

Access to Justice
The Role of Court Administrators
and Lay Adjudicators in the African
and Islamic Contexts

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Edited by

Christina Jones-Pauly and **Stefanie Elbern**



KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by:

Kluwer Law International

P.O. Box 85889, 2508 CN The Hague, The Netherlands

sales@kli.wkap.nl

<http://www.kluwerlaw.com>

Sold and Distributed in North, Central and South America by:

Kluwer Law International

101 Philip Drive, Norwell, MA 02061, USA

kluwerlaw@wkap.com

Sold and Distributed in all other countries by:

Kluwer Law International

Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

Library of Congress Cataloging-in-Publication Data

Access to justice : role of court administrators and lay adjudicators in the African and Islamic contexts / edited by Christina Jones-Pauly and Stefanie Elbern.

p. cm.

Includes index.

ISBN 9041118802 (hb : alk. paper)

1. Courts--Africa, Sub-Saharan--Officials and employees. I. Jones-Pauly, Christina. II. Elbern, Stefanie.

2002032015

Printed on acid-free paper.

Typeset by *Steve Lambley Information Design*, The Hague.

ISBN 90-411-1880-2

© 2002 Kluwer Law International

Kluwer Law International incorporates the imprint of Martinus Nijhoff Publishers

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INTRODUCTION

Christina Jones-Pauly

Justice reform has become a popular topic. As a result, institutional infrastructure for realizing justice has been focused on. As part of this focus are placed new emphases on the necessity to re-enforce the rule of law. This edited volume aims to contribute to understanding the realizing of justice in various cultural contexts.

Within the context of the rule of law, a contemporary notion of justice presumes an egalitarian society. An egalitarian society can mean to each the same, or to each according to some distinctive particularities (Perelmann 1963). Thus, the notion of access to justice can mean each having an equal opportunity to ask for recognition of entitlements (McFadden, n.d.). In practice, access to justice has meant a movement to widen the scope of persons having their grievances and disputes settled by the state institutions or state-supported institutions. Targeted are especially disadvantaged groups. Legal aid and class actions are products of the movement for more access to justice.

The access to justice movement is not confined to the wealthy social welfare states of the industrialized world. It has spread to the development projects financed by these same wealthy states. Access to justice offers an example of a convergence of institutions across the globe. Washington State in the USA has an access to justice network; campaigns against violence against women in South Africa focus on legal aid to empower women on their path to the heart of justice; Sri Lanka has introduced new arbitral structures for relieving the state courts, where access to justice is being strangled by long delays; the United Kingdom has spent resources on reporting how to respond efficiently to the demand for justice as litigation costs spiral upwardly.

Access to justice is also about rights. As Roberto Unger (Unger 1998: 268) reminds us, rights are not merely resources, the exercise of which are conditioned on the resources the welfare state is prepared to allocate. At the heart of claiming rights is conflict. I would add, challenge. Claiming rights, as Unger rightfully points out, constitutes a strike against a structure of inequality and to privilege. What Unger has not calculated, however, into the notion of claiming rights are those claims which are aimed at perpetuating or reintroducing injustice in the sense of retaining privilege

and inequality. Nonetheless, as a tool for claiming rights, Unger proposes that a special branch of government be initiated. Its task would be to remove “localized obstacles” to effective exercise of rights that would lead to more equality. He does not specify the contours of this process of “localizing” obstacles.

This volume of edited papers seeks to identify those localized obstacles. Identifying localization of obstacles requires an inquiry into the culture of access – a look at what is understood as privilege and inequality, non-privilege and equality, a look at the structures upholding the culture of access. The papers in this volume present the structures of both state judicial systems and dispute settlement structures tolerated by the state, but not from the point of view of efficiency of structure. Rather the point of view is that of the “who”. In this regard, this volume takes a cue from Llewellyn and Hoebel’s famous study of the Cheyenne legal way. The authors, a lawyer and an anthropologist, did not start with structure *per se*. They started rather with investigating the “who” – the person who takes action when trouble arises, the person who represents an entirety or another person, the person who can enlist backing and pressure (Llewellyn and Hoebel 1941: 25), in other words, the person who exercises privilege, the person who has certain concepts of equality and inequality. Through their focus on the “who”, they were able to arrive at the lines of structure of justice of the society that was the object of their study.

The papers in this volume focus also on the who, but for a different purpose. It is for the purpose of identifying the “localized”-who in relation to justice. In the societies chosen for this volume, the structures through which people access justice are easily identifiable: whether pre-colonial instances of litigation and dispute solving or state courts of law. Thus, in distinction to Llewellyn and Hoebel, but with the help of Unger’s approach, the aim of this volume is to investigate, through the “who”, the “localized” obstacles that the adjudicating structures themselves present to claimants of entitlement to justice. The “who” especially focused on is not the person entitled to make the decision, but the persons in the supporting roles, without whose cooperation access to justice and final judgment is hampered or rendered impossible. In Ghana in the Queen Mother’s court, these are the *akyeame*. In South Africa, they are the children’s court assistants or the family advocates. In South African non-state fora, they are the lay arbitrators. In Britain they are the court clerks. In Tanzania, they are the assistant registrar, the assessor, even the court watchman. In Burundi, they are the political party committee members or the lay adjudicating forefathers, whose tradition of asserting themselves against executive authority is kept alive by a trial judge belonging to a family of lay adjudicators. In Sudan they are either the lay arbitrators, lay judges, or the litigants themselves who determine the composition of the lay adjudicating body.

The question the papers raise as a whole is whether there are common strands in cultural patterns relating to roles the supporting actors play in access to justice, or whether the differences are too variable. In answer to this question, we need to briefly summarize the papers. Stoeltje's anthropological article on the Queen Mother's court in Ghana – a pre-colonial court – indicates a clear hierarchy in the adjudicating structures. Obeng's article complements the social and anthropological analysis with a linguistic analysis of the exchanges in cases heard in the Queen Mother's court between litigants and assistants of the Queen Mother. The language is highly indicative of demeanor and intimidation. The linguistic analysis shows that the obstacles to access to justice are hierarchy and decorum, yet this does not prevent a chief being called to account for breaking the rules. In his study on Burundi, Weilenmann analyses rivalry between the executive and the judiciary for power in the pre-colonial as well as post-colonial eras. Again the dependence of actors on the hierarchy can pose obstacles to justice, as the example of a conflict with a woman made unpopular for her assertiveness illustrates. Shouk's analysis of courts in Sudan points out how the introduction of the state hierarchical judicial structure places power in individuals. This in turn poses obstacles to groups' access to justice, but opens new ways for individuals' access. The article also points out the strategies developed by litigants in response to these changes in an effort to restore a non-hierarchical arrangement of personal power and groups' access to justice. Moosa's article on South Africa also highlights the conflict between individuals' and groups' access to justice regarding claims arising from Muslim communities. While groups have, without any great obstacles, placed claims before state courts, individuals have met with obstacles in both state and non-state religious adjudicating bodies. The obstacle is the monopoly held by religious personnel (ulama) over knowledge of Islamic law. Access of women and state court judges to this knowledge is lacking as well as legitimization of a pluralistic control over access to that knowledge. Goolam's ensuing article is the only one to take a comparative cultural approach. It contrasts the adversarial access to justice promoted in western legal systems with the consensus-compromise approach in Islam. Central to the notion of access to justice in Islam is maintaining the right of the conflicting parties to determine who shall adjudicate. The parties must be assured that the adjudicators represent their interests and so can check one another's power. Access to an unbiased adjudicator is not the goal; it is rather access to several adjudicators whose biases are known. Burman and Derman give us insight into the movement in family law to open up access to non-judicial experts. This is intended to widen the range of judicial solutions to family conflicts brought to state courts (South Africa). Zaal, concentrating on a non-judicial curial officer, the Children's Court Assistant, deals with the problem of expanding access to non-adversarial advocacy in the face of the constitutional norms that stress adversarial advocacy (in South Africa). This unresolved

confrontation between non-legal advocates and legal advocates (lawyers) poses obstacles to widening access to justice. The authors of the last three contributions are practitioners – two lay magistrates from the United Kingdom and Tanzania, Annan and Mwakajinga, respectively, and a legally trained magistrate, Lyamuya, again from Tanzania. They acknowledge with graphic examples their dependence on supporting staff members for smooth functioning of the judicial tasks. The obstacles lie literally in incompetencies of staff, not hierarchy. If the staff are not trained, paid enough, or are not well equipped, access to court processes, especially at the lower levels is limited. Public confidence falls.

One can conclude on the basis of the summaries of the articles that localized obstacles to access to justice and claiming rights are very culturally tied. The differences are sufficiently varied that no one pattern emerges. Maintaining dependence on hierarchy is important for accessing justice in some systems, flattening out hierarchy is important in other systems to assure access to justice. No one recipe can be prescribed for assuring access to justice.

As for the rule of law, what emerges, however, is a common respect for the rule of law. The forms under which the actors perform only differ – state and non-state. State structures do not guarantee that the actors will assure the rule of law per se. A combination of non-state and state is necessary for widening access to justice and the rule of law. Furthermore, any reforms relating to access to justice have to concentrate on the level of administration, which supports lay as well as state structures.

The articles also raise important issues relating to the role of lawyers in access to justice. In Tanzania, lawyers have been barred from the first instance state courts, where most of the people go to litigate their causes (Primary Courts). The key players at this level are the assessors, who are the lay members of the community, who sit and judge along with the magistrate, and the court clerks, who determine whether a complaint shall be filed. Lawyers are not considered to be trained well enough in the intricacies of African customary laws. It is also feared that the lawyers would either stymie the dynamic development of customary laws or perpetuate them as strong competitors against state law.

On the other hand, lawyers have played an important role in Tanzania and South Africa in terms of asserting constitutional, human and social rights against a backdrop of traditional rules of law. For example, in Tanzania, a lawyer was hired by an elderly rural woman (without formal school education) to have a higher court declare the traditional debarment against inheritance by a woman a violation of her human rights (Jones 1995).

One can certainly debate whether the assertion of rights by lawyers destabilizes the social scene or cures abuses that otherwise have a destabilizing social impact. Nonetheless, it is sure that lawyers, when properly trained in all systems of law – customary,

indigenous, or religious – prevailing in any one society, are necessary for initiating and sustaining debates on how best to uphold access to justice by guaranteeing the realization of basic constitutional political and social rights. Yet to concentrate only on training lawyers in justice reform can be a mistake. It would be unrealistic. For non-lawyer personnel are often more important in the processes of access to justice as the articles in this volume illustrate. The training of these persons should be given priority or at least the same priority as for lawyers.

Finally a word should be said about how this volume fits into the literature on law and anthropology, specifically in relation to non-western law. The very title of this volume “Access to Justice” is a sign of new concerns facing legal and legal anthropology specialists. The initial efforts in this field were aimed at “legitimizing” the non-western law. The African, Asian, and Islamic systems were seen as quasi-law because they were said to serve the same functions of law as in western systems (Malinowski 1945). Nonetheless, the non-western legal systems constituted no more than the “local law of politically subordinated communities” as part of the colonial imperial situation (Fallers 1969: 3). After World War II, these quasi-legal systems began to be regarded as bearing an essential characteristic ascribed to western legal systems, namely, they were rational and logical in judging disputes (Gluckman 1965). Yet the rationality was deemed limited. It seemed to be compromised by personal influence and authority (Fallers 1964: 108) or by appeal to the supernatural (Gluckman 1969: 35). With independence from the imperial (colonial) situation came a drive to distil the purely legal elements of the non-western systems which could serve as the basis of a legal system befitting a centralized nation-state. Professionalization of the judiciary and substantive formulation of rules in the form of codes of customary and religious law were stressed (e.g. A. Allott’s Restatement of African Law project at the University of London, Allott 1968). Concern was expressed, however, about the political realities, which could undermine the ideal of rational resolution of disputes within the framework of a judicial system. That concern was the weakness of the central state. If the central executive and judiciary powers were not strong enough to enforce their wishes over the whole population, this would weaken the enterprise to transform the adjudication systems and the substantive norms (Gluckman 1969: 35).

The concerns have changed radically since then. The concern is not about evolving concepts of what is law or what is a legal system in the non-western worlds. It is more about the people in the system. In this volume of essays and case studies, we take people at where they are. We assume that they have their own systems of logic and reason that are not a priori outrageous or law-less. We look at what obstacles exist that hinder the litigants or disputants from the process of pursuing their own agenda of objectives within an orderly framework, either created already for them or created by themselves (as in the Sudan). One such obstacle we have identified is the supporting

personnel. The reason is obvious. In order for every legal or adjudicative system to function, legal personnel are essential.

Our survey of the literature shows that no one has studied the role of supporting personnel before. Earlier studies concentrated on political personnel in the functioning of chieftaincies (Fallers 1964), but they neglected examining the personnel in local adjudicating organs because it was thought that there was not sufficient differentiation in the roles that could be equated to the differentiations in western legal system, such as the between bench and bar (Fallers 1969: 14). This prejudice is beginning to be put aside as evidenced in some of the latest legal advocacy literature. References to legal personnel are to be found now in activists' literature. This is mainly in terms of the gender biases of personnel (Women and Law in Southern Africa Research 1999, 2000). It is hoped that this volume of edited papers will spur further work on legal personnel.

I am personally indebted to all of the contributors to this volume for their cooperation. They were all keen about the topic. I am especially grateful to Professor Beverly Stoeltje. The idea for this volume grew out of informal discussions stimulated by presentations at a workshop which she had organized on Women, Language and Law in Africa at the University of Indiana in 1997. The idea snowballed as those of us who kept in touch after the workshop continued to nurture the idea and as further experts whom I contacted voiced enthusiasm for the same. I am much obliged to all for showing great patience in the process of editing and waiting. For whatever obstacles there were I take full responsibility for them.

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PERFORMING LITIGATION AT THE QUEEN MOTHER'S COURT

Beverly J. Stoeltje

Abstract: Taking the Queen Mother's court in Kumasi, Ghana as an example of a powerful non-state judicial authority with an array of clerks, counselors and linguists, this article explores the power of the key administrative actors controlling the litigation process, namely, the okyeame – spokeswoman or spokesman for the Queen Mother, the final judge. Their roles are set in a complex gender identity in a dual gender court system (Queen Mother's and King's courts) in the Asante society, where politics rests on kinship and where each person has a complicated identity, but where selection of court personnel is based on objective qualifications of eloquence, character, knowledge of customary law, and matrilineal relationship. It is shown how the duality and complexity set into motion a checks and balances system in the exercise of legal authority. Analysis of actual court hearings illustrate how the elaborate separation of functions of all actors, including the public audience, contributes to the formation of customary law as an interplay of fact-finding, arbitration, consent, and customary rules as variously interpreted by the several actors.

I. Introduction

In Kumasi, Ghana, the Asante Queen Mother's court meets weekly in her palace at Manhyia to hear cases rooted in the affairs of everyday life. The court provides a site for the settlement of disputes involving women because an Asante Queen Mother has responsibility for the welfare of women and for the settlement of disputes in her domain.

In this paper I will consider an issue fundamental to the processes of the court: communication between the authority of the court and the litigants. Taking the position that the complexities embedded in the process of litigation can be captured most effectively by an approach which identifies the interactions between the authority of the court and the litigants as a significant variable, I will explore the communicative resources of Custom as constitutive of the dynamics of the Queen Mother's court.

Identification of the actors and the positions they occupy, the communicative resources and to whom they are available, and the examination of the specific moments of interaction permit the study of rules and rhetoric, of conventions, innovations, and violations, and of the various forms of power that are enacted in the court. Focusing on the interactions as the performance of litigation in the customary court provides perspectives that expand our knowledge of both communicative and legal processes. Perspectives gained from knowledge of the actual performance of litigation allow us to understand the ability of a people to create and utilize institutions for the purpose of navigating through the social realities of their own construction.¹

As the communicative resources of Custom and the dynamics of the court are intimately linked to the Asante cultural system and social relations of power, and expressed through indigenous forms, verbal and non-verbal, the paper will discuss the institution of the customary court and its place within the indigenous cultural system in order to contextualize the performance of litigation.

2. The Asante

The Asante people belong to the larger linguistic and cultural group known as the Akan whose indigenous political and legal system can be described as a dual gender system, meaning that the system recognizes both a female and a male leader. Although a stratified society with one king and queen mother at the top of the hierarchical pyramid, the complete system is replicated in every political unit of the Asante people; this means that every village, town, and division has a chief and queen mother and sub-chiefs and elders, all defined with responsibilities and in relation to each other. Each location belongs to a larger unit called a division, with a chief who serves as their overlord, and to the larger Asante confederacy, and consequently each village, town and paramountcy fits within the political hierarchy at the top of which are positioned the Asantehene and Asantehemaa (often referred to as the “king” and queen mother of the Asante). Because of this replication of the political system which rests on the kinship system, (and it is matrilineal), and the integration of the political and the legal and the religious, each individual person has a complicated identity, framed and outlined by clan membership and location. Not an abstract phenomenon, this identity packages social and economic obligations and sets in motion relations of power that function in the affairs of everyday life and become apparent on ritual

¹ I am indebted to West and Fair’s rich discussion of communication and development in Africa (1993) for the perspectives incorporated in this view.

occasions and in formal institutions. The dual gender system of the Akan, like others of that kind, specifies roles for both female and male leaders. These function in complementary relationship. They do not reflect equality as Western models might suggest, but, in their ideal state, they divide responsibilities and power, creating a balance of authority. This balance is reflected in the fact that the chief and the queen mother occupy separate stools. In any location the symbol of authority is the stool. It functions powerfully as a symbol in discourse as one refers to the person who holds the position of queen mother or chief as "on the stool", meaning that she is sitting on the stool and exercising the authority of the position. Moreover, the symbol of the Asante nation is the Golden Stool, a specific stool that is believed to have been brought down from heaven by the powerful priest, Komfo Anokye, who, together with the equally powerful military leader, Osei Tutu, was responsible for the creation of the Asante nation.

In Asante culture authority is clearly and unambiguously vested in the position of chief and queen mother who are "on the stool", and the degree of that authority accords with one's position in the larger hierarchy of Asante, in combination with the power and resources of the particular individual who sits on the stool. However, the system distributes authority to many other individuals in a very complex arrangement of specialized roles, ranging from the powerful spokesperson known as the Okyeame who speaks for a chief or queen mother, to the person who is in charge of his/her sleeping arrangements. Often those individuals derive their authority from a specialized stool and a specific title, created for a particular function. An example is the recently created position of "progress" chief or queen mother. Created by the Asantehene, this title is available to any chief or queen mother to bestow on an individual from their town who has achieved success in the modern financial or political world, and it carries with it the responsibility to bring resources back to one's town.

An example of the flexibility and viability of the system of chieftaincy, this new title recognizes and incorporates into the system of chieftaincy those individuals who have chosen the path of modernity. I draw attention to it here to demonstrate the ease with which Asante indigenous culture can adapt to change. Moreover, many Asante chiefs are quite well educated individuals, some of whom have advanced degrees in law or anthropology or philosophy, and many of whom are engaged in international business. In fact, recent years have seen an increase in the number of professors at the University of Ghana or the University of Science and Technology who have chosen to assume the title of one of the various supporting chiefs in their hometowns. Moreover, the Asantehene, who holds a law degree, was serving as ambassador to Italy when it was determined that he would accede to the position of King of the Asante.

However, not all chiefs are educated in the formal Western system, and the majority of queen mothers are not, though the number who are is increasing. While the

matter of education varies widely among Asante, even within one family, this is a stratified society that maintains a firm distinction between those families considered “royal” and those who are “commoners”. “Royals” are generally defined as those who were the founders of a particular town. Members of a royal family can trace their ancestry back through the female line to a particular ancestress. Only those who are royal can occupy a stool and participate in chieftaincy affairs. Although there are wide differences among the many royal families in terms of education, wealth, and prestige, there is nevertheless a significant social space between royals and commoners, and it is not possible for a commoner to become a royal.

3. Custom and Customary Law

The Queen Mother’s court constitutes the site for the performance of litigation that derives its concepts and procedures from the cultural regulations and conventions commonly known as custom. Forming an integrated set of beliefs, laws, and practices that were formalized in the pre-colonial period, custom is simultaneously shaped and expressed through the multimedia discourse that characterizes everyday life as well as legal institutions.

Like the related terms, tradition and heritage, the terms custom and customary law have been widely used to construct a past that will serve the needs of the present. In Africa especially, as post-colonial studies have demonstrated, the concept of law provided one of the justifications of colonialism (Richards 1985), and customary law served as a means to enforce colonial policies (Faris 1973).

Sally Falk Moore argues that the term, customary law, is a residual category of local norms claiming tradition as legitimation, but that the actual content of such rules and practices differ from one place to another and from one period to another. To account for such differences, she argues, the “unit of analysis in the study of such interdigitations must encompass both local and supralocal entities, and it must do so within a historically conceived framework” (1989: 299-300).

Historian Tom McCaskie also issues a call for new models, ones that question the use of old terms such as custom, and ones that transcend disciplinary boundaries. He argues, “that the record must not only be recuperated ... but must also now be interrogated at the highest sustainable level of analysis” (1998: 42). His “Custom, Tradition and Law in Precolonial Asante” effectively illustrates his model in that he interrogates the body of practices entitled Custom from the point of view of the construction of the jural superstructure that forms its foundation. Established in the late 17th century at the inception of the state when the Asante defeated the neighboring Denkyira who had previously ruled over them, this superstructure integrated the legal, political,

religious, and kinship systems into one, making it possible for the state to assume “discretionary control over the arena of jural corporateness” (1998: 36).

McCaskie identifies as “operational premises” the rules and conventions that formed the basis of the social order *prior to the inception and elaboration of the Asante state*. These were directed by matrilineages and matriclans and included the maintenance of jural corporateness and the resolution of conflict by consent and arbitration. (Emphasis mine). Jural corporateness, “in effect the identity of being an Asante with citizen rights”, was removed by the new superstructure from the purview of the lineage ordering of society and transferred to the agencies of the state.

Announced by the powerful priest, Komfo Anokye, who was also credited with bringing down the Golden Stool (the symbol of the Asante nation) from heaven, the superstructure took the form of “Seventy-seven National Laws” and the Asantehene was charged with their enforcement (McCaskie 1998: 28). Characteristic of this body of custom was an epistemological division between the essential and the contingent, expressed as *aman mmu*, immemorial custom (that which was not subject to fundamental change by legislative enactment), and *aman bre*, jural custom (that which might be adjusted by legislative act) (30). The state transferred jural corporateness to itself by codifying *aman mmu* and placing jural corporateness at its heart, and then making the state (in the person of the Asantehene) the guarantor of this arrangement, and assuring that it would not undergo change by guaranteeing the inviolability of *aman mmu* (34-36).

As noted above, the process of conflict resolution by consent and arbitration was linked to jural corporateness (lineage identity) which was not subject to modification, but McCaskie argues that conflict resolution was considered one of several contingencies of jural corporateness, and therefore that it was subject to legislation that would adjust matters relating to aspects of the social order (33).

Throughout the 18th and 19th centuries much of the attention of the Asantehenes was taken up with the processes of monitoring and modifying that segment of jural custom defined as *aman bre* as the state was “relentlessly interventionist in relation to” the social order. Moreover, in addition to negotiating the relationship between the Asante state and the social order, the king and the administration set up by the state were engaged in battle with the British throughout the 19th century until they were finally defeated as the century came to an end. Subsequently, the British ruled the Asante through the institution of chieftaincy in a process widely known as “indirect rule”. During this time, Captain Robert Rattray served as commissioner and from 1921 as director of the unique anthropology department in Kumasi (Owusu 1987: 165). A trained anthropologist, he published a number of volumes on Ashanti culture, ranging from folk tales to law and including *Ashanti Law and Constitution* (1911). Although a colonial administrator and an anthropologist trained to think in an evolu-

tionary model, Rattray's dedicated efforts to document Asante culture have provided rich ethnographic sources on the subject of chieftaincy and custom as practiced during his lengthy stay in Asante, and his works are widely used as an authoritative resource by chiefs today. Maxwell Owusu is of the opinion that Rattray, Sir Francis Fuller and Sir Gordon Guggisberg (governor of the Gold Coast from 1918 to 1927) "contributed much to the revival and restoration of Asante kingship and chieftaincy in the Gold Coast" (1987: 165) [after the disruption caused by the British occupation when they exiled the Asantehene and Asantehemaa and their entourage to the Seychelles]. Certainly Rattray's works provide a bridge of continuity between the era in which the Asante state established its dominance and the modern period in which the institution of chieftaincy and the practices of custom are not only in evidence but are proving to be relevant to contemporary social and political life. That this should be the case is the result of a complex set of factors, according to Owusu, including "the intrinsically familial democratic, and popular character of the institution" (169).

Without question, then, the contemporary practices of custom and the institution of chieftaincy have been much affected by the encounter with British colonialism and by the presence of the modern nation state; but the system itself was formalized as the central core of the Asante state when it was established and has continued to occupy a position at the core of Asante identity ever since in spite of the introduction of dramatic changes. What is of interest to us now, however, concerns this popular institution in contemporary Asante society. The beliefs, laws, practices and formal institutions such as the courts are relevant to both royals and commoners who invoke them in social relations. Not simply a set of rules and processes that invoke the past, custom and chieftaincy are expressed in forms of communication that embody relations of power; simultaneously, however, they offer ordinary persons the opportunity to express conflicts in a formal setting and to be heard by traditional authorities who possess the knowledge necessary to resolve disputes stemming from situations of everyday life.

These interactions are possible because the concepts embodied in custom and laid down at the inception of the Asante state which combined the operational premises of the segmentary lineage system (conflict resolution) with the principles of a centralized state (with chieftaincy as its institution) continue to serve their function, providing jural corporateness (essentially identity) within an integrated set of institutions that maintains continuity over time. Moreover, the two categories of custom laid out by Komfo Anokye allow for change to occur in the system in some domains while others should remain unaffected, thus creating space for both flexibility and stability.

4. The Court

Central to the institution and to the concept of jural corporateness is the court. At this site an ordinary person, a commoner, can be heard by authorities who possess the knowledge of custom necessary to settle disputes derived from customary practices. In this section, then, I will approach the court as a site for the performance of litigation in which the discourse is that of Custom. The authority of the court is complex but always drawn from the elite (royals), and the litigants are ordinary people (commoners) who bring conflicts to the court for resolution.²

The significance of having a voice and an audience for the expression of one's concerns and the possibility of achieving transformations that are relevant to one's social life can hardly be exaggerated. Ordinary people (commoners) use the beliefs and the verbal forms of custom in their everyday lives to express social relations, especially hostilities. Some of these social interactions will develop into "a case" and enter the courts where they will be heard and resolved. From the time that a person makes the decision to bring a case to court and arrives at the Queen Mother's palace to schedule an appearance in court until the case is finished, s/he communicates through the Queen Mother's spokesperson, the *okyeame*, to the court. He is the person who communicates directly with the litigants, and he has the responsibility for all arrangements and communication at the court. Not only, then, is the *okyeame* "the principal focus of all formal discourse", as Kwesi Yankah has explained, but he also holds the position of administrator of the court. Yet, it would be incorrect to single out his role to the exclusion of other individuals who hold positions of authority at the court. In the following discussion, therefore, I will focus primarily on the *okyeame*, but will situate the role within the larger body of authority at the court, and will identify the major points of interaction between the litigants and the authority to demonstrate the processes of the court.

² Performance in the court involves a wide range of communication strategies characteristic of the discourse of Custom. Samuel Obeng has examined these strategies closely, particularly the use of deferential modes of reference, apologetic expressions, indirectly authored speech forms such as tales, riddle, proverbs, and so on as they are utilized in Akan judicial discourse and concludes that these forms of polite behavior are required of subordinates in their effort to persuade superordinates to accede to their appeals or requests. These discursive strategies are implicit and performed with ease by those familiar with custom, but when an individual lacks communicative knowledge or skills, the authorities of the court will make the most fundamental rules explicit. It is a point of interest that even though some individuals are not well versed in the discourse of custom, they will bring a case to the courts in an effort to address their disputes.

The authority of the court is, of course, the Asantehemaa, the Queen Mother of the Asante. As the most powerful Queen Mother in Asante, she holds a formal court with a full body of authorities present on a regular weekly basis. This practice is consistent with a Queen Mother's responsibilities for dispute settlement. Although chiefs also settle disputes, and the Asantehene holds a formal court twice each week, Queen Mothers are expected to resolve problems involving women and domestic matters especially. Ordinary people bring a wide range of problems to the court, but the majority of them concern the use of verbal forms governed by custom, examples being curse and insult. Before the court the litigants and their witnesses perform the narrative that tells the story of the conflict, thereby entitling it, and then the authorities negotiate a resolution, using the discourse of custom. At that point the authority of the court as the voice of custom has been confirmed and one or the other of the litigants has been declared guilty and must pay a fine or make a sacrifice or do both. In this lengthy process by which social conflict is transformed into narrative performance and examined by authorities, custom itself is also interpreted as it is applied to specific cases and debated in the process of resolution.

The Queen Mother is assisted by her spokespersons whose title is *okyeame* (sing.), *akyeame* (pl.), the pleading chief whose title is the *Dwanetoafohemaa*, with whom one negotiates one's fine, and the elders who interrogate the litigants and discuss the case as it is resolved. A number of queen mothers from towns or neighborhoods come to the court, either because of an obligation which links their town to the Queen Mother and therefore requires them to appear in her court as an elder, or because they want to learn more about custom and the settlement of dispute. This latter is the case with the Queen Mother of the Ewe, a patrilineal ethnic group in Ghana who did not have queen mothers at all until they were recently created as part of their customary system. Additionally, an audience is also present consisting of forty to fifty people. Another category of persons present in the court are those who serve the Queen Mother in the palace – one woman looks after the stools of the ancestors in the stool room (*BanmufoO*), and another woman is in charge of all the servants in the palace, including the many children (*ModwoafoO*), and seven or eight women (*Nkonwasoani*) who are stool carriers sit near the Queen Mother's stool and guard it whether or not the queen mother is present. Several young men from the palace set up chairs for the members of the court and deliver messages during the meeting of the court. The name for all of the people who serve in the palace is *KotimsifoO*.

Apart from the Queen Mother herself, the key figure in the dynamics of the court is the individual who holds the title of *Okyeame*. Often translated into English as "the linguist" or "spokesperson", the powerful position of *okyeame* attaches to a chief or queen mother. A specialist in speaking, the position is formally recognized in all Akan cultures as the person who speaks for the chief or queen mother to any other person,

and vice versa, repeats the words of others to the chief or queen mother. To state the rule clearly and unambiguously, no one communicates directly with a chief or queen mother even though he or she may be present. The *okyeame* transmits the words of others to the chief or queen mother and their words to the intended audience. A queen mother or chief may have a number of *akyeame*, but one of them will have the major responsibilities for speaking and for supervising and implementing policies. S/he may be recognized as the chief of the *akyeame* or as the *okyeame* who holds an especially prestigious position.

