors including Abbaa Gada.

3.1.2.2) Normative Components: In dealing with public matters, those governing institutions in of Gada system base their decisions and govern people in accordance with custom (tradition) called **Aadaa** and traditional laws called **Seera**. In Gada system, **Aadaa (tradition) a totality** of rule of conduct which is accepted and governs Oromo communities and it involves spontaneously evolved rules emerging through long process in social relationships. On other hand, law or **Seera** is legislation which is enacted throughout deliberation of legislative body of Gada system called GG in Borana and Chaffee in other parts of Oromia. Whereas state may

¹⁰³ Supra note 101, at 93

impose law and political decisions by the use of force or the potential use of organized force whose control is delegated to certain social entities, the Borana maintain their internal order by consensus and persuasion, which in turn are obtained by diffused and intense participation in process of decision making within assemblies¹⁰⁴.

3.1.3 Incorporation of Borana under Ethiopian Empire

As oral traditions and different writing indicates the Menelik incursion into Borana lands took place in Gada of Liban Jaldesa (1891-1899)¹⁰⁵. The Menelik occupation of Borana land had come from two fronts and it faced different response from the people. One is from Liban current Liban Zone of ORS, the first colonial incursion into Borana lands that probably took place in 1896, when Ras Darge, the ruler of Arsi lead expedition into Liban¹⁰⁶. This occupation force of Menelik under Ras Darge faced serious resistance from Borana. At the time, the GCs waged war against the Menelik by horse. But at the end Borana horseman were defeated because of military superiority of Menelik force by Modern riffles at the time¹⁰⁷. Following defeat of Borana horse man, the Menelik force took several children of GCs (Dabballee)¹⁰⁸. The second front which enters Borana Land from Dire was lead by Fitawrari Habte Giorgis. The Borana offered no resistance to this force and agreed to pay tribute¹⁰⁹. The reason why Borana of Dire offered no resistance to this force of Habte Giorgis could be probably a lesson taken from war with British in which about 150 Borana warriors were died by British forces. Since then the Borana of Dire know the effect of gun and when Menelik force come armed with rifles, they saw uselessness of resisting¹¹⁰.

¹⁰⁴ Marco Bassi, Power's Ambiguity or the Political Significance of Gada, in P.T.W. Baxter, Jan Hultin and Alessandro Triuzi, *Being and Becoming Oromo* (1996), at 159

¹⁰⁵ Interview with Dr. Borbor Bule, waqo Guyo, Elias Galgalo, Wako Galgalo, Guyo Arero and others. See also Jatan Dida, Jaarraa, at 331 and Helland at 142.

¹⁰⁶ Johan Helland, The political Viability of Borana Pastoralism, a discussion of some features of the Political System of The Borana pastoralist of Southern Ethiopia, in P.T.W. Baxter, Jan Hultin and Alessandro Triuzi, *Being and Becoming Oromo* (1996), at 142

¹⁰⁷ Interview with Dr. Borbor Bule and Waqo Guyo, Nov, 2017

¹⁰⁸ Id

¹⁰⁹ Id and supra note 100, at 142

¹¹⁰ Id, 143

3.2 The Current Ethiopian formal State Structures

Currently Ethiopia has adopted federal state structure with 9 regional states and two city administrations. Horizontally the 1995 FDRE constitution has established three wing of governments legislative, executive and judiciary. Vertically, the constitution has established federal and nine regional states governments each with defined powers and responsibilities. Furthermore below regional governments the country has put in place the administrative structures called Zone, Woreda and Kebele each with certain degree of autonomy. The 1995 FDRE constitution, the regional state's constitutions, codes and proclamations adopted by federal and regional governments constitutes large normative components of current Ethiopian political and legal system. Oromia is one of the largest regional states in Ethiopia and it consists of 20 administrative zones and 18 equivalent city administrations. Of 20 Zones, Borana Zone is the second largest Zone next to Bale. The Council of the State (Chaffee) is the highest body of Oromia regional government¹¹¹.

3.3 Indigenous Governances in Ethiopian Laws and Policy

3.3.1 Pre-1991 state of Affairs

Though the history of Ethiopia as state may traced back thousand years before Christ, it took the current shape and geographic size only in the 19th century under emperor Menelik II through the process of subjugation¹¹². The process of subjugation has been by large through suppression without giving any significant recognition to identities and autonomy to subjugated people¹¹³ despite ethno-linguistic, cultural, social, religion and economic diversities. In all territories subjugated what attempted was imposition of single Abyssinian culture, language and ethnic assimilation which was marked with success at the beginning albeit potential resistances which later consolidated itself and developed into political forces. Thinking about recognition of ethno-linguistic, religious and cultural identities and self-rule of different groups was dismay as such

¹¹¹ Oromia Regional State, Ethiopia Government Portal, <http://www.ethiopia.gov.et/oromia-regional-state>

¹¹² (Bahru Zewde cited in Merera Gudina: *Competing Ethnic Nationalism and the Quest for Democracy 1960-2000*, (Ph.D. Dissertation), Maastricht, Shaker Publishing, 2003, at 57.

¹¹³ *Ibid*, page 60

measures were understood by rulers as against process of state building and national unity¹¹⁴. Assimilation through suppression of identities and autonomy of subjugated peoples and territories were conceived as the only ways to achieve national unity for granted¹¹⁵. Therefore no recognition and autonomy was granted to IPs and their traditional governance institutions. Thus, the Menelik incorporation undermines identities of different indigenous groups in the country by attacking their institutions and symbols. Introducing alien values and ideals by marginalizing the indigenous variants characterized the drives of the successive imperial regimes in this respect¹¹⁶.

The situation in Borana was not that much different from general situation of IPs in the country. When Borana land were incorporated by Menelik under Ethiopia empire, despite the fact that there had been very strong Indigenous Gada governance system, very little recognition were been given to the later. Of all five BIGIs explained above only Kalu Institution were recognized by then regime. The recognition given to Kalu institution itself was only to use it as the instrument of indirect rule. As indicated above when Menelik come to Borana Land from Dire, both senior Kalu (Oditu and Karrayyuu Kalu) were settled in the Dire. This force did not seriously challenge Menelik Incorporation as in case of Liban. Because of this Menelik government selected Kalu institutions for purpose of indirect rule and it appointed Kalu Gedo Jilo (kalu of Karrayyuu) and Guyo ana (the brother of Oditu Kalu) as Fitwarar to represent Ethiopian state to the Borana population and as spokesmen for Borana¹¹⁷. Another reason for Menelik government to give recognition to Kalu was because hereditary nature of Kalu office that is similar with then autocratic regime. Except Kalu all other indigenous institutions including the GCs were official disregarded by imperial regime. Since GCs were seriously challenged incorporation at Liban, it was identified by incorporation force as Warlike group and hated by the government.

The Imperial regime did not only disregard the indigenous institution, but it also interferes in the way indigenous leaders are elected. One of critical measure the Menelik government did in this regard was, it gave the institution of Kalu to have decisive role than traditional been in election

¹¹⁴ Christophe Van Der Beken, Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level, Africa Focus, Vol. 20, Nr. 1-2, 2007, Page. 2

¹¹⁵ Ibid, page 3

¹¹⁶ Markos, 144

¹¹⁷ Hellend, page 144, interview with Dr. Borbor and Waqo Guyo, Nov, 2017

of GCors. The Institution of Kalu was given final say and to declare the winner of GCors. Though according to traditional custom each moiety (lead by Kalu of Oditu and Karrayyuu) would select its three adula councilors with consent and approval of the opposite moiety, the Ethiopia government has intervened the process of election through decree issued by Minister of interior and decided each moiety to appoint their Adula councilor independently¹¹⁸. This decision followed the disagreement between two Kalu councils on election of Adula councilors in Gada of Dida Bitata (1876-1883).

Coming to the throne of emperor Haile Sellassie did not brought any positive change to IPs in the country. Like its predecessors, the emperor Haile Sellassie kept attached to the project of nation building through centralization of powers and assimilations approach in more fashioned and elaborated ways. One facet of this was the codification project launched by regime which resulted in adoption of six western styled codes. The idea was to have one law applicable for the whole country denying room for legal pluralism of any kind¹¹⁹. One repressive outcome of this codification project on the IPs was the repeal of all customary laws¹²⁰. In Borana, like that of Menelik the Haile Sellassie regime also continued to utilize Kalu institution as means of indirect rule. Interventions in the election of GCs during this period were also remarkable. The Borana District government has issued another decree similar to previous on Miazia 7, 1940 which give power of electing Adula and Garba councilor to Qalu alone¹²¹. Asmarom indicated how the government of Ethiopia has intervened in process of election of GCors particularly in election of Adula councils of 1963.