This form of mediated oratory, which Yankah has labeled “triadic communication” and its allied phenomenon, “surrogate performance or oratory”, can be found in many parts of Africa and Oceania, generally associated with monarchies and formal speech (1995: 5-24). The sequencing and patterning of this teamwork may take any one of the following forms:

1. Principal speaks and the mediator transmits the message in embellished form
2. Principal speaks, mediator repeats words spoken
3. Principal speaks, mediator ratifies by affirmative formulae, confirming the truth
4. Principal is present but does not speak; the message is spoken by an orator
5. Principal is absent from the scene of discourse; the orator speaks on his behalf. (Yankah: 13)

In the Queen Mother's court the *okyeame* utilizes all of the above listed patterns. He repeats the words of the Queen Mother to the litigants and vice versa, and quite often the queen mother does not speak, but the *okyeame* speaks the message; on some occasions the queen mother is not present, and the *okyeame* simply assumes the authority for the queen mother and speaks for her but does not sit on her stool or stand in her space. In some complicated cases if she is not present but is in the palace, the *okyeame* will leave the court in order to consult with her before making decisions.

The *okyeame*, particularly the chief of the *akyeame*, is the supervisor of the court, in charge of the operation. The authority of the court is unquestionably the Queen Mother, but the *okyeame* speaks for her and implements the procedures and rules and shepherds all of the individuals involved through the processes of the court. The Asantehemaa has a total of six *akyeame*, male and female. Seldom do the female *akyeame* come to court as they are traders in the market, even though the senior *okyeame* is a woman. However, the female *akyeame*, like the males, may be asked by the Asantehemaa to travel to outlying villages to investigate cases that come to the court from there. A female *okyeame* would be asked to investigate a case in which a “woman is naturally advantaged”, that is, a case that is essentially about women's affairs.

Asked if the female *akyeame* engage in the same processes of interrogation and discussion that the males do when they are present in the court, the answer from the men was that it is possible for the women to do what the men do but generally, “their mind is not as sharp as ours”, so they do not often speak when the men are present. Moreover, it is widely believed, at least among the men, that the women are not always able to read between the lines in difficult cases.

The Asantehemaa has six *akyeame* who serve her, but one has the primary responsibility for speaking for her and for supervising her court, and he maintains a room in the palace. As the most prestigious of the *akyeame*, he has the major responsibility for the authority of the court although he is not the senior *okyeame*. His prestige is symbolized by the fact that Okyeame Osei occupies a stool, and in fact it is a blackened stool, emphasizing the power and respect it commands. The Queen Mother’s *okyeame* is then a chief, himself, who occupies a family stool. Someone from his family, who should be eloquent in speech, will always be the *okyeame* for the Queen Mother because that is the purpose of this particular stool.

The individual who is selected to serve on the stool as an *okyeame* serves for his lifetime, as do the occupants of other stools unless he or she becomes disabled. When a new *okyeame* must be chosen for the stool, the elders of the family to whom the stool belongs select the best-qualified person in the family to serve. They determine who in the family it will be on the basis of good moral character and individual speaking ability – the person should be eloquent in speech. (The individual cannot be the son of an *okyeame* because the position must go through the matriline.) Once the family has made the selection, the individual is presented to the Asantehemaa who must approve the choice. Then he swears an oath of allegiance, but as the Asantehemaa is a woman, no one should point the sword of state on her in order to swear the oath of allegiance, so it is sworn to the Asantehene. Then the *okyeame* pays a “stamping-fee” and presents a bottle of schnapps and then becomes the official *okyeame* of the Asantehemaa’s court.

Okyeame Osei’s grandfather was considered to be a very eloquent *okyeame*; since Okyeame Osei is also known for his eloquence, it is often said that he is his grandfather incarnated.

Other *akyeame* do not have a stool, however, and thus the procedures for their selection and appointment differ. The Asantehemaa can select and appoint other individuals of her choice to serve, but the appointment does not extend beyond that individual’s lifetime to other members of their family, nor would that *okyeame* continue if a new Asantehemaa came on the stool; the office expires with the particular individual who occupies it or the Asantehemaa who appoints him or her; the appointed *akyeame* also do not possess prestige equal to that of the chief *okyeame* nor do they exercise the same authority. The one woman linguist is the senior one,

(Esessuhemaa) and after her comes the Bomsuhene. Next is Okyeame Osei who occupies the *okyeame* stool. Following him is Okyeame Dawuro (his nickname means the double gong) and the last in status is Okyeame Nsiah who was appointed by the Asantehemaa.

As the spokesperson for the Authority (the chief or queen mother), the Okyeame has a powerful position; moreover, much of the court's activities revolve around him as a result of his administrative responsibilities. Yet, to fail to recognize the other individuals through whom the authority of the court speaks, and through whom Custom is given voice would be naive. These others known as elders participate in the discourse of authority as it applies to an individual case.

Each of these elders in the court has been selected by one of several processes. On the West side of the court are the Konson, and on the East side are the Kotimsi. Kotimsi represent the first kings so they come before the Nkonson. They represent a total of twenty-four villages that are obligated to send elders to sit in the court (it is also compulsory for the villages of the Kotimsi chiefs to send a child to the palace to serve the Queen Mother). In addition to the elders who are sent from those villages that have an historical obligatory link to the Queen Mother, she can appoint individuals to serve in the court. In this capacity, as appointees, several of the queen mother's brothers serve as elders, and because of their extensive knowledge of Custom, they assume a prominent role in the court proceedings.

5. The Dynamics of the Process

In the following section I will briefly describe the dynamics of the process that directs an individual with a case through the Queen Mother's Court. At Manhyia many people come and go on almost any day of the week. Located at this site in the heart of the Kumasi neighborhood known as Ashanti Town is the Asantehene's palace and surrounding buildings, the Asantehemaa's palace, and the official Records office.

Among those who come and go are some who wear traditional cloth while others dress in western clothes. The mission for selected ones of these individuals is to arrange to come to the Asantehemaa's court. For this reason, they are in search of the Asantehemaa's *okyeame* who schedules cases for her court. He can be found somewhere in the vicinity of the Asantehemaa's Palace on almost any day of the week, but he will not be in any one particular location. When there is no formal event at the palace, he will be dressed casually, but on court days and other formal occasions he wears cloth, as do all of the other members of the court. Those who come in search of him might need to place themselves on his register so that they can schedule an appearance in the Asantehemaa's court, in which case they will need to narrate the story of their dispute to him; others seek him because they need to make a payment on a

fine, while someone else might need to postpone the date for their case. The *okyeame* makes all of these arrangements for the Court and supervises the cases as they move along or must be postponed. He listens to the narrative of the individual bringing a case and advises him or her whether or not to bring the case to court and what the procedures are, or whether there is some other route to follow; then he schedules the cases for the court to hear. He also keeps the records on those whose cases have been postponed, those who owe fines, those who must make a journey to another location in order to resolve their problem and any other matters concerning the court.

As I stood talking to Okyeame Osei outside of the Asantehemaa's palace on a day the court did not meet, a woman came to him to explain that she needed to postpone her court date; a second woman who had been convicted of invoking a curse on another woman explained that she did not have the money to cover the expenses entailed in removing the curse at this time so she needed to postpone their travel to the river where she could revoke the curse through an extensive ritual process. Yet a third woman who explained that she is a prostitute came to talk to the *okyeame*, saying that she had been cursed and would probably need to bring the case to court. From these examples we can observe that the initial contact between a litigant and the Authority of the court takes place when an individual actually comes to the Asantehemaa's Palace and talks with the *okyeame* about the conflict that has developed. At that time a court date can be scheduled. Having established this contact, the litigant will continue to communicate with the *okyeame* as the primary link between her or him and the authority of the court even though many other voices may be heard during the course of a case.

When the *okyeame* determines that the case is ready, he will place it on the register of the court for a specific day and tell the individual to be present with witnesses. Then when the court convenes with the Asantehemaa, her *akyeame*, the elders, the other queen mothers and chiefs, the servants, the litigants and their witnesses, and the audience who have gathered in or around the space that becomes the court when it convenes, the *okyeame* opens the court and announces the name of each individual when he or she should appear before the court.

After everyone has arrived and has seated themselves on the side of the court designated for them, the Asantehemaa enters the court and is seated on her stool with her servants surrounding her. One group of elders sits on one side of the court with the linguists, and on the other side sits another group of the elders, according to which villages they represent. When the name of a litigant is called by the *okyeame*, he or she and his or her witnesses enter through the open side of the rectangular space formed by the members of the court and face the *okyeame*. There the litigants are given a choice as to whether they will swear by god or by idols, and then they must swear to tell the truth. Once the swearing in has taken place, the complainant must narrate the

story of the dispute that lies at the center of the case for the court. The witness or witnesses are usually asked to tell the story from their point of view as well. The defendant and his/her witnesses then usually tell their story. The authorities of the court (the Asantehemaa, elders and *okyeame*) can and do question the litigant at any point in the narration of the case; they can comment at length and discuss the details among themselves and interrupt at any point that a violation of Custom is in evidence. Eventually the elders arrive at a conclusion, unless, of course, a case is thrown out. Once the authorities of the court have made a decision, the *okyeame* announces the victor and sprinkles talcum powder on that individual as a sign of victory. The individual found guilty goes to speak to the pleading chief who is seated not far from the *okyeame*. She stands while the guilty individual pleads for a reduction in the fine; usually she reduces the fine although on occasion she will consult with the *okyeame* and then announce the adjustment. The fine may be paid at that time, or the individual may need to go and buy a sheep to sacrifice and return to the court. In any case, the fines and the sheep that are sacrificed go to the members of the court.

Although this outline represents the process by which an individual moves through the court with a case, there are many circumstances that call for variations. Some of these develop as a consequence of the kind of offense that lies at the basis of the dispute while others may emerge from the performance of one of the litigants or a witness in the court itself.

6. Cases at the Court

The Asantehemaa's court serves as a site for the performance of the discourse of custom. In her court, as well as other customary courts, the jural superstructure known as custom meets the customary practices of everyday life creating a point of intersection. Shaped, challenged, and negotiated by the individuals present at the court, Custom is embodied as law by the authorities who interpret the cultural regulations and conventions and apply them to the situations brought before them by individuals whose beliefs and circumstances require the assistance of authority to resolve conflict, creating winners and losers. No written sources are used by the court and nothing is recorded.

The conflicts that appear before the Queen Mother's court develop from the affairs of everyday life, and generally but not always the disputants know each other. Sometimes they are individuals living in the same compound while at other times they may be women who encounter each other in the marketplace or who share the same man, and at other times the disputants may be a couple who are or have been married to each other. The case itself is often a matter of insult, oath, curse or the accusation of witchcraft. These are all actionable offenses, but the role of the court is to determine

whether or not the accused actually delivered the verbal offense. Once it has been determined, generally a fine must be paid, but often other measures are necessary as well such as ritually sacrificing a sheep to cleanse the earth of the offense.

Quite a number of cases also involve disputes over land use (who can use a farm, for example) and conflicts over labor that has been contributed to a farm and the consequences of having done so. Petty theft cases can also be brought to this court, as can complications from a divorce from a marriage in which the customary rites were performed.

The development of a situation of conflict into a case in court is a complex process in which the narration of the situation plays an important role. The litigant will tell her story many times to individuals in her family or clan or her local queen mother, before actually arriving in court where it must be told once again; witnesses must be available who will also tell the story as they witnessed it, and then the members of the court will respond with questions and opinions based on their concept of Custom.

7. Performance of the Court

Both the dynamics of the process and the significance of the interactions are best illustrated through specific examples from the court. Toward that end, I will present an abbreviated discussion of a case that appears to be rather simple on the surface but which in fact reveals how custom is used in everyday life, and the dynamics of custom as performed in the court. In a brief discussion of a second case I will point to the significance of a model that identifies the communicative resources utilized in customary law and demonstrates the relevance of performance. Throughout, the *okyeame* speaks and directs, acts as the master of communication, the individual who speaks with eloquence when he performs but who also administers the court and directs the litigants through the process.

The first example permits a close examination of the relationship between individuals' use of customary forms in everyday life and the courts' role in resolving disputes arising from the use of these forms. Equally important, the case permits a close view of the interaction of the authority of the court with the litigants, revealing the relationship between rules and performance and outcome. In this case the Asantehemaa is present in the court and, moreover, she has a vested interest in the case; the litigants are two teen-age girls who have very little power but a great deal at stake and an inclination to behave recklessly.

The case involves two teen-age girls living in a house that belongs to the Asantehemaa. She rents rooms in the large house to many tenants, and thus she is particularly interested in keeping peace in the house. The two girls have been fighting and disturbing all of the tenants. Because the house belongs to the Asantehemaa herself, the conflict

has been brought to her court for resolution, whereas were the house located elsewhere and did not belong to her, the case might not appear in the court.

The two girls have been sharing a room, but are not sisters. One girl's father lives in the house and the other girl's mother lives in the house. The girls have been fighting and disturbing the other tenants, so the caretaker has reported the misbehavior. The father of the one and the mother of the other and several other tenants have come to the court as well as the two girls. The caretaker of the house is also present and has been called before the court. (All of this is known to Okyeame Osei who has scheduled the case and instructed the caretaker to bring the individuals and their families and witnesses to the court.) Okyeame Osei announces the case and the caretaker comes forward. Then Okyeame Nsiah asks the caretaker of the house to identify the two girls who are causing the trouble, and when he does so, the girls come forward and stand before the *okyeame*. The father of one of the girls stands with them and tries to speak for them, but the court shouts him down, and one of the elders explains to him that the court will not allow the father to speak for the girls; they must speak themselves.

There is some discussion of the situation among the elders, and then there is an interruption from someone not involved in this case, and then the attention of the court returns to the girls. One elder suggests that the girls be warned since this is the first time the caretaker has brought such a case before the court. Another elder asks how could we warn them if we do not know what they have done. He states that the two girls who are causing the problem should speak so that the elders will know how to warn them. Okyeame Nsiah then states that the Asantehemaa wants to know why the two girls do not want peace in her house, why they want fire in the house.

This constitutes the essential question, then, with the *okyeame* speaking for the Queen Mother, asking the girls what is the source of this conflict. In reply, one of the girls explains (directing her speech to the *okyeame*) that the other girl has insulted her with a serious insult, and then she also accused her of being a witch. Both of these are serious violations according to custom. When either of these forms, an insult or an accusation of witchcraft, is activated through performance by adults, it is actionable; the insulted and/or accused one can bring the other to court. The issue in the case is always whether or not the accused did indeed deliver the insult or accusation. If so, a fine must be paid. The case is not about whether or not one is a witch. The sole purpose of the court is to determine whether or not the accusation or the insult was delivered.

In her narrative the complainant explained that the accused teased her by saying that when she was born, there was a tooth in her mouth.

"I do not know how I looked like in my infancy, but this girl (pointing to the second girl) suddenly decided to tease me by saying when I was born there was a tooth in my mouth."

This constitutes an insult because the implication is that when the child was born, she came from the devil and is thus a child of the devil, an evil person. The complainant continues to explain that the accused and some other girls made statements to the effect that she was a witch. The statement was not made directly but once again, she used the strategy of indirection. (Obeng 1997 and Yankah 1995). It is widely believed that witches occupy coconut or palm trees during the night when they are out and about doing their evil business, and, therefore, it is not uncommon that trees near houses are cut down to remove the witches' nocturnal abode. The complainant explains in her story that a coconut tree near the house they occupy was felled recently; then the accused girl accused her of being a witch, using indirection, by saying that "The tree of the witch has fallen, and the witch cannot go on her nocturnal rounds anymore." With this statement she implied that the girl was a witch and now that the tree has been cut down, she cannot use it any more for her nightly activities.

The girl continues on with her story, explaining that she reported these events to her mother who

"spoke at the top of her voice to the effect that there was no tooth in my mouth when she gave birth to me and that whoever persisted in that would be called before the appropriate authority to prove their case. So that is why we used to fight often in the house. She always insinuated that I am a witch."

These two accusations constitute violations of custom. They are based on beliefs concerning evil and witches, and they constitute an insult and an accusation of witchcraft. As verbal forms that violate custom, they are actionable and thus can be brought to the court. Were the litigants adults, the case would proceed in which the elders would question the two individuals involved and discuss the case, and ultimately a decision would be made. However, this case is unusual in that the litigants are two young women who were brought in by adults, and the whole case is affected by the fact that the house belongs to the Asantehemaa. Due to these conditions, the Asantehemaa speaks directly to the second girl and asks her why she wants to fight with the other girl?

"Has she seized your husband from you or has she wrecked your marriage?"

The girl accused of delivering the insults replies that the other girl insults her from time to time. The Asantehemaa interrupts her before she is finished, telling her to stop

speaking and states that she “deliberately wants the house to be on fire”, and that is why she causes these quarrels.

The Asantehemaa then ends the discussion by saying that she will ask somebody to watch the girl's behavior and if she hears any adverse reports it will be the end of her stay in the Asantehemaa's house. She names one of the tenants specifically to keep watch in the house and to inform her if it happens again so that she can come and see to their ejection herself. She concludes the discussion by saying,

“I forgive you; go and do not repeat such riots.”

In this instance we see all of the complexity of the authority of the court. The *akyeame* take charge of the case; one of them sets up the case and another initiates the questioning on behalf of the Asantehemaa. The elders engage in discussion of the case and how the court should proceed. At a certain point, however, the Queen Mother speaks directly, unusual according to the formal rules but not unusual for queen mothers who are more likely to speak directly than are chiefs. She concludes that the accused is indeed guilty and delivers orders to her to cease from causing problems. Moreover, she instructs someone to watch the girl, and to inform her if she causes further trouble so that the Asantehemaa can eject her from the house. This order, of course, implicates others as well: the parents of the girls and the other tenants in the house.

Subsequent to this conclusion, two of the tenants asked to say something about the case. They were immediately told by several elders of the court to stop speaking because “after the Asantehemaa has spoken no one is expected to say anything again”. In other words, the Asantehemaa must have the final word in her court, and no one should even consider introducing any further testimony after she has spoken, concluding the discussion. This rule is one of many determined by Custom, and the elders are present to make certain that Custom is enforced.

This case permits us to see that the Asantehemaa does indeed speak directly in some circumstances, and it is my observation that queen mothers are more likely to speak directly to litigants than are chiefs. This variable seems to be affected by seniority as well as gender. That is, a senior *ohemaa* who has many years of experience relies less on formality for her authority than a younger, junior queen mother or chief would. We also see the exercise of the rule that the queen mother's (or a chief's) ruling is the final word; it cannot be contested. This rule is quite firmly and widely applied in all contexts. Anything anyone has to say is not relevant once the Queen Mother has spoken and closed the case because her authority is final.

In this instance and various other ones throughout the case, the rules had to be stated and enforced. This is not uncommon as many individuals who come to court are not familiar with the formal rules, and consequently, the *okyeame* and the elders are frequently articulating the rules and providing interpretation of custom, *empha-*

sizing the fact that the court is a site for the negotiation of custom itself as well as the resolution of disputes.

Moreover, this case demonstrates the widespread use of insults and accusations in everyday life. These are very familiar to the general population, the young as well as the old, and to the elders. It is not necessary, therefore, to explain the meaning or the consequences of their use, to the litigants or to the court. Because these are meaningful in the everyday lives of the population, the court offers an important site for individuals who have engaged in conflict using these communicative resources to bring their hostilities before authorities who are familiar with these forms for resolution.

Turning now to the matter of a litigant's performance before the court, let me mention also that the audience listens carefully to every case, and they may laugh and speak to each other or express their disagreement with a verdict through grumbling, hissing, or commentary which is ignored but nevertheless heard by the elders of the court. When a litigant is unable to speak well, to perform the narrative that explains the case with fluency, or provides too many details of the case or otherwise extends the length of the narrative so much that the audience becomes bored, they will respond in one or another of the communicative forms mentioned above. In one specific case, a woman spoke at such length narrating her story that the elders first began making disparaging comments, and then the audience began to noise their opinion. Members of the audience finally began to laugh, and hiss, and to comment that she goes on too long. Both the audience and the court became disgusted with her, and her case was dismissed. In a follow-up discussion with the chief of the *akyeame*, I inquired about the case and the significance of the ability to tell one's story, and he replied that:

"It shows that some are wise and quite eloquent while others who never think about the consequences of insults, they leap on others in a fight and come to stand before the court and mess up. Eventually, the one who speaks well wins. But oftentimes they tell such an impressive story which makes everybody think that it is too 'fine' a story and that she must be telling lies."

With this case the *okyeame* points to the importance of the litigants' ability to speak well. Not only is eloquent speech highly valued for *akyeame*, but litigants are also affected by their speaking abilities as well. Moreover, as the *okyeame* is a specialist in speaking, he is a particularly good judge of speech and can direct the court to the significance of the litigant's speaking ability – whether it is inferior or highly polished. But equally noteworthy is the response of the audience to the litigant's communicative abilities. Although they are ignored and have no voice in the decision making process, if the general population should become disillusioned with the performance of the court, they could cease to bring their cases to the court. Although the court is powerful, nevertheless it is not obligatory. The court can and does utilize policemen

to bring people into court, but they are not always successful. For the most part, individuals come to the court because they are involved in a dispute that they want settled, and they feel that the Asantehemaa's court has the authority to resolve it. Therefore, while the audience's response has no official link to the authority of the court, they are allowed to express their opinion, and members of the court can take it into account in future decisions if they wish, knowing that the audience is present at every session of the court and evaluating every decision made by the authorities.

The communicative resources of the court, then, link all of those present into the events before the court at any given time: the Asantehemaa, her *okyeame*, her pleading chief, and her elders, the servants of the court, the litigants who bring their cases and their witnesses, and the audience who respond to the performance of the litigants and to the decisions of the authorities. Not only the rules embodied in Custom, but the epistemologies of knowledge and the social relations of power, the vehicle for the expression of hostilities and the processes for the settlement of disputes, and the power of indigenous knowledge and practice to define reality through performance in everyday life, are choreographed in the Asantehemaa's court through a complex body of communicative resources.

8. Conclusions

Focusing on the dynamics of customary court including the specificity and historicity of Asante customary law and the power of the communicative resources as performed in court permits us to account for behaviors and outcomes not otherwise accessible to analysis. The importance of viewing the courts as an interaction that brings customary authority into communication with ordinary people, and searching for the communicative processes employed in the creation and resolution of conflict, brings to our attention the significance of the *okyeame*. While his performance as an eloquent spokesperson for the chief or queen mother is publicly acknowledged and displayed on many formal occasions, his position in the court as master of communication, who directs litigants from the time they seek to initiate a case through the performance of the litigation in the court until they have completed the case, is less familiar. He not only speaks for the Queen Mother, both when she is present and when she is absent, but when we take the perspective of the litigant, we see that the *okyeame* also shapes the litigants' experience, both in court and outside of it.

At the court the social relations of power consistent with Custom are quite apparent. But the negotiation through those relations of power that every litigant must manage in a court case, is guided by the *okyeame* who can direct the individual with facility or with difficulty. Lest we presume too much power in the voice of the *okyeame*, however, we should remember that the non-negotiable authority of the court is the

Queen Mother, that there are more than one *akyeame*, and that the elders play an important role in the negotiation of every case. It is the *okyeame*'s role, then, to coordinate and choreograph all of these voices of authority at the same time that he is responsible for the litigants who must be permitted to narrate their experience for evaluation.

From this perspective we see that he acts as the conduit between the indigenous cultural system and the institution of customary authority. It is through his position at the court that jural corporateness and the resolution of conflict by consent and arbitration continue to be linked together, ensuring their continuity and relevance through the performance of the discourse of custom at the Queen Mother's court.

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LEADING LITIGANTS TO SPEAK THE
UNSPEAKABLE: A LINGUISTIC ANALYSIS OF
CROSS-EXAMINATION IN AKAN JUDICIAL
DECISIONS

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Abstract: Linguistic analysis is used to illustrate the Akan concept of the rule of law in some sample cases in the Ashanti Queen Mother's Court, a very popular non-state court. Cross-examination to get at the truth of a claim is a highly developed skill of the court counsellors (akyeama), who use language to tightly control the court discourse and maintain the high social status of court personnel. The litigants also develop strategies of deference and evasion. The perfect use of the Akan legal language plays a key role in establishing credibility as a litigant. One example, however, indicates that even in the highly hierarchal Akan society, chiefs and their accomplices are called to account for breaking the law. The article illustrates the importance of the socio-cultural context of legal discourse for the rule of law and access to justice.

1. Introduction

This paper extends previous work on Akan judicial communication (Obeng 1997a). In that paper, I demonstrated that traditional Akan legal professionals (particularly chief interveners or appeal chiefs) employ various polite and persuasive strategies when entering a plea for their clients. I demonstrated further that the choice of a particular register or speech form (e.g., the kind of reference or mitigating formula) used by judicial personnel “is governed by their social status, the social status of the addressees, the cultural context, the information source, as well as the location of the discourse” (Obeng 1997a: 25).

The main object of this paper is to examine cross-examinations done by “prosecutors” in Akan dispute settlements. In particular, I examine the different kinds of

linguistic and (meta)communicative strategies employed by “prosecutors” to “force” litigants to speak the unspeakable (e.g., swear a queen mother’s oath which requires a heavy fine or answer an unanswerable question) and thereby extract incriminating evidence against the litigants, fine them, establish if there is really an issue with remedy under Akan law or whether a case merits going on appeal to the queen mother’s court. Although I provide the end result of each legal dispute in parenthesis at the end of the discussion of each excerpt, the main focus of this paper is on the process by which facts are established rather than on the end result of the legal dispute itself. I also describe the linguistic structure of some of the speech strategies involved.

My use of the term “prosecutor” is different from the way it is used in western juridical register or parlance. By prosecutors, I am referring to the *akyeame* (i.e., court officials serving in different capacities as judges, orators, counsellors, and court clerks in a chief’s or a queen mother’s¹ court). The *akyeame* have the power to cross-examine the claimants and defendants and even though in some Akan legal discourse a claimant and a defendant may be allowed to cross-examine each other, many a time, such a cross-examination is done in a triadic interactional style with the *akyeame* acting as pseudo-epicenters.

The *akyeame* use cross examination for several purposes. First, they use it to find out whether the litigants are serious about telling the truth and bringing enough facts to support their claims and/or defenses. Cross-examination may also be used to establish if the case raises an issue that is prosecutable under Akan law.

In the course of the proceedings, fines may be intermittently imposed as a way of emphasizing to the litigants that they must at all times throughout the litigation be prepared to bring the facts and proper decorum that make up a proper case. In some cases (e.g., example 4), the fine may be an intermittent judgment – the settlement of a sub-issue in the course of a larger issue.

Dankwa (1928), Yankah (1989), and Obeng (1995, 1997a) have provided some insights into Akan customary laws. In Obeng (1995), I discussed the high value the Akan place on jurisprudence and hence their establishment of judicial structures from the level of the family, through the village and town, to that of the city and paramountcy (county). I also discussed cases that fall under the jurisdiction of the various judicial structures by indicating how minor family, inter-lineage and intra-lineage disputes are settled by respectable persons, usually with an empaneled jury. However, I noted that major disputes are settled by a village, town, or paramount chief with an experienced empaneled jury, usually selected from within the high domains of society. I indicated

¹ The term “queen mother” is used in Ghana to refer to a female chief.

that people found guilty by these traditional courts are typically made to pay a fine, part of which may be paid to a complainant as compensation. The *akyeame* and jury members get paid from fines collected from the litigants. Offenses like murder, traffic violations, tax evasion, and such, lie beyond the traditional court's jurisdiction and are referred to the western style state courts.

The *akyeame* in these "native courts" (as the courts are sometimes called) are also in charge of information flow from and into the palace. Most of them do not have any formal education but are very competent in Akan traditional customary law. They always impose heavy fines on litigants with the view that the litigants will ask for a reduction in the fine (usually through the office of the chief intervener). In fact, a litigant who does not plead for a reduction in the fine is seen as arrogant or a snob and may consequently have his or her fine increased.

In Obeng (1997a), I also indicate that Akan traditional law recognizes the necessity of appeal and every community has a person through whom a plea for intervention may be routed. The *dwanetoahene* or *dwanetoahemaa*, i.e., appeal chief/chief intervener or appeal female chief, is respected by members of the society in view of his/her competence in Akan customary law. The appeal chief is appointed by the court and he/she enters pleas on behalf of persons found guilty by the traditional court and is usually able to either plead for clemency, get a reduction in the fine imposed on people, or get a new trial if the original trial was unfair.

Brevity and truthfulness as well as various politeness strategies perform significant roles in persuading the court within the Akan judicial process. A litigant with a "good" case who is judged to be rude or impolite by the court, may "suffer" at the hands of the jury.

2. Akan Judicial Communication as an Institutional Discourse

Akan judicial communication falls under what Agar (1985) termed institutional discourse. Like other institutional discourses, Akan judicial discourses are often monotopical and are usually made up of question/answer adjacency pairs. They exhibit some of the features of such institutional discourses as gatekeeping interviews (Fiksdal 1990), academic counselling (He 1995), psychotherapy (Ferrara 1994), and therapeutic discourse (Labov and Fanshel 1977). Drew and Heritage (1992) note that the genre of institutional discourses is distinct from naturalistic conversation. It must be noted, however, that in Akan traditional judicial discourse, some of the communicative strategies employed in everyday talk (e.g., mitigation and politeness devices) may be present although such strategies may undergo some modification. Second, although turn allocation is generally regulated by the *akyeame*, some of the litigants may self-select when the need arises (e.g., when they need to refute an allegation being levelled against

them, raise an objection, or correct or support an argument). It must be noted that in most of such cases, the *akyeame* step in to restore “decorum”. In view of the high social status accorded the judicial professionals, the litigants may, for instance, engage in considerable mitigation and use more deferential or reverential devices.

The Akan courts are not statutorily regulated, but have jurisdiction to hear cases and fine litigants by way of the parties themselves. The litigants voluntarily seek a solution to their problems that is given by the Akan legal professionals. In one way or the other, Labov and Fanshel’s asymmetry of rights and power is thus assumed in Akan judicial discourse since, like psychotherapeutic interview, seeking help from the judicial professionals is socially and culturally defined as a statement that the litigants are unable to solve their problem by themselves. The Akan communicative maxim “*se wonim w’asem ka a, womfa nkɔ mpaninfoɔ anim mma wɔn nagoogyoo wo*” (If you are able to solve your problem, you do not go before the elders to be subjected to gruesome cross-examination) supports this assertion.