One of extremely serious measure against Borana Indigenous Gada governance happened during Gada of Jaldesa Liban (1960-68), when Abba Gada Jaldesa Liban and his councilors were summoned by the district Governor and detained for a month. The Abbaa Gada and his councilors are ordered to accept Christianity¹²². The Abba Gada said that he was the father of all Borana and a ritual leader of his class and therefore was not free to accept Christianity¹²³. The

¹¹⁸ Supra note 101, 206

¹¹⁹ Abera Degefa Abera Degefa, *The Impact on Offenders of Rivarly Between Formal and Criminal Justice System and Indigenous Justice System, Experiences Among Borana Oromo In Relation to Crime of Homicide*, page 34

¹²⁰ The 1960 Civil Code of Ethiopia, Art.3347

¹²¹ Supra note 96, at

¹²² Ibid

¹²³ Ibid

nature of relationship between Haile sellassie regime and GG (highest legislative and Judiciary organ) also worth mention here. The codification project in general and art.3347 of the 1960 civil code of Ethiopia which repealed all customary laws contrary to it in particular has very repressive impact on the Gumii. It has repealed all laws enacted by Gumii and made the Gumii irrelevant at least officially. On other hand Gumii has also passed decision against Ethiopia government. For instance occasionally Gumii passed judgments against Ethiopian official¹²⁴. Despite lack of official recognition given to BIGIs and severe measure to undermine their authority and legitimacy, because the administration of Borana areas remained quite rudimentary, the legitimacy and authority of Indigenous Gada system was not seriously challenged during Imperial regime.

The Derg was also continued with the idea of state building. One significant progress made from perspective of the rights of IPs during this period was official recognition of diverse ethnic identity as the result of which commission is established with mandate of undertaking studies on the Ethiopian ethnicity¹²⁵. Despite this the Derg regime was identified as the most repressive regime to the indigenous system comparing to its predecessors. Under military rule, traditional leaders and institutions were abolished altogether branded as collaborators of the imperial regime and dubbed as reactionaries and the enemies of the people¹²⁶. In Borana, discussion with elders indicates that when it first comes Derg insulted elder, Gada, culture and religions and religious leaders as well. The institutions of Kalu that had recognition of imperial regime for purposes of direct rule were totally disregarded by DERG and their role in election of GCors were taken away. Derg did not use any Borana IGI for purpose of direct rule. New administration bureaucracy is put in place with establishment of Peasant association. Borana students played active role in adapting this system to the local condition.

One of very serious measure against indigenous system during Derg period was promulgation of the 1975 Land reform proclamation which total disregarded indigenous system and made them irrelevant. In Borana, this land reform has made traditional Borana territory around water resources called Mada totally irrelevant and has violated indigenous rights to lands. Under the

¹²⁴ Asmarom Legesse, *Oromo Democracy: an indigenous African Political system*, 2006, The Red Sea Press, page 213

¹²⁵ Abera Degefa, *Lecture of Ethiopian constitutional development*, 2017

¹²⁶ *Supra* note 32, at 158

peasant association the grazing lands were reorganized internally by dismantling the traditional model of the Borana, thereby reconstituting major changes to land use both from within and without¹²⁷. In certain cases, the PAs even tried to control movements of herds across the administrative borders¹²⁸. The intrusive governance by the state through PA political cadres has thoroughly weakened the functioning of indigenous land use systems¹²⁹. This harsh position of Derg regime against indigenous system was however mitigated in Borana by relatively good Local administration. For instance local administration prohibited intervention in indigenous decision making process except taking away of the role of Kalu institutions in election of GC and also prohibited traditional leaders not to interfere in the state affairs¹³⁰.

3.3.2 Post 1991 State of Affairs

Downfall of Derg in 1991 and subsequent adoption the 1995 FDRE constitution marks paradigm shift in Ethiopian political discourse in general and the demand of IPs in particular. Cognizant of ethno-linguistic diversity of the country and popular demand to accommodate it which all previous regime could not address, the 1995 FDRE constitution has established ethnic federal state. The constitution guarantees all nations, nationalities and peoples of Ethiopia many rights in manner that is a quite different from previous constitutions. It assumes NNPs as maker of constitution and stipulates that they are holder of all sovereign powers¹³¹. This contemporary political arrangement introduced by FDRE constitution creates favorable condition to accommodate the demands of IPs and traditional governance institutions in the country. The federal structure put in place is very relevant to IPs and IGI as a mechanism for recognizing their self-governing status, a basis for decentralizing and hence realizing their desire of national and local identity. It also create good atmosphere to address and regulate interface between the state and traditional governance institutions. In context of 1995 FDRE constitution all IPs in Ethiopia enjoys rights that are granted to NNPs since they are also part of them. Some of entitlements guaranteed by constitution to the NNPs and very relevant to the IPs are, right to language, culture and history (Art.39 (2), right to self-determination (Art.39 (1, 3) Art.47 (2), right to be represented in federal institution Art Some of IPs may also enjoys the protection given to

¹²⁷ Supra note 117

¹²⁸ Ibid

¹²⁹ Ibid

¹³⁰ Interview with Dr. Borbor Bule, Nov, 2017

¹³¹ The 1995 FDRE Constitution of Ethiopia, Art.8

minority groups. Furthermore, constitutional recognition to customary laws (Art.34 (5)) and customary courts (Art.78 (5)) has prominent value for IPs in the country.

Though the current federal arrangement creates favorable condition for IPs and they can benefit from constitutional guarantees to NNPs and some to minority groups that is not adequate by itself. The political, economical and cultural position of IPs within wide society begs special consideration. Particularly, the issues about recognition and protection of traditional institutions and their nature of interface with the state need critical attention. However, despite existence of several indigenous groups and traditional governance institutions playing significant roles in the live of respective society, the FDRE constitution and most of regional state's constitution are entirely silent on IPs and their traditional governance institutions except recognition granted to customary laws and customary courts which itself has narrow legal base. With regard to customary court the constitutions provides only possibility of recognition in near future. HPR and SC are not obliged by constitutions to establish or official recognize customary court.

It is unfortunate that nowhere in the FDRE constitution and most of regional state's constitutions, those IPs and their traditional governance institutions are mentioned. Nor the indigenous governances were recognized by statute. This has enormous implications on the state-society relation and the rights of IPs. It may undermine the political legitimacy of the state. The political legitimacy of the society as a whole is enhanced when the political integrity of different social groups within the society is recognized¹³². Here one may doubt whether the maker of FDRE and most of regional state constitutions did gave any attention to the demands of IPs and their traditional governance and had informed of indigenous movement at international level. Indeed one may further ask whether the issues of IPs and their traditional institutions require constitutional treatment in Ethiopia. Though there is no criteria set to determine what are constitutional matters that needs constitutional treatments and not, the nature of issues involved, the intensity of issues as public concern, the seriousness of issue and the possibility of addressing issues by other non-constitutional mechanisms are important considerations.

Based on the specific circumstances of the Ethiopia, the issues of indigenous governances is the issue of constitutional concern because of the nature of issue involved, its intensity and

¹³² Supra note 32, at 4

seriousness. What make the nature of issues relevant for constitutional treatment is that it raises the issues of power sharing. One function of constitution is to regulate power sharing among state organs. Besides, constitution should go beyond and regulate also issues of power sharing between state and other organs such as IGIs if any. Indeed, one may questions about the role of indigenous constitutional order. The issue is vitally intense because there are many IGIs in country playing vital governance role in concerned society in accordance with their respective traditional constitutional order. Issues are critical because unless adequately regulated, it may potentially result in conflict between state and indigenous system, undermine political legitimacy of society and affect state-society relation. Though it is possible to regulate matter by statutes, recognition of Indigenous government within the Constitution is important to ensure Indigenous governance is properly accounted for in government law and policy. Non-recognition of indigenous governance in Ethiopia legal and political system implies an only state has a right to govern. But indigenous governances do not need state recognition to operate. Failure to recognize traditional governance is considered as the deficits and gaps experienced in the course of efforts aimed at building democratic governance in multi-ethnic and multi-cultural societies¹³³.

However, Afar and Somalia regional state has made significant departure by recognizing traditional leaders in their respective state constitution. The Constitution of Afar Regional State provides clan leaders have significant roles to play by actively participating in the deliberations and associated processes of the councils of elders¹³⁴. The Somali Regional State's Constitution provides for the establishment of councils of elders and clan leaders¹³⁵. Besides, the constitution of both states gives due recognition to the traditional and religious courts well as customary laws in private and family matters.

3.3.2.1 Insight into Current Ethiopian Land Policy on Indigenous Right to Land and Natural Resources

In the way that seems little bit departure from the general political and economic policy (liberal capitalism), Ethiopia has currently adopted communal land policy by promulgation of the 1995

¹³³ Ibid, at 4

¹³⁴ Afar regional state's constitution, Art.65

¹³⁵ Somali Regional state's Constitution, Art.56

FDRE constitution. The constitution unequivocally stipulates under article 40 (3) the ownership rights of lands and natural resource is vested to the state and peoples. When one sees it alone this stipulation has both positive and adverse implication on the rights of IPs in the country. To begin with the positive implication, the stipulation has potential to avoid the danger of privatization of lands. Since lands is common property of state and Ethiopian peoples and not subjected to sell, there is no private land ownership right. Legally the impact of this on IPs is it avoids transfer of ancestral land to third party (individual persons, company's, inter-state corporation, NGO etc.). This in turn protects eviction of IPs from their land of origin and sustains IPs rights to lands.