In Akan judicial discourse, given the fact that the *akyeame* control the communication process, they dominate the talk by determining what can be talked about (i.e., the topic) as well as the turn-taking system. Like Akan “normal” conversation, in Akan judicial discourse the litigants are generally allowed neither to question the *akyeame*’s integrity nor their decisions since that is considered an act of disrespect in view of the *akyeame*’s high social standing. However, unlike Akan “normal” conversation where the conversational participants can talk about any issues, in Akan judicial discourse the litigants are not allowed to discuss topics or issues deemed by the legal professionals as being outside its scope of operation. In effect, the topics and issues dealt with in Akan judicial discourse are to a large extent restricted and/or controlled by the *akyeame*. Like the persons in authority in *gatekeeping interviews* discussed by Fiksdal (1990: 14), the *akyeame* in Akan judicial discourses make decisions that affect the litigants’ future (i.e., whether or not they are found guilty as well as the nature of a fine to be imposed on them). The *akyeame* are also solely responsible for the sequencing of the discourse. In particular, as noted earlier, they regulate the turn and topical openings and closings. Often times they are also responsible for initiating repair² including correction particularly in cases involving other-repair performed by persons other than the producer of that which needs correction or repair (Schegloff, Sacks and Jefferson 1977). In cases of overlapping talk, it is the court crier who “shouts” for order to be maintained; this is then followed by a directive on turn allocation from an *okyeame*. Generally speaking, the litigants’ turns are shorter than those of the *akyeame*.

² Repair is a discourse strategy for rectifying a mishearing, a non-hearing, and a mishearing, a non-hearing, and a misunderstanding (Schegloff 1978).

The *akyeame* interrupt every now and then to seek clarification, maintain order, challenge a point being made, and so on and so forth. In effect, the *akyeame* more or less control the interaction.

An interesting sociolinguistic phenomenon which is observed in Akan judicial discourse is how the participants (*akyeame*, complainants, defendants, and plea chiefs or interveners) use language to show and preserve the status relationships between them. Whereas the litigants use an overly deferential language (in view of their lower social status), the *akyeame* use power laden language through the use of directives, particular question types (e.g., yes/no questions which restrict the kind of response a litigant can give), and “pronouns of power”. Use of such speech acts as apology, expression of thanks, and request by the litigants as well as use of speech acts like rejection of suggestions, demanding clarification, warning, and reprimanding by the *akyeame* helps to further bring out the status relationship between the discourse participants. In effect analysis of language use helps to bring out the non-congruence (i.e., status imbalance) inherent in Akan judicial discourse.

3. Method

The analyses presented are based on transcripts of some court claims some of which were collected in June, 1990 in Ashantihernaa's (the Queen Mother of Ashanti's) court in Kumasi in the Ashanti Region of Ghana by Beverly Stoeltje.³ The rest of the data were collected in Asuom in June, 1995. The data consist of utterances made by the *akyeame* and those of litigants-complainants and defendants. A tape recorder was used for the recording. Permission was sought from the queen mother and her counsellors before the recording was done. To ensure anonymity, only the initials of the interactants are used. Analytical claims are supported with excerpts drawn from the data. In the analyses, I explore the connection between linguistic forms (e.g., sentence types or pronominal forms, etc.) and speech acts.

The study draws on two main analytical traditions – ethnography of speaking (Bauman and Sherzer 1974 and Gumperz and Hymes 1964) and conversation analysis (Levinson 1983, Sacks, Schegloff and Jefferson, 1977, and Schegloff 1972a). Attention is therefore focused on the context of situation (Malinowski 1924) including the participants, the codes, syntactic and lexical forms, genres, and the setting and scene. In interpreting the strings, I also take note of how the interactional participants produce various strings as well as how they respond to prior turns. My intuitions in Akan and

³ I'd like to express my sincerest thanks to Professor Beverly Stoeltje (Folklore Institute, Indiana University) for making one of her tapes available to me.

about Akan judicial communication play a part in my analyses; although, I must say, that participants' orientations form the main focus of my analyses.

4. Text and Discussion

Two observations are put forward on the communicative strategies employed by courtroom interactants. The first observation relates to the linguistic and metacommunicative strategies employed by *akyeame* to extract information from litigants and is stated as follows: *Akyeame* use several linguistic and metacommunicative strategies including (1) syntactic or grammatical categories like alternate questions, yes/no questions, imperatives (especially direct commands), reported speech, direct speech (if the reported speech fails), the modal auxiliary "have", and repetition of certain syntactic frames (i.e., clause and sentence patterns) etc.; (2) pragmatic units like indirectness via pre-suppositions and implicatures; and (3) phonetic features such as forte and fortissimo loudness.

The second observation I put forward relates to the linguistic and metacommunicative strategies employed by the litigants to avoid speaking the unspeakable and is stated as follows: Litigants in an attempt not to provide information that might hurt their case resort to several strategies including using a metacommunicative phrase to imply one's modesty and deference, evasion, giving up on words, apologizing for the use of an unspeakable word or expression, and prefacing a referential or an address form with a honorific title. Four excerpts are cited below to help explicate the two observations stated above.

Example 1

Context: A woman (AB-plaintiff) wants to prevent another woman (AG-defendant) from setting foot on a farm that is part of a disputed tract of land until such time as the case is litigated in the Queen Mother's court. To bar AG, AB swears herself the Queen Mother's oath, believing this should have an injunctive effect. AB alleges that AG ignores the injunction and trespasses on the farm. The case is brought before the Queen Mother's court for settlement. As far as I know, this case is not on appeal; however, AG, the defendant who was eventually found guilty, could appeal through the chief intervener if she chooses to.

(T1) AB: Mesɛ nana kokonnua sɛ afuo no masiisi ne so nso wakɔ mu.

I-beg nana kokonnua that farm the I-have-seized him on but he-has-gone in

(T2) JPI: ɛsɛ afuo no woakɔ mu

She-says farm the you've-gone in

(T₃) AG: Nana menכ mu.

Elder I've-not-gone in

(T₄) JP₂: εno deε se yenteε hwee. כse woakכ mu

that as-for that we-haven't-heard anything. He-says you've-gone in

(T₅) AG: MENKכ MU.

I've-not-gone in [*forte*]

(T₆) JPI: Nea worekeka se menככ mu menככ mu no deε

What you're-saying that I've-not-gone in I've-not-gone in that as-for

ye-ate na εnye adwuma כ ha.

We've-heard but it-not-do work in here

(T₇) JP₂: WOAKכ MU

You've-gone in [*fortissimo*]

(T₈) JPI: WOAKכ MU

You've-gone in [*fortissimo*]

(T₉) JP₂: כse waka Nana kokonnua se afuo yi woakכ MU.

She-says she's-sworn Nana's kokonnua that farm the you've-gone in

(T₁₀) JPI: Fabכ so ε

take-hit on emp.

(T₁₁) AG: Me nso mesre כhema kokonnua se afuo no mensii mu.=

I also I-swear Nana's kokonnua that farm the I-not-step in

(T₁₂) JP₂: ככנכ mu!

She-hasn't-gone in

(T₁₃) JP₃. Nana kyere כnon dedua ε!

Elder, arrest them arrest emp.

(T₁) AB: *I swear by Nana's kokonnua that although I (by Nana's oath) placed an injunction barring her from setting foot on the farm, she's broken the oath and gone to the farm.*

(T₂) JP: *She says "you've gone to the farm!"*

(T₃) AG: *Nana, I've not gone "to the farm".*

(T₄) JP₂: *As for that, we haven't heard anything. She says "You've gone to the farm!" This is not what we want to hear, you should also swear by Nana's oath.*

(T₅) AG: *I'VE NOT BEEN TO IT "THE FARM".*

(T6) JPI: *Merely saying "I've not been on the farm, I've not been on the farm" is not acceptable (i.e., is not a convincing argument) in this court.*

(T7) JP2: *YOU'VE GONE ONTO THE FARM!*

(T8) JPI: *YOU'VE GONE ONTO THE FARM!*

(T9) JP2: *She (the other litigant) says she's sworn by Nana's kononnua that you've been on the farm!*

(T10) JPI: *Hit it with it (i.e., respond [to an oath] with an oath!)*

(T11) AG: *I also swear by Nana's kokonnua that I haven't set foot on the farm.*

(T12) JP2: *She hasn't set foot on the farm!*

(T13) JP3: *Elder, arrest them immediately!*

In example (1), above, AB, the complainant, in accusing the defendant, AG, of violating the Queen Mother's oath by failing to abide by an earlier injunction placed on her by the plaintiff's previous invocation of the same oath, begins her utterance (T1) by pleading use of the oath. The expression *Mesɛ* (I beg for ...) involves avoidance and deference. With this phrase, she is acknowledging the fact that the oath does not belong to her; if it did, she would not have had to beg for its use. Appealing to the owner of such an important thing as an oath before using it signifies that the user recognizes the superior status of the owner. In Obeng (1997), I indicate that in view of the collective nature of the Akan society, request may not be seen as an imposition on the requestee. However, I also noted that if the requested item is of a high value, then some imposition may be inherent in the request and that may require a high degree of deference. AB is fully aware of the fact that using this oath in the presence of the court is subject to instant arrest and prosecution. In fact, she could just have stated her charges without swearing the oath. Thus, she uses the oath in an attempt to prove to the court that she is being truthful and hence has a strong case. If she had sworn the oath without "begging" for its use, she would have been fined heavily and the court could have either prevented her from filing her complaint or found a way of severely punishing her by, for example, undermining her chance of winning. Apologizing for the use of the oath is therefore consistent with the institutional discourse she is involved in.

Pragmatically, the complaint launched by AB is in the form of a challenging move. It is intended to extract a response, in this case, an acceptance or denial of the proposition inherent in her (AB's) string.

Having taken note of AB's complaint, by repeating the oath to the defendant, the *akyeame* now begin a gruesome strategy to get AG, the defendant, to also swear the oath so that a formal arrest of her could be made and thereby enabling them to exact a fine from both litigants (AB and AG), and continue with the adjudication. Three *akyeame* (JP₁, JP₂, and JP₃) were involved in this attempt to get AG to swear the oath. In T₂, JP₁ formally accuses AG of trespassing (going to the farm in defiance of an injunction in the form of an oath placed on her). JP₁'s string is in the form of a reported speech. ɔ- (the third person pronoun prefix) in the stretch ɔse (she says) refers to AB. JP₁ makes a grammatical change in AB's original string. *wak* ɔ (she's gone) in AB's string becomes *woak* ɔ (you've gone). JP₁ thus changes the pronoun referring to AG from the third person to the second person thereby making the accusation more direct and forceful. Furthermore, both AB and JP₁ attach the modal auxiliary verb "a" (have) to the verb "ɔ" (to go). Use of these grammatical strategies helps to make the charge more forceful and thereby puts pressure on AG to speak. AG, after hearing this charge, denies it (T₃). The string involving the denial, (T₃), has the structure:

Noun Phrase (NP) + address + S(entence)
+ deference

AG addresses the *akyeame* with the deferential title *Nana* (elder). Specifically, she displays her respect for the high office and high social status of the addressee. The sentence *men* ɔ ɔ *mu* (I've not gone onto the farm) following the address form involves a statement of a fact. It is made up of the first person pronoun *me* (*I*), the negating particle *-n-* (not), the verb ɔ (go) and the post-positional particle *mu* (in) referring to the farm. AG's initial sentence utterly refutes the proposition or the suggestion by AB that she had stepped on the farm.

Unable to get AG to swear the oath right away, another *akyeame*, JP₂, comes in (T₄) with the string *eno dee se yentee hwee* (literally meaning: as for that one we have heard nothing). Pragmatically, the above string reveals or presupposes that AG's denial is unacceptable to the court. This string is followed by a repetition of the charge levelled by JP₁. Like JP₁'s utterance, JP₂'s utterance is in a reported speech form. Unlike JP₁'s string, however, JP₂'s utterance omits the locative noun *afuo* (farm) since that is already firmly established. AG's second turn (T₅) *Men* ɔ ɔ *mu* (I've not been to it) is produced in a forte loudness. Pragmatically, the forte loudness has several implications. It could signify frustration, or anger on the part of AG. The *akyeame*'s strategy of making her "do the undoable" appears to be working. Close attention to the above string reveals that unlike her first utterance this utterance is not prefaced by any defer-

ential address form. This is an indication of frustration and hence of a move towards disaster since *akyeame* capitalize on such behavior to extract more incriminating information. The next five turns are taken by the *akyeame* in an attempt to put pressure on AG to speak the unspeakable.

In T6, JP1 depicts AG's pragmatic, communicative and strategic incompetence by telling her that the responses she has so far provided in T3 and T5 are unacceptable to the court. In Akan, as in many other cultures, to be told that your contribution in a discourse is unacceptable is extremely face-threatening. JP1 uses this strategy to "direct" AG into swearing the oath. In an ordinary discourse, JP1 could just have said *What you're saying is unacceptable*. The repetition of the embedded clause *menkɔɔ mu* by him (JP1), therefore, in one way or the other, serves as a clue for AG not to repeat the same string again.

T7 and T8 involve coercion by the *akyeame*. The unusual loudness (fortissimo loudness) associated with both strings show frustration on the part of the *akyeame*. Tried as they did, they had not been able to "compel" AG to speak the unspeakable. Syntactically, both utterances are statements and both have the modal auxiliary "have" and therefore denote certainty on the part of the speakers. Had the modal auxiliary been "may" the utterance could have denoted uncertainty.

T9 and T10 involve very interesting but completely different coercive strategies. In T9, JP2's utterance is an indirect way of suggesting that AG should also swear the oath to support the assertion that she has not set foot on the farm. JP2 appears to be drawing AG's attention to the fact that AB swore Nana's oath to support her claim; so to be able to properly counter that claim, AG needs to strengthen her defence with an oath. To buttress JP2's point, in T10, JP1 issues a directive (in a non-literal (idiomatic) expression) to AG. In reality, JP1 is telling AG that an oath must be responded to with an oath. Use of the emphatic particle "ɛ" at the end of T10 is also a sign of frustration on the part of JP1 resulting from AG's delay or unwillingness in swearing the oath. Having been literally "worn down" by the persistence of the *akyeame*, AG eventually swears the oath to support her claim. Like AB, AG also "begs for the use" of the oath to show deference to the Queen Mother, the custodian of the oath. No sooner had AG finished her turn than JP2 makes what appears to be an "interactional U-turn". In fact, JP2 starts up in a latch position (i.e., JP's starting point and AG's turn ending point are simultaneous-notated as = in the transcripts.) Specifically, he moves away from suggesting that AG had set foot on the farm to suggesting that she (AG) had not set foot on the farm. The long "guide" maneuvering to helping AG to speak the unspeakable is finally over and both litigants are firmly under the control of the *akyeame*. In T13, an *ɔkyeame*, JP3, calls for the immediate arrest of the litigants – AB and AG. The call is done in a command form and the verb *kyere* (arrest) is in the imperative mood. This call by JP3 suggests that the case is now ready for the court to begin

adjudication since swearing the oath empowers the *akyeame* to exact fines from the litigants for using the oath and this leads to the official recognition by the court that the parties have a justiciable case.

From the above excerpt and discussion, we could argue that legal professionals have several strategies of getting their wish fulfilled in court and that no matter how hard litigants attempt to avoid speaking the unspeakable, the enormity of the pressure brought to bear on them (litigants) might make them venture into the communicatively dangerous zone – speak the unspeakable.

(Outcome: On the sub-issue of using the Queen Mother's oath, both the claimant and the defendant were found guilty and were subsequently fined a sheep and about \$3. With regard to the main issue, that of trespassing, AG was found guilty and was fined two sheep and about \$6.)

Example 2

Context: A woman, AG, from Aboabokese near Kumasi (Ghana) accuses another woman (AK) also from Aboabokese of insulting her. In court the accused is asked whether she is guilty or innocent. In this court, admitting to either of the possible options (especially saying one is innocent) subjects one to stringent cross-examination and possible loss of case. The litigant is aware of this and tries to avoid falling into this “trap”: yet the judicial professionals use “coercive” strategies to make her speak the unspeakable. The defendant did not appeal the court's verdict.

(T1) AG: Ɔse mase ketekete; me soro kakrakaa. Ɔse meye tuutuuni.

She-said my-under small-small my top big-big She-said I'm prostitute

(T2) JP1: Wodi ɛ anaa se wodi bem?

You're guilty or you're innocent

(T3) AK: [...]

[Silence]

(T4) JP2: Wodi ɛ anaa se wodi bem?

You're guilty or you're innocent

(T5) AK: Nana mepa mo kyew nsem a ɔrekeka no koraa mennim ho hwee.

Elders I-appeal-to-you stories which she-is-saying those even I-not-know self nothing

(T6) JPI: Ei! ɔbaa yi koraa ɔye deen ni?

Ei! Woman this even she-be what origin

(T7) JP2: Wodi ɛ anaa se wodi bem?

You're guilty or, you're innocent

(T8) AK: Nana mepa mo kyew nsem a [ɔre]

Elder I-appeal-to-you stories which she-is

(T9) JPI: [Aa!] Ababaawa yi ɔnte Ashanti anaa?

Aa! Lady this she-not-hear Ashanti Q

(T10) AK: Nana medi bem.

Elder I'm innocent

(T11) JP2: Nana mosempa.

Elder your-case-good

(T12) JPI: M'awuraa ka nea esiie na yentie.

My-young-woman say what happened so-that we-may-listen

(T1) AG: *She said I'm thin down and huge up (i.e., I have a disproportionate body). She said I'm a prostitute.*

(T2) JPI: *Are you guilty or innocent?*

(T3) AK: [...]

(T4) JP2: *Are you guilty or innocent?*

(T5) AK: *Elders, please, I have no idea about the accusation she's levelling against me.*

(T6) JPI: *Honestly! Of what ethnic origin is this woman? (i.e., This woman's communicative incompetence amazes me.)*

(T7) JP2: *Are you guilty or innocent?*

(T8) AK: *Elders, please, the accusations [she's]*

(T9) JPI: *[Amazing!] Doesn't this young woman understand Ashanti?*

(T10) AK: *Elder, I'm innocent.*

(T11) JP2: *Elders, you heard them. (i.e., the case is now prosecutable.)*

(T12) JPI: *My (i.e., Dear) young woman speak so that we may listen to you.*

In (2), several attempts are made to “force” a litigant to select one of two alternatives – guilty or innocent – as an answer against her wish. The excerpt begins with the complainant (AG) pressing charges against the accused, AK. The charges levelled against AK relate to AK having insulted AG about her physical shape and moral character. She is alleged to have told AG that her body is “unwoman-like” because the lower part

of her body is thin whereas the upper part is humongous. She is also alleged to have labelled her a prostitute. These two charges, especially the one involving prostitution, are obviously serious since the defendant is required to prove them before the court. Each charge against the defendant could attract a heavy fine if she cannot thoroughly substantiate and/or prove the allegations. My knowledge about Akan substantive law is that even if it is proved that her body is disproportionate as AK is alleged to have claimed, and it is proved AK in fact made such an utterance, she (AK) could still be fined since it is none of her business. Further, my knowledge of Akan traditional norms suggests that in order to prove in her defence that AG is a prostitute AK would have to have witnesses to support her claim; however, no one would be willing to testify in such a “foolish” case. In effect:

- a) AG has to prove AK actually said the words.
- b) If proved, then AK has to prove that her words are of the truth, but witnesses are hard to find.
- c) Even if AK succeeds in the proof, she is still subject to liability given the fact that Akan substantive law prohibits someone from insulting another for a body size because it is someone’s own business how large or small they are.
- d) If proved that AG is a prostitute, she cannot be punished under any Akan substantive law since she is not married, and most importantly, given the fact that she can do whatever she likes with her body. At worse, she may be “ridiculed” and “advised”. AK, however, will still be subject to liability cognizant of the fact that her actions would be seen as a direct interference in AG’s personal affair.

The question “Are you guilty or innocent” put to the accused in T₂ by JP₁ is an alternative question. Specifically, it requires the addressee (AK) to select one of the two alternatives – guilty or innocent – as an answer. In Akan traditional judicial discourse, answering this question involves “communicative difficulty”. Selecting either of the alternatives, especially, the innocent alternative, automatically subjects one to intensive cross-examination. In fact, saying one is innocent before the elders is considered an insult. Choosing the guilty alternative may also be bad for the defendant especially if several cases are before the court. A third alternative which is less committal is to plead “guilty with explanation”. The question put by JP₁ could qualify as an unanswerable question since selecting either of the two alternatives presented to the addressee involves far reaching consequences. A close look at the excerpt points to the fact that although the question is put in T₂, the “expected” answer is delayed until T₁₀. The fact that the desired or expected response to the question and the question

itself are seven turns apart evidences the difficulty inherent in the question or the question's unanswerability.

In T₃, AK gives up on words; she remains silent although she obviously has something to say. Giving up on words has several implications in Akan judicial communication or dispute settlements. It may be interpreted as a sign of guilt. An Akan expression often used to describe such a situation is *Asem no atɔ ne so* (S/he is emotionally and physically overtaken by guilt.) Furthermore, giving up on words may also be interpreted as being in a state of shock in view of one's complete innocence. An Akan expression used to describe this state is *Asem no abɔ no pusa*.

As JP₁ was unable to get any response in T₃, another prosecutor, JP₂, repeats JP₁'s question. Repeating a question to demand an answer in this context clearly shows the importance attached to the question. Knowing fully well that selecting either of the alternatives inherent in the question for an answer will be bad for her case, AK, in T₅, denies knowledge of the charges. It is important to note that AK's answer in T₅ does not involve either of the alternatives – guilty or innocent. Her answer works via an implicature. If she has no knowledge of the accusations being levelled against her, then the question of guilt or innocence does not arise. In effect, she is implicitly calling for the case to be thrown out. In the string itself, AK prefaces her answer with a deferential and a metacommunicative device. She addresses the *akyeame* with the respect title *Nana* (elder) and follows that with a metacommunicative phrase *mepa mo kyew* (I appeal to you) to imply her modesty and deference to the court. In ordinary Akan conversation, such a respectful behavior would have attracted some sympathy; however, in this context, AK's answer in T₅ is seen as evasive and as an attempt to throw dust in the eyes of the court. From the logico-formal point of view (Kiefer 1983), the question put by JP₁ and JP₂ (Are you guilty or innocent?) is an alternative question – a question in which a variable presupposed in the question is constrained to the set *which one of these two*. Cognizant of the fact that AK does not select either of the two variables, her answer could be said to be evasive. In Gricean cooperative principle (Grice 1975), AK may be seen an uncooperative since her answer also flouts the relevance maxim. In particular, her answer is, in the context of traditional Akan jurisprudence, irrelevant to the context of communication.

In fact, her, (AK's) answer is interpreted by the judicial professionals present at the scene of the discourse as a sign of pragmatic incompetence – a fact supported by JP₁'s question in T₆ and JP₂'s question in T₇. In the question, JP₁ asks about AK's ethnic origin; an indication that she is not communicating as an Ashanti would. JP₁'s question would be interpreted by any competent speaker of Akan as a big insult. If she is Ashanti and she is not speaking like a competent speaker of Ashanti, then this by implication suggests that she is either stupid or she is not telling the truth. The interjection *Ei!* which I have translated as "Honestly" for lack of a better alternative, also

questions the pragmatic competence and integrity of AK. Finally, in referring to AK as *this woman* JP1 is employing a “distancing” strategy. JP1 obviously knows AK’s name, so referring to her in the third person is for avoidance and a show of disrespect for her. From the psycholinguistic or social psychological point of view, JP1’s string in T6 “Honestly! Of what ethnic origin is this woman” could also be interpreted as a sign of anger and of frustration on the part of the *akyeame* for failing thus far to make AK speak the unspeakable.

In T7, JP2 again repeats the question asked in T2 and T4 in an attempt to put more pressure on AK to say whether she is guilty or innocent. AK attempts to repeat the answer she gave in T5 but is interrupted by JP1. Again JP1 in T9 questions the linguistic and pragmatic competence of AK. In this turn, (T9), however, JP1’s question is prefaced by an interjection *Aa!* (translated as “Amazing!” for lack of a better alternative) which suggests severer anger and frustration on the part of the *akyeame* than the interjection used in T6. In view of the pride of the Ashanti and of their loyalty to their ethnic group (Fiscian 1972 and Amonoo 1989), questioning AK’s “Asanteness” and her pragmatic competence makes her cooperate. Furthermore, sensing the danger inherent in the “evasive” answers she is giving and in an attempt not to further make the *akyeame* angry, AK, in T10, selects one of the alternatives – innocence. She still addresses the *akyeame* with the deferential title *Nana* to show respect towards the addressees.

Immediately she gave the *akyeame* the answer they wanted, they stopped that line of questioning and asked her to begin her defense or to tell her side of the story. From the above discussion, it may be noted that *akyeame* will exert the maximum pressure to “extract” the required information from an accused and that no matter how escapist or evasive an accused might want to be, every available strategy may be used to put pressure on him/her to make him/her speak the unspeakable. Having made AK to do what the court wants (i.e., speak the unspeakable), the tone of the communication changes from harsh to friendly. JP1 who had been adopting a distancing strategy prior to this point in the discourse now addresses AK with an address form, first person possessive pronoun, *my*, which denotes closeness, tenderness and the idea of being liked.

(Outcome: The defendant, AK, was found guilty of insulting AG without any provocation. She was fined about \$3, drinks, and made to apologize to AG.)

In (3), below, the *akyeame* used various linguistic and (meta)communicative strategies in getting a complainant, AM, to accept the fact that she had misled the court. Two kinds of questions – Yes/No questions (questions which require yes or no as part of an

Example 3

(T_I) JPI: Saa nnipa mmienyu yi na wobeyee wɔn komplein no?

(T₂) AM: Aane.

(T₃) JP₂: Wogye di ampa ara se **נחמ** mmienu na woyee **נחמ** komplein no?

(T₄) AM: Nana mese “Aane”.

(T5) JP2: Awuraa, meresan abisa wo bio se saa abrantee yi ne ne ba na wobeyee
 young-woman I'm-again asking you again that this young-man this and his child
 emp. You-come-make

wann komplett no?

Them complaint Q

(T6) AM: [...]

[Silence]

(T7) JP₂: Awuraa kasaε!

Young-woman talk!

(T8) JP1: Wotuaa sen?

You-paid how-much

(T9) AM: Metuaa tuu taasen ንፊ ሙሉ NAO

I-paid two thousand four give NAO

(T10) JP1: ከሰላም ስለሚሆንክም ከሚሆንክም ከሚሆንክም

Then emp. You-come-make complaint the one

(T11) JP2: Yeate ase፤ ስለሚሆንክም ከሚሆንክም ከሚሆንክም

we-have understood that she-come-do complaint the one Nana Kyeame stand

ha reb፤ kyaagye no ስለሚሆንክም ከሚሆንክም ከሚሆንክም

here narrate charge the he-said complaint which she-come-make is that elder this insult-him

Yeante “waka me nno፤ma agu”; na ስለሚሆንክም ከሚሆንክም ከሚሆንክም

wo-not-hear he’s-pushed my things down and if he’s-pushed my things down

nna y፤n anim a, ad፤n nti na monia y፤fa y፤n ho ስለሚሆንክም ከሚሆንክም ከሚሆንክም

not-lay us before if why do you-make we-take our selves that we’re-going-to-settle

waka me nno፤ma agu ase፤m? Aduane a y፤ahwie agu፤no no,

he’s-pushed my things down case food which we’ve-pushed down the

፤ho ase፤m mma mu; na ፤ho ase፤m mma mu de፤ a,

itself case not-come in and itself case not-come in if

na ፤de owura yi ab፤gyina ha kwa. Enti ስለሚሆንክም ከሚሆንክም ከሚሆንክም

then she-with gentleman this has-come-stand here for-nothing so if she-with him come-stand

ha kwa de፤ a, ከሰላም ስለሚሆንክም ከሚሆንክም ከሚሆንክም

here for-nothing if then emp. she-spoil his time Let-us we-find her guilty and we-impose her fine

(T1) JP1: *Did you bring charges against these two men?*

(T2) AM: *Yes.*

(T3) JP2: *Do you truly believe that you brought charges against both of them?*

(T4) AM: *Nana, I said “yes” (i.e., I’m positive.)*

(T5) JP2: *Young woman, I’m asking you once more, did you bring charges against this man and his son in this court.*

(T6) AM: [...]

(T7) JP2: *Young woman talk!*

(T8) JP1: *How much did you pay as a fee?*

(T9) AM: *I paid 2,400 cedis (\$1.03) to Chief NAO.*

(T10) JP1: *Then you brought charges against only one of them and not both of them.*

(T11) JP2: *We now know that she brought charges against only one of them. When Nana Kyeame (the clerk) was narrating the charges, he said the complaint was about this man insulting this woman. We did not hear "He's kicked down my property"; and if "He's kicked down my property" is not before this court, why do we waste our time prosecuting such a case? The complaint involving the destroyed food is not before this court, and if it is not before this court, then she has brought this man's son here for no reason. If she has brought him before us for no reason, then she has wasted his time. Let us find her guilty on that count.*

In T1 above, JP1, in an attempt to find out whether AM, the complainant, pressed charges against a man and his son posed a yes/no question – a question which by nature predicts or expects a response which locates the answer on a positive/negative continuum (Wilson 1990). AM's answer "Yes" is not evasive and indicates that she is at least, in principle, sure of her facts. In T3, JP2 displays uncertainty in AM's previous response. This uncertainty finds expression in another yes/no kind of question. What is different about JP2's question in T3 is that it is prefaced with a metacommunicative phrase "do you truly believe" which performs a cognitive (memory) function. In particular, it prompts AM to do a memory search or to attempt to recollect a past action in order to ensure certainty and/or correctness of facts that are already stated. Pragmatically, this expression "Do you truly believe ..." is an "other-repair" initiating feature. Thus, it is an attempt by JP2 to prompt AM to rectify her response in T2. This also suggests that JP2 is aware of the fact that AM's response in T2 is a "repairable" (Schegloff, 1978).

Close examination of T3 points to the fact that there is textual cohesion. The third person object pronoun *wɔn* "them" has anaphoric reference to *these two persons* in T1. AM's response in T4 is again not evasive, an indication that pragmatically, she is cooperating although from the legal perspective she might not be seen as cooperating. Structurally, AM's answer, "Nana, I say I'm positive", is different from the one in T2. She prefaces the "yes" answer with a deferential title to show politeness and then follows this deferential title with the string "I say" denoting certainty.

JP2's next question (T5) casts further doubt on AM's answer. Like the previous questions, this question is also a yes/no question; unlike the previous questions, however, JP2 makes several lexical, metacommunicative and syntactic changes in this question. Although AM is addressed as *wo* (you) in T3, in T5, she is addressed as *Awuraa* (young woman). Use of this third person reference instead of second person, could be an avoidance strategy. Following this address form is a metacommunicative phrase "I'm asking you once more" in which the speaker, JP2, attempts to further prompt AM to engage in further cognitive search and to make an attempt to repair or do a correction if necessary. Use of the synonyms *san* and *bio* (again) send a strong signal to AM that the *akyeame* either doubt the truthfulness of her utterance or they want a strong confirmation of the statement made by her. In effect, the entire metacommunicative phrase, "I'm asking you once more", via implicature, points to speaker dissatisfaction with previous facts. As it turned out later in the discourse, AM's assertion was untrue so the repeated questioning was an attempt to initiate a rectification of the error made.