On other hands stipulation has also adverse impact on the rights of IPs. The constitution prohibits not only private land ownership rights of individual but also that of group. The spirit of constitution is to avoid the private land ownership rights of all kinds. Hence according to this interpretation, there would be no land ownership of specific ethnic group, rather lands is a common property of all NNPs of Ethiopia and the state. Legally this stand could restrict IP's right to freely own, use, and dispose ancestral lands. Expropriation which is a famous restriction on individuals and groups rights to land could be restricts also IP's right to land over. This principle is against a view and practices of several indigenous groups, the view and practices that they are each the solely owners of ancestral lands.

Regarding the recognition of the roles and powers of indigenous institutions in administration of land and natural resources and application of customary laws in settlements of land disputes, the state legal system is almost silent. The constitution explicitly vested legislative power to federal government and power to administer land and natural resources to the concerned state government leaving no room for indigenous political institution. Likewise the constitution and subordinate legislatures including state's constitutions did not provides any stipulations that recognizes the roles of indigenous political institutions in administration of lands and natural resources as well as settlement of disputes. Besides, the state legal system is silent on the application of customary laws on land disputes. The provisions of the 1995 FDRE constitution and states constitutions which recognizes the powers of indigenous and religious institutions in settlements private and family matters and application of religion and customary laws do not apply to land disputes since lands is common property and disputes over lands always involves public interest.

Chapter Four

The Nature of Relationship between the State and Borana Indigenous Governance System

Before the incorporation of Borana lands into the Ethiopian empire, Borana political institutions had been the only legitimate governance institutions. However since incorporation of Borana lands, these traditional governance institutions have encountered formidable challenge. This section deals with the current nature of the relation between Borana traditional political institutions and formal state structures. The discussion specifically addresses the nature of relationship between BIGIs and state in law making and enforcement, dispute resolution and administration of justice, administration of land and natural resources in practice.

4.1 The Nature of Relationship between State and Borana Indigenous Governance System on Law Making and Law Enforcements

As indicated above the Gumii is the highest law making organ in Borana indigenous governance. This organ which seats once at eight year made new laws, amend or repeals existing laws according to custom. On other hand the state legislature (HPR at federal and state councils at state level) and other organ at different level also enact laws on different matters. The question that could come to one's mind is whether this institutions take into consideration the law enacted by other on specific area so as to maintain harmony and avoid possible inconsistency in application of law. Does GG Take into account relevant state law when it enacts specific law on certain matter? What about federal/state legislators? Do they take into account custom or the law of Borana Gada system in area?

Here the underlying values and fundamental doctrine of the state's and Borana indigenous legal system actually differ. But harmony can be made to certain extent if not possible absolutely. In practice Gumii does take into consideration the existing state's law. For example when Borana lands were first incorporated under Ethiopian empire, what Menelik government declared was prohibition of death penalty except by state¹³⁶. Before that in Borana customary law death penalty called (*Hamna-mudamuddii dha'an*) can be imposed on doer of serious crime.

¹³⁶ Interview with Waqo Guyo, Yaballo, Nov, 2017

Following prohibition of death penalty by State GG has in prohibited imposition of death penalty as punishment for public wrong¹³⁷. Gumii of Abbaa Gada Boru Mada has proclaimed all Borana to educate girl, while Gumii of Abbaa Gada Guyo Goba child marriage girl cercmistation are prohibited based on state laws. Besides children right to education was recognized for the first time and further it was declared that no one could nominate his son for position of Adula council unless he has sent him to school. The reason why Gumii take into consideration the state laws in its function of law making may be probably willingness on the part of Gumii to live in harmony and cooperation with state and/or unnecessary influence from the state or utility of such stipulation. On other hands State's legislatures do not take into account the relevant Borana laws and customs because they may not now the very existence of such law or may deliberately ignore it. In fact states laws are much influenced by the western liberal ideology, values and principle such as democracy, Rule of law, Principle of Natural justice, principle of human right and fundamental freedom rather that indigenous values, norm and principle. The Constitutional mechanism that establishes indigenous council or commission along law making chamber with power of law making or advisory body to government on indigenous demands can compromise/alleviate problem of totally ignoring indigenous norm and values in law making process of many parliamentary African country.

The issue about existence of any influences by state in the process of enactment of law, by GG and vice versa seeks critical attention. As discussion with elders indicates State can influence process either directly or indirectly¹³⁸. Direct interventions of the state in Gumii were witnessed at Gumii of Gada Boru Mada and Liban Jaldesa¹³⁹. The government in both instances has among other thing brought new political agenda which need not entertained by Gumii. One of agenda brought by government to Gumii is about Oromo Liberation Front (OLF)¹⁴⁰. According to elders, the government asked Gumii to pass resolution that OLF would surrender arm and seek peaceful political negotiation¹⁴¹. The Gumii in both cases has accepted and passed decision as government asked. During Gada Boru Mada special military force by name Abbaa Gada arm (equivalent to

¹³⁷ Ibid

¹³⁸ Interview with Dr Borbor Bule, Nov, 2017

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Ibid

Liyu Haile in Somalia regional state) was established by government to avoid OLF incursion¹⁴². These all indicate direct influence from government in the Gumii decision making process. Indirectly the government may also intervene by means such as awareness creation and meeting with community and Gada leaders etc.

The issue about which law (state's or Gumii's law) prevails in case of inconsistency worth brief highlight. Ideally, there is no order of hierarchy as each law is applied by different authority. But art.9 (1) of FDRE constitution and equivalent state's constitutions stipulates supremacy of constitution and make void any practices, decision and laws contrary to the constitution. In practice the state law (including constitution, proclamation, regulation etc) prevails over Borana customary and traditional laws since cases are frequently taken to court or other state's organs by ways of appeal from the customary judiciary organ and the state institution obviously apply state's laws. For instance the stipulation of Oromia Family code which provides that decision of divorce be declared only by court of laws prevail in practice over Borana custom which holds that only the clan institution could declare divorce of couple. This issue was specifically dealt with in next section.

Another important point begs question here is whether each institution cooperates for implementation of each other laws. Do Borana indigenous political institution cooperates with state for enforcement of state's laws? What about state institutions and local leaders? Do they cooperate for implementation of Borana customary and traditional law? In reality indigenous institutions do cooperate with state for law enforcement, for example in crime protection and control particularly on inter-border ethnic conflict. Discussion with Police officials, community leaders and elders, judges and GCs indicates that the indigenous institutions cooperates through awareness creation, community policing, informing commission of crime to the police, serving as witness etc. Since leaders of indigenous institutions especially Abbaa Gada have great respect in the community, the state usually channels its policies and law through these institutions. In this case leaders of indigenous institutions play the role of inter-mediating the state-society relation.

¹⁴² Ibid

On other hand state institutions and local leaders do not cooperate for implementation of Borana custom and laws because of different reasons. In this regard implementation of Borana custom, customary laws and decision have been facing formidable challenges since incorporation of Borana lands to Abyssinian Empire. This is mainly attributed to lack of official recognition granted to indigenous system and established mechanism to parallel enforce them. State institution have constitutional mandate to enforce constitutional established system only¹⁴³. They don't have any legal obligation to enforce customary laws and decisions of traditional institutions. On other hand sometimes the measures of state institution to enforce customary laws and decision of customary organs may be at conflict with state legal system. This has been what witnessed usually in Borana since incorporation. Usually, what is prohibited as public offence by Borana custom and laws are not criminalized by Ethiopian laws. What is prohibited by custom and customary law as illegal may be legal by state standard. For instance *caphana* (the act of being pregnant before marriage) is one of serious crime according to Borana custom is lawful pursuant to state's legal system. If someone commits this act, there is heinous punishment imposed according to custom. The intervention of state to enforce this custom may be considered as violation of individual right since persons should not be punished for what is not criminalized by state's criminal laws.

One of recent case that creates huge controversies between BIIs and the state was the law of Alcohol and Chat declared by GG of Abba Gada Guyo Goba and similar resolution made by Borana at Alona. Indeed it was the second time Gumii to proscribe usage and trading of alcohol and Chat in Borana lands, the first one being during Gada of Boru Guyo¹⁴⁴. The reason behind this rule was Borana consider alcohol and Chat is detrimental to Borana custom and over all social, political and cultural of Borana community and individual Borana households. According to this law consuming and trading of alcohol and chat, buying and using it for ceremony, giving to any one voluntarily for election campaign and using it during burial service is totally prohibited. Furthermore this law imposed fine of five cattle on transcended of any above stipulations. Fine shall be the income of kebele and it shall be used for development activities undertaken by Kebele. This law is quite clear, good and private only to Borana peoples own affairs. But implementation of this law faced serious challenges. Its enforcement faced conflict

¹⁴³ Commander Abatano Halake (Commander of Yaballo Woreda Police Office) Nov, 2017

¹⁴⁴ Jatan Diida, Jaarraa, Haaromsaa Aadaa Booranaa, page, 211

with state system. According to the law anyone who saw same one with chat and alcohol or who is in state of intoxication in rural areas shall communicate matter to the relevant kebele administration for arrest and can themselves destroy chat and alcohol he saw person possess.

In many occasion in both study Areas and all Borana land this measure to distract chat and alcohol appended have created tension. For example in Arero district some persons appended responded that, they are governed according to state's laws not according to Borana Gada customary laws and customs and they approached court and police claiming compensation. Most of those who raise this respond they don't belong to Borana. In some cases the persons who cooperate to enforce the laws were arrested and sentenced by the court for commission of crime for distraction of property.¹⁴⁵ In some few cases in Arero district, Abba Gadas has intervened voicing why they don't have autonomy to enforce their laws and customs. In most case GCs and community elders have intervened the charge were cancelled and dismissed by public prosecutor and court through administrative influences. At the end because of pervasive tension between GCs and any Borana Who cooperate to enforce this laws level and the state institution at district and Zonal level, enforcement of this laws are weekend and finally it fail. This would undermine the autonomy of Indigenous institution and Borana people's right to self governance. If the laws declared by Gumii are not enforced, people would lose faith in Gumii and the very existence of Gumii as indigenous law making organ for Borana would fall under suspect.

With regard to enforcement of customary and laws there is few disparity among two study areas. In Arero states institution shows cooperation than Yabalo district. Though it is very few in number, there is instance in which a person summoned and refused to appear before GCs are arrested by police and Kebele milisha and appeared before GC¹⁴⁶. In one case a man named Rashid Guyo Fayo summoned by GC accused for violating the law of chat refused and the wereda police has arrested and apprehended him before GC¹⁴⁷. Similar case never happened in Yaballo district. The reason for this variation is most probably attributed to the fact that the main seat of GCs being in Arero. In general enforcement of Gumii's laws and Borana custom has been facing formidable challenges and found in conflict with formal state legal system.

¹⁴⁵ Interview with Isaq Hassan Molu (president of Yaballo Woreda FIC), Yaballo, Nov, 2017

¹⁴⁶ Interview with Kura Jarso Kura(current Abba Gada of Borana) and Hassan Borbor Bulee (public prosecutor at Arero Woreda), Arero, Nov, 2017

¹⁴⁷ Ibid

4.2 The Nature Relationship Between Formal Justice Organ and Borana Indigenous Justice Organ in Dispute Resolution and Administration of Justice

In Gada system there is a division of executive, legislative and judiciary power among different branch and level of governments. As one wing of the government powers, adjudicative power is granted to specified organs. Division of adjudicative power in Gada system goes in parallel with administrative structure of the system. In Gada form of government, there is range of administrative structure from smallest unit called Village (Ollaa) to the highest organ called Raba Gada (National government). At each level of governments, there is judiciary organ responsible for solving disputes that arose in such administrative unit. The Ollaa has the first instance jurisdiction on all disputes among members of Ollaa. If the dispute is among members of different Ollaa, it falls under jurisdiction of second level of government called Reera. Likewise if dispute is among person of different Reera, it falls under jurisdiction of third level of government called Dheeda. Furthermore, if dispute is among the members of different Dheeda, it will be solved at Raba Gada. GG is the highest.

However this would not always hold true. There is some special case granted to some organ in Gada system, like Age-set institutions called *Hiriyaa* and clan institutions. For example, case of Caphana is entertained by Age-set rather than Olla or other organ. The case of Caphana was granted to *Hiriyaa* specifically. On other hand, the dispute between parties from the same clan shall be solved by clan elders rather than by Ollaa.

On other hand, Raaba Gada has an appellate jurisdiction over the case entertained by Dheeda while Dheeda have appellate jurisdiction over case entertained by Reera. Likewise, Reera have appellate jurisdiction over case entertained by Ollaa in principle. However, exceptionally, the case between parties who belong to same clan shall be taken not to Reera level, but to clan institution in form of appeal. For example, in family dispute, appeal against decision of Ollaa shall be taken to clan institution not to Reera level. There is no restriction on numbers of appeal in Gada system. Any conflict which is not solved at all these levels will be entertained at national Assembly called GG. Decision rendered by this organ is final and there is no room for further appeal. At Ollaa level abba Ollaa (head of Ollaa) and others elders in Ollaa solves dispute. There is no limit on numbers of judges and any person young, elders and even strangers can participate in trial. Litigation is open trial and is held either under shade or in house one of

disputant or another third neutral person. In dealing with adjudication of disputes, judiciary body of Gada system base their decisions on two laws; customary laws called **Aadaa** and traditional laws called **Seera**. They apply both substantive and procedural laws of Aadaa and Seera in process of solving disputes.

In Ethiopia legal system Indigenous dispute resolution has got some recognition on private and family matter so long as parties agreed to solve their disputes through customary court. Concerning criminal matters, Ethiopia has continued to pursue the earlier monist and centralist policy¹⁴⁸. But in Borana indigenous justice organ have continued to adjudicate all kinds of dispute beginning from simple defamation to grave homicide in practice. There is no distinction between civil and criminal case as provided by law for Borana indigenous Justice Organ to claim jurisdiction. Though that attitude is now weekend, Borana peoples view customary ways of solving dispute as the only proper way to solve dispute and get justice. Taking one's own case to the formal justice organ was taboos and a person that took his case to the later was considered as giving Borana man to enemy¹⁴⁹. Despite the fact that persons often pursue formal justice organ now without hesitation, it is still considered among Borana as irreparable relation between parties.

In this context, the issue about the nature of interface between formal and informal justice organ in Borana deserve critical attention. The nature of relation between two vary from case to cases and sometimes it depends on the perception judge handling the cases. The following section briefly deals with the nature of relationship between two systems in adjudication of civil and criminal cases.

A) The Nature of Interaction on Adjudication of Civil Cases

In civil cases that are private and family in nature, the Ethiopian legal system has given recognition to indigenous dispute resolution mechanism. However, due to gap in law, the nature of relationship between formal justice system and Indigenous dispute resolution mechanism has been experiencing certain difficulties. Except constitutional recognition of customary system, the area of interface between two has remained entirely unregulated. In Borana, this gap in law

¹⁴⁸ Supra note 92, 34

¹⁴⁹ Interview with Waqo Guyo, Yaballo, Nov, 2017

and other factors have caused certain problems in practice. While certain practice of courts shows recognition of customary dispute resolution mechanisms, other practice shows non-recognition of indigenous conflict resolution mechanism even in civil matters.

One factor that shows recognition of customary dispute resolution mechanism is that, the court or other formal justice organ usually encourages parties to solve their dispute through ADR including customary system. This among other thing is achieved with awareness creation about the benefits of ADR by justice meeting and advice to the parties when they bring their case before the court¹⁵⁰. It is common to see writing “*wal-dhabaa ofii Karaa jaarsummaatin xumurachuun Qaroominnaa!*” posted in compound of courts which literally means “solving one’s own dispute through arbitration is civilization”. Furthermore, there are rare occasion in which a case pending before court are returned to the customary organ with questions of indigenous leaders and consent of parties¹⁵¹. On other hand the court close file when parties said they have finished their dispute through elders. Besides, a few judges testify the practice of using customary laws when there is a gap within state legal system without acknowledging source¹⁵². On other hand, as discussion with interviewed person’s shows, indigenous leaders and community elders have shown willingness when summoned by court to explain what happened at grassroots, serve as witness and help enforcement¹⁵³. These practices signify mutual recognition, harmony and cooperation between courts and Indigenous institutions on civil disputes.

Despite above practices in Borana that signifies smooth relation between formal and indigenous justice system on civil matters, a number of factors indicates otherwise dimension of relation. There is no problem when the case taken before Indigenous institution is finally decided by itself and goes nowhere and vice versa. That may entitle only public condemnation. The problem happen when the case first brought before indigenous institution is taken to other by one party. When the case that is already settled or under consideration by indigenous institution is taken to court by one party, except in few cases, the court usually disregards decision or proceeding before indigenous institutions.

¹⁵⁰ Interview with Guyo Wario (judge at Borana Zone High Court), Oct, 2017

¹⁵¹ Interview with Isaq Hassan Molu (president of Yaballo Woreda FIC), Yaballo, Nov, 2017

¹⁵² Ibid

¹⁵³ Ibid, also interview with Abba Gada Kura Jarso, Nov, 2017

Some indication of this are, first neither the proceeding before indigenous institution considered as requirement of pendency nor the decision of later as requirement of *Res-Judicata*. Occasionally, the person against whom the case is brought before court rises the fact that the case is under consideration or it is already decided according to custom if that is a case as preliminary objection¹⁵⁴. Without undermining the practice of encouraging and advising parties to solve their disputes out of court as indicated above, legally speaking, the court usually dismiss these kinds of defenses. If parties disagree with advice and request to solve their dispute through other ADR mechanism, the court proceeds with the case by totally disregarding the proceeding and decision of indigenous institution¹⁵⁵.

The second indication is the reality of considering court as the first instance forum when case is referred to it from indigenous institution. Though party against whom case is brought before court may raise proceeding before indigenous institution as preliminary objection, neither applicant nor court technically consider case as appeal. This strongly implies non-recognition of indigenous dispute resolution mechanism by court even in civil matters. In fact appeal from indigenous institution shall follow customary line and indigenous remedies shall be exhausted to preserve autonomy and integrity indigenous institution.