Another interesting feature about T5 is that the persons summonsed are referred to as "this gentleman and his son" and not as either "these two persons" (T1) or "them" (T3). Thus, there is a certain amount of specificity with regard to the identity of the referents in T5 and this points to the fact that the *akyeame* are still unsatisfied with AM's answer or that they know that there is something wrong with it. In fact, when in T6 AM failed to take over the floor promptly to answer JP2's question, JP2 came back to the floor to issue a command to get her to speak. The interactional sequence displayed in T5, T6, and T7 fits perfectly into Sacks, Schegloff and Jefferson's (1974) opportunity assignment rules or turn-taking rules which states that if a current speaker selects a next speaker and the next speaker fails to take up the offer, then the current speaker may re-take the floor. Pragmatically, AM's silence could be classified as an "initiative time latency pause" (McLaughlin 1984: 272) – a pause capable of making a current speaker self-select or resume the floor as a result of a potential next speaker's failure to take the floor.

Use of a command sentence by JP2 via implicature points to doubt in AM's integrity with regard to truthfulness. From the sociolinguistic point of view, it points to status imbalance and brings the interaction's non-congruent nature into a sharp focus. Specifically, it brings AM's lower social status and the *akyeame*'s high social status into the open. As far as politeness is concerned, one might be tempted to argue that JP2's sentence involves little or no politeness; but the fact of the matter is that he need not be overly polite in view of the institutionalized nature of the discourse and of the context of situation.

In a bid to seek supportive evidence that AM is being truthful, JP1, in T8, poses a wh-question – a question in which the unknown variable presupposed by the ques-

tion is constrained to the set of quantity (how much). The fact that JP1 asked about the amount of money paid implies or points to the fact that the fee paid to file a complaint helps to determine the number of complaints filed. Thus, JP1's utterance in T8 is an implicit way of finding out the truth in AM's earlier claims.

In responding to JP1's question, AM, in T9, states the amount of money paid when filing the complaint. A look at AM's response (T9) might tempt one to argue that she was pragmatically not being cooperative since she provided more than required information and the excess information she provided was, on the surface, irrelevant to the question. Specifically, given the fact that her answer breaks Grice's (1975) communicative maxim of quantity and relevance (for she was asked how much she paid and not to whom she paid the money), a close and systematic attention to the previous turns suggest that AM was attempting to provide more evidence to support the fact that she had filed a complaint against two people and not one as the court appears to be suggesting to her. Pragmatically, therefore, AM's response denotes certainty; not only is she certain about the amount of money she paid as a summonsed fee, she is also certain about whom she paid the money to. It could also be speculated that AM may have mentioned the name of the recipient of the fee as a result of either sensing a probable foul deal – thus, she may have thought that NAO may have collected the fee for two complaints and booked only one – or she could have been thinking that the recipient of the fee could be called to testify to the truth of her assertion.

In T10, JP2 concludes that AM made only one complaint. The word *ennee* (then) links T8 to the previous turns and helps to create textual cohesion. Thus, JP1 appears to be suggesting something like, "If you paid two thousand four hundred cedis (\$1.02) as a complaint fee, then you made a complaint against one and not two persons."

An interesting grammatical feature associated with the next turn (T11) is the prevalence of conditional (If-Then) clauses. JP2, in a professional fashion, "sums up" the main facts of the case by justifying why the court should not bother its head to listen to the case involving the damaged goods (or financial loss) and why a fine should be imposed on AM since she has treated one of the accused unfairly and wasted the court's time. Another significant grammatical feature in T11 is the repetition of the second clause of each previous sentence in the first clause position of the following sentence. Thus, it exhibits such a feature as: [If X, then Y] + [If Y, then Z] + [If Z, then A]. This grammatical strategy has the interactional advantage of making the other discourse participants follow through the logic of the argument being advanced as well as creating textual coherence.

(Outcome. The claimant, AM, lost both the sub-issue (claiming that she had filed charges against two persons although she had in reality filed charges against only one

person) and the main issue (charging the man for insulting her). She was fined \$2.50 for the sub-issue and about \$6 and several drinks for the main issue. Given the fact that AM was unsatisfied with the verdict for the main issue, it is most probable she might appeal.)

In (4), below, the *akyeame*, in an attempt to get a litigant, AA, to produce incriminating evidence against a chief, use as many as four yes/no questions and one wh-question. An examination of the excerpt reveals that the *akyeame*, by their questioning strategy, are able to “easily” get what they want – make AA confirm the fact: (a) that chief NAK was the one who gave her the permission to use an oath belonging to another royal personage, the Queen Mother of Ashanti; (b) that she did not seek the permission from the right source; and (c) that her action and that of chief NAK are in violation of Ashanti customary law. Close examination of excerpt (4) also suggests that unlike the previous excerpts where the litigants made various attempts not to speak the unspeakable, in (4), AA, the litigant, gave no evasive answers. In particular, all her responses to the yes/no questions were located on the positive/negative continuum. The response to the wh-question was also consistent with the demands of the question.

Example 4

Context: A young woman (40), AA, uses an oath whose usage can only be permitted by the Queen Mother of Ashanti. Since she did not ask the Queen Mother for permission prior to using the oath, she has violated customary law and will therefore have to be fined. She is cross-examined on who authorized her to use the oath so that charges could be made against him/her. This case is different from example (1). It did not go on appeal.

(T1) AA: Mekaa Nana Kokonnua guu ne so.=

I-swore Nana kokonnua put his on

(T2) JP1: =Hwan na ɔmaa wo kwan se kɔka Nana Kokonnua guu ne so?

Who emp. he-gave you permission to go-say Nana kokonnua put her on

(T3) AA: Mepa wo kyɛw NAK.

I-beg you beg NAK

(T4) JP2: Worekɔka ntam no, NAK na ɔmaa wo kwan se kɔka ntam gu ɔbaa yi so?

You-were-going-to-say oath when NAK who he-gave you permission that go-say oath put woman this on

(T₅) AA: Mepa wo kyew me mefiri Seidu. Mekos NAK anim se mereka nta no,
I-beg you I I-come-from Seidu I-went NAK face that I'm-going-say oath when

mene Nana a, ggyina m'akyi yi na eka. ^ana se se woabeka saa a [mate.I

I-and Nana who he-stands my-back this emp went and he-said that if-you've-come-say that then I-hear

(T₆) JP₂: [Kaka?]

go-go-say

(T₇) AA: Aane.

Yes

(T₈) JP₂: NAK na maa wo kwan se ka?

NAK who he-gave you permission that go-say

(T₉) AA: Aane.

Yes

(T₁₀) JP₂: no na maa wo kwan?

He emp. he-gave you permission

(T₁₁) AA: Aane; rnepa wo kyew.

Yes I-beg you

(T₁₂) JP₂: Nananom, mo adaworoma, nea meresre aka ne se, maame yi

elders your grace what I'm-asking-for-permission to-say is that woman this

ka se NAK na kaa se nka saa kokonnua no a, eno ehimhim

say that NAK who he-said that she-must-go-say that kokonnua that if that it-shakes

m'adwen efise, kokonnua dee wo NAK wobetumi ama kwan se

my-mind because kokonnua as-for you NAK you-can give permission that

obi mmesre kokonnua; wo ne hwan na worekama no kwan se

someone must-come-ask-for-permission kokonnua you be who to you-go-give her permission that

"ka kokonnua". Maame yi kokonnua no a, kae no, se

go-say kokonnua woman this kokonnua the which she-said if

NAK na maa no kwan oo, se no ara na kae oo, ene amannee bi abira.

NAK who he-gave her permission or if she personally who she-said or it-with custom be opposite

(T13) JP1: Enti adee no wammesre nti wanya amane.

So thing that she-did-not-come-ask-for-permission so she's-got trouble

(T1) AA: *I swore Nana's Kokonnua oath to restrain her (from setting foot on the farm.)=*

(T2) JP1: *=Who gave you permission to use Nana's kokonnua oath?*

(T3) AA: *Please, NAK.*

(T4) JP2: *Before swearing the oath, was it NAK who gave you permission to swear the oath to restrain this woman from setting foot on the farm?*

(T5) AA: *Please, I'm from Seidu. When I was going to speak the oath, I went before NAK with this elder standing behind me. And he (NAK) acknowledged receipt of my complaint.*

(T6) JP2: *Go and say it (i.e., he said you should go and swear the oath?)*

(T7) AA: *Yes.*

(T8) JP2: *Did NAK give you the permission to use this oath?*

(T9) AA: *Yes.*

(T10) JP2: *He gave you the authorization?*

(T11) AA: *Yes, please.*

(T12) JP2: *Elders, by your grace, I beg to say that the allegation that this woman is making about NAK with regard to his authorization for the use of the oath beats my imagination because you, NAK, do you have any authority to give permission for the kokonnua oath to be used by anyone? Who are you to give such an authorization? Whether permission was sought from NAK or this woman used the oath on her own accord, the use of the kokonnua oath is a violation of custom.*

(T13) JP1: *So cognizant of the fact that she did not ask for permission from the right source, she is in trouble (i.e., she is guilty of the offence.)*

In (4) above, the fact that the beginning of JP1's utterance (T2) is latched on to AA's initial utterance suggests that he was monitoring the completion point of her utterance. Specifically, the mention of the *kokonnua* oath necessitated an instant questioning since being a member of the court, JP1 knew that AA had not sought permission from them before using it. His question, a wh-question, requires AA to name the person who authorized the use of the oath. The question via implicature suggests: (a) that the oath cannot be used without permission; (b) that AA does not possess

authority over the oath; (c) that it is probable that an unknown individual, acting improperly, may have given AA the permission to use it; (d) and that since such a permission did not come from the right source a customary law may have been broken.

In AA's response, (T₃), NAK is given as the one who gave permission for the use of the oath. The string "I beg you"/"please" occurring before the mention of NAK's name is a politeness phenomenon. In this context, it could also be an implicit way of pleading for mercy. Surprised and probably annoyed by the mention of NAK's name as the one who gave AA the permission to use the oath, JP₂ asks a series of questions (T₄, T₆, T₈ and T₁₀). All the questions are yes/no questions and restrict AA's response in the choice of answers available to her. Thus, her response is limited to saying yes or no. Apart from T₅ where AA attempted to go beyond saying just yes and attempting to explain what led to the use of the oath, the rest of AA's turns are extremely brief – limited to between one and three words. In T₅, AA explains the circumstances leading to the saying of the oath by talking about where she is from and how she got to NAK's palace to swear the oath. Although AA does not explicitly say that chief NAK gave her the permission to use the oath, the strings involved in her utterance implicitly suggest NAK did. JP₂'s utterance in T₆ overlaps the final word of AA's utterance in T₅. This kind of overlap could be described as that involving surprise and incredulity. The entire utterance in T₆ seeks to confirm the implicit "yes" in AA's utterance in T₅. Although the initial sentence in AA's turn ("Please, I'm from Seidu") might sound irrelevant to the question, knowledge about the speaker and about the overall interactional context reveal that it is very significant. Seidu is a small settlement under chief NAK's traditional jurisdiction (AA comes from Seidu also), so swearing an oath without seeking permission from him is in violation of custom. What AA failed to see was that that particular oath belonged to a more superior traditional ruler, the Queen Mother of Ashanti, and that she should have sought permission from her instead. JP₂ is obviously amazed by NAK's disregard for customary law. The fact that he (JP₂) repeats the main facts of the question (NAK's name or the pronoun "he" in T₁₀ with anaphoric reference to NAK's name and the swearing of the oath) in T₄, T₈, and T₁₀ shows either how he felt about the improper action taken by AA and NAK or how doubtful JP₂ considered AA's answers to the questions. AA's responses in T₇, T₉, and T₁₁ involve explicitness.

In the last but one turn (T₁₂), JP₂ expresses his agreement with the course of action taken by AA. He employs different pragmatic, syntactic, and rhetorical devices to air his views on the matter. In spite of the fact that he is a member of the prosecution team, he shows deference towards the other members by addressing them as *elders*, producing two metacommunicative phrases "by your grace" and "what I'm begging to say" that mark humility and/or modesty and deference to the other *akyeame*. Up to

the point where he (JP2) verbalizes his disagreement or his doubt about AA and chief NAK's course of action (i.e., from "Elders ..." to "... anyone") he appears to be addressing the court or his fellow *akeyame*. However, he appears to be addressing NAK from then on until the beginning of the last sentence. Specifically, the string beginning "You NAK" to "authorization" appear to be addressed to NAK. Use of the second person singular pronoun *wo* (you) as an address form supports the above fact. However, since NAK was not present at the scene of the discourse, the question "put to him" is obviously rhetorical. Thus, JP2 is merely trying to argue that NAK has no legal right to authorize the use of the Queen Mother's oath. In the final sentence of his turn (T12), JP2 addresses the court "directly" by noting that AA's action is a violation of custom, a fact supported by JP1 in the final turn (T13).

(Outcome. AA was found guilty for using the Queen Mother's oath without first asking for permission. She was fined a sheep, \$3, and several drinks. She was asked to report the verdict to chief NAK. The *akeyame* decided to issue chief NAK with a summons to appear before the court to explain by whose authority he acted. I do not have any information as to whether or not chief NAK did actually appear before the court.)

4. Conclusion

Akeyame in Akan judicial discourse use two main types of questions – yes/no and wh-questions. Use of such questions restricts the litigants to a specific limited choice of possible answers. With the yes/no questions, the litigants' answer must be located on a positive/negative continuum. If a litigant fails to provide an answer along such a continuum, the *akeyame* use such strategies as repeating the question, issuing a directive which requires the litigant to produce a more acceptable answer, or other strategies which work via implicature. With wh-questions, the litigant's answer is restricted to a set of choices involving who, how, where, which, and so on and so forth. A deviation from the above may lead to the subjection of the litigant by the *akeyame* to rigorous cross-examination strategies described above. The *akeyame* are able to do what they do because of the authority they have over the litigants. During repetition, the *akeyame* indulge in a formal organization of their questioning through overt use of such metacommunicative phrases as "I'm asking you again ..."

In an attempt not to lay bare their thoughts, the interactional participants may communicate via implicature. This is done because of the delicacy of the nature of the discourse, as well as the interactants' intended goal(s). The *akeyame*, may, for example, wish to be firm (even if they know the litigants very well) and to maintain their dig-

nity and respect in the community. For their part, complainants would want to win whereas the accused would want to prove their innocence.

The *akyeame* dominate and control the discourse. They allocate turns, interrupt to “keep litigants on track” (by checking the validity of a fact, challenge a move, or seek a clarification of a proposition inherent in a litigant’s utterance), regulate turns, and do most of the repair initiations.

If in answering a question a litigant’s answer appears to be vague, the *akyeame* may be more specific with regard to referents in the discourse. This could involve the use of personal names or other lexical and grammatical items which clearly specify the referent about whom the question is being asked. If a litigant hesitates in taking the floor or refuses to assume the turn occupancy when selected, the *akyeame* re-take the floor through self-selection and use the opportunity of being the new turn holder to produce challenging moves intended to stimulate further discussion.

The discussion in this paper points to the fact that the *akyeame* are highly skilled at using cross-examination to establish the issues and facts in case. Finally, it has been demonstrated that the communicative behavior of interactional participants and the application of customary law are influenced by the sociocultural context in which the discourse takes place, the participants’ goals, and intended outcomes as well as status and/or power relationships between the interactants.

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SEMI-AUTONOMOUS INTERACTIONS IN LEGAL
INSTITUTIONS:
A CASE-STUDY FROM BURUNDI

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Abstract: Applying the concept of the “semi-autonomous social field” (Sally Falk Moore) to the first instance court milieu in Burundi, this article deals with the legal setting as a behavioral concept. Getting a state court to accept a complaint as admissible has little to do with the substance of the case. It has more to do with a power struggle between the local executive political party, which offers access to adjudicate, and the state court. Added to this is the litigants’ view of themselves as a network of interests and not just individuals. Hence, forum has more importance than the norms. A case study illustrates how the decision of court personnel to adjudicate the conflict and legitimate judicial repute and power is taken on the basis of pre-colonial judicial structures and relationships despite colonial suppression of these structures. Much depends on the motives of court personnel – whether they feel dependent on the executive for career advancement, or feel loyalty to the pre-colonial tradition in which the bashingantabe (pre-colonial judges, reduced to arbitrators) struggled to maintain autonomy so that legal-moral norms could prevail over political interests. The power to mediate between state power and the populace is seen as the key to successful access to justice.

1. Introduction

In her well-known article about the “semi-autonomous social field” Sally Falk Moore (1978) discusses the relationship between state law and social change. By way of two examples from the daily workings of the American textile industry and from the history of state formation in Tanzania, she contests the law-maker ideology. According to this ideology, social change is produced by state law, particular regulations, and strategies of court application of the law. She shows most eloquently how legal rules interfere indeed in local contexts and effect changes; it is just that the process of change is

not effected necessarily as envisaged by the particular law-maker. Legal rules certainly form an important point of reference in the local context, but they also come to be embedded in the local dynamics of relationships and thus in the culturally variable perception of state law. Moore concludes that key aspects of the relation between law and social change can be detected only when one researches the effect the law has on the normal or everyday life (1978: 78). This plea for such research has been enthusiastically taken up in the sociology of law literature. It is exemplified in numerous case studies of conflicts out of court. Concepts such as legal pluralism, integral plurality or multiplicity of legal systems derive from this development (*cf.* Merry 1988; Starr and Collier 1989).

There is no real reason why the model of the “semi-autonomous social field” should be limited to the out-of-court milieu as Moore tacitly did without even explaining this limitation. Such a limitation assumes *a priori* that the legal institutions can be relatively rigid regarding a particular socio-cultural network of personal relationships that is more independent than the law-maker believes. It is indeed possible to find examples of court’s pre-formed images about the out-of-court milieu that tell us as much about the daily court routine as about the social environment that these images are supposed to duplicate. This is far from saying, however, that courts function like slot machines. For judges, like assessors, clerks and other court personnel, are in the first place quite normal human beings with their own idiosyncrasies, who interpret legal provisions one way or another, decide the law is on the side of one or the other and adjust their conduct accordingly. Whether they really think and act as they say they believe they have done or as the institutional norms intend is largely dependent on the degree to which the institutionalized norms have established themselves as the determinative rules, the degree of the cultural closeness between the legal norms and the court’s daily routine, and on the degree of role identity. The different means of mobilizing, applying and implementing the law are thus the result of a complex adaptation process that aligns itself with the different interests and that has a side inside the institutionalized law and a side external to the institutionalized law.

In contrast to the more popular law-maker ideology, Leopold Pospisil once described law as an “intellectual conception” (1982: 9), a methodical instrument for securing power.¹ For him it was a matter of replacing an implicit top-down approach and the idea of the control function of law by an analysis of law as a conceptualization.

¹ “Law is ... not a phenomenon, which can be examined, rather it is a summation of terms in the form of a conception that is put into action as a methodical working tool for examining social phenomena, so that it can be used to control the members of a given society.” (1982: 9).

I rely on this definition to make it clear that law as an “intellectual conception” also raises questions about the mental condition or approach of the law’s agents. Whoever makes a profession out of law as an intellectual conception hopes to satisfy various personal aspirations,² which need not have anything to do with (state) law, but which could, and which, by simply being there, influence the application of law – even when they are not supposed to. Another aspect relates to the fact that working with the law at court is a “cushy life”. Law is for a court not only an operational instrument of conflict management. It is, just like animals are to a butcher, the object of self-satisfaction, an element that sustains professional identity and cultural and subjective self-definition. In this respect it is really amazing how few legal anthropological studies make use of ethno-psychoanalytical concepts in order to analyze procedural dynamics resulting from such pre-conditions. For when one recognizes that the social and individual experience exercises great influence on the way a certain matter is interpreted, manipulated, instrumentalized and operationalized, then in order to understand the law, such considerations cannot be left out. When law is understood ultimately as an “intellectual conception”, as a mental model, then the question is: How is this model transformed by the agents of the law who turn applying the law routinely into an asset? For if the influence of the remaining court personnel on the court’s decision-making process is to be examined, the question of the value that implementation of the law has for them acquires even more urgency.

By way of a case study on regulation of conflicts in courts in Burundi, I would like to deal with the above-mentioned issues and elaborate certain aspects of the patterns of semi-autonomous relationships, but within legal institutions. Even if the aim of this collection of essays is to deal especially with the role of court staff who are not professional judges, I cannot avoid including the role of the judges. Besides, in the African context, it is not very useful to arrange the judiciary along the lines of western professional criteria. The superimposition of state law on an immense number of customary laws and the wide tendency in Africa of the executive branch to control the judiciary results in a very heterogeneous profile of roles, concomitant with a long-standing and deep rooted legal pluralism. For this reason, professionalism, which is much in demand in African countries, presupposes a synthesizing mentality.

For outlining such correlations Burundi offers an interesting example. First, it has an extensive pre-colonial history of judicial and political control. Pre-colonial Burundi, a ritual monarchy, can thus be described as an early state (*cf.* Laely 1995). Secondly,

² For court personnel want to also marry, bear children, earn money, make careers, be respected in life and lead a happy life on the whole.

Burundi owes its present territorial boundaries not to colonialism as is usually the case in Africa. Cultural history and state history in Burundi largely coincide so that political changes upset cultural identities. Currently Burundi is not in the process of state-building. It is in transition from a former feudal sacral monarchy to a bureaucratically organized state cut out on a western model that “administers” native culture. The resulting rupture is sustained by a confrontation between bureaucrats’ logic and feudal peasants’ logic. This confrontation can hardly be reduced to fixed images of roles. For one, most judges are also sons of peasant farmers. Secondly, the other judicial personnel of the state bureaucracy want to be respected. Hence, the internal cultural rift runs throughout individual persons and leaves in its trail numerous overlappings, mix-ups, and a state of confusion that Lloyd Fallers has already graphically described (1955, 1965, 1974) and which in the final analysis constitutes the essence of the course of semi-autonomous relationships.

Burundi is also a country with a lot of problems. Here it is best known as a land of power struggles between the Bahutu and the Batutsi and the indescribable cruelty of a war that has drawn in its wake the entire Great Lakes territories. Political writings have extensively discussed the importance of the Bahutu and Batutsi in Burundi’s history, whether Burundi comprises different “races”, “tribes”, “castes” or “classes”, whether Burundi is an ethnic group in itself, or whether this nation is divisible into several ethnic groups, etc. I wish rather to develop an angle that is closer to the subjective experiences of the protagonists.

Before I delve into the case study, I want to point out elements of the political and socio-cultural context. For the case study, which represents a mundane conflict between two women about their honor, consists of several strands of conflict that indicate conflicts outside the case itself and can be understood only in its cultural and socio-historical context. Then with one eye to the function of the state’s judge-made law, I give a brief outline of the embodiment of the court’s jurisdiction in the local environment. The analysis of the court case allows me to argue from the point of view of contextualization, to treat court processes in a routine setting, and to crystallize certain characteristics of how semi-autonomous relations work. I shall try to keep my arguments within the parameters of legal ethnology and ethno-psychoanalysis.

2. Burundi

Burundi is a tiny land-locked country in the heart of Africa. It lies on the eastern ridge of the central African rift in a very hilly and partly mountainous area, on the north end of Lake Tanganyika, pinned in between former Zaire, now the Democratic Republic of Congo, and Tanzania. With its six million inhabitants, next to Rwanda, Burundi is today the most densely settled state in all of Africa. Ninety-five percent of

the entire population still work in agriculture. The country has a noteworthy pattern of scattered settlements that are evidence not only of the innumerable self-subsistence family economic units, but also of the pre-colonial state history.

Before colonialization, Burundi had an emerging sacral monarchy that showed signs of an early state. At the start of the 19th century all of Burundi's inhabitants, the Barundi, were organized in a comprehensive client system that tied the farmer/peasants in a vertical axis with the king. In contrast to the present-day president, whose role corresponds more to that of the president of a governing board, the kingly office controlled its own landholdings. The monarch was in theory, as the father of the country, the owner of all lands that could no longer be kept by certain family lineages. One of the variant client systems, the "*ubugerêrwa*", assigned landholdings, which could not be exploited, to the aristocratic retinue, who in turn, when they could not use the land themselves, gave it to their loyal subjects. In return, the political authorities demanded taxes or military protection. Polygamy permitted the authorities to occupy free hills with their various wives across the entire country. This promoted a well structured system of enclaves and mobile royal courts. In this way an entire network of a variety of dependencies covered the country, in which a farmer/peasant could be the client of the king as well as a client of a local prince.

2.1. Pre-colonial law jobs: *bashingantabe*³

Thus, the system of political power, differentiated into a social order (political hierarchy) and in a spatial order (enclave building), presented a striking contrast to the social position of the *bashingantabe*. The social position and the legal competence of the local judges, the *bashingantabe*, did not derive from their aristocratic identity, but first from their *spatial* order, i.e. the place, the political sphere of influence, and the enclave where they lived, and, *secondly*, from how *competent* they were to solve a dispute.⁴ The *demand for their competence* led to all *bashingantabe* living in a particular place and taking pride in their excellent knowledge of the local situation. For this reason the *bashingantabe* were known for a long time as the "*voice of the people*". When

3 "Le mot *bashingantabe* signifie 'ceux qui plantent la baquette', à cause de la petite baquette (intahe) qu'ils frappaient sur le sol lorsqu'ils instruisaient les litiges" (Mworoha et al. 1987: 209-210). The word "*bashingantabe*" is a term in the national language of the Burundis, *Kirundi*. It is the plural of the traditional word for judges. In the singular, the word is "*mushingantabe*", the pre-colonial institution of conflict regulation called "*bushingantabe*".

4 However, neither representatives of the Pygmies, the so-called Batwa, nor women could be *mushingantabe* (Laely 1995).

nominated to the “*mushingantahe of the Court*” they went on circuit with the political authorities around the country. The king’s *bashingantahe*, called the “*banyarurimbi*” underwent the same *initiation rites* like any other *mushingantahe* of any other hill.⁵ Their designation as *abanyarurimbi* derived not from their social position, but rather from their special function as the learned jurists of the King. The *bashingantahe* represented at all levels the general and the particular law. They produced legal norms, were known as an important moral instance, and established the criteria for decisions in concrete cases. Their legal judgments set a moral standard as well as an executive norm. Rendering a judgment was neither the exclusive domain of the *bashingantahe*, nor the exclusive domain of political instances. It was more a question of how a *mushingantahe* managed to get his legal-moral position heard and to persuade the executive or to win out over political considerations. To the outside world, the king, or his political representatives, functioned as a kind of “higher judge”.

2.2. Colonial reconstruction of state structures

Late colonialization – first by the Germans (1899-1916), later the Belgians (1916-1961) – introduced a fundamental reconstruction of the state structures. The League of Nations (1919) declared Burundi the Mandate territory of Belgium and the monarchy of Burundi was given a colonial executive administrator. Intending to create “clear power relations”, the Belgians established numerous political and territorial enclaves, placed the clients under the nearest territorial chief and dissolved some “*chiefs’ territories*” (Meyer 1916) completely. The currently highly explosive polarization between the two national groups, the Bahutu and the Batutsi, is the result to a large part of Belgian colonial politics. The Belgians established, for example, in all instances, where the Bahutu officiated as chiefs, inherited lines in favor of the Batutsi, so that the Bahutu in the end disappeared from the political scene.⁶ The role of the chief was so fundamentally changed that he became only the ruler of a limited geographical space and was no longer, as previously, head of a widespread client network that was not tied to any territorial boundary. The Batutsi chiefs were interested above all in increasing the number of their local political power successors, for in that way they were able to firmly establish the power of their lineage.

⁵ The pre-colonial territory order was not divided into “provinces”, “districts” or the like. The important territorial division was the hill.

⁶ “The Bahutus, generally bishikira and banyamabanga, disappeared from the political map of Burundi (28% in 1933, 2% in 1937, 0% in 1945).”, Gahama and Le Jeune 1979: 13.

The legal institution underwent a *horizontal* and a *vertical* split. The law of procedure was codified and the European civil and criminal law system set up as a counterforce to customary law (vertical split). The *bashingantaha* were pushed into the lowest political administrative level of the hill and cases that went up to higher instances were regulated by colonial and/or locally trained administrative personnel (horizontal split). While the vertical split – known in the literature as the “dual legal system” – ended upon Independence, the horizontal split remained in the judicial system in Burundi. This is evident in the heartland of Burundi, where the *bashingantaha* were increasingly rendered incapacitated and marginalized, but remained for the state judicial system irreplaceable depositories of knowledge about the pre-colonial legal order of the country. The colonial powers never succeeded in possessing the monarchy culturally. They indeed tried to establish a hold in the heartland with a long list of prohibitions and declarations of invalidity. But the attempt, for example, to develop a functioning cadastre failed because of the peculiarity of the scattered settlement patterns and the passivity of the subsistent farmers/peasants. The result was that the colonial intervention led only to a fundamental and long sustained legal and norm pluralismus (cf. Meyer 1916; Ryckmans 1925; Griffiths 1986; Morse and Woodmann 1988). Upon Independence, the colonial key state posts at the very top – especially in the army and judiciary – went to the up to then disadvantaged sub-group of the Batutsi, the Bahima-Tutsi, who were at home in southern Burundi. They sought to solve problems of governance with draconian force.⁷

2.3. *Cultural disorientation and ethnicity*

Today the central political power of Burundi – to put the matter simply – has inherited a very heterogeneous history or at least two cultures and two states, each alien to the other, which would have had nothing to do with each other but for a history of violence. These two axes constitute the background of a change in state style. This social change was initiated from the political center, but spread beyond the center of its origins. The cultural identity of the Barundi was always bound up with a state organization, so a change in style means a cultural upheaval too. The western bureaucratic state model, imported by the colonial powers of Germany and Belgium, is woven into the self-definition of the Barundi, but does not destroy the cultural inheritance reflected in the language and history. And the monarchical-feudalistic

⁷ With the murder of the throne successor Charles Ndizeye in 1966, Michel Micombero, an army captain, seized power, which has been since then in the hands of the Bururi-Matana group.

mentality, which is continually oriented towards blood relationships and is hierarchical, cannot rely any more on a state model that would correspond to this way of thinking. The corresponding problem of cultural legitimacy of rulers has hardly been touched upon today from the political standpoint. While the state agents and their epigons find refuge in the continuous extension of the state and parastatal arm,⁸ various international development co-operation agencies have intruded by conditioning aid on democratization along a western ideal,⁹ without even raising the problem of cultural legitimization of governance.