The third indication is that when case is referred to court by one party, the court always assumes no consent to jurisdiction of customary court. As provided by both 1995 FDRE constitution and states constitutions the jurisdiction of customary court over family and private matters is consent based. But the manner by which consent is expressed and time to express consent have different implication. Setting aside the manner of expressing consent, consent shall be decided at the beginning of proceeding before customary court. Once parties are consented to jurisdiction of customary court (either expressly or impliedly) parties should not be allowed to reject the outcome of case, unless the outcome is contrary to customary norms which may call for appeal. The practices in Borana indicates, no matter parties are consented to the jurisdiction of customary institution at the beginning, the court always take an assumption of no consent, once the case is brought to its attention by one party. This understanding and practices critically undermines jurisdiction and autonomy of indigenous institutions.

¹⁵⁴ Ibid and interview with Guyo Wario, supra note 145

¹⁵⁵ Ibid

The fourth and perhaps most hazardous indication is tendency to give recognition to decision of customary institutions only so long it is not contrary to laws. Because underlying fundamental norms, principles, values and practices of indigenous system differs from that of formal legal system, variation between customary and state's laws on specific area is inevitable. Though there are strong theoretical and legal arguments which argues for consistency of customary laws and decisions of indigenous institutions with the constitution of respective countries, the requirements which provides application of customary laws, decisions and practices of indigenous institutions only so long it is not contrary to state's laws as whole is self-contradictory. This tantamount to give recognition by one hand and take it away by another. In Borana interviews with some judges' shows, the courts give recognition to the decision of customary institutions over civil matters only if it is not contrary to laws¹⁵⁶. This stand and practice is against the principle, norm and values of legal pluralism and could potentially undermine legitimacy, autonomy, and jurisdiction of indigenous system in general. By violating the distinct nature of indigenous system, it hampers people's rights to cultures and collective existence.

The last factor is there is no institutional mechanism of enforcing the decision of indigenous institutions officially. Discussion with elders, judges, prosecutors, police officials, GCors and community leaders establishes the formal state institutions do not plays any role in enforcement of decision of BIIs. Though there is indigenous institutional mechanism for enforcement of decisions in Borana Gada system particularly through Jallaba officers, its significances has highly decreased due to deficiency inherent to its nature and influences from the state. When the decision of one institution lacks institutional mechanism, people's loss faith in that institution and the very continuity of institution will be undermined. In Borana the decisions of indigenous institutions have faced enforcement crisis due to weakness inherent to indigenous decisions enforcement mechanism and absence of formal mechanism of enforcing decisions of indigenous institutions. A person usually approaches formal system mainly because it provides him with strong enforcement mechanisms¹⁵⁷.

¹⁵⁶ Interview with Getu Abebe (Judge and vice president of Arero FIC), Nov, 2017

¹⁵⁷ Interview with Abdi Ishetu (Judge at Arero FIC), Nov, 2017

Despite certain recognition of indigenous dispute resolution mechanism in civil matters, the above factors all confirm non-recognition of Borana indigenous conflict resolution mechanism even in civil cases. These have resulted in certain controversies between formal and indigenous system in practice. When this happened non- recognition of each other is intensified and developed into competition and conflict between courts and indigenous institutions. There is scenario that GCs appeared before the court and ask return of case to customary organ¹⁵⁸. When indigenous mechanism is not recognized as indicated, indigenous institutions often faces jurisdictional crisis.

Among civil cases, the family dispute between couple that involve question of divorce is peculiar for dimension of relation it creates between formal and indigenous system in Borana. Very critical controversies are observed in practice between two on dispute between couple involving question of divorce. These controversies occur mainly because of variation between two systems on fundamental underling philosophy in general and the value of marriage and its role in society in particular. Besides, most probably attributed to difference on fundamental underling philosophy, existence of explicitly conflicting rules concerning divorce in each legal system is the ultimate cause for controversy between two systems in practice. In Africa, society and their laws are founded on communal assumption of collective organization unlike that of western which is founded on individualistic assumption¹⁵⁹. Setting aside difference on fundamental underlying philosophy and basic principles let focus on some specific rules on marriage in which both legal system differ and ultimate cause for controversy between indigenous and state governance on family case involving claim of divorce.

The first point of difference among two legal systems is their stand on divorce. In state law marriage can be dissolved on ground such as death of either partner and unfulfillment of essential condition of marriage. Furthermore, marriage can be dissolved by divorce upon request of one partner at any time even without providing any cause. In this sense, dissolving marriage by divorce is much easier than dissolution of contract. But this is not a case in Borana indigenous system. Perhaps, the most remarkable fact about Borana marriage is the fact that it is

¹⁵⁸ Interview with Guyo wario, Nov, 2017

¹⁵⁹ J.H Driberg, *The African Conception of Laws* (1934), *Journal of Comparative Legislation and International Law*, Vol. 16, No. 4 (1934), pp.230-245

indissoluble¹⁶⁰. There is no institutional procedure for the permanent separation of husband and wife and division of estate between them¹⁶¹. When there is serious dispute between couple indigenous system has a mechanisms that allows couple to live separately either permanently or temporary but maintaining marriage bond ideally.

The second factor is existence of explicitly conflicting rules among two legal systems over the organ having adjudicative power over dispute between couple involving claim of divorce. In state legal system family laws explicitly provides that only court have power to declare divorce¹⁶². On contrary, in Borana indigenous system only clan can pass decision for couple to live separately. Finally, the third point of controversy is on administration and division of common property. In state family laws, all common property shall be shared equally when divorce is declared. In Borana indigenous system, when clan passes decision to live separately, it may give power to administer common property to either partner while giving another partner only right to use¹⁶³. Often husband's right over common property is restricted only to use by clan usually when he is found to be extravagant.

Discussion with community elders, Gada leaders, judges, public prosecutors and police officers reveals existence of certain controversies between indigenous and formal state organ on adjudication of disputes between couples that involve claim of divorce. Controversies arise when a case under consideration by indigenous organ or already settled by later is brought before court. When claim involves question of divorce, the court usually entertain the case by totally disregarding proceeding and/or decision of indigenous organ. In most cases, court reverse decision of indigenous organ on divorce and its results such as partition of common property and the fate of minor children if any¹⁶⁴. This practice of courts faces condemnation from indigenous leaders, community elders and wide society.

¹⁶⁰ Supra note101, p.16

¹⁶¹ Ibid,18

¹⁶² Oromia Revised Family Code (1996) Art.98

¹⁶³ Interview with Waqo Guyo, Yaballo, Nov, 2017

¹⁶⁴ Interview with Guyo Wario, Isaq Hassan, Abbaa Gada Kura Jarso, Abdi Ishetu.

B) The Nature of Interaction on Adjudication criminal cases

Adjudication of criminal cases is area of high tension between indigenous and formal system. The reason is clear. As Degefa has rightly stated, Ethiopia has adopted monist policy with regard to criminal cases¹⁶⁵. So the existing criminal justice system monopolizes adjudication of criminal disputes and has left no room for indigenous system. In Borana Indigenous organ has continued to entertain disputes including criminal disputes from simple defamation to grave homicide. Despite existence of high tension between two systems, smooth, harmonious, cooperation and collaboration among them are witnessed on certain area. For instance Cooperation and coordination on awareness creation about danger of crime, protecting crime and disclosing criminal especially on ethnic conflict is witnessed¹⁶⁶. Government usually gives awareness to elder and Gada leader on crime¹⁶⁷. This is elaborated by community policing mechanism. In general two scenarios are identified as discussion with judges, prosecutors, Gada leaders, community elders and police officers indicates: these are the cases of Accusation and upon complaint. Some officers tend to show this distinction as grave and minor crime. But the former distinction seems correct legally and technically.

Crime upon complaints: Though commission and omission of any acts proscribed as crime affects public as whole, there are certain acts that are strictly personal which its commission or omission have insignificant impacts on public interests. In criminal system of several countries such crimes as “crime upon complaints and its commission and omission of those acts can be brought to the attention of criminal judicial organ only by individual victim. In cases of Adjudication of crime of upon complaints there is less tension. Crime upon complaints are those in which public interest are less affected. In this case the parties can withdraw their cases at any stages of adjudication and can settle it through indigenous system¹⁶⁸. Police, Prosecutors and Judges show less reluctance if parties agreed to settle their disputes through customary dispute mechanism.¹⁶⁹ It is almost same with civil cases.

¹⁶⁵ See Supra note 119, at page 34

¹⁶⁶ Commander Abtano Halake (Commander of Yabello Woreda Police), Nov, 2017

¹⁶⁷ Ibid

¹⁶⁸ Judge Guyo Wario, Ishetu, commander Halakee, elders participants.

¹⁶⁹ Ibid

Those controversies identified above on civil cases such as failure to consider the proceeding before indigenous organ and the decision of later as *Res-Judicata* (double Jeopardy in criminal case), considering court as first instance forum, despite the fact that the case under consideration is referred from indigenous institution, assumption of no consent to jurisdiction of customary courts, tendency to give validity to decision of indigenous institution only so long it is consistency to state laws and lack of institutional mechanism to enforces decision of customary organs also prevail in adjudication of crime upon complaints. Adjudication of crime upon complaints by indigenous justice organ and tendency to give recognition to give recognition or at least not oppose by formal justice organ could be justified by personal nature of such disputes which the constitution allows to be solved by customary and religious organ so long parties consented even though no similar stipulation is stipulated in criminal code and other legislation.

Crime of Accusation: crime upon accusation are those crimes which its commission and omission endanger/disturb public principles values and norms. Because of this commission and omission of such crime can be brought to the attention of criminal justice organ by anybody. High tension and controversies is prevalent between formal and indigenous justice in Borana on adjudication of crime upon accusation. The reason seems clear. The government has strong interest representing public to adjudicate such cases by formal criminal justice organ. Similarly Borana indigenous organs have also an interest to adjudicate any dispute arise in society as they are mandated to keep peace of Borana. Indigenous institutions are only mandated to solve society problem at grassroots even in the area government cannot reach. But they are also accountable if peace of Borana is disturbed. Because of this in Borana indigenous organ have continued to adjudicate criminal cases irrespective of its kinds and gravity alongside state, no matter what law says. This has created multiple dimension of relation between indigenous and formal justice organ.

The first dimension of relation is smooth and harmonious relation on crime protection and detention. Safeguarding peace of society by protecting crime and detecting criminals is the common goal and agenda to both formal and indigenous justice organ¹⁷⁰. As discussion with officers, prosecutors, community elders and leaders indicates two systems collaborates in crime protections and detection.

¹⁷⁰ Supra note 166

On other hand some hostile relation is observed on adjudication of crime of accusation. In significant number of cases claim for jurisdiction and competition against each other is witnessed. Similar to civil cases, this mainly occurs when case handled by indigenous institution is brought to the attention of formal criminal justice organ. A criminal dispute under consideration by indigenous organ is usually brought to attention of formal criminal justice organ either parties or by initiation of police officers after accepting accusation. In rare cases indigenous organ handling the case may itself communicates issue to formal institution if it felt that cannot settle disputes and fear further disaster which they could not control may happen. In this later case mis-understanding and controversy between two systems is less probable.

In the first two scenarios, proceeding before formal criminal justice organ often faces some negative reaction from indigenous institution and society as whole. First of all indigenous institution may felt jurisdictional insecurity, violation of institutional integrity and right to autonomous existence. Hence indigenous institution may not give recognition to proceeding before formal criminal justice organs and may condemn the whole process and outcome. In few rare cases, this reaction is intensified and developed into real conflict between two organs. Like civil cases there are some occasions in which Gada leaders and community elders appear before police and prosecution office and court claiming jurisdiction and return of cases. In few cases they are succeeded and not in most cases. Though this reality may happen with commission of any kinds of crimes, it is highly prevalent in case of crime of homicide (particularly, homicide committed on ethnic conflict), Abduction and crime committed between family, rape etc¹⁷¹.

Except in few cases in which indigenous organ succeeded to return cases to its jurisdiction, the formal criminal justice organ usually proceeds without any regards to proceeding and decision of indigenous organs. As the outcomes of this measures indigenous institution faces jurisdictional crisis and lose faith from society and the measures usually violates individual rights (victim and suspect) by unnecessary prolonging proceeding which cause delay of justice, exposing to unnecessary expenses and sometime to double punishments. For illustration let see the following case of homicides of Borana Zone high court. Nevertheless indigenous institutions in practice settle a number of criminal cases particularly in rural area without intervention of formal institution. The formal justice organ may not aware or may intentionally ignore it. Indeed there

¹⁷¹ Ibid and interview with Isaq Hassan

are instances in which police and a prosecutor terminates investigation before charge even if the has adequate evidences to allow individual victims and suspect to settle their disputes through ADR and indigenous conflict resolution mechanism.

Case One: Borana Zone Public Prosecutor Vs Gollicha Dida and Kunate Sora

(File No: 13524)

In above criminal case of homicide the two suspects were accused for killing of individual victim diseased Ware Dube on 15-10-2009 E.C in Borana Zone, Gomole woreda, Sele Kebele, at specific place called “Dambalaa Guddaa”. Here both suspects were from Oromo Borana, whereas the victim deceased is Oromo Gujii. Because of this, the death of above victim created tension between Borana, Gujii and Gabra and the conflict took shape of inter-ethnic conflict. To solve conflict and avoid further tension traditional leaders (abbaa Gadas) and community elders from Borana, Guji and Gabra met on 03-12-2009 at Gomole woreda, Tula Wayu kebele. This is usual phenomenon that happens when conflict arose between this Oromo community. After long debates, the leaders and community elders reach at agreement, that the victim was killed by person from Borana, payment of blood compensation to the family of deceased by Borana, and to settle peace among three communities. However they did not identified specific person that killed the victim, except agreeing that he is from Borana.

Along with above indigenous measures and efforts to solve conflict and settle peace, the issue was communicated to formal state organs and it got state intervention. Following this the above suspects (Gollicha Dida and Kunata Sora) were arrested and charged with crime of homicide. This state intervention faced fierce (serious) challenges from indigenous leaders. The leaders challenged state intervention on issue, arguing that it was against peace deal between indigenous leaders of three communities. They particularly challenged arrest and charge of second suspect (Kunata Sora), because the measure was against their decisions. In their peace deal at Tula Wayu, indigenous leaders of three communities had specifically addressed the issues of suspect Kunata Sora. They have firmly established that suspect Kunata had been in Arero woreda, Orotto kebele, at specific place called Dakara on responsibility of cattle keeping at *Foora* on the day crime was committed and had no involvement in commission of crime. Indigenous leaders of three communities made huge effort to dismiss criminal proceeding such as influencing the

decision through administrative channel, communicating criminal judicial organs (police and prosecution office and court) and arguing to reverse their decision. Most importantly, they asked release of Kunata Sora by letter. Despite all these efforts by indigenous leaders of three communities to avoid conviction of suspect, the court finally convicted both suspects for crime of homicide and punished each of them by 20 year rigorous imprisonment. This decision of court upset indigenous leaders of three of three communities.

4.3 The Current Nature of Relationship Between BII and State on Administration of Land and Natural Resource

As indicated above and elsewhere, IPs have close tie to their ancestral land and natural resources. The reason is that land and natural resources on the territory they occupy have great economic, social, cultural, political and religious importance to them. Ancestral land and natural resources are the symbol of distinctive and collective existence without which IPs cannot obtain status of “indigenous”. Despite above all facts, the history of many native communities shows eviction from the lands marginalization and deprivation of right to lands and natural resources. To reverse and evict harsh consequences of this policy and action a wide policy and legal reforms have been made at international, regional and national levels. Among other things, this policy and legal reforms guarantees IPs right to lands and natural resources and right to be consulted on any decisions and action affecting ancestral lands and natural resources. On other ways, indigenous right to land and natural resources encompasses recognition of the roles of indigenous institutions in administration of land and natural resources as well as application of customary laws.

Insight into the Practices: The Actual Nature of Interface between Borana Indigenous Governance System and Formal state institution on Administration of Land and Natural Resources.

Prior to incorporation of Borana lands into the Ethiopian empire, the Borana lands and natural resources on it (mainly rangelands and water bodies) were solely administered by Borana indigenous organs in accordance with Borana customs and traditions¹⁷². As indicated at the beginning of this chapter, Borana indigenous administrative structures are multiple with

¹⁷² Interview with Waqo Guyo and Dr Borbor Bule, Nov, 2017

unoverlapped powers and responsibilities. The base of Borana indigenous administrative structure is both geographical and hierarchical (organizational).

The geographical administrative structure includes Ollaa (a villages, the smallest administrative units that is a settlements of a few households headed by abbaa olla head of village), Ardaa (a division consist of several Ollaa), Maddaa (a division consist of many Ardaas and usually created along water sources) and Dheeda (the widest administrative division consisting many Maddaas and demarcated on factors such as climate condition, soil types, forest coverage, distributions of rainfall etc.). Ollaa headed by Abbaa Ollaa has power and responsibilities to regulate the settlements of village members and to decide the request of other outsider to be member of their Ollaa and if accepted direction and manner of the settlements. On other hands Ardaa headed by Jaarsaa Ardaa (Ardaa elders) has responsibilities to regulate management of rangelands among different ollaas. Maddaa is responsible for fair and proper use of water sources such as haroo (lakes) and Eelaa (water well) both Tulaa and Adadii. Dheeda headed by Abbaa Dheeda is responsible to manage usage of rangelands and water bodies within its territory next to Ardaa and Maddaa. Dheeda is also responsible to settle any disputes among Ardaa and Dheeda on use of rangelands and water sources. In addition Abbaa Dheeda carries huge responsibility to defend any attempts of intrusion into Borana territory by other group and expansion of Borana lands when necessary. Besides, Abbaa Dheeda together with other organs is responsible for implementation of decision of highest organs within his Dheeda.