Ethnicity in the last analysis defers the problem and shoves it into another arena, whereby the issue of governance legitimacy is replaced by the issue of monopolization of state power, the creation of fictive enemies, and constructions of guilt. Since Independence there have been no less than four horrendous massacres,¹⁰ in which more than 400 000 people lost their lives. The background of these slaughters lies in the attempt of the Muhutu elite to argue against the exclusive access of the Batutsi to state power and the fear of the Batutsi, after giving up key political positions, of being marginalized by the Bahutu or even being thrown out of the country, depending on the circumstances.¹¹ But even if the Batutsi are the problem for the Bahutu and the Bahutu a problem for the Batutsi, underneath lies the history of the cultural and state rift that runs through the entire population and raises the issue of cultural, psychological and political self-definition. Of some consequence are the physical differences between the Bahutu and the Batutsi, that are less oriented on the colonial anthropometric measures of body size, nose and lip formation, but rather on the contours of the ribs, the heel and the neck (*cf.* Laely 1995: 225) and which are of great political importance. For those who have the legal and administrative posts come from certain blood lines of the Batutsi and often look different. Simply put, it can be said that the state of Burundi has a certain countenance. This induces a personalization of the political processes. And the destroyed national-state and cultural identity evokes the desire for a new emotional homeland. When so seen, the ethnicity of Burundi satisfies

⁸ Since Independence there have been four state constitutions, a fundamental reconstruction of the local administrative structures, the assumption of modern infrastructural duties, and some measures indicating a *judge-made law* that not only is affected by this change but also supports and deliberately promotes this process.

⁹ I am especially critical of the democracy position of USAID and the strategy of the Swiss state development co-operation (DEZA) (*cf.* Weilenmann 1997a and 1998a).

¹⁰ Namely in 1965, 1972-74, 1988, and 1993.

¹¹ The fate of the Batutsi in Rwanda serves as an example.

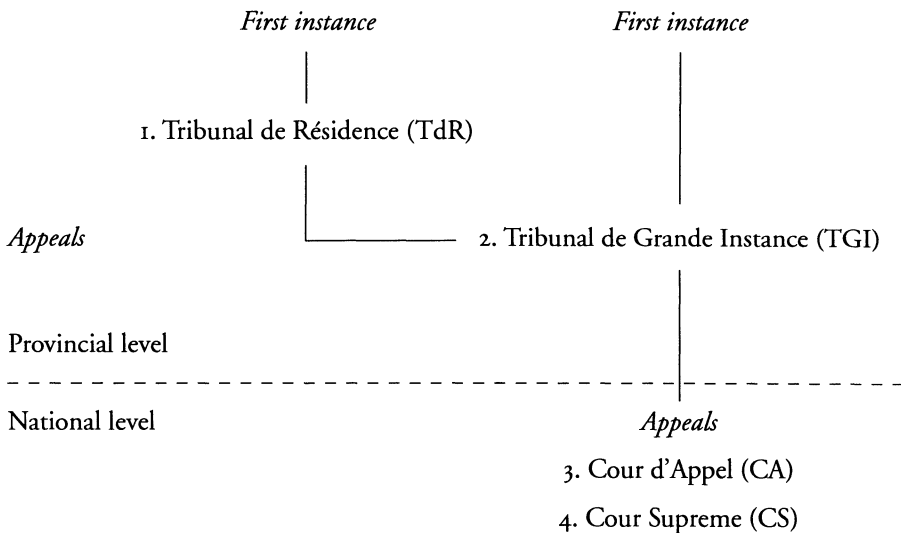
one wish, namely the wish to restore the destroyed cultural identity. If such an identity cannot be sustained on the level of the original nation, then at least the “Hutu Nation” or the “Tutsi Nation” can offer a new vehicle to satisfy the desire for integrity and completeness: “We are the champions ... !”

It is all the more important in this context that legal anthropological studies dealing with institutional history in a concrete operational context should show how values introduced by normative determinations are connected with the way conflicts are regulated in court.

3. Burundi's judge-made law today: Institutional construction and the personnel question

At the provincial level today there are two first instances, namely the “Tribunal de Résidence” (TdR) and the “Tribunal de Grande Instance” (TGI). The TGI supervises the entire province, and the TdR is the lowest state court for regulating conflicts at the district level. Civil cases of high value as well as moderate and serious criminal offenses come directly to the TGI. At the same time the TGI is the first appellate level for the TdR.

Organizational diagram for judge-made law in Burundi



One problem that repeatedly casts doubt on the credibility of law in post-colonial Burundi arises from the precarious relationship between the executive, judiciary, and legislature. One can observe a steady increase in executive power since the military takeover (November 1966) up to Pierre Buyoya's taking office (September 1987–June 1993). Ever since the democratically elected President Melchior Ndadaye was murdered by the army, the country has remained in a state of emergency because of repeated horrendous massacres and witchhunts by the military.

After Independence in 1961 the training of judges became increasingly formal and since the early 1970s a university degree in law is required. Today one can assume in general that a judge has a professional education from the national university or an administrative school. One characteristic of the contemporary court system that affects the jurisprudence is the frequent change in place of service. This is supposed to guarantee objectivity (against bias and prejudice). On average every one and half years a judge changed court in 1988. This rule gave on the one hand judges the chance to get to know one another and promoted their esprit de corps. They define themselves as "soldiers of the legal front". They get to know the various courts in the country, come to know of the preferences and eccentricities of their predecessors and colleagues, but the frequency of this rotation reduces at the same time their knowledge of undecided cases and prevents them from gaining an insight into the local power structures, which is so important for their work. Quite to the contrary, they tie their ambitions to the Ministry, which decides about their rotation. The almost yearly rotation of posts is taken by many judges as a personal evaluation of their work. Whoever is ordered to Bujumbura, the country's capital, feels awarded, and whoever lands in some isolated hamlet feels punished. Another characteristic of the judiciary is that in 1988 all judges were members of a single party, the UPRONA¹² (Unité et Progrès National). This in combination with their ties to the Ministry resulted in a system of an entire network of mutual dependencies, which many judges perceive as highly personal. One of the most frequent phrases used during the recording of judges' biographies was: "The Minister ..." or "The President nominated me as judge." This is in no way typical simply of judges; it is a feature that all other state functionaries share and that betrays a strong tie to the state president.

Although during the colonial era the *bashingantahe* were pushed out of the upper legal functions of the hill, they still had the opportunity to continue to hear and arbitrate local conflicts. For at the lower political levels of the hills, there were still customary law rules to apply in so far as the matter was not criminal. Since colonializa-

¹² The UPRONA had to give way in 1992 to a multi-party system.

tion the *bashingantabe* have had no judicial authority to render a judgment or anything like that. In the forefront were their witness functions and arbitration of emerging family quarrels. Their local knowledge of social references and particularly their legal-moral position became as a result more important. In the course of new governance relationships they functioned more as go-betweens: They were supposed to educate the superior authorities set over them about local conflicts that arose and disseminate as favorable an image of the prevailing regent as possible among the local people. This role was ascribed to them up to the end of the First Republic (1966-1976). During the Second Republic (1976-1987) this function was turned over to the local Party Committees. These are branches of Burundi's former single party UPRONA, which comprises three integrated organizations: the "Union des Femmes Burundaises" (UFB), the "Union des Travailleurs Publics" (UTB), and the "Jeunesse Révolutionnaire Rwagasore" (JRR). These groups make up a finely knitted hierarchical network, which covers all of Burundi. Their internal structures correspond to the state administrative structures:

Administrative Hierarchy

Province (Province)
Communes (Communal)
Collines de recensement
(Hills of commissions)
Collines géographiques
(Geographical Hills)

Party Hierarchy

Comité provincial (Provincial Committee)
Comité communal (Communal Committee)
Comité de section (Sectional Committee)

Comité de cellule (Cell Committee)

(From Chrétien, Guichaoua, Le Jeune 1989: 79)

Today it is the local Party committee "that meets every Thursday at the place of the old *bashingantabe* and at which all local problems are laid bare" (Laely 1995: 243). They represent at the local level ("zone", "hill") the "Communal Administrator" (Decree-Law No. 1/10 of 24 July 1987, Art. 2) and are obliged "to assure public order, security, peace and health of the population" (Decree-Law No. 1/26 of 30 July 1977, Art. 11). Most important is hearing all local disputes, which, as a rule, are attended by an attempt to arbitrate. If arbitration is not successful, then the committee is obliged to send the matter to the competent instance. They do not have further legal competencies. In particular they may not render a judgment. The following case study sits exactly at this borderline.

4. “*Le tronc d’un bananier*” [The Trunk of a Banana Tree] – Two women fight over their honor

The case study, which came before a court in 1988 is a private delict. It centers on two different conflict fields. It is above all a complaint by a small peasant farmer woman against defamation. But mistakes in formal procedure open up a second field of conflict, namely the desire of the lower instances to judge and punish and – in this connection – the problem of “forum shopping” and “shopping forums”, which Keebet von Benda-Beckmann (1983) describes as a continuous struggle for attention and winning an ear to be heard.

4.1. *The case*

The defamation complaint has to do with a dispute about the sexual integrity of two women. One party, whom I shall name Godeline, accused her neighbor Anésie¹³ of having mocked her sexual integrity publicly. Godeline’s complaint alleged that Anésie said “*que mon sexe (grandes et petites lèvres) sera découpé, tombera ensuite dans mon bas ventre au niveau de mon sternum pour retomber enfin dans mon sein. ... Elle a en presence des notables dit que mon sexe est comme du cuivre dégradé et que je ne fais pas l’amour avec mon mari mais avec le tronc d’un bananier.*” [My sex (large and small lips) will be cut, will fall then in my lower stomach to the level of my sternum in order to fall finally into my very being. ... In the presence of notables she said that my sexuality is like degraded copper and that I do not make love to my husband, but rather with the trunk of a banana tree.¹⁴]

In the background is an affair with men, which the two disputing parties equally try to keep from the judges: Anésie’s first husband, a politically engaged Muhutu small peasant farmer, worked in the early 70s in one of the conspirative groups against Bahima Tutsi rule. In the massacre of 1972 he was shot by the military. Anésie returned to the hamlet of her original family. There she succeeded in becoming the only woman to build a house out of stone. This raised a certain furor in the community. Some men began accusing their wives that they did not take care of the minimum necessities, while this widow had managed to build a stone house on her own. Later Anésie remarried. Now Anésie was a strong woman who did not suffer her husband or her neighbor to do what they liked with her. If a beating was threatened, the men mostly withdrew rather quickly. It happened several times that she beat up her new

¹³ All names have been changed.

¹⁴ Translation by editors.

partner. At the time of the court complaint, her husband had a lover – by the name of Godeline. Now in Burundi not only is enticement of a married man frowned upon, but also a woman who places herself above her husband, much less beats him: “*Dans notre société on n’aime surtout pas une femme arrogante, on n’aime pas une femme qui injure tout le monde et on n’aime surtout pas une femme qui bat son mari*”, [In our society one does not like an arrogant woman, one does not like a woman who hurts everybody and above all a woman who beats her husband.] explained a representative of the Union of Burundi Women (Union des Femmes Burundaise) who took it upon herself to get involved in this story.

It was irritating that Anésie, the defendant, appeared before the court as plaintiff and the original plaintiff, Godeline, as defendant. The complaining defendant claimed that she was on appeal from the lowest state court: “*(Godelein) est allé déposer plainte devant les membres de l’Union des Femmes Burundaises (UFB) qui à leur tour m’ont convoqué. ... Ayant entendu ses fausses et honteuses déclarations, j’ai voulu m’enterrer. Les membres de l’UFB ont refusé de prendre en considération mes déclarations ainsi que telles de mes témoins et ils m’ont infliger une amende de 3,000.-Fbu à titre de dommage moral, sans que je sache la faute que j’ai fait. ... Alors je me suis décidée à aller en appel au Tribunal de Résidence.*” [(Godelein) had gone with her complaint to the members of the Union of Burundi Women (UFB), who in turn summoned me before them. ... Having heard her false and shameful declarations, I wanted to fall into the earth. The members of the UFB refused to take into consideration my declarations as well as those of my witnesses and they inflicted a fine of 3,000 Fbu on me as damages, without my knowing what I had done wrong. ... Then I decided to go on appeal to the Court of Residence (Tribunal de Résidence).”]

4.1.1. Local Processes of reaching a decision: A case becomes an opportunity

Now the members of the local Party Committee have no competency to function as judges. So this “appeal” brings to light a general abuse of competency, namely that the local Party Committees appropriated to themselves, namely the competency of judges to make “court judgments” and fine those they find to be in the wrong. Concepts of truth finding as applied by state courts are totally foreign to them. They take decisions according to their own view of local relationships. As I sought in a conversation with the representative of the UFB to get at the cause of the defamation, she resorted to recalling childhood memories that had little to do with the dispute, but which indicated the local image of the plaintiff and clearly consisted of fantasies of revenge: “*Ca ne dépend vraiment de rien, mais seulement de ceci: Elle (Anésie/MW) est née comme ça, très agressive, jusqu’à ce que même pas écouter les parents. Même lorsqu’elle était jeune et on l’a dit ‘va priser’, elle pouvait répondre ‘va priser’. Aussi la mère pouvait dire ‘va apporter du bois’, alors elle répondait, ‘moi, je n’y vais pas, tu n’as qu’à laisser de la nourriture’. Alors*

elle est née comme ça et puis elle a grandi comme ça jusqu'à ce qu'elle perturbe la société. Maintenant elle doit recevoir sa punition." ["All derives from only one thing: She (Anésie/ MW) was born like that, very aggressive; she did not even listen to her parents. As she was young whenever anyone said to her, we are going to get you, she answered, 'Come get me!' Even when her mother told her, 'Go carry some wood,' then she would answer: 'Me, I am not going to do that. You have only to leave cooking.' So she was born like that and she grew up like that disturbing society. Now she gets her punishment."] The assisting "chief of the hill" added that the representatives of the UFB would have had to punish the culprit in any case, who had hurt the pride of women: "The women of UFB themselves feel indignant as women and sisters."

The identifying process connected with the plaintiff was based on moral considerations. This made it difficult to explain the real facts of the matter. Favorable witnesses were not heard. One knew this woman and she was simply so. The local image seemed apparently more important than the concrete history of the conflict. The punishment related much less to the concrete case and much more to the impression of a person that had taken hold over decades, an impression that had its own history: The women of the Union of Burundi Women who had come together in the local Party Committee had a hard time dealing with Anésie, because Anésie in spite of lower birth and modest means had been able to build her own house out of stone – the nicest stone house in the entire hamlet – and because Anésie disavowed the banana beer price politics.¹⁵ Background to this local scenario is a fight over potency and a history of jealousy, which combined, explains the identification with Godeline. The local Party representative used the conflict to his own advantage, in order to impose a punishment, which, in the words of the UFB representative, should have been given long ago ("Now she has to receive her punishment."). The case became an opportunity. It is no wonder that no one of the local authorities interviewed was prepared to talk about the defamation and to put it in relation to the following questions: Such as, how it came to defamation, who really said what, and which background motives were to be taken into account and weighed, even though these are not unknown in the local context. It did not bother the local conflict resolution instances in the least, first of all because this was not about concluding and settling a *story* of conflict.

¹⁵ See section 4.1.2.

4.1.2. On local history of pre-determined opinions

Now in Burundi it is not usual that persons go before court in their individual capacity. Often they represent networks of relationships and opinion networks, which, especially in the case of defamations, seek to test their local strength. This was so in this case.

In the hamlet there were three banana beer bars, one run by Anésie, one by a relative of Godeline, and a third by a peasant farmer, who was not involved in the conflict; in addition there was a rather dilapidated four wheel car that was valued as the most comfortable bar with bottles. Now each bar attracted its own clientele. The car was frequented by local “agricultural animators” and an animal caretaker, who were in the pay of the development cooperation agency (FED) and who were mostly Batutsi; the bar of the peasant farmer, a well respected Muhutu, offered high quality banana and sorghum beer, which was especially liked for family occasions; Anésie (Hutu) produced a large quantity of banana beer and started a kind of price war while Godeline’s relative (Tutsi) put more value on the looks of his bar and offered in addition to banana beer simple grilled snacks. Paradoxically most peasant farmers went to Godeline’s relative after work, but bought the beer from Anésie. Anésie had no problem with that; Godeline (Tutsi) had problems indeed. She wanted to sell her own beer to her relative. Then when it came to a show-down because of an affair with men – Godeline liaised with Anésie’s second husband – Godeline used the opportunity to isolate Anésie by bringing a complaint against her in the hamlet. It is possible that her status as a Mututsi-kazi helped her, since the majority of the Party Committee members were Batutsi.¹⁶ They claimed to come from a better family. So Anésie, given her economic strength, was long a thorn in the eye. Some Batutsi men saw her house as a symbol of casting doubt on the local claims to dominance, described Anésie as a source of disruption in the hamlet, and suspected conspiracies at her place. This made the legal case a subject of local political opinion-making. This indicates a third issue and only marginally has to do with the actual story of the insult.

At the core of the local decision-making were definitive opinions and images that had grown up over the years, the history of which does not necessarily constitute these images. I perceive these unshakable opinions and images as reactions to prior issues and events that are to be worked out and evaluated as opinions and attitudes. I also got the impression that these images were operationalized in daily life, in order to

¹⁶ This fits in with the remark of the officiating “chief of the hill” (Hutu) that the representatives of the UFB should have punished Anésie “as sisters”.

structure one's own (social) action and to justify future actions. For this reason they are to be seen as prospective lines along which thinking and actions take place. Closing the history of the dispute presupposes an inner distance and a curiosity, which did not exist in the case at hand. Thus decisions that are made on the basis of local images of a person signalize problems with distance. The Party Committee was part of the conflict; it decided on the basis of identifying processes, which came to constitute unshakable opinions.

The so-called desire of the UFB for punishment undermined their ability to perceive their legally defined role as Party representatives of state authority. Their playing judge and imposing a fine was a mistake for which they paid. One of the consequences is obviously continuous friction with the competent courts. The behavior of the Party Committee can contribute to an escalation of a conflict, since some of the injured parties reject state authority and join conspirative groups. This process is the result of how conflicts are dealt with. Consequently, the local authorities tend to remain silent before the instances that are set over them and/or remain passive.¹⁷ The same goes for me as an external researcher.

4.2. Institutional legal policy: the judiciary versus the executive

In the arena of official justiciability the intervention of the local Party Committee brought great consternation. First, they confirmed a justified fear, namely that the local Party Committees, as the lowest representation of the executive, blocked peasant farmers from accessing the judiciary officials or filtered (illegally) complaints coming

¹⁷ In his search for local causes of the ethnically motivated massacre of the Marangara-Ntega in the summer of 1988, Gabriel Le Jeune found that the local Party Committees have a precarious access to local events and he complains, "... *l'engrenage des peurs réciproques (entre Bahutu et Batutsi/MW) ... révèle l'incapacité du Parti UPRONA non seulement à maîtriser localement le débat ethnique, mais encore à transmettre vers les autorités supérieures, régionales et nationales, des analyses cohérentes et convaincantes sur la gravité des tensions, ou bien inversement à diffuser parmi les militants et l'ensemble de la population le discours officiel. ... On constate en quelque sorte, qu'à Ntega les organes de base du Parti n'ont en rien joué leur fonction de relais d'opinion.*" (1989: 85) ["... the concatenation of reciprocal fears (between Bahutu and Bahtutsi/MW) ... reveals the incapacity of the UPRONA Party not only to master locally the ethnic debate, but also to transmit to the higher authorities, regional and national, coherent and convincing analyses of the gravity of the tensions, or in the reverse, to diffuse among the militants and the entire population the official discourse. ... One can confirm more or less that at Ntega the local organs of the Party have not played their role at all nor fulfilled their function as disseminators of opinion."]

eventually before the courts. Furthermore, it was quite clear, especially to the older judges, that despite their ties to the state president, they were in the end dependent on the respect of the peasant farmers. For it is this respect that determines the position of the judge in the legal process. Judges, whose access to the peasant farmers is endangered, risk being marginalized in the routine life of the peasant farmer. Secondly, the intervention of the Committee implied a disrespect for the division of powers and supported the idea that the executive would (or wanted to) undermine with the help of the local Party Committee the effectiveness of the state courts in order to secure exclusive access to the peasant farmers ("shopping forum"). This daily struggle for access to the peasant farmers, which underlines the legitimization of current norms, became so bitter (and dangerous) because it also concerns the legitimization problem of the military ruling the political center. In contrast to the state courts, which are relatively often used in Burundi,¹⁸ the executive powers did not enjoy the best reputation among the rural population – certainly owing to repeated machine gun massacres and the relative strong connection with the 'Bururi-Matana group'. Thirdly, the Committee's intervention confirmed the courts' widespread fear of intervention. President Buyoya's proclamation of independence of the judiciary was only ostentatious, since the representatives of the executive (local Party Committees, District and Provincial chairpersons) continued to intervene in the legal business and ignored repeatedly the court's decisions.¹⁹ The judges of the affected local and provincial courts

¹⁸ On the basis of my own statistics on the use of courts in all of Burundi one can assume that in every year 1 civil case for every 570 persons comes before a state court. By way of comparison with data from Botswana, Kenya, and Togo, this is a very good level. For more details cf. Weilenmann 1998: 157ff.

¹⁹ An example of this: A peasant farmer complained to the "Governor" of Kirundo. He told him that five years ago he had won a case at the local court of Bwambarangwe against a fellow countryman. The judgment obliged the defendant to pay back to the plaintiff a sum of 5800 FBu. According to the peasant farmer, the judge had received the money, but had up to now only given him 2000 FBu. Thereupon the civil servant in a letter (No. 531.09/853) to the "Communal Administrator" ("*Administrateur communal*") demanded that he start the necessary investigation. A copy of the letter went to the "Tribunal de Grande Instance", but not to the judge concerned. The Administrator began gathering information in the community about the conduct of the judge and finally approached the court concerned. There he learned that the peasant farmer had lied to the Governor. What happened? The Administrator gave evidence in this answering letter to the Governor of the settlement. A copy went to the Tribunal de Grande Instance. In the community there was no official report to correct the false impression. Because of this the affected judge complained in a letter: "Mr. Governor, as we are a full democracy, would it not have been

considered complaining and demanding disciplinary investigation. But there was an investigation of the local Party Committee in the aftermath of the massacre in Marangera and Ntega and the then responsible provincial chairman was dismissed. So the court felt that the matter had been settled.

4.2.1. Judicial Discussions about how to deal with peasant farmer complaints

Now the case of defamation led to an extensive discussion among the judges about whether to accept the complaint or reject it. For a start the younger judges tended towards rejection. They were first of all irritated over the fact that the parties withheld the cause of the defamation. Without knowing the detailed circumstances they could hardly pass a judgment about the gravity of the harm done. Furthermore they said that peasant farmer women have no honor to defend; they are ordinary folk and should get on with their work. Defense of honor is a right that accrues to persons who can show they have a public position to defend, such as politicians. Finally, they perceived a rejection of the complaint as an opportunity to teach the local Party Committee a lesson: The rejection of the complaint along with the fine imposed by the Committee would not only expose their formal and their substantive incompetence, but also would damage their public image locally!

In the end, however, the oldest judge prevailed. He pleaded vehemently for accepting the case with the following arguments: First, the defamation was aimed directly at the sexual integrity of the plaintiff. She would never be able to recover her integrity if the complaint were rejected. Rejection would impair rather the image of the court. It had to be clarified whether and how far the refusal to give details about the surrounding circumstances indicated magical practices, which could not be revealed as magicians are punishable. Finally, judges, as the state president had said, have the function of setting an example; they are the true “agents of development” and depending on the way in which they accepted the case, they could instruct the local committees about how to deal with similar cases.

Due to ethnic massacres, the parties had to flee and the proceedings were interrupted. Thus the tragic history of violence caused again a rupture in personal life, destruction of local history, and a case that could not be processed within the framework of state conflict management.

necessary to call together your cabinet and judge without blackening my name in the first place?” (Letter No. 552/.042.5/67/87).

4.2.2. Strategies of the application of law in the shadow of the Bushingantahe

The local court that decided over accepting or rejecting the complaint was comprised of two judges and an assessor. Since the behavior of the local Party Committee had disquieted the regional judiciary, the president of the Tribunal de Grande Instance dealt with the affair and participated along with me as external observer in the decision-making process of the Tribunal de Résidence. Since the discussion that flared up about accepting the complaint or not had become an issue of differences of position among the court personnel, the influence of the *bushingantahe* emerges as a factor:

- The young judge Pierre, a graduate of the École Secondaire Technique et Administrative (ESTA), who was promoted to court president upon reaching the marriageable age of 21, pleaded for rejecting the complaint because the peasant farmers withheld facts relating to the background of the defamation suit.
- The young judge Georges, an educated, urban jurist of the University of Burundi and court president of the Tribunal de Grande Instance – 32 years old – doubted whether peasant farmers have honor and emphasized as justification of rejecting the complaint their lack of standing as public figures. He was for rejection of the complaint plus reversal of the penalty as an opportunity to rap the fingers of the irritating local Party Committee and to expose their incompetence. He perceived the case as an opportunity.
- The assessor Jean (41 years old), a farmer with good local knowledge of the region, knew only the representative of the UFB, whom he described as resentful, and he was silent the entire time.
- The oldest judge, Albert (55 years old), a former court clerk, and a judge under the last King Mwami Mwambutsa, was court president from 1969–1987 and the son of a respected *mushingantahe*. He prevailed with his legal policy argument, presumably because he linked it clearly to the peasant farmer logic, drawing attention to magic that raised the issue of personal attitudes²⁰ and appealed to the pride and honor of judges whose function is to set an example as representatives of the state president.

Apparently one cannot draw any conclusions about the decision-making process on the basis of the hierarchical position of the players. The real authority at the state

²⁰ If magical motives are responsible for withholding the background information of a legal complaint, these have nothing to do with the state court and judges. The latter can only show themselves to be generous or small-minded.

court was Albert, an old long serving judge and son of a *mushingantake*. Georges and Pierre to a certain extent went to Albert to learn from him, something they revealed to me only confidentially in secret. Georges told me that in the daily discussions with Albert he had to admit that he did not always understand how peasant farmers think and in customary law matters in particular he was dependent on Albert, mainly because he himself grew up in the capital city of Bujumbura. In a personal conversation with me Albert said that his father had taught him above all to stay curious and to relativize his own point of view; to give responsibility to younger people when they reach an age at which one can still pass on one's own values to them;²¹ and to retain the ability to resign from one's profession in order to be a father figure and serve the state president. Development is only possible if the moral values of the *bushingantake* are passed on. Georges and Pierre were good court presidents he thought. He was proud of them, as though they were his pupils. Georges and Pierre made fun of Albert sometimes, because he always liked to drink and did not place much value on appointments. At the same time they feared and respected him in a way that took me a long time to understand. They said, he had "swallowed small stones that were filled with men" – a symbol for the strength and wisdom of a *mushingantake*.

Thus, hundred-year-old traditional conceptions of authority, law and state play a much more important role in the routine life of the court than the normative substance of the law reveals, and can, as in the litigation at hand, still influence the decision-making process.

5. Setting Problems: Validating legal norms in a concrete case

If one tries to summarize analytically the above described problems of the case, the legal setting offers a possible focus of attention. For in principle the legal setting can be understood as a behavioral concept, with which one can establish points of view, expectations or orientations in terms of norms, which the law-maker sets as the basis for truth-finding by the courts. Implementing such norms requires first, respect for the division of powers between the executive, the legislative, and the judiciary (competency rules); second, observing the competencies of the various instances (procedural rules); and third, respecting the relationship between a judge or judges and the parties that has been formalized by the law (rules of conduct).

Thus, the above described case presented a very serious disruption of the setting. The substance of the conflict was dealt with in such a way that problems of compe-

²¹ Albert gave up the presidency of the court in favor of Pierre.

tency and forum choices became issues. In this respect the case is an atypical legal case. From the point of view of semi-autonomous patterns of relationships, at the point where the state court and the local decision-makers overlap, then the case is an eye-opener. I have shown how within the local limits of a hamlet, pre-determined opinions and images about a person can result in an opportunistic use of a legal case. Thus it becomes clear that how a conflict is handled in terms of substance is not only a matter of strategic considerations, as is often presupposed in legal anthropology studies,²² but also a matter of prior experience, relative images and personal insults that remain unarticulated and which have nothing to do with the substance of the case at all or need not have something to do with it, but which influence the course of the case. Because of such pre-conditioned circumstances, the Party Committee was induced to clearly infringe the rules. In the arena of the state court other rules are in force, but there too, experiences – such as the above described irritation with the executive branch – play a role, along with various fears, which have just as little to do with the substance of the dispute. For some of the judges, the nature of the conflict between the parties is secondary: The discussion over the question whether a defamation complaint is to be accepted or rejected, turns on factors that have little or nothing to do with the substance of the complaint. The main thing is to get the Party Committees, which are under the authority of the executive, to be sensible. In this connection the discussion turns on whether rejection of the complaint would hurt the reputation of the local Party Committee – or of the state court (legal policy: “shopping forums”). In the end, political history, in the form of repeated massacres, interrupted the normative setting and prevented completion of regulating the conflict.

When one further reflects, which psychic function the legal setting fulfills in the routine life of the court, one can generally say that the highly formalized course of the process is aimed at keeping the aggression that each case history brings with it under control. Independent of the substance of the conflict, the aggression is to be poured into the same mould, which lays down the course of the process step for step and forces the judges like the parties to repeatedly formulate their thoughts. This framework fell apart in the case at hand. One does not see in daily life that legal norms have any more meaning than in the bureaucracy. Legal exegesis is not the focus of attention. The focus is on a delimitation problem, namely how to draw the line between the local Party Committee and the judge and is accompanied by various fears and feelings of revenge. It was not at all possible for the Party Committee to construct an

²² Cf. Comaroff and Roberts 1981; Lowy 1978; Moore 1978; Starr and Yngvesson 1975; Rosen 1989.

appropriate setting for the dispute, since it is entirely interwoven in the local political context. In the arena of the court this disruption of the setting led the judges to think about how they could start a disciplinary proceeding against executive instances, a step that can be interpreted as an attempt at politicization with institutional (legal) means. Thus "law" as an "intellectual concept" can become not only a strategic means, but also an inner psychological tool that satisfies one's own ambitions of aggression (law as a weapon). It is precisely this possibility that should be prevented by the construction and correct use of a legal setting. This raises the question whether the routine use of the normative setting can be an indicator of the degree to which legal institutions are themselves semi-autonomous.

If we look at the role of the old judge Albert, two cultural aspects become clear, which are psychological manifestations and typical for Burundi. As the son of a locally well-known *mushingantahe* and a person who is not so culturally schizoid, Albert offered an orientation in critical situations for insecure judges and assessors. For they sensed that the peasant farmers respected Albert. Behind his appeal to identify with the father-state, which conforms also to Party identity, was his sentiment for the king. This enabled insecure civil servants to regain steadiness and to look forward to settling a norm case befitting the normative setting. If there are grave disruptions in the setting, then recalling the pre-colonial cultural identity offers a possible shield. For the cultural affinity, not only of the substantive norms, but also of court personnel, is highly important as long as the internal institutional implementation of normative determinations remains controversial and a professional identity with a role that has a western model can hardly take root in Burundi.