In general Borana has two major Dheeda in both Kenya and Ethiopia. The two Borana Dheeda in Ethiopia are Liiban (which is further divided into two sub-Dheeda of Golbaa and Diida) and Dirree (the widest of all Borana Dheeda which is further divided into five sub-Dheeda Goomolee, Golboo, Malbee, Tulaa and Wayaama). The major Dheeda in Kenya are Saku and Waasoo.

The hierarchical administrative structure of Borana includes those institutions such as Gada and its subordinates, Gumii, Kalu, clans and Hiriyaa institutions. These institutions are responsible for administration of Borana Lands and natural resources on it at different levels and to keep peace of Borana at all.

After incorporation of Borana lands into the Ethiopian empire, the roles and responsibilities of Borana indigenous administrative organs in administration of land and natural resources began to decline. The impact was very minimal during emperor's periods due to remoteness and inaccessibility of Borana lands and resistance from community to adapt to new system¹⁷³. During this period the state lacks ability to exert its forces at grassroots and it was only able to secure payment of land tributes¹⁷⁴. Indigenous institutions have sustained much control on administration of lands and natural resources. As indicated above, the impact of state was highly increased during DERG regime with promulgation of the 1975 land proclamation and introduction of Peasant association. In post 1991 of EPDRF Regime the penetration of state administrative system reach its peak. The state put in place a new administrative bureaucracy with the establishment of Kebele and Woreda administrative division at grassroots. At kebele, the smallest administrative units, adapting state bureaucracy is facilitated by appointing wise, wealthy and influential persons in area to kebele and other crucial positions. At Woreda level modern bureaucracy is more or less put in place as it is filled with educated manpower equipped with necessary materials to some extent.

Because of proximity to and influential status in society, hide of information from kebele administrator is less probable. Often kebele administrator and those kebele leaders have double personalities, one as elders and leaders of indigenous institution and local administrators. Certainly what happens in society is communicated to woreda authorities by kebele administration through administrative channels. In this context Borana Administrative structures could lost its control on lands and natural resources and were made irrelevant at all in administration of lands and natural resources. Exception to this Abbaa olla has upheld powers to manage settlements of members of olla and power to decide new membership request. Abbaa Ollaa has to inform new members to Kebele administration if any. However, there were occasion in which Ollaa were evicted from their settlement and forced to settle in other place by state under guise of correcting settlement. Another departure in which indigenous institutions sustain power is that, the clan institutions and Maddaa divisions have upheld significant powers of managing water sources. In some area this was also challenged related with expansion of several water projects owned and controlled by states and other organs. When this happen society often

¹⁷³ Interview with Dr. Borbor Bule, Nov, 2017

¹⁷⁴ Interview with wako Guyo (expert and Historian of Borana Gada system)

prefers to utilize the state owned water source as it provides them with clean water which make traditional water sources less relevant.

Though the state machineries faced less resistance from the leaders of indigenous institutions and a wide society and it operates smoothly, the peculiar nature of interface between local administration and higher BII's mainly Gada and Kalu councilors beg special attention here. What is peculiar about Gada and Kalu councilors is that they frequently move from one place to other to perform different cultural and political ceremonies. In this process some kinds of controversies were observed between councilors and local administrations. Here the conflict arose between Arbora council and Arero woreda administration and Awatu GC and Karayyu Kalu council and Yaballo woreda administration worth mention. In some few cases the controversies were serious that result in quarrel between members of councilors and local community¹⁷⁵. There are instances in which leaders of indigenous councils are arrested by local administration following quarrel¹⁷⁶. The local administration often intervene and protect settlement of indigenous councils in a place reasoning that it is wrong and illegal settlement, whereas councilors argue that they were settled at that specific place because the nature of ceremony they undergo and interest of their cattles dictates¹⁷⁷.

In addition the indigenous institutions have lost their traditional roles of settlements of disputes over lands and natural resources excepts in rare case of remote area in which indigenous institutions are strong and state machineries are weak. Disputes over lands are mostly adjudicated by formal state mechanism which began from kebele administration and goes to court in form of appeal. Application of customary laws is unthinkable in this scenario. In general the current Ethiopian land tenure has produced the following outcomes that undermines BII and deteriorates the nature of interface between Borana indigenous political institutions and formal state machineries on administration of lands and natural resources.

First of all it diminishes the roles of traditional institution in administration of lands and natural resources. Secondly it curtails application of Borana customary laws which is a manifestation of Borana values, norm and principles on lands and natural resources. By doing so it endangers the

¹⁷⁵ Discussion with experts and head of Arero land Administration Office, Arero, Nov, 2017

¹⁷⁶ Ibid

¹⁷⁷ Ibid, and Interview with Arbora Gada Councilors, at Arero Badhasa, Nov, 2017

values, principles and norms of Borana society. Thirdly the policy and practices on administration of land and natural resources violates individual and group rights under the traditional system. For instance under the traditional system village can own *Kaloo* (a rangeland protected and used during dry season). This is one of indigenous means of surviving the dry season. The current Ethiopian land tenure does not recognize *Kaloo* as possessed land which violates the group's rights under indigenous system and undermine the indigenous mechanism of surviving hardship during dry season. Fourthly, eviction of pastoralist's community from their settlement and grass land without fulfilling legal procedures and fair compensation were observed in numerous instances particularly with expansion of urban centers, farming, government owned ranches and different development activities. Significant numbers of pastoralist communities were also displaced from their settlements by the government's measures to correct settlement. Probably farming rank first to displace huge number of pastoralist communities. Though significant number of Borana community now practice farming as economic means of livelihood, the majority view toward farming is not good. On interview with herder Murku, he openly expressed that "we are pastoralists today and tomorrow we are pastoralist, farming in an invansion. In this interview Murku described how pastoralism is thier life and the manner Ethiopian government support commercial farming encroach thier land¹⁷⁸. Borana has lost vast grassing land to small scale and large scale farming. Though there is no division of Borana lands free from this, the Liban division (lands found north eastern of Dawa River, Liban and Gumii Eldallo woreda of Guji Zone) is mostly affected by farming. When pastoralist communities are displaced for whatever reasons, displacement took places without following required legal procedures and payment of compensation to displaced communities. This among other things is attributed to lack of considering *Kaloo* and other land occupied by pastoralist communities as possessed land and absence of pastoralist land ownership certification¹⁷⁹.

¹⁷⁸ Borana.com, <https://kwekudee-tripdownmemorylane.blogspot.com/2013/07/borana-people-largest-oromo-pastoralist.html?m=1>

¹⁷⁹ Pastoralist land ownership certification is a legal mechanism of recognizing and protecting the land rights of pastoralist communities. Particular it avoids possession of pastoralist land by new comers without following necessary legal procedures. In Ethiopia, the program is adapted by Afar regional state. In Borana, implementation of this program is under consideration in Borana Zone. Research is taking place with collaboration of governments and NGO to demarcate Borana lands according to traditional division of Dheeda. As interview with coordinator of

Fifthly, externally Borana has lost vast ancestral territory by enter-ethnic wars and administrative decision. Borana share border with many ethnic groups of which Somali ethnic group is one that Borana share long Border with in east front. Of all ethnic groups and clans with which Borana share border, the eastern border with Somali ethnic groups is marked by long history of enter-ethnic war between Borana and Somali groups. As the result of this war and administrative decision in favor of Somali groups, Borana has lost a vast territory in east. The land Borana lost in east to Somali groups is nearly in size to the land Borana currently occupy. Related to this one of the recent phenomenon is establishment of the so called Dawa Zone. Dawa Zone is newly established administrative division of Somali regional state in Ghari Somali ethnic group is dominant. A recent Approval of Dawa Zone by Somali regional state council faced serious challenges by Borana peoples. Borana resist establishment of Dawa Zone alleging that it is established on the lands that totally belong to Borana and where several ardjila and historical sites are found. Among other thing, two of nine Borana historical Tulaa water wells (Goofa and laye) are found in this newly established Zone. Following the decision of Somali regional state Borana has pleaded to both Oromia and federal government and voiced its concern on Medias but without obtaining sufficient solutions. On other hands following the decision the war was erupted between Ghari and Borana that took many lives, injured and displaced many from their settlements from both sides. The current Ethiopian land tenure violates the rights to culture of Borana peoples. Besides, the administrative decision of Oromia regional governments that incorporate Borana land of Liban under administrative division of Guji zone has caused Borana to lose much control over Liban. Note, Borana consider Liban as land of origin and sacred land of all Borana land divisions.

Sixthly the current Ethiopian land tenure violates the rights to culture of Borana people. As indicated above Borana pastoralist has lost vast lands with introduction of farming, expansion of urban center, different development activities and enter- ethnic wars. As the result many ardjila and historical place are destroyed as Borana lost control over it. Though there are Ardajila in all Borana lands, most of them were found in Liban. Most of Borana historical Ardajila in Liban divisions were destroyed. As interview with elders and GCors indicates about 86 Ardajila and

project indicates the assessment and mapping of three divisions (Tulaa, Malbee and Golboo) was completed and ready for certification.

historical places in Liiban division were destroyed by either of above factors¹⁸⁰. On other hand several historical Ardajila were destroyed by expansion of urban centers. It is firmly established that many of urban centers in Borana (including Nagele Borana and Yaballo town) have been established on historical Ardajila where different cultural and religious ceremonies were held. Significant numbers of Ardajila are also destroyed by cultivation. By restricting or avoiding Borana people from perform political, cultural and religious activities the current land tenure violates the rights to culture of Borana people. Particularly GCs face difficulties to perform different ritual activities at Liban crossing Dawa River.