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NATIVE COURTS AT WORK:
A CASE STUDY FROM DĀR BIDAYRIYYA
IN THE SUDAN

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Abstract: This article analyses the transformations of patterns of access to Native and Sharia Courts over a period of more than 50 years in Dār Bidayriyya (Kordofan) in Sudan. The author illustrates how colonial interference in patterns of access to justice, motivated by objectives of revenue collection and military security, can upset political power balances. This in turn can evoke pluralistic responses from litigants in their efforts to adjust to the new power order. The result is a reconceptualization of extrajudicial jurisdiction (based on consent of litigants) and judicial settlement (by force of state power) as well as a redefinition of individual vis-à-vis collective responsibility for criminal and civil law transgressions.

1. Introduction

This article deals with the role of the native courts in the administration of justice in Dār Bidayriyya in the Republic of the Sudan, during the period of the Anglo-Egyptian colonial regime (1898-1956) and the first fifteen years following the independence of the Sudan (1956-1970). In addressing this issue the paper will examine the structure of the native courts of Dār Bidayriyya, their powers and jurisdiction, and discuss the laws which they administered and customary procedures which they followed.

¹ The author is indebted to Prof. R.S. O’Fahey and Dr. A. Bjørkelo for their valuable comments.

2. The establishment of native courts in Dār Bidayriyya

Dār Bidayriyya was a tribal and administrative term used to denote the area that lies between latitudes 30° 30 and 29° 32 North and longitudes 13° 35 and 12° 15 East, in the province of Kordofan. Under the Anglo-Egyptian colonial regime this territory was given the name of the Central District and divided into fourteen administrative units (*ʿummudiyyas*) and the latter into a couple of hundred villages. First the administration of the district was entrusted to a British chief inspector (later district commissioner), assisted by two Egyptian officers (*māʿmūr*), and local chiefs who were gradually incorporated into the structure of the colonial regime. In 1934 the Central District, excluding al-Ubayyid town, was renamed Bidayriyya Nazirate, after the largest tribal group in the district, the Bidayriyya. The head of the Bidayriyya Nazirate was given the title of *nāzīr* and appointed by the governor-general of the Anglo-Egyptian Sudan, who vested him with both judicial and administrative powers to exercise his office. Under his control a number of local chiefs (*ʿumdas*)² and several hundred shaykhs of villages (sing. *shaykh al-hilla*) were confirmed in their positions and others were nominated to maintain security and order in the district. A judicial hierarchy consisting of an appellate court and four first instance tribunals was established to deal with criminal, civil and Sharia (personal matters of Muslims) cases at the Nazirate level. A local treasury was set up to regulate the revenue and expenses of the Nazirate. To administer these institutions in a proper way, *the nāzīr* was subject to the supervision and guidance of the district commissioner based in al-Ubayyid, and to the administrative regulations issued by the central authority in Khartoum. Again the creation of the Nazirate, in this sense, gradually undermined the traditional concept of leadership based on a lineage system and placed political and economic resources (arable lands and gum gardens) of the Nazirate in the hands of the *Awlād* (son of) Zākī al-Dīn ruling family and their subordinates who became very dependent upon the state's patronage.³ In this section my concern will be directed towards the judicial institutions (courts) of the Dār Bidayriyya Nazirate and how they were established and developed.

After the occupation of the province of Kordofan in 1899 the *ʿumdas* of the Central District were authorised to participate in the assessment and collection of local taxes, and to act as voluntary tribunals in hearing minor disputes after obtaining the consent

² *ʿUmda* is a head of an administrative unit comprising a collection of villages.

³ For details see Abu Shouk 1997: 2-3.

of the disputant parties.⁴ In 1913 the governor of Kordofan province conferred on them further magisterial powers in order to hear the following offences and impose fines not exceeding the amount mentioned in the table below.⁵

Table 1. The powers of *ʿumdas* 1913

<i>Offences</i>	<i>Fine: piastres</i>
1. Being found in another man's house without his permission (<i>taʿadāʿalā bayt</i>)	200
2. Striking with stick (<i>falgat ʿasā</i>)	100
3. Striking with whip (<i>sūt</i>)	100
4. Striking with hand (<i>kaff</i>)	100
5. Verbal abuse (<i>shatīma</i>)	50

For the settlement of such cases, each *ʿumda* was obliged to issue his verdict in the presence and with the consent of a council consisting of at least three elders. If the person accused of committing such a crime was found guilty, the fine imposed upon him (if collected) should be divided into three equal parts between the *ʿumda* who heard the case, the village shaykh who brought the accused before the court, and the injured party. As president of a local court, the *ʿumda* was instructed to keep a judicial record of every case tried, containing the name of the plaintiff, the defendant, and their shaykhs; the fine which he imposed and the actual amount paid; and the date and place of the trial. Again he was given limited police powers to arrest any person of his district accused of committing major crimes such as "homicide, theft or dealing in stolen property, theft of slaves or dealing in slaves, and serious wounding", and to send him immediately to the district headquarters in al-Ubayyid.⁶

⁴ The Central District – Dar Bederīa, NRO, 2. K. 1. Obeid, A, 42/1/1.

⁵ The powers of *ʿumdas* of sedentary tribes in Kordofan province, NRO., Civsec., 1/9/30.

⁶ *Ibid.*; The Central District: Dar Bederīa, NRO, 2. K. 1. Obeid, A, 42/1/1.

Under the provisions of *The Powers of Nomad Sheikhs Ordinance* of 1922 the range of the cases that should be heard by the *ʿumdas* was increased including the following criminal and civil cases:

Assault, hurt, mischief, house trespass, trespass on cultivation areas or grazing grounds, adultery, rape, sexual connection with a virgin, theft, receiving stolen property, disobedience to a reasonable order, abuse, desecration, insult, threatening, affray, wrongful restraint, defiling water supply, act of indecency in public, wilful damage to property, and removing or damaging boundary marks, other than those erected by Government.⁷

The crimes mentioned were divided into two categories: major and minor cases. The line of division between them was based on the seriousness of the offence and the capacity and authority of the president of the court who would hear the case. Accordingly, the major cases were reserved to the *ʿumda* when he sat in a council of elders. In such a situation the *ʿumda* could impose a fine not exceeding twenty-five Egyptian pounds or its equivalent in kind; and hear civil suits if the value of each was less than fifty pounds. If the value of the case exceeded this amount, he should first obtain the approval of the provincial governor and then pass his decision. When he acted alone as a court he could hear only minor criminal cases and impose a fine not exceeding three pounds.⁸

In 1928, under *The Powers of Sheikhs Ordinance*, a senior *ʿumda* and the head of the Awlād Zākī al-Dīn ruling family, Husayn Zākī al-Dīn, was made president of an inter-tribal court with seventeen members drawn from the *ʿumdas* of the district and a few notables (see Table 2).⁹

The new court was then given magisterial power over the whole territory, excluding al-Ubayyid, and its president was authorised to settle all intertribal disputes that might occur among the tribal groups living in the district. Both the president of this court and the *ʿumdas* were subject to the direct supervision and control of the district commissioner who had a revision power to check their judgments and interfere at any stage of the hearing whenever he felt the president of the court concerned had misused his power.

⁷ Article 9, *The Powers of Nomad Sheikhs Ordinance* 1922.

⁸ *Ibid.*, Article 5; The Central District: Dar Bederia, NRO, 2. K. 1. Obeid, A, 42/1/1.

⁹ Governor of Kordofan to the civil secretary, May 1934, Headquarters of Shaykān Province (al-Ubayyid), File no. Kn.P, 66/E/34.

Table 2. Members of the intertribal court of Dār Bidayriyya

<i>Name</i>	<i>Tribe</i>	<i>Position</i>
ʿAbd al-Jabbār Husayn Zākī al-Dīn	Bidayriyya	ʿumda
Ādam ʿUbayd al-Hājj	Bidayriyya	ʿumda
Muhammad ʿAlī	Bidayriyya	ʿumda
Yaʿqūb al-Nasrī	Bidayriyya	ʿumda
Ahmad Abū Sakka	Bidayriyya	ʿumda
Ahmad Muhammad al-Kanūn	Bidayriyya	ʿumda
al-Badawī Madanī	Bidayriyya	ʿumda
Sulaymān al-Zākī	Shuwaybāt	ex-ʿumda
Hasan ʿAbd al-Hay	Shuwaybāt	ʿumda
al-Makk al-Tāhir	Tumām	ʿumda
al-Bāsha Qādim	Tumām	ʿumda
Tibayq Hammād	Ghudiyāt	ʿumda
Khalīl Muhammad al-Sughayir	Barnū	ʿumda
Hasan Muhammad al-Kanūn	Barnū	ʿumda
Muhammad Mūsā	Bidayriyya	Faki
Khalīfa Muhammad al-Badawī	Bidayriyya	Faki
ʿAbd al-Nabī Muhammad al-Sughayir	Bidayriyya	Faki

In 1934 the structure of judicial institutions in Dār Bidayriyya Nazirate was completed when the regime replaced the intertribal court of Husayn Zākī al-Dīn by a Main Court (first class court) that was vested with original and appellate powers over the whole territory (see Table 3).

Again, the presidency of the Main Court was held by Husayn Zākī al-Dīn, whose two sons, ʿAbd al-Jabbār and Mīrghanī, were appointed as vice-presidents with ten notables as ordinary members. Furthermore, the *ʿumdas* courts were grouped into four regional (or minor) courts that had limited magisterial powers in the areas of their jurisdiction. The warrant of each regional court specified the name of its president, the limit of punishment which he could impose, and the names of the shaykhs and notables from whom he could constitute the quorum of his court. It also instructed the president to hold the sessions of his court at a known place within the area of his jurisdiction and on fixed days of the week in order to be accessible to litigants and members, and to the district commissioners and the president of the

Main Court, if they were interested in attending certain sessions or conducting some inspection works. Thus, in such manner, the Anglo-Egyptian colonial regime transformed the simple *ad hoc* councils of elders in Dār Bidayriyya into carefully elaborated and organised local courts that drew their powers and jurisdiction from the state.¹⁰

Table 3. The powers of the president and vice-presidents of Dār Bidayriyya Main Court

<i>Name</i>	<i>Title</i>	<i>Delegated Powers</i>	<i>Limits of Jurisdiction</i>
Husayn Zākī al-Dīn	Nāzir	Two years imprisonment and LE. 100 fine. Whipping or flogging up to 25 strokes. Civil suits up to LE. 100	Dār Bidayriyya
ʿAbd al-Jabbaʿr Husayn Zākī al-Dīn	Wakīl nāzir	One year imprisonment and LE. 50 fine. Whipping or flogging up to 25 strokes. Civil suits up to LE. 30.	Dār Bidayriyya
Mīrghanī Husayn Zākī al-Dīn	Wakīl nāzir	3 months imprisonment, or 6 months and LE. 20 fine for animal theft. Whipping or flogging up to 25 strokes. Civil suits up to LE. 20.	Dār Bidayriyya
Ahmad Husayn Zākī al-Dīn	ʿUmda	Ditto	Abū Harāz
Muhammad Ahmad Abū Sakka	ʿUmda	Ditto	Umm Dikayka, Farrūja, and Umm Qawāwa
Al-Zayn ʿUbayd al-Hāji	ʿUmda	Ditto	Al-Jallābiyya, Umm Arada, Khūr Taqqat, and al-Mulbas
Al-Badawī Madanī	ʿUmda	Ditto	Juayabāt, Kāzqayl, ʿAllūba, and al-Birka

¹⁰ For details see Abu Shouk 1997: 96-107.

3. Native courts at work

In Dār Bidayriyya there were no strict formal requirements for presenting or hearing a case before the court. The native courts were allowed to follow customary procedures combined with some western and Islamic elements. A plaintiff (or a complainant) could either (a) raise his case to the court's president or a member in court or at home; (b) appear before the court and raise his petition; or (c) prepare a written petition addressed to the district commissioner (later resident judge) who in turn could transfer it to the relevant native court in the district.¹¹ Whenever the petition found its way to the court and was accepted as a *prima-facie* case, a summons would be issued to the defendant and witnesses to appear before the court on a fixed date.¹² Such a summons was usually effected by the village shaykh or any person who knew the defendant and witnesses. If either the defendant or any witness, without good and sufficient excuse, neglected the court's order, the president had the power to bring him in by force.¹³

4. How cases were heard

On the fixed date of hearing, the watchman (*ghafir*) would first call the names of the plaintiff and the defendant to enter the court, if it was not held outdoors. In the court chamber the plaintiff would be invited to state his case and evidence.¹⁴ After hearing his statement and evidence, the court would turn to the defendant and ask him whether he was guilty or not.¹⁵ If he admitted that he was guilty the court would close the hearing and issue its final verdict.¹⁶ In the case of denial, he would be asked to deliver his defence and bring witnesses who would testify in his favour according to what they had heard and seen.¹⁷ If the witnesses of any party refused to deliver evidence on

¹¹ ‘Abd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid; 1993, J. Reid 1936, Note on procedure and custom in Arab native administration courts, NRO, Civsec, 1/48/127.

¹² ‘Abd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1993.

¹³ *Ibid.*

¹⁴ *Ibid.*; J. Reid 1936, Note on procedure and custom in Arab native administration courts.

¹⁵ Judicial register, case no. 6, 8.I.1959, Archives of the Main Court of Dār Bidayriyya, al-Ubayyid.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

oath (swearing on the Qur'ān) his opponent would win the case.¹⁸ But the situation might be complicated if the witnesses of the two parties had delivered contradictory sworn testimonies. In such a situation the court could choose either party to restate his case or defence on oath. Upon such sworn statement or defence the court could furnish its final verdict.¹⁹

In modern systems of litigation inside the court chamber the judge should act as a referee, leaving the responsibility of the judicial contest to the litigants and their pleaders. Either party should present evidence in support of his claim and with the intention to defeat the opponent's case. As John Makec wrote, by this sense of neutrality the judge could attain "a high degree of public confidence in the law and prestige for" his profession.²⁰ This "adversary system", as it is known in the English common law procedure, had no parallel in the Dār Bidayriyya Nazirate. The president of a native court could act as investigator of facts, questioning both litigants and witnesses during the process of hearing. As my informant 'Abd al-Jabbār Husayn Zākī al-Dīn argues,²¹ the

¹⁸ 'Abd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1993; J. Reid 1936, Note on procedure and custom in Arab native administration courts, NRO.

¹⁹ *Ibid.*

²⁰ Makec 1988: 218.

²¹ 'Abd al-Jabbār's career is well worth some elaboration. Born in 1903 in the village of Umm Simayma (about thirty-three miles south-west of al-Ubayyid) as the second son of Husayn Zākī al-Dīn, the first *nāzīr* of Dār Bidayriyya Nazirate (1934-1948), at twenty-four he was appointed *'umda* of Umm Simayma in the place of his father, who had been promoted to *'umda 'umūm* of the central district of Kordofan (later known as Dār Bidayriyya). After two years in office the District Commissioner described him as "an energetic and reasonably successful tax collector, and in spite of his youth, is respected by his people rather than loved at this moment, since he had the difficult task of succeeding his quite outstanding father at Umm Simeimna, and a really outstanding elder at Abu Haraz ... His failings are those of youth, but enthusiastic and energetic youth. He is apt to drive through opposition ... with scant regard for the feelings of those whom he regards as obstructionists ... He has been brought up in the best Arab and Mohammedan tradition, and is a good example of it. He should make an admirable successor to his father." (Personality report, NRO, 2. K. 1. Obeid, 33/1/6). A few years later, 'Abd al-Jabbār took over 'Abū Harāz's *'ummudiyya* after the dismissal of Ahmad Muhammad al-Kanūn, and took over the Barqū who lived at Jabal 'Abū Sinūn, after the dismissal of Ya'qūb al-Nasrī of Umm Duma *'ummudiyya*. Owing to these administrative changes he had in a short time become head of the largest *'ummudiyya* in the central district of Kordofan. In 1938 he was transferred to al-Ubayyid, the seat of Dār Bidayriyya Nazirate, where he acted as *wakīl* (deputy) to his old father whom he

investigation during the process of hearing would enable the president of the court to base his verdict on evidence that would hardly be contested by either party, because the president could raise questions to both litigants and witnesses whenever he (the president or the court) felt that there was a degree of uncertainty that should be clarified. In this respect, he could use his personal knowledge to evaluate the case, whether it was of real importance or not. If it was of little importance, he could devote himself to what he considered as an actionable issue upon which he could found his verdict.²²

Thus the usage of personal knowledge in settling local disputes among the villagers seems to have been a widespread phenomenon in traditional African societies. In southern Zambia, for example, Colson attributes this phenomenon to the composition of the native courts of the members who would hardly distinguish between their role as magistrates and as members of their own society.²³ This assumption of Colson should not be confined to the case of southern Zambia, but applied to all British-African colonies or dependencies where the British administrators established the system of native courts. This system created a sort of duality in the role of the presidents of native courts, who acted as magistrates when they issued their verdicts, as lawyers when they investigated the cases in question, and as councils of elders when they used their personal knowledge and based their judgements on the predominant public opinion of their own society.

succeeded in 1948. In the same year he was nominated representative of Dār Bidayriyya in the Kordofan Provincial Council; in 1951 he was recognised as vice-chairman of Dār Bidayriyya Rural Council and later as chairman for three turns (1958-1969). In 1952 the District Commissioner described him as "a loyal and trustworthy nazir. Has a pleasant personality and considerable charm. He runs the affairs of his tribe with wisdom and firmness ... He always has the welfare of his people at heart and is a competent and efficient administrator." In consequence, he recommended him "for a First Class Robe of Honour". (Personality report, NRO, 2. K. 1. Obeid, 33/1/6). Beside his administrative and judicial careers, Nāzīr ʿAbd al-Jabbār was an active member and chairman of the Kordofan Tribal Leaders Association, and deputy of the head of the Ansār sect, one of the largest religious and political groups in the Sudan.

²² ʿAbd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1993. For details in Northern Kordofan and Southern Zambia see J. A. Hamilton 1930, Some notes of the working of courts in northern Kordofan, NRO, Kordofan, 1/1/1; Colson 1976.

²³ Colson 1976: 15-29.

5. How cases were proved

Oath-taking was the most important of the three major methods (i.e. offering testimony and making confession in court) of evidence in Dār Bidayriyya. It enabled the native courts to move outside the limits of available evidence, and to pronounce their verdicts on sworn statements/defence that would hardly be contested by either party, because they believed that if the swearer made a false statement he would receive his punishment from God. This phenomenon seems to have been well-known in the Northern Sudan. For example, J. Reid, governor of the White Nile (1931-37), wrote:

“The oath is regarded [by the Arabs of the Sudan] as a dangerous thing to take, and a swearer risks supernatural penalties if he misuses it. An oath, even a righteous one, is regarded as a serious matter, and one involving a certain risk; for one may unintentionally make a mistake, which might be visited upon oneself or one’s family. Thus the less sophisticated Arab, and people of a pious disposition, will not take an oath about a trivial matter, and Courts will often for this reason persuade the parties to accept a settlement ‘li rafa el Yami’, ‘to avoid swearing’. By such settlements a plaintiff is often forced to accept half his debt or a defendant to pay half a debt claimed even if he denies his liability. This often strikes a British mind as unfair, but it is a fairly general practice and based on the quite understandable reasons above mentioned.”²⁴

In Dār Bidayriyya, there were three modes of oath-taking applied by the native courts. The first mode was that which the court would administer on the Qur’ān whenever it asked a witness to deliver his testimony or either disputant party to state his/her claim or defence on oath. In the latter case the court should choose the party nearest to the “truth”, because any judgment based on a sworn claim or defence would not be contested by the other party, since, as was mentioned, if the swearing party did not tell the truth he would receive his punishment from God.²⁵ The second mode was that when either party asked his opponent or a witness to deliver his statement (or defence or their testimony) on a tomb of some particular religious man (*fakī*) such as Ismā‘īl al-Walī in al-Ubayyid or Makkī Abū Harāz in Abū Harāz village. The villagers believed that if the swearer gave false statements or evidence, his wealth would be destroyed by the ghost of the *fakī* and bad luck would visit his family.²⁶ This mode of oath-taking

²⁴ J. Reid 1936, Note on procedure and custom in Arab native administration courts.

²⁵ J. A. Reid 1936: 159; ‘Abd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1994.

²⁶ ‘Abd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1994.

seems to have been very effective and universal in Kordofan. In 1927, for instance, the Kabābīsh drove off a herd of camels (*ibl*) belonging to the Awlād Bilāl section of the Kawāhla. As Reid wrote, the theft was admitted but the number of the stolen camels disputed. To settle such a case, *nāzir* ʿAlī al-Tūm of the Kabābīsh asked the owner, the herdsman, and ten just men of the Awlād Bilāl to swear on the tomb of Fakī Umm Dubbān in the vicinity of Jabal Kāja Katūl and give the exact number and ages of the stolen animals. The Kawāhla accepted the offer and pointed out that the owner and the herdsman should swear on the number and ages of the animal and the ten just men to the credibility of the former's oath. But when it came to the point of facing the spiritual vengeance of Fakī Umm Dubbān, the Kawāhla preferred to settle the case by agreement (*sulh*) and the oath was lifted.²⁷

The third mode of oath-taking was generally associated with land disputes in Kordofan, where land borders between neighbours were poorly demarcated compared with the riverain provinces. Whenever such a boundary dispute occurred, the elders of the village concerned should persuade either disputant to agree on an elder to demarcate the disputed borders according to his own personal knowledge. Or if a plaintiff failed to produce sufficient evidence in support of his claim then the burden of evidence would be transferred to the defendant to demarcate the disputed boundaries according to his personal knowledge too. If the two parties agreed on a certain elder, the latter should first hang a copy of the Qurʾān around his neck or put it on his head while he was walking along his version of the boundary. According to R. Davies, "if the bearer of the Koran wilfully favoured his own side, the losers could at least draw satisfaction from their belief that he would die within the year with worse to follow".²⁸ Soon after he finished his job the boundaries would be marked by trees and hills in the vicinity. Then one of the elders would read some Qurʾānic verses closing the case. In Dār Bidayriyya in 1958, for instance, sons of Yaʿqūb al-Nasrī claimed usufruct rights over a gum garden in Umm Dūma village. In their claim they said that:

"We have a gum garden in Umm Dūma village, inherited from our father ʿumda Yaʿqūb al-Nasrī and it has been in our possession for 25 years. Muhammad ʿAbdallāh is a person who annually collects its gum up to the present day. Al-shaykh Ahmad Muhammad Rizqallāh had trespassed upon the boundaries of this land. [For this reason] we now came [before the court to show] our grievance and this is our claim."²⁹

²⁷ J. Reid 1936, Note on procedure and custom in Arab native administration courts.

²⁸ Davies 1957: 34.

²⁹ Letter from the executive officer of Dār Bidayriyya Rural Council to the governor of

In his defence shaykh Ahmad Muhammad Rizqallāh said:

“The land claimed by the sons of ʿumda Yaʿqūb al-Nasrī has been in my possession for more than 25 years. And during the life-time of ʿumda Yaʿqūb al-Nasrī the present Muhammad ʿAbdallāh had trespassed and tapped the [gum] trees of this land. When I came, I informed him that this land did not belong to the sons of Yaʿqūb al-Nasrī, showing him the exact boundaries ... and asked him to go back and bring the owner of the land. From that time the owner of the land disappeared and the land has been in my possession for 25 years up to now.”³⁰

After the defendant finished his defence the court turned to the only witness, Muhammad ʿAbdallāh, and asked him to deliver his testimony on oath. Soon after he testified in favour of the defendant the court closed the hearing and ordered the defendant to demarcate the disputed boundaries according to his own knowledge. A copy of the Qurʾān was given to him to hang it on his neck while he was demarcating the boundaries of his own garden.³¹ In line with this decision the case was closed and the disputed boundaries were settled in favour of the defendant’s version.

6. Customary law in Dār Bidayriyya

Dār Bidayriyya customary law was a set of norms and customs that regulated all aspects of individual and community life. These norms and customs were in a continuous process of development, between immediate requirements of the society and the surrounding environment. In this section certain judicial facets of this customary law will be examined in order to see to what extent they contributed to the maintenance of justice and order, and to what degree they were influenced by English Law.

7. Customary law and criminal cases

The main object of the pre-colonial customary law of the Bidayriyya was to maintain cohesion and peace among and within the segments of the tribe. All criminal matters were measured in terms of money, livestock or other wealth that would be paid by the

Kordofan, 5.7.1957, Headquarters of Shaykān Province (al-Ubayyid), File no. 66/E/10 (Text in Arabic, my translation).

³⁰ *Ibid.*

³¹ *Ibid.*

culprit and his relatives to redress the injury. In homicide cases, for instance, the fixed tariff of the full blood money (*diya*) was thirty cows, divided into six categories equal in number: five *madamūn* (not yet weaned), five *bikr* (one year old), five *tani* (two years old), five *fātin* (three years old), five *rabā* (four years old), and five *jaddā* (five years old).³² In other offences against the human body, the injured party used to be compensated in terms of fractions of the full *diya*. For example, a half of the full *diya* for the loss of an arm, a limb, and an eye; two thirds for the loss of masculinity; and a sixth for the loss of each finger.³³

This system of compensation seems to have been universal in pre- and post-colonial Africa. Some scholars like Elias and Makec attributed this phenomenon to two factors: First, the non-existence of institutions of coercion such as judges who could try criminal cases; police who could prevent the commission of crimes and apprehend criminals and present them to the courts for trial; prison wardens who could take custody of convicts who had been sentenced to terms of imprisonment; and prisons or cells where the convicted prisoners or detainees would be kept. Secondly, the main object of the customary law itself was centred around the idea of compensation. The concept of compensation means that the culprit would not be punished for his individual responsibility for the crime which he had committed. The responsibility of his guilt would be taken by the whole tribe or at least his relatives.³⁴

Under the Anglo-Egyptian colonial regime in the Sudan this system of compensation was undermined by the concept of punishment, as a means for maintaining justice. Native courts were set up and authorised to hear criminal cases and pass various penalties ranging from imprisonment to fine and flogging. Under the 1922 Ordinance they were authorised to pass fines to a certain limit, and under amendments of 1927 and 1932 to pass other physical punishments such as imprisonment and flogging. Again the establishment of these judicial institutions gradually eroded the concepts of compensation and of collective responsibility. Accordingly, the main object of the customary law was modified so as to punish the criminal for his wrongdoing, to discourage others from committing similar criminal acts, and to protect the community from crimes that would endanger its safety, honour, and welfare. Here, I have a case

³² *Ibid.*; *Diya* means compensation or bloody money which is payable for homicide or other offences against the human body to the injured party or the nearest blood-relatives of the murdered. Its amount was assessed at the value of a man's life in terms of cattle or other wealth, and varied according to the customs of the victim's tribe.

³³ *Ibid.*

³⁴ For details see Elias (1st. edn. 1956) 1972: 130-161; Makec 1988: 34-36.

from Dār Bidayriyya that might show some aspects of this shift and illustrate how the system of compensation gave way to the concept of punishment.

The case – M.N.A. (complainant) v. M.Z.D. (the accused)

[Plea by the complainant]

The complainant M.N.A. appeared before [Dār Bidayriyya Main Court] and said, in truth, on 28.10.1954, I entered the house of the accused, M.Z.D., at twelve o'clock in the evening with intent to commit adultery with his wife [U.A.], since he was away. When I was inside [the straw-hut], the accused came back and ordered his wife to lit the light. She did not find the match sticks. After a while the light was put on and I went outside [the hut]. The accused then seized me and drew a knife [from his arm], and stabbed me three times upon my left shoulder. When he first came in he was carrying a spear and he stabbed me. [At the same time] I had a stick and hit him without causing injury, but his stab had cut my artery. Then all the inhabitants of the village and the shaykh came [to the hut of accused]. They [first] reported to the al-Ubayyid police, and then seized and sent me with the said accused to al-Ubayyid, where I spent a month under treatment. I entered the hospital on 30.10.54 and left it on [30.]11.1954. Now, I am oppressed and want justice from the accused on the account of the injury.

[Plea of the accused]

The accused M.Z.D. was asked [by the court to deliver his defence]. He said, in truth, on 28.10.54, I was away from home and came back at two o'clock in the [next] morning, and when I was standing at the entrance of my hut I heard a movement of a man with my wife inside the hut. I said to her: "Open the door of the hut." She opened it. Then I ordered her to lit the fire. She replied: "I have no match sticks" and left the hut. I entered and lit the fire and found the complainant M.N.A. inside the hut. Before I seized him, he beat me with a stick. I then gripped and took him outside the hut. At the entrance of the hut I saw a knife on his arm. I drew it out and stabbed him. I confess causing injury to him, and I am oppressed by his committing adultery with my wife.

[Plea of the second accused]

U.A. [the wife] admits that she committed adultery with the complainant, M.N.A.

[Basis of the judgment]

After necessary investigation on this case [before] the court the complainant confessed that he had committed adultery with the accused's wife, the accused, M.Z.D., confessed that he had stabbed the complainant by his knife causing injury to him; and the [second] accused confessed that she had committed adultery with the complain-

ant. The medical report explains that the complainant was injured upon his left shoulder and left arm, and spent thirty days in the hospital.

[The judgment]

In the presence of the litigant parties the court fined the accused M.Z.D. twelve Egyptian pounds due to his confession that he had seized the complainant and drew his knife and stabbed him. Ten pounds of this fine [should be paid] to the complainant as compensation and the balance to the court as government fine. In the case of not paying, four months imprisonment. In the presence of the litigant parties the court fined the complainant M.N.A. of six Egyptian pounds for [committing] adultery, and in the case of not paying three months imprisonment. The [second] accused U.A. was sentenced to a three-pound fine, and in the case of not paying half a month imprisonment. Likewise the complainant was ordered to swear on the Qur'ān that he ... will not visit the accused's wife ... and the case was concluded on this line.³⁵

Thus, crimes such as animal theft, adultery and offences against the human body became classified as crimes against the community as a whole. The perpetrators of such crimes used to be punished in terms of their individual responsibility for the crime which they had committed. For instance, in 1938 out of eight hundred twenty-two offenders the native courts of Dār Bidayriyya imprisoned eighty-six for more than six months, thirty-one for less than six months, fined three hundred forty-eight, and released four hundred sixty-five on different terms of probation.³⁶ Thus, on the one hand, this shift towards the concept of punishment gave the Awlād Zākī al-Dīn and their subordinates further control over their territories and released them from the influence of the lineage system, in the sense that the president of each native court could pass his decision in terms of customary law and government ordinances. This meant that he would not need to base his judgement on the consent of the contesting parties or on the prevailing opinion among their lineages. On the other hand, this shift enabled the district commissioner to inspect the works of native courts regularly and evaluate the performance of their presidents in relation to their judicial records. Thirdly, this shift itself led the customary law in Dār Bidayriyya to consider the wrongdoing of each offender as an offence against the collective community. The offenders

³⁵ Judicial register, Case no. 6, 8.1.1955, Archives of the Main Court of Dār Bidayriyya al-Ubayyid (text in Arabic, my translation).

³⁶ Summary of judicial work of native courts in the Central District, NRO, Kordofan, 1/17/85.

who committed such crimes that might disturb the security of the community should be individually punished for the crime which they had committed.

8. Customary law and Sharia matters

The Sharia Court of al-Ubayyid was officially authorised to hear all personal matters (marriage, divorce, inheritance and so forth) of Muslims who lived in the Central District of Kordofan according to the Hanafī School. In practice, the court only attracted the townspeople. The majority of the villagers preferred to settle their own personal matters before the native courts and *ad hoc* councils of elders, avoiding the formality and strictness of the Sharia law.

Toward the end of the 1920s the Sharia judges in Kordofan refused to recognise the power of native courts to hear the Sharia cases. They argued that these courts were not legally authorised to settle such matters, and their presidents were practically unqualified to deal with the Sharia law.³⁷ To undermine this claim, the 1932 Native Courts Ordinance authorised the presidents of native courts throughout the northern provinces to hear Sharia cases on the agreement of the disputants and the presence of a Sharia scholar among the members of the courts concerned.³⁸ Local *fakīhs* who commanded some knowledge of Sharia law were appointed as members of the native courts in order to give advice on Sharia matters. It seems that the British administrators did so, because they were aware that the authorisation of Sharia judges to deal with personal matters of Muslims in the rural areas would undermine the powers of tribal shaykhs.

In Dār Bidayriyya, for instance, in 1934 Ahmad al-Badawī Hamdān, the *nāzīr*'s cousin, was appointed as advisor in the *nāzīr*'s court. In practice, the influence of the Sharia law was limited to the area of marriage and divorce cases while the customary law covered other aspects of personal matters such as inheritance and the custody of children after divorce. For example, in 1952 a plaintiff called Tayyiba Muhammad

³⁷ Letter from the civil secretary to the northern governors, NRO, Civsec, 1/44/115; Note on sheikhs courts *maazun*, NRO, Civsec, 1/44/115; Letter from the grand qādī to the legal secretary, 1931, NRO, Civsec, 1/44/115; Appointment of an Alim for the Bederia main court, NRO, 2. Kordofan, 1, Obeid, 1/8/23; Ibrahim, 1997. In this article, Ibrahim analyses the correspondences exchanged between the sharia court authorities (*qādī*, judges of *sharīʿa* courts) and British officers in the Sudan and shows how these correspondences aimed at institutionalising the relationship between the sharia and native courts.

³⁸ Appointment of an Alim for the Bederia Main Court, NRO, 2. Kordofan, 1, Obeid, 1/8/23.

claimed usufruct rights over the lands of her deceased father in al-Qarūd village. In her claim, before Dār Bidayriyya Main Court, she said:

“My father died eight years ago, leaving plots of land in al-Qarūd village, the shaykhship of Sulaymān, ʿummudiyya of Umin Dikayka. After his death, shaykh Sulaymān al-Nūr has annexed his land [to the village] ghifār [in his custody]. And he is now going to distribute it to the [village] ʿummār. Therefore, I am wronged [by this deed and] I ask [him to give back] my father’s land, and I am ready to stay in the village.”³⁹

In his defence, shaykh Sulaymān al-Nūr said:

“The plaintiff’s father died more than eight years ago and left his land in my possession as ghifār. In the last days certain ʿummār of the village complained [and] applied for plots of land to cultivate. [As a result] the land of the plaintiff’s father was divided into two parts between Ahmad al-Daw and ʿAbd al-Rahīm, and this division was taken by the village committee.”⁴⁰

After closing the hearing the court dismissed the claim of Tayyiba on the grounds that she did not live in her father’s village. Even if the plaintiff had lived in the village she would not get the whole legacy of her father. According to the customary law, she would get some parts of her father’s legacy, if she was the only heir and was not married to a stranger. She would get nothing, if she had adult brothers who lived in their father’s village.⁴¹ In this context, it is obvious that the customary law of Dār Bidayriyya was in contrast with the Sharia law, in the sense that if the case in question was reheard by a Sharia court, the plaintiff would get a half of her father’s legacy, since she was the only heir.⁴² This situation leads us to ask a question: Why did the government appoint a “Sharia scholar” for the *nāzir*’s court since this scholar himself was not in a position to apply the rules of the Sharia on such personal matters of Muslims? It seems that by the appointment of this “Sharia scholar” the government only intended to undermine the claim of the Sharia judge of al-Ubayyid who argued that the presidents

³⁹ Judicial register, Case, no. 209, 12.12.1952, Archives of the Main Court Dār Bidayriyya, al-Ubayyid, (text in Arabic, my translation).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² The Qur’ān, Chapter three, Verse 11, “God (thus) directs you As regards your children’s (inheritance): to the male, A portion equal to that of two females: If only Daughters, two or more, their share is two-thirds; If only one, her share is a half.” See Ali, n.d.: 181.

of Dār Bidayriyya native courts were unqualified to hear the Sharia cases. At the same time, it tried to maintain the control of the *nāzir* over all civil, criminal and Sharia cases that might occur in the district. For this reason, Ahmad al-Badawī Hamdān, the *nāzir*'s cousin, who knew little, if nothing, about the Sharia law, was appointed as a "Sharia scholar" for Dār Bidayriyya Main Court. Again this case shows that the colonial regime was not interested in imposing any form of the Sharia law in the district but wanted rather to maintain the rules of security and order, and to give the *nāzir* further control over the Nazirate.

7. Settlement of disputes outside the Court

As was mentioned earlier, the presidents of native courts of Dār Bidayriyya were prevented from hearing major cases such as homicide or serious wounding. Their powers were limited to the arrest of persons accused of committing such crimes and sending them to the nearest police station. If a president of a native court dared to hide such accused persons from justice or to hear the cases at his own native court he would be punished as an accomplice and dismissed from office. In spite of this warning, homicide (*diyya*) cases remained to be settled by elders of Dār Bidayriyya, particularly, when such cases were dismissed by government courts for lack of sufficient evidence. In this respect the dismissal would hardly satisfy the relatives of the victim but rather might encourage them to retaliate and kill any member of the culprit's tribe or family other than the culprit himself. To reduce the danger of vengeance and retaliation, the elite of the Nazirate kept their traditional institution of *diyya* in order to settle such cases in a more civilised manner. In order to understand the role of elders regarding the settlement of homicide cases outside the court chamber, here we shall demonstrate two cases settled in this manner from Dār Bidayriyya Nazirate.

The first case occurred sometime in the 1950s at al-Sharafa village, where a villager was found murdered. After the dead body was found, the village shaykh reported to the *ʿumda* and president of Abū Harāz Regional Court, who immediately arrived at the place of the incident with his retainers and arrested a suspected person from a village in the vicinity of al-Sharafa. The accused with two witnesses was sent to the resident judge of al-Ubayyid, where the accused denied his responsibility for the crime and the two witnesses failed to prove how he killed his victim. The case was then dismissed and the accused was released for lack of sufficient evidence. As a result the relatives of the deceased started mobilising members of their lineage for retaliation. Before taking further steps the *nāzir* ʿAbd al-Jabbār Husayn Zākī al-Dīn arrested the accused and took him into his custody, formed a council of three *ʿumdas* and elders recruited from the two villages to provide him with further information on the case. After a couple of days the *nāzir* and the council met at the deceased's village, where

they convinced the nearest blood-relatives of the accused to take the responsibility for the crime, and pay a full *diyya* to the victim's relatives.⁴³ At the time of this incident the fixed tariff of the full *diyya* was sixty Sudanese pounds,⁴⁴ which was paid in advance by the nearest blood-relatives of the murderer to the injured party. The payment of the *diyya* in advance is known in Dār Bidayriyya as blood-price (*sadd al-raqaba*) which the nearest blood-relatives of the murderer should pay in order to release their kin and reduce the danger of retaliation. When the council of the *diyya* later collected the share of the other members of the murderer's lineage, the payers of *sadd al-raqaba* would get back part of what they had paid in advance.⁴⁵ If the murderer and victim were Bidayriyya by residence the household heads of the murderer's lineage would be obliged to contribute to the payment of the victim's *diyya*. But if the murderer was a Bidayrī (I mean any inhabitant of Dār Bidayriyya) and the victim was an outsider, the twenty-one "lineages" (or *khashm bayts*) of Dār Bidayriyya cited below would be obliged to contribute to the payment of the victim's *diyya*. The Bidayriyya would pay about 53% of the full amount of the *diyya* and the rest (47%) would be paid by the non-Bidayriyya groups living in Dār Bidayriyya.⁴⁶

The second case took place in the late 1940s, when four men from Dār Hāmid tribe and a Bidayrī stole five camels from the Shanābla tribe and rode away. Near Abūb Shadīda village the owners of the stolen camels were about to reach them, but the latter ran away leaving the stolen camels. Only the Bidayrī continued exchanging fire with them until he was shot dead. The villagers immediately arrested the murderers and sent them to the district headquarters in al-Ubayyid. The district commissioner there acquitted the accused on the grounds that they had a legal right to recover their property by force. As a result of this decision the *nāzir* of Dār Bidayriyya and his counterpart of the Shanābla held a meeting with the two parties. After a long process of mediation they obliged the closest relatives of the murderers to pay a half of the full *diyya* to the victim's kin. Thus by this decision, as the *nāzir* ʿAbd al-Jabbār argues, the door of animosity was closed between the two tribes and the Shanābla restored their relations with the Bidayriyya.⁴⁷

⁴³ ʿAbd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1993.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Ibrāhīm al-Zayn ʿUbayd, *Payment of the diyya in Dār Bidayriyya Nazirate* (private papers).

⁴⁷ ʿAbd al-Jabbār Husayn Zākī al-Dīn, *Interview*, al-Ubayyid, 1993.

Table 4. Payment of the *diya* in Dār Bidayriyya

<i>Bidayriyya</i>	%	<i>Non-Bidayriyya</i>	%
1 – Awlād Halib	10	9 – Shuwayhāt	10
2 – al-Dahmashiyya	10	10 – Kināna	5
3 – Awlād Na ^c miyya	10	11 – Tumām	5
4 – Awlād ^c Ali	7.5	12 – Fallāta	4
5 – Awlād Shahāda	7.5	13 – Takārīr	4
6 – ^c Ayātqa	3.5	14 – Barqūb	3
7 – Awlād Hilāl	2.5	15 – Dājū	2.5
8 – Zinnāra	2	16 – Ghudiyāt	2.5
17 – Manāsra	2.5		
18 – Musabba ^c āt	2.5		
19 – Jallāba Hawwāra	2.5		
20 – Danāqla	1.5		
21 – Muwalladīn	2		
Total	53%	Total	47%

The settlement of *diya* cases in this manner undermined the traditional concept of a tribe as a political-ethnic entity, in the sense that it treated the non-Bidayriyya groups who lived in Dār Bidayriyya on the same footing with their hosts, the Bidayriyya. In other words, this shift modified the traditional concept of *diya* from a wrongdoing among the tribesmen or between the latter and external groups, to the concept of public offence against the inhabitants of Dār Bidayriyya as a whole. Therefore, by this shift the Awlād Zākī al-Dīn had gained two political objectives. First, they undermined the power of the micro-groups (lineages) that lived in the district, and secondly, they solidified their own power and dominance over the whole territory. If they had kept the narrowest ethnic concept of *diya* treating the non-Bidayriyya groups as strangers, they would have encouraged the latter to challenge their power and refuse recognising their authority over the whole territory. This shift in attitude seems to have been encouraged and supported by British colonisers on the grounds that it might maintain law and order rather than creating minor tribal entities that would disturb the public security in the district.

8. Conclusion

From what we have learned from the case of the Dār Bidayriyya Nazirate, one can generalise and say that the Anglo-Egyptian colonial regime succeeded in transforming the existing *ad hoc* councils of elders in the Sudan into more elaborated and organised local courts that drew their powers and functions from the state. The establishment of these courts developed the criminal aspects of customary law and limited the influence of compensation in criminal cases to the areas of homicide. It also introduced the concept of punishment which gradually freed the presidents of native courts from the control of the lineage system and presented them as real magistrates in the eyes of the villagers.

After the independence of the Sudan in 1956, the combination of judicial and administrative powers in the hands of the presidents of native courts was criticised by new policy-makers and senior judges in Khartoum, who called for the establishment of a professional judicial system in the rural areas under supervision and control of the judiciary. As a result of this attitude, in 1970 the system of native courts was abolished and substituted by benches of magistrates which were authorised to hear minor and civil cases according to state ordinances (the Sudan Penal Code and the Civil Justice Ordinance).

In the field these benches of magistrates failed to maintain justice and gain confidence among the local population. The most important aspects of their failure were summarised by Abdul-Jalil, who argued that under the new system of adjudication the number of cases appealed to the resident magistrates' courts increased dramatically to the extent that it became difficult for the resident judges to handle the increased volume of work. At the same time the rotation system adopted for the presidency of these courts slowed down the efficiency of the courts themselves, because it kept both presidents and members in changing positions. Again lack of supervision increased the degree of corruption and led some bench members to make political capital out of their office.⁴⁸

The outcome of this situation was that in 1976 the government abolished the benches of magistrates in favour of people's local courts that were authorised to hear civil and criminal cases according to customary law and state ordinances.⁴⁹ About 90% of the membership of these courts was drawn from among the ex-native administrators,

⁴⁸ Abdul-Jalil 1985: 147.

⁴⁹ See the People's Local Court Act 1976.

who were appointed as presidents, vice-presidents, and members.⁵⁰ But, under the new system the presidents of people's local courts were disarmed of their former administrative powers and placed under the control and supervision of the judiciary.

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THE ROLE THAT LAY MUSLIM JUDGES PLAY
IN STATE COURTS AND RELIGIOUS
TRIBUNALS IN SOUTH AFRICA:
A HISTORICAL, CONTEMPORARY AND
GENDER PERSPECTIVE

Najma Moosa

Abstract: Taking the example of a religious adjudicative body for Muslims in the Western Cape in South Africa, this article analyses the symbiotic working relationship between state courts and non-state dispute settlement bodies, in which the lines of interference are fluid and not always predictable. Seeing the need for adapting international legal anthropological investigative methods to the particular situation of South Africa, the author highlights the inadequacies of both the state and non-state bodies in solving religious disputes between factions seeking control over the Muslim communities and in avoiding the perpetuation of Islamic rules that discriminate against women.

1. Introduction

There are no formally recognized religious courts in South Africa. Informal religious tribunals do, however, exist alongside South African civil law. For this reason the religious disputes of Muslims are normally resolved in their own unofficial religious tribunals (Department of Foreign Affairs 1968: 19). One such tribunal, namely the Muslim Judicial Council,¹ played a clear role in dispute resolution involving Muslims

¹ Hereafter abbreviated to MJC. This is the Western Cape-based Muslim religious tribunal (established in 1945) available to Muslims seeking redress or advice in essentially Muslim personal or family law matters. Details of this body will be elaborated later in this paper. See also footnotes 5 and 35.

in the Western Cape² and it has over the years forged a 'working relationship' with the Cape Provincial Division of the Supreme (now High) Court. While Muslims are subject to the state legal system they are also morally bound to a system of religious law which is as yet not recognized by the state. Muslims, within a broader South African society are therefore exposed to a plurality of legal systems. Non-recognition has meant that for more than 300 years since they first arrived in South Africa, resolution of their religious disputes³ were left in their own hands. There are several conservative *Ulama*⁴ or male religious bodies of experts on Islamic law located in the various provinces in South Africa and who dominate these bodies (Naudé 1985: 28).

Although their decisions are of a binding nature upon the conscience of the Muslims, they lack the legal power to enforce them. This is due to the non-recognition of Muslim Personal Law.⁵ Their competence to apply Islamic law is also questionable because members of these bodies do not necessarily have accredited local legal training. As will be elaborated below this does not, however, detract from the significant role that they play in dispute resolution. These religious authorities are now seeking

² In terms of the final Constitution South Africa now consists of nine provinces of which the Western Cape is one (section 103). See footnote 7.

³ While the two concepts of dispute and conflict might be linked or even used interchangeably there is a distinction between "... disputes which are a feature of normal and frequently collaborative and creative relationships, endemic in all social relationships, and an integral part of competitive systems ... and ... conflicts which are deeply-rooted in human needs, and which frequently require major environmental and policy restructuring for their resolution" (Burton 1990: 1). The concept of dispute will form the basis of this paper.

⁴ "In practice the interpretation of the law, ethics, morality and religious values of Islam is largely the responsibility of the *ulama*. As such, they have the authority and power over the religious symbols" (Moosa, E. 1989: 73).

⁵ This is essentially a religiously-based private law which has its origins in the *Qur'an*. The *Qur'an* is a religious text considered by Muslims to be the literal word of God. It is a primary source of Islam and contains approximately 80 verses dealing with legal matters, most of which pertain to personal laws of family and inheritance. The term "Muslim Personal Law" has been coined by various Muslim countries and jurists because it pertains to, among other things, marriage, divorce, inheritance, polygyny, custody and guardianship which fall under the category of family law. Moreover, it is interesting to note that *all* laws affecting the status of Muslim women have historically been relegated to Muslim Personal Law (private sphere of family). Henceforth the abbreviation MPL will be used. Because of its divine origin, MPL has remained relatively unchanged.

formal state recognition of MPL to be implemented in newly created *Shari'a* or Islamic courts. The viability of this option will also be elaborated in this paper.

While their disputes were usually resolved in their own unofficial tribunals, Muslims, *including* members of the religious tribunals themselves, have on numerous occasions resorted to state courts when these tribunals failed to meet their needs and expectations. This, however, in no way implied that secular courts were better able to deal with religious issues. While in the new dispensation constitutional provision for the possible recognition of MPL has been made, it remains to be seen *how* such recognition will in fact materialize. Freedom of religion in its various manifestations does not necessarily require the same treatment for all groups. Both the interim (1993)⁶ and final (1996)⁷ South African Constitutions now makes provision for the possible recognition (section 14 (3) now section 15 (3)) and implementation of MPL and thus the establishment of such types of courts. It is now a constitutionally guaranteed right and choice to access (gender) justice. Both these Constitutions do not erect walls of separation between church and state. Section 22 of the interim Constitution (and section 34 of the final Constitution) provided that members of religious communities "... shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum." This means that recourse can (as of right) be had to 'an outside referee' should members of a religious community not be able to resolve their disputes among themselves (Du Plessis 1994: 64). While section 22 appears to give some legitimacy to existing religious tribunals, section 166 (e) of the final Constitution goes one step further by providing that "any other court established or recognized by an Act of Parliament" would be a court of the Republic. Muslim religious authorities, calling for the establishment of religious courts, wish to utilize the latter option. As indicated, they want MPL to be implemented in separate, specially created *Shari'a* or Islamic courts. In order therefore to assess the feasibility of such a recommendation, it is necessary to determine whether existing religious tribunals and secular South African courts which have been performing this function have been doing so adequately and whether recourse can be had to other effective methods of dispute resolution in conjunction with these courts and tribunals in order to determine whether practical legal effect can be given to section 34 of the final Constitution. This paper therefore also briefly examines the feasibility of linking alternative methods of dispute resolution (like religious tribunals, mediation and negotiation) to tie in with the role of secular courts in order to give effect to an imple-

⁶ Act 200 of 1993.

⁷ Act 108 of 1996.

mentation of a recognized MPL in South Africa as this would obviate the need for separate *Shari'a* courts. It is envisaged that the implementation of MPL will follow as a consequence of its being recognized. However, because Muslims are divided on the issue of subjecting MPL to the final Bill of Rights, the possibility remains that MPL will remain unrecognized or recognized but not sustainable (and therefore unenforceable). Thus it becomes important to gain more insight into how disputes are settled both in instances in which a state refuses recognition or recognizes a system of personal law.

There is not as much information about the relationship between the resolution of internal religious community disputes and state legal systems as there is about conflicts between religion and the state (Halperin-Kaddari n.d[1993?]: 1-2). Many theories try to explain how religious law should be treated by the state's legal system and *vice-versa*. They "... range from state suppression of religious law, through various forms of intervention, limitation, recognition, and application, to religious control over state law" (Galanter 1981: 28). These theories appear to be relevant in the South African situation too in the sense that there have been occasions where secular courts in South Africa restricted MPL practices, like polygyny, with reference to 'public policy'. There have also been instances where religious tribunals restricted the religious freedom of individual Muslims or condoned discriminatory practices as being in conformity with Islam.

In this paper a brief background of Islam in South Africa will firstly be sketched. Sanders (1991: 68) has identified religious law (MPL) as a new area for legal anthropological research in South Africa. Assuming that we are ignorant of how all disputes among Muslims are settled in South Africa, international experience will provide useful indicators, not only about what *might* be happening here but also about how future South African policies should be developed. For this reason legal anthropology (irrespective of the Western or Islamic nature of the discipline) and how it brings to our attention other ways of dispute resolution, will be briefly highlighted. The role of state courts in resolving disputes of a religious nature and the circumstances that prompt individuals to select one forum over another will then be assessed with a view to determining whether secular court procedures are adequate. The main focus will be on decisions of the Cape Provincial Division of the Supreme Court because some disputes it has adjudicated have directly or indirectly involved the Cape-based Muslim religious tribunal, which will also be discussed below. The viability and role of alternative methods of dispute resolution, like mediation⁸ and negotiation, in imple-

⁸ Mediation in the context of this paper presupposes that the disputes are between people who share a common religion or culture.

menting a recognized MPL, will also be briefly considered. The role of internal religious tribunals as mechanisms for the resolution of disputes will then be looked at. As indicated, the focus will be on the establishment and function of one such Muslim religious tribunal in the Western Cape, namely the MJC, in order to determine whether it seeks to mediate and/or adjudicate/arbitrate and whether or not parties, for example, seek arbitration over and above other dispute resolution methods like mediation and negotiation.

3. Muslims and Islam in South Africa today

Since their first arrival at the Cape more than 300 years ago, Muslims in South Africa have always practised their religion but could not give legal effect to their personal laws as social restrictions and political inequalities prevailed until recently. While the new democratic dispensation now allows for a change to the *status quo*, MPL to date remains unrecognized. Muslims constitute an estimated 1.1 % (approximately ½ million) of the total South African population compared to the approximately 66.5 % Christians (Central Statistical Services 1993: 9). South African Muslims in general belong to the *Sunni*⁹ school of law and are more or less equally divided between the *Hanafi* and *Shafi'i* schools (Naudé 1985: 25). The present government of national unity in both the interim and final Constitutions now not only guarantee freedom of religion and belief (section 14 (1)) (now section 15 (1)) but also makes provision within the Bill of Rights that legislation can be provided by the state for the recognition of any religious personal law (section 14 (3)(a)) (now section 15 (3)(a)(ii)) and for the recognition of Muslim marriages (section 14 (3)(b)) (now section 15 (3)(a)(i)). While there is no separation between “state” and “religion”, the *right* to have MPL recognized is, however, not constitutionalized in both these Constitutions. However, once recognized, such laws must conform to the spirit of equality foundational to our final Constitution which now, unlike the interim Constitution, subjects a recognized MPL to the Bill of Rights (section 15 (3)(a)-(b)).

Various Islamic bodies, *Ulama* and relevant organisations have now, in the light of the new political dispensation in South Africa, reached consensus on the need for the recognition of MPL and its implementation although they still remain divided on the issue of subjecting MPL to the final Bill of Rights. The Muslim community in South

⁹ In the eighth century the four major Islamic schools of law were established and named after their founders namely, *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali* (Esposito 1982: 2). These together comprise the *Sunni* (traditionalist) schools.

Africa is therefore not united under one national MPL body because of various problems encountered in this regard.

4. Legal anthropology and dispute resolution

Legal anthropology is the study of rules, processes and values at grassroots level (Sanders 1991: 66). The insights provided by legal anthropology to academic legal studies lie in its research methods and an emphasis on the existence of various alternative methods of dispute resolution, the need to take account of the situation and perceptions of litigants and the general social context of the law (Snyder 1981: 160). Legal anthropology and the study of methods of dispute resolution in law is a relatively new concern (Witty 1980: 1; Bennett 1991: 51). There was therefore a movement from a preoccupation with rules to a study of courts. The case-method approach has proved particularly useful in accommodating this shift from structure to process in the cross-cultural study of law (Nader and Todd 1978: 5; Moore 1978: 232-233).

In spite of a late start anthropological studies have made much progress in the study of methods of dispute resolution. These studies give us a good idea of how disputes are managed in specific societies (Nader and Todd 1978: 2). The guidelines contained in these studies indicate that irrespective of the nature of the discipline (Western or Islamic)¹⁰ a certain method of settling disputes, like mediation, will be chosen in particular situations because it "performs predictable personal and social functions, regardless of the cultural setting" (Witty 1980: 7). These methods can therefore be used in support of an implementation of a religiously-based MPL unique to South Africa, because as many influential writers also maintain, basic terms such as "judicial system", "law" and "legal institutions" "... are clearly circumscribed and readily comparable across cultural boundaries" (Comaroff and Roberts 1981: 4).

A valid criticism that can, however, be directed at anthropological studies is that reporting does not necessarily (accurately) reflect the true status of Muslim women because reporters are mostly male anthropologists who have little access to or contact with Muslim women during their research as a consequence of restrictions (like seclusion) placed on these women which do not allow them to make contact with males (Ahmad 1986: 58). Furthermore, anthropologists studying the legal status of women in the Middle East have been accused of placing too much emphasis on personal laws

¹⁰ For the contrary argument, namely that the nature of the discipline is relevant or that an "Islamic anthropology" might be better suited to make findings on Muslim societies, see for example Ahmad 1986: 7, 25.

at the expense of other fields of law, for example, criminal law (Mohsen 1990: 15). In South Africa Muslims can only seek redress to criminal law issues in secular courts and the final Constitution makes provision for only one aspect of Islamic law, namely MPL (family law), to be formally recognized. Anthropological studies do, however, highlight that in the Middle East “[t]raditional legal authorities continue to enjoy considerable recognition in the interpretation of law and mediation of local dispute[s]” (Johnson and Lintner 1985: 238). Furthermore, cultural systems and law influence each other to perpetuate inequalities even though classical Islamic law has not necessarily made custom a source for deciding judicial cases (Rosen 1989: 302-315). The negative consequences of such conservative interpretations on the status of Muslim women will be further detailed below when the role of the MJC in disputes of a matrimonial nature is discussed. These studies further highlight that the rights of women and their public roles are receiving more recognition both within and *outside* of the *Shari’a* courts where women are also becoming more active participants. Definite rules also define the conduct of the *qadi* (Islamic judge) with his jurisdiction basically being limited to personal and commercial law matters (Ghani 1983: 353; Antoun 1990: 36). In secular Turkey, on the other hand, because village women benefited more from bringing their disputes before the national courts rather than the traditional village mediators, they usually chose the former (Starr 1992: xl, 89-115).

The experience of developing nations has shown that modern secular judicial systems generally do not satisfy the real needs of the general population. This emphasizes the need, in both third world and modern societies, for inexpensive, simple and accessible methods of dispute resolution to exist together with formal judicial systems (Cappelletti 1979: vi). It is therefore not surprising that “[e]very society develops a range of mechanisms for resolving disputes, some of which are informal, rooted in such local institutions as religious association” (Merry 1982: 18). For these reasons the experience of existing Muslim religious tribunals in South Africa must not be overlooked when considering options for the implementation of MPL. In Muslim countries, where Muslims are obliged to abide by their personal laws, informal methods of dispute resolution also co-exist with formal judicial systems. In some Muslim countries the national legal system is superimposed on the religious system and in other Muslim countries there is a separation between religious or *Shari’a* courts (dealing with personal law matters) and secular courts. Disputants, nevertheless often find themselves in a position of having to exercise a choice between using the state courts of the national legal system (which either incorporates *Shari’a* courts or where they exist independently) and alternative dispute-resolving mechanisms (Ayoub 1965: 11; Nader and Todd 1978: 29). *Shari’a* courts have become main centres of dispute resolution alongside *other* mechanisms of conflict resolution, but Muslims often resort to using the alternative mechanisms as a first step to dispute resolution. The difference in

South Africa is that although MPL is as yet not formally recognized, Muslims have always practised their religion but as citizens have exercised a choice between using existing state and Muslim religious legal and judicial systems. However, their choice of courts was limited in the sense that secular courts did not necessarily entertain disputes of a religious doctrinal or purely MPL nature, especially when they considered these to be outside of their jurisdiction or in conflict with state policy. Muslims can nonetheless choose to use secular personal law over religious personal law and can also resort to secular courts to resolve disputes (even of a religious nature). In terms of provisions of the final Constitution¹¹ it further appears that Muslims as citizens can exercise this choice between secular and religious courts *even if* MPL was in fact to be recognized, religious courts were in fact to be established or existing religious tribunals were to be given legal status. In view of the possible recognition of MPL, international legal anthropological studies serve to provide valuable insight into finding those dispute resolution methods best suited to the unique needs of South African Muslims so that they can balance their public and private lives without having to compromise one or the other. However, not only is legal anthropology itself a relatively new science but religious law is also a new area of anthropological research in South Africa. For these reasons too much emphasis must not be placed on international anthropological studies. The focus should instead be on its further development in a South African context.

5. Alternative methods of dispute resolution

Alternative dispute resolution mechanisms to what the courts can provide will now be briefly examined with a view to recommending that they be given increased importance and priority as a (cost) effective first step or link in the chain of dispute resolution. This is done because of the inadequacy on the part of South African secular courts to deal with disputes of a religious nature and because litigation is a costly business resulting in courts not always being readily accessible to ordinary people. The possible symbiotic relationship of these alternative mechanisms with other informal methods of dispute resolution, like the existing MJC, could also reinforce the need to retain religious tribunals. Dispute settlement by mediation¹² (one such alternative

¹¹ See for example, section 15 (freedom of religion), section 9 (equality and equal protection of the law) and section 34 (access to justice) of the final Constitution. See also section 166 (e) (establishment of new courts) of the final Constitution.

¹² See footnote 8.

method) and its effectiveness as a conflict-solving tool will be looked at in order to determine its practical feasibility for the implementation of a recognized MPL in South Africa. Furthermore, Islamic judges act as both mediators and arbitrators and therefore these techniques need further elaboration. The emphasis will thus be on the features and advantages of mediation and its importance in the context of recommendations to be made for the implementation of MPL later in this paper.