Last but not least, the current Ethiopian land tenure together with enter-ethnic war and bad administrative decision has cut Borana land (of Dirre and Liban) into two that do not share border. This has curtailed two Borana communities not to share each concern and collaborate in difficult time.

¹⁸⁰ Interview with Abba Gada Kura Jarso, Elders and experts of Arero Woreda Culture and Tourism office

Chapter Five

Concluding Remarks and Recommendations

As indicated in this and other studies the current African societies are characterized by duality of governing institutions, the state and informal IGI. In past this dual nature of African societies was deliberately ignored and only the state was considered as a legitimate force for granted at the cost of traditional political institution. But later on accelerated with the specific nature of African societies and the shortcomings of formal state institutions, the undeniable roles of African indigenous institution in the day-to-day lives of communities at grassroots and the adverse effects of failure to recognize this reality, there are growing interest to reconsider the African indigenous system. Besides, the international development on the right of in IPs in human right sphere has much influenced the decision to reconsider African indigenous system in general and indigenous political institution in particular. The decision has attracted numerous studies from different disciplines on African indigenous system that suggest relevance of indigenous institution for African societies. As the result, some African countries have begun to review it laws and policy towards its indigenous institution which is followed by measures to correct *status co* through the mechanism such as legal (constitutional) recognition of traditional governing institution, capacity building, awareness creation etc.

In this context, this study was aimed at assessing the move Ethiopia has made so far in this regards and the actual nature of interface between state and indigenous governing institution in selected area. In addition the study was also aimed to identify the impacts current nature of interface between state and indigenous institution has on the right to self-government of Borana people. After assessing general legal and policy frameworks and critical analysis of the current practical nature of interface between formal state and Borana IGI on law enactments and law enforcement, dispute settlement and administration of justice and administration of land and natural resources the study has arrived at the following conclusions and way forwards.

An inquiry into policies and legal systems reveals the issues of indigenous governance are not sufficiently addressed in Ethiopia, irrespective of the fact that a country is home of many indigenous political institutions playing significant roles in the lives of their respective societies.

The gaps identified in this respect are mainly lack to give adequate recognition to indigenous political institution and inability to institutionalize the recognition granted.

The Ethiopian political and legal system before 1991 did not accommodate indigenous political institution for obvious reasons. Downfall of Derg in 1991 and subsequent adoption the 1995 FDRE constitution marks paradigm shift in Ethiopian political discourse. Cognizant of ethno-linguistic diversity of the country and popular demand to recognize this reality, the 1995 FDRE constitution has established ethnic federal state. Though contemporary federal political arrangement creates favorable condition to accommodate the demands of IPs and traditional governance institutions, it is not adequate by itself. The political, economic and cultural position of IPs within wide society begs special consideration. Particularly, the issues about recognition and protection of traditional institutions and their interface with the state need critical attention.

However the FDRE constitution and most of regional state's constitutions (except Afar and Somalia regional state's constitution) are almost silent on IPs and their traditional governance institutions. It is unfortunate that nowhere in the FDRE constitution and most of regional state's constitutions, IPs and their traditional governance institutions are mentioned except on application of customary laws and jurisdiction of customary courts which itself has narrow legal base. On customary court the constitutions provides only possibility of recognition in near future by HPR and SC of respective states. Nor the indigenous governances are recognized by statute. Besides, unlike a country such as Canada, Ethiopia has no treaty based mechanism of addressing traditional political institutions. Non-recognition of indigenous governance in Ethiopia legal and political system implies only states have a right to govern. Though indigenous governances do not need state recognition to operate, failure to recognize them undermines the interest of indigenous groups by violating their identical political integrity within a wide society.

Thus based on policy and legal gaps and deficits in current Ethiopian politico-legal system to accommodate and address the demands and issues of indigenous groups, the study suggest that a reform made into Ethiopian toward the IPs. A reform should be made to recognize the roles indigenous political institutions plays in day to day lives of society at grassroots and their contribution in enhancing political integrity of the state as whose. The study specifically suggest granting adequate legal recognition to indigenous political institutions in application of

customary laws and traditional law making process if any, indigenous mechanism of disputes settlements and administration of lands and natural resources. This requires allowing indigenous institutions to exercise certain degree of autonomy on matters that are purely internal to them and consultation and participation of later on any decisions and action that affect them. By doing so the state could put in place a basis for decentralizing and facilitates self-governing of indigenous groups which realize the desire for national identity without undermining national identity and state autonomy. Particularly Ethiopia should shares the experiences of some African countries that allow representation of traditional leaders in state organ or that establish organ composed of traditional leaders with mandate of voicing the interest of indigenous groups in states policy and legal decision and measures.

Based on the specific circumstances of the Ethiopia, the issues of indigenous governances need constitutional treatment. Though it is possible to regulate matter by statutes, recognition of Indigenous government within the Constitution in Ethiopia is important to ensure Indigenous governances are properly accounted for in state's law and policy. Besides the Ethiopian government shall recognize and address the issues of indigenous governances with bilateral treaty signed between state and leaders of indigenous communities that have strong indigenous institutions like Borana on areas that are characterized by high tension. This measure is important to solve immediate problems and address argent issues that cannot wait legal and policy reforms which probably take a long time.

Furthermore the study has firmly established that the constitutional promises to indigenous institutions are not institutionalized. Even on those areas (application of customary laws and jurisdiction of customary court) in which constitution explicitly recognized the roles of indigenous institutions, the indigenous systems have continued to face challenges. Thus the study in this regard argue fulfillments of those constitutional promises before or together with new promises to be made that follows a wide legal and policy reform as suggested above.

In the study assessment into practices on actual nature of interface between state and BIGI has clearly identified some critical features. In the first place the study reveals duality of norm, institution and process. The study shows parallel co-existence of both state and Borana indigenous system on laws making and laws enforcement, settlement of disputes and

administration of justice and on administration of lands and natural resources. Secondly, in this dual co-existence of state's and indigenous norms, institutions and process the study clearly underlines that the nature of interface between two systems is not legally regulated. To sum up, in this context of dual co-existence of state and BIG system three major type of nature of interfaces are boldly illustrated by the study.

The first is the harmonious and smooth nature of relation. This happens in occasion in which both indigenous and state system operates but without interface in each other affairs. This type of interface is identified in all thematic area of study and the decision and measures of one system usually complement and benefit the other and vice versa. The second is coordination and cooperation nature of interface in which both system work together for mutual benefits and common goal, for instance in crimes protection and detection of criminals. On this point one thing researcher underscores is that the indigenous system as whole usually cooperates with the state's decisions and actions while the state is not in contrary. By doing so, the indigenous system and the leaders' indigenous institutions shown tendency and willingness to work and exist in harmony with formal state system. But the state system and its authorities did not show such tendency and willingness to required level. Thirdly the hostile nature of interface characterized by competition and conflict is revealed by this study. In all three thematic area of study the competition for jurisdiction against each other that resulted in conflicts (both ideal and real) were observed. It can be concluded that the main cause of hostile nature of relationship between states and BIS are the policy and legal gaps and deficits identified above in Ethiopia political and legal system and the negative attitude and practice of state authorities. Thus by filling the gaps and deficits within state laws and policy as suggested above and shaping attitudes of state authorities though mechanism as awareness creation the nature of interface between state and indigenous political institutions in general and government and BIGI can be enhanced in particular.

Lastly in this study attempt was made to examine the impacts of nature of interface between state and BIGI on the right to self-governance of Borana people. In this regards analysis of state's laws and policy toward IPs and critical insights into actual practices in study area established adverse impacts on the rights to self-government of Borana people. Since the nature of relationship between two is not legal regulated and it open for negotiation, the nature of interface

is Susceptible to abuse by state authority. In this situation IGS are usually undermined because of power imbalance. As indicated in all thematic areas of the study BIIs often encountered jurisdictional crisis when it come in conflict with formal state institutions and lacks means of enforcing it decision. Thus peoples lose faith in the process and outcomes of BIIs that undermines the institutional integrity and the very continuous the institutions. As indicated in the study the roles of BIIs in the lives of Borana people have diminished from time to time and the state control all social, political and economic lives of societies. This violates the rights of Borana peoples to determine the institution by which they govern themselves and laws to which they and other are subjected in their own lands. Though the BGIs have strong support of Borana people, it cannot resist state's coercive power. It is the state that decides on all fate of Borana people. There is no room for self-governing through recognition of IGI. In this regard legal and policy reform suggested above should grant adequate recognition to BIGIs to allows Borana people to continue to protect their unique cultures and identity and insures Borana remains viable as distinct group of people. Of all the reform should allow certain degree of autonomy to Borana people on ancestral lands and natural process. Related to this initiative began in collaboration with NGOs to grant pastoralist lands ownership certificate should be finalized and implemented.

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