As a subject of study mediation has been neglected (Gulliver 1977: 43-44). However, it appears to be the most promising of alternative dispute resolution mechanisms and is now beginning to be seriously considered by several courts (Cratsley 1978: 14). Mediation has been claimed to be "... all process and no structure" (Fuller 1971: 307). It is a social process based on specific or certain defined principles (Witty 1980: 10). A mediator is a third party who "... has no ability to give a judgement [but] acts in some ways as a facilitator in the process of trying to reach agreement ... between two other parties who are in [the] process of negotiating to seek settlement of some dispute between them" (Gulliver 1977: 15-16).¹³ Mediators attempt to reconcile disputants through compromise and parties normally choose mediation because they wish to maintain their relationship with each other. Sometimes, however, mediation results in the termination of a relationship, for example, when parties are assisted in accepting the inevitability of a divorce (Fuller 1971: 308; Merry 1982: 39; Starr and Yngvesson 1975: 562; Witty 1980: 10). Third party mediators merely mediate the dispute in informal alternatives to courts. They do not pass judgement. They act as "debate regulators". A mediator assists the parties to reach agreement by appealing to their own interests (Ayoub 1965: 13; Snyder 1981: 149; Galtung 1965: 360; Eckhoff 1967: 158). A mediator may come from the local community but in order to ensure impartiality he (or she) is normally required to be a stranger to the disputants (Merry 1982: 34; Comaroff and Roberts 1981: 111; Roberts 1979: 75, 164; Aubert 1967: 42). "Mediators are characterized by a number of traits that are consistent cross-culturally. Mediators are respected, indigenous to the community, generous, even-handed, and not young. They are also invariably men, at least in the public aspects of the process." (Witty 1980: 4) There are therefore many similarities between the attributes of *qadis* (Islamic judges) and mediators.

¹³ In contrast, dispute-processing personnel in "religion-oriented cultures" are usually priests or holy men; in "secular, rule-oriented cultures" they tend to be lawyers and in "secular, consequence-oriented cultures" they tend to be scientific experts such as psychiatrists. A combination of the latter two cultures is evident in modern, typically Western legal systems (Galtung 1965: 376).

It is also interesting, when viewed in terms of its implications for MPL, to note that disputes for mediation often stem from the area of civil (especially family) law and not criminal law (Cratsley 1978: 15; Fuller 1971: 330). The jurisdiction of *qadis* has been extended to include matters pertaining to MPL. Mediation, however, does not necessarily have to be limited to personal law matters like divorce, as for example expounded in Q.4: 35,¹⁴ but could include commercial, property and other transactions. There are numerous *Qur'anic* references to mediation in family disputes which can be considered. These include: Q.2: 224; Q.4: 35; Q.4: 59; Q.4: 114 and Q.49: 9-10. Muslims, including women, often do not understand or know much about Islamic law. They therefore group themselves, often quite instinctively, around local religious leaders and depend on them for assistance in resolving conflicts (Anderson 1957: 35).

Mediation and negotiation are viable alternatives to adjudication (Gulliver 1969: 21). These modes are all representative of institutionalized responses to interpersonal conflict and in all three instances a third party intervenes in the dispute (Felstiner 1974: 63,69; Pospisil 1975: 107; Comaroff and Roberts 1981: 108). A common point in all three of these modes of dispute settlement is that both parties/disputants to the dispute participate in the process (Galtung 1965: 358). The expertise required from a judge is obviously different to that required from a mediator. While a judge relies on rules and is bound by form, pattern and structure, a mediator assesses the social, cultural and religious context of the dispute – a context which he, unlike the judge, shares and is sometimes (though not necessarily) familiar with (Felstiner 1974: 73-74; Gulliver 1977: 21, 37; Cratsley 1978: 14; Bennett 1991: 54). A judge (or umpire) is not interested in reconciling the parties but wants to reach a decision or pass judgement as to which of them is right (Eckhoff 1967: 161; Roberts 1979: 20, 77).

Studies indicate that a rapid rise in the number of disputes to be heard at any one time inevitably necessitates an increase in the number of courts (and court costs) to accommodate the extra work load. However, this rise in the number of disputes can be reduced if the focus is placed on the prevention or early settlement of disputes (Sander 1976: 111; Nader and Singer 1976: 314-315). Using alternative dispute resolution mechanisms, like mediation, is one way of addressing such a problem (Bush 1979: 307). However, the "... advantages of informal alternatives to courts, in cost, access, processual variables, lay participation ... are not proven" (Abel 1985). Sanctions normally only relied on in traditional cultures, like respect for religious authority, are an important part of mediation (Galtung 1965: 373). Co-operation between courts and communities towards establishing alternative methods of dispute resolu-

¹⁴ This would read as *Qur'an* chapter 4 verse 35.

tion could well provide more appropriate answers. There is, for example, growing evidence to indicate "... that significant numbers of disputants will choose, if offered, a variety of new, court-related methods to resolve their grievances" (Cratsley 1978: 69). "The focus of ... drawing everyone into the operation of the national legal system ... should be reevaluated. The problems of legal pluralism might be turned into [social and legal] assets [rather than liabilities] if legal pluralism were analyzed at all its different levels. [This] might well require the integration of mediation [, negotiation] and adjudication into one model of dispute management" (Witty 1978: 314).

This is an excellent way of giving practical effect to section 34 of the final Constitution in terms of which access to justice (in secular or other independent and impartial forums) is guaranteed to all. The needs of all communities can thus be satisfied at very little expense because there is no need to create separate forums for different groups and at the same time optimum use will be made of the legal system. As indicated above, integration of mediation and adjudication is not something novel to Islamic law. The characteristics of *qadis* and mediators correspond to a large extent although in early Islam a *qadi* functioned mainly as a mediator rather than a judge because he did not necessarily decide which party was "right" and who was "wrong". It will also become apparent when dealing with the role of the MJC that members of the MJC already act as mediators.

While the viability and suitability of mediation and negotiation in the implementation of MPL are not doubted, there is a need for especially mediation to become a more specialized technique. International expertise and guidance must therefore be sought. In order for optimum benefit to be derived from mediation, certain stumbling blocks must be removed. Firstly, successful "[i]mplementation and maintenance of community alternatives to courts involve culturally specific adaptations to community characteristics. [Furthermore] [t]he support of lawyers and the legal profession ... is necessary for the prolonged success of local mediation ..." (Witty 1980: 134). This will be no easy task because "[i]mplementing community mediation programs requires long-range planning. The principles of mediation must be fully understood ... mediational needs must be locally self-defined" (Witty 1980: 132-133). In order therefore to succeed in this endeavour, lawyers need to be drawn into the process. They should be taught skills of negotiation and mediation at university level already (Nader and Singer 1976: 314-315). An activist bar could also establish preventive clinics to provide advice in areas like family law (Nader and Singer 1976: 317-318). These factors will be given further consideration in the concluding paragraph.

6. Adequacy of secular South African Courts in resolving Muslim religious disputes and the role of the MJC

In this section the role of the South African judiciary, particularly the Cape Supreme (now High) Court, is examined to ascertain its success in resolving disputes of a religious nature and also to determine what factors and circumstances influence the ways in which Cape Muslims settle their disputes. A broad spectrum of cases, not limited to any specific period, will be examined.

Individual members and groups of the Cape Muslim community have often had (and still have) recourse to secular state courts. They engage these secular courts to resolve religious disputes and to enforce either religious or secular law even against their own informal religious tribunals with whose decisions and opinions they are not satisfied. Sometimes even the religious tribunal *itself* (MJC) has recourse to state courts. This is so even though its members often regard themselves as a source of authority equal to that of the state judicial system. Emphasis will be placed on how religious groups have used state courts to resolve religious disputes and how they have brought these disputes within the jurisdiction of these courts. In cases where state courts did adjudicate in religious disputes it will be determined how their decisions influenced the attitudes of religious groups towards the secular state courts and ultimately the continued use of state courts.

As background to recent case law involving Cape Muslims and the role of the South African judiciary in these disputes, it needs to be determined what exactly made early Cape Muslim society obey rules and how their disputes were settled, assuming that there were no Muslim judges or religious tribunals operating at that stage (Roberts 1979: 12, 185). Because political and social history are important forces in shaping the jurisdiction of Islamic law, their influence on Muslims in the Cape must not be underestimated (Bradlow 1985: 41). With the British Occupation of the Cape in 1795 Roman-Dutch law was retained as the general "civilized" law of the colony. Any other system of law was irrelevant (Bennett 1991: 111). As far as Islamic Law was concerned it was observed in 1907 that "... the superior courts of South Africa have for a century [already] been ... in darkness as to the precepts and principles of Mohammedan law" (De Villiers Roos 1907: 177). The extent of this ignorance is apparent from decisions of the Supreme Court which concerned similar issues but on which the court gave varying decisions. For example, in one case a Muslim marriage was accepted, in another it was considered to be a concubinate relationship, in yet another it was considered a business partnership. In another case it was boldly recognized and the dispute resolved according to the principles of MPL (De Villiers Roos 1907: 186). The position is still very much the same today almost two centuries later. This type of

confusion, however, reinforces the need for a code of MPL to assist courts in such matters.

It needs to be determined when and why religious groups use secular (state) courts to resolve religious and intra-group disputes. It is believed that Muslims were finally induced to participate in the judicial mechanisms of the state "... from as early as 1843 on [where one] can discern a process of disintegration affecting the Islamic structure of the muslim community ... By the mid-1850's there can be no disputing this. By 1856 it would seem as if the internal squabbling within the muslim community, *particularly among the ulema*, had reached such proportions that they were unable to solve the issues internally, and external mediators were appealed to" (emphasis in italics added) (Bradlow 1985: 141). Bradlow (1985: 128) points out that by the beginning of the 1860s Muslims "... turned to the judicial apparatuses of the state to mediate conflicts they seemed unable to settle in the traditional manner, [i.e.] via the mediation of the *ulema*."

Davids (1980: 5) sums up the types of early religious disputes with which the Cape Supreme Court had to contend: "Over twenty cases have been located between 1866 and 1900 in which the position of the Imam¹⁵ was disputed ... [including] internal conflicts [such] as the Hanafee-Shafee Dispute, the Shafee Juma-ah Question and external conflicts such as the Khalifa [Ratiep]¹⁶ Question of 1856 and the Cemetery Riots of 1886."

As far as the *Hanafi/Shafi'i* disputes were concerned, the majority of Cape Muslims adhered to the *Shafi'i* school of Islamic law.¹⁷ However, a religious guide and mediator named Abubakr Effendi¹⁸ at the time tried to instil (his own) *Hanafi* views on questions relating to the Friday congregational prayer (*Jumu'ah*). This caused conflict

¹⁵ See Davids 1980: 50 and footnote 39.

¹⁶ This is a practice which has no links with Islam. It is characterized by piercing the body with sharp objects without causing any blood to flow. This practice is accompanied with chanting and music (Davids 1980: 33).

¹⁷ See footnote 35.

¹⁸ Effendi was sent to the Cape Muslim community in 1862 by the Turkish government at the request of a Cape parliamentarian (Garabedian 1915: 32; Davids 1980: 53; Davids 1990: 5). After he divorced his first wife, she sought recourse to the Cape Supreme Court for financial relief. This is an interesting case taking into consideration that Muslim marriages were not recognized by the state and that a Muslim woman took the initiative in suing her husband, regardless of the fact that he was considered an "official" Muslim judicial authority, in a secular court (Davids 1990: 6-8).

amongst Muslims and since their theologians could not resolve it, lengthy litigation and a series of Supreme Court decisions followed (Shell 1974: 53). However, despite the state court's intervention, these conflicts were only finally resolved with the establishment of the MJC in 1945 (Cilliers 1983: 105, 107; Davids 1980: 51-56).

There was also a series of mosque disputes decided by the Cape Supreme Court related to the nomination of successor *Imams* which in turn led to the establishment of more mosques in the Cape (Davids 1980: 159; De Villiers Roos 1907: 185). Besides these and other criminal cases there were other social issues, for example, the cemetery disputes (1858-1886),¹⁹ property issues and so forth where Muslims also sought redress in South African courts (Bradlow and Cairns 1978: 81, 91, 99; Davids 1980: 62-84; Bradlow 1983: 15; Rochlin 1939: 217 fn 1 – 218; Dangor 1985: 110; Von Sicard 1989: 205; De Villiers Roos 1907: 183-186). This is therefore evidence of both communal and individual cases and the fact that it was not necessarily issues pertaining to MPL that were disputed.

The underlying issues behind these cases were either doctrinal in nature, for example, disputes as to how Islam should be practised, or they related to leadership issues (Bradlow 1985: fn 3; Davids 1980: 50). These cases did not really involve MPL as such. In 1873 a Supreme Court judge noted that: "It is much to be regretted that the parties interested in this suit, instead of seeking redress in a Court of Law, did not endeavour to solve the difficulties and settle their differences amicably, and thus restore that harmony between them for which the Mahomedan community in Cape Town was at one time remarkable, but which has lately been so seriously disturbed." (Bradlow 1985: 143) The fact that religious groups resorted to secular courts in the above instances implies that they (including Muslim women) must have had some confidence that these courts were neutral institutions mediating between the interests of different groups in society. While the remarks by the Supreme Court judge do to some extent explain why Muslims had made use of the South African judiciary in the past even when they had access to their own legal advisers/mediators (most of whom were highly educated and imported), it still needs to be determined why they are still doing so at present.

Later case law involving Cape secular courts in essentially religious disputes will now be addressed. The focus here will be on its implications for freedom of religion under a new dispensation in South Africa. The first case involved the controversial

¹⁹ Essentially "complacent" Cape Muslims, in disputes involving the closure of their burial grounds because of a health hazard caused by a smallpox epidemic, vehemently objected to their cemeteries being closed (Davids 1984: 47-79; Bradlow 1985: 187). See footnote 32.

Ahmadiyya issue.²⁰ In 1962 already the MJC condemned the *Ahmadiyya* movement as un-Islamic and its followers as apostates and in 1965 issued a *fatwa* to this effect. In so doing, the MJC had taken it upon itself to resolve and give moral judgement on the matter. Because bodies like the MJC are not necessarily bound by certain ethical rules of conduct, it would have been futile for a member of the *Ahmadiyya* movement to request that the MJC reconsider its decision, to contest the impartiality of the decision or to rely on the rules of natural justice that the other side was not given a fair hearing. Thus there was no option but to resort to secular courts. In 1982²¹ an *Ahmadiyya* movement, in its quest for an “Islamic” identity, made an urgent application to the Supreme Court against the spread of defamatory material and other infringements of its rights. Its members sought recourse in the South African legal system which, they believed, could give them back their identity on the basis of religious freedom. The courts, however, did not prove to be of much assistance. The MJC was cited as first respondent in the case. Van den Heever J gave judgement on 1 October 1982 to the effect that she was unable to judge, on account of the papers before her, as to whether certain teachings of Mirza Ghulam Ahmed were blasphemous or not. She set aside the application for an interdict and ordered the *Ahmadiyya* movement to pay the costs of respondents (Lubbe 1989: 116–119, Annexure 12 (A-21–A-34); Naudé 1985: 28). Not deterred by Van den Heever’s judgement, in 1984 an *Ahmadi* individual sought an order declaring *Ahmadis* to be Muslims. The case between this individual (plaintiff) and the MJC and others (defendants) commenced before Berman AJ as he then was. Counsel for the defendants “... questioned the competence of a secular court to attempt to resolve issues of such a doctrinal nature as was involved in this case because international Islamic bodies have already declared *Ahmadis* to be non-Muslims” (Lubbe 1989: 120). The view of these bodies is not necessarily reflective of the teachings of Islam. However, giving judgement approximately eight months later, the court, unlike Van den Heever J, considered itself competent to deal with the issues at hand and

²⁰ *Ahmadiyyas* believe in all Islamic tenets except that they deny that the Prophet Muhammad (Peace Be Upon Him) was the last of the prophets. Instead they believe that a certain Mirza Ghulam Ahmed was the final prophet, hence their name. “There is a distinction between the two groups of Ahmad’s adherents. The Qadiyanis regard him as a prophet. The Ahmadis regard him as a reformer with certain of the attributes of a prophet. Though the emphasis on his status differs, both groups accept his claims ...” (Lubbe 1989: 118).

²¹ *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (CPD) 857 G.

ordered that the trial proceed (Lubbe 1989: 116-119, Annexure 13 (A-35-A-54); Rahman, Fuad 1995a: 5).²²

Williamson J gives a list of past cases where the Supreme Court had been called upon to give judgement in cases where Muslim usages and customs were involved without it being considered inappropriate for a secular court to decide such matters (Lubbe 1989: 124, Annexure 14 (A-63)).²³ The trial then proceeded in the Cape Supreme Court before Williamson J at which stage the defendants withdrew from the case because they "... felt that as Muslims they could not in conscience submit to the jurisdiction of this [secular] court ... to decide who is a Muslim" (Lubbe 1989: 121). Was it possible that the MJC could predict the outcome of this case on the basis of the willingness of the court to decide on the matter? It certainly had no qualms with the judgement by Van den Heever J in its favour. The fact that she is a female did not seem to matter either. It certainly condoned other decisions of the Supreme Court to be detailed below. Halperin-Kaddari (n.d[1993?]: 100-101) states that a court has four options when adjudicating on religious disputes: "... dismiss the suit altogether, exercise jurisdiction for the sole purpose of endorsement of the religious group's position, hear the case and employ a certain degree of review ... or adjudicate the case in a regular manner ignoring the previous religious proceedings". If a court decides that a case is not within its jurisdiction, as happened in the first *Ahmadiyya* case (1982) referred to above, then this could indirectly be construed to mean that it supports the religious group, usually the stronger party, in this case the MJC, who was being sued (Halperin-Kaddari n.d[1993?]: 101). This might also have been the reason for the MJC's willingness, despite its earlier protestations, to submit to the state courts' jurisdiction in the next *Ahmadiyya* case (1984). Nevertheless, the court in its judgement ordered, as against all three defendants, that the second plaintiff be declared a Muslim and entitled to all rights and privileges that pertain to such status. While a remark and assumption made by Williamson J before any evidence was led, namely that "in this case we see two contending groups of Muslims", was construed to amount to some prejudgement on his part, the MJC was also criticised for its late withdrawal from the trial (Lubbe 1989: 124, Annexure 14 (A-55-A-99)).²⁴ "This judgement caused considerable consternation in the Muslim community of the Cape ... the President of the MJC ... was reported in various newspapers to have said that he had no intention of abiding by the judgement of Williamson J and to have urged all Muslims to ignore

²² Supreme Court (CPD) Case number 10058/82: 24 July 1985.

²³ See also De Villiers Roos 1907: 176.

²⁴ Supreme Court (CPD) Case number 10058/82: 20 November 1985.

the ruling of the Supreme Court since 'no unbeliever can make another unbeliever a Muslim'.²⁵ In so doing the MJC merely displayed behaviour typical of the losing party in such cases because "... the loosing side ... either chooses to go on and attack the religious outcome in a secular-civil court ... or ... chooses to disregard and resist it by merely refusing to act accordingly" (Halperin-Kaddari n.d[1993?]: 23-24). Even more so, "... the inconsistent behaviour of the MJC by presently contesting yet another "*Ahmadi*" case before yet another non-Muslim judge, becomes rather difficult to explain and certainly strengthens the case of its critics" (Lubbe 1989: 125).

In 1987 a new case was heard in the Cape Supreme Court when *Shayk* Mogamat Jassiem instituted a lawsuit against the MJC for unlawfully dismissing him. He also sued Sheikh Nazeem, the president of the MJC, for defamation because he called Jassiem an *Ahmadi* sympathizer. Both the MJC and its President defended the case. Van den Heever J, before whom this case was served and who had previously considered the court incompetent to deal with doctrinal issues of this nature, then reserved judgement (Lubbe 1989: 125-126). In her judgement delivered on 23 February 1990 she dismissed Jassiem's claim against the MJC for unlawful dismissal but upheld his defamation action with the amount awarded to be paid jointly and severally by the MJC and its President.²⁶ As is evident from the findings of this case, freedom of religion was considered an individual and not a group right.²⁷ This accords with international trends. Van den Heever J pointed out that "... the MJC ha[d] already irrevocably prejudged the [*Ahmadiyya*] issue by accepting the ruling of 'the ulema of the world'" (at 102). If a Muslim judge has already made value judgements on certain doctrinal issues such as, for example, who is considered to be a Muslim, then he is not able to give an impartial decision. If this is the case then Muslims really do not have any alternative but to seek recourse in secular courts where they at least have the statutory assurance that judges will be impartial.²⁸ Both Nazim and the MJC appealed²⁹ against

²⁵ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 12. See also Haron 1991: 13-20.

²⁶ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 139.

²⁷ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 102.

²⁸ The same biases and impartialities will have to be dealt with if MPL is recognized and Islamic courts are given jurisdiction over these matters, because it is doubtful whether Muslim judges can be considered impartial in terms of section 34 of the final Constitution if they, for example, show a bias towards a particular version of Muslim law or jurisprudence.

²⁹ Case number 201/1992. Mohamed and Another v Jassiem 1996 (1) SA 673 (A).

this decision and in so doing the MJC once again relied on the state courts for a judgement. The MJC was successful in that the Appellate Division of the Supreme Court, delivering judgement on 26 September 1995, upheld its appeal but dismissed Nazim's appeal, in both instances with costs (at 718-719). The Appeal Court ruled that Muslims themselves have a right to decide whether Ahmadis are Muslims and all five Appeal Court Judges (Hoexter, Smalberger, Steyn, Marais and Schutz) unanimously commented that: "One cannot deny the right of those who are legitimately charged with the protection of the Muslim faith to seek to safeguard what they consider to be the fundamental and critical tenets of their faith, and to excommunicate someone whose convictions and beliefs are in opposition to, or not in conformity with, those principles. *It would therefore be inappropriate for us to measure* by conventional juridical standards *the fairness or justifiability* of declaring murtad a person who persists in adopting a neutral attitude towards Ahmadis ..." (emphasis added) (at 714). It was reported in a local Muslim newspaper that "new court arbitration now has favourable civil consequences for Muslims. (i) Ahmadis can now legally be debarred from mosques. (ii) Ahmadis are now legally debarred from burial in Muslim [cemeteries], (iii) Ahmadis can be denied Muslim Marriages" (Rahman 1995a: 5).

In this particular issue state courts initially did not accept jurisdiction. While it did later accept jurisdiction, it was not of much help because the court adopted a hands-off approach by declining to decide fundamental questions relating to freedom of religion. In the light of the human rights provisions of the interim Constitution this was a very unsatisfactory way of dealing with the *Ahmadiyya* matter. There is no clear separation between state and religion. Furthermore, provision is now made in the final Constitution for the recognition of religious law and access to justice for all.

Examples of civil law matters will be looked at next. In the Claremont Main Road Mosque case a 12-year legal battle ensued which was eventually resolved in the Appellate Division of the Supreme Court of South Africa. A dispute arose between a certain family and the Muslim community over the question of ownership of a mosque and the position of an *imam*. The matter was taken to the MJC for resolution in 1964. The MJC decided that the mosque is *waqf* property³⁰ to which nobody can claim ownership and that the appointment of an *imam* vests in the mosque committee (the latter being appointed by the community). The family rejected the decision of the MJC. This shows that the judgements of a religious tribunal are not necessarily always

³⁰ This is property which was permanently dedicated to a charitable cause whereafter the owner relinquishes all rights thereto or property held in perpetuity with the income devoted for religious and pious purposes (Amin 1990: 165).

complied with. However, the greater the likelihood that judgements will be upheld, the more suitable judgement will be as a form of dispute resolution (Eckhoff 1967: 162). This decision also indicates that where community pressure was not successful in ensuring compliance, secondary recourse to state courts was necessary. This then reduces the weight of the decisions of such tribunals. Abel (1982: 3) puts it thus: "... [I]nformal institutions under capitalism must rely on state coercion rather than private threats ... in order to induce the parties to consent to their jurisdiction, agree to their recommendations, and comply with them. The mere existence of coercive alternatives to informal institutions *inevitably colors the dispute process within the latter*" (emphasis added). This case therefore illustrates a link being created with state courts by referring the case to state courts in order to affirm a decision of the MJC. What happened in the interim was that an appointed board of trustees took this matter to the Supreme Court and eventually succeeded in ejecting their *imam*. Interestingly Watermeyer J based his finding that a mosque is *waqf* property on *Hanafi* evidence presented on behalf of a mainly *Shafi'i* MJC³¹ (Lubbe 1989: 163, 165, 167-168). The judgement that the MJC had given in this regard was considered to be of decisive importance to both the court and the Muslim community (Lubbe 1989: 161). It also indicates that it is possible for secular and religious tribunals to work in harmony with each other in South Africa. "In many ways ... adjudication in official courts may serve to promote the application of norms that lie outside the official law by which they are guided." (Galanter 1981: 25)

The next civil law matter³² involved the South African National Zakah Fund (SANZAF). In this particular case where *the state redirected a dispute involving Muslims back to the MJC*, the latter's judicial competence played a significant role. In January 1984 the Chairman of SANZAF applied for a court order against an ex-employee of SANZAF to refrain from publishing defamatory statements regarding the administration of the Fund. In February 1984 King J, in what was considered to be a historical event, accepted an agreement by both parties to refer the dispute to an

³¹ See footnote 35.

³² Other matters, for example, include the High Level Road cemetery issue where the MJC was embroiled in allegations, which it later confirmed, that it was party to the sale of this consecrated burial land. In August 1985 it applied to the Cape Supreme Court for an interdict against both the Cape Provincial Division and Raad to stop exhumation. This application was dismissed with costs in February 1986 (Lubbe 1989: 183-184, 187). In stark contrast to the earlier "cemetery" cases, vocal Muslims were rather complacent when the MJC sold the above sacred burial site. See footnote 19.

Islamic tribunal for arbitration. The MJC constituted this tribunal and the dispute was heard on its premises. In July 1984 judgement was passed by the President of the MJC on behalf of the tribunal. The President was apparently appointed judge with the rest of the tribunal acting in the capacity of advisers and/or assessors (Lubbe 1989: 171-174). Lubbe (1989: 181-182) writes that: "In assessing the judgement given in the SANZAF case, it can be said that, with the exception of one ruling, the work of the Tribunal has impressed with its scholarly approach and sound reasoning mainly based on authoritative *Shafi'i* works ... On the whole ... sound judgement was given in what must be a very important milestone. It is clear that the historical significance lies in the fact that an Islamic Tribunal was appointed and that the integrity and competence of its members generated enough confidence for its findings to be made an order of court." (Lubbe 1989: 182) What is especially significant is that the Muslims involved, after resorting to a secular court, agreed to resolve the matter in an Islamic tribunal. The question of impartiality comes to the fore again. If the MJC has certain and set views on matters of a doctrinal nature it is very difficult to imagine that they can give impartial rulings on these matters. It also clear that the very tribunal Muslims ought to resort to and rely on, itself sought and continues to seek the relief provided by the secular courts. This hampers the confidence that people ought to have in a judicial authority of such a nature. Compliance with the rules of natural justice, implications of a possible horizontal application of the Bill of Rights, protection offered by human rights instruments and other basic rules of administering justice should apply with equal validity to Islamic tribunals before there can be any successful implementation of MPL. It is, however, clear from this case study that existing Muslim tribunals can successfully work with secular courts and that they can reinforce each other's decisions.

In the 1960s Muslims were not really involved with particular political groups but this changed during the 1980s. Court cases became more politically than legally orientated.³³ The more recent cases discussed above are indicative of a changing perspective on Muslim identity. It must also be noted that by this stage in their history, Muslims in South Africa have succeeded in creating for themselves "... several private religious, cultural, legal, economic and educational institutions and organisations of varying degrees to provide solutions for their problems and difficulties" (Nadví 1989: 74). The MJC was one such body which was formed to resolve legal issues. It is clear from this section that secular courts have played an instrumental role in resolving

³³ For example, cases relating to a Muslim organization called the *Qibla* Movement, the *Ahmadiyya* cases and the *Zakaat* (Charity) Fund case.

disputes of a religious nature in the Western Cape, albeit with mixed success. With a new dispensation in place courts are also in the process of undergoing a transformation to rectify past imbalances and inadequacies.³⁴

7. The MJC as a mechanism of dispute resolution

This section will give a brief background to the MJC and events leading to its establishment. It will focus on the role of the MJC as a conflict-resolving mechanism with a view to assessing how well existing religious tribunals operate in South Africa.³⁵

By the end of the eighteenth century there was a noticeable shift from the "... mystical experience that had characterised the practice of Islam up to that time [to] ... the establishment of a period of structured, juridical practice dominated by a formal clergy, a form that has continued to dominate the practice of Islam up to the present" (Bradlow 1991: 9).

Tuan Guru who arrived at the Cape in 1780 is unofficially considered to have been the first *qadi*³⁶ at the Cape (Lubbe 1989: 45, 62; Davids 1980: 98; Lubbe 1986: 29; Bradlow 1991: 9; Bradlow 1988: 153). With his assistance "... chains of religious authority [were] created within the mosques ... schools were established, courts and legal proceedings initiated and a semi-formal network of charitable and health work conducted" (Bradlow 1991: 9). At the pinnacle of this religious hierarchy which Tuan

³⁴ Imbalances are now beginning to be redressed to accommodate the political, cultural and religious mosaic of traditions in South Africa. This is evident from the recent appointments of, for example, Muslim judges (incidentally all males) to the Supreme Court and Constitutional Court (Van Zyl 1995: 134). This does not imply that these judges possess any legal qualifications in Islamic law. South Africa's new chief justice and Minister of Justice are also Muslim males. The first female Muslim judge has now been appointed to the Land Claims Court and there are at least four Muslim women magistrates apparently all located in the province of Kwazulu Natal. However, while new appointments are welcomed and long overdue, it is not enough to prepare or educate court personnel for the challenges facing them. There should also be more significant changes in the judicial personnel and gender imbalances in the composition of the bench should be rectified.

³⁵ The MJC essentially subscribes to the *Shafi'i* school of thought. The legal opinions or *fatwas* issued by the MJC regarding political matters, matters of belief and worship and civil matters indicate that its opinions were not restricted to matters pertaining to MPL only (Lubbe 1989: Summary, 1).

³⁶ A *qadi* usually refers to a religious judge. It is, however, used in a different sense here as will be explained below.

Guru helped to create was the highly coveted and prestigious position of *qadi* or “chief priest” (*Imam*).³⁷ He (*Imam*) was the spiritual head of the community and was responsible for appointing other members of the hierarchy (Bradlow 1988: 150-151). Bradlow (1988: 157) states that “... within the [M]uslim community alternative judicial structures existed, structures that could, and indeed, did enforce a general pattern of practice.”³⁸

Traditionally one of the functions of an *Imam*³⁹ was to settle disputes within a community. Prior to the introduction of the MJC a local *Imam* normally provided leadership and guidance to his own congregations and an *alim*⁴⁰ made (his own) decisions on a case to case basis (Lubbe 1989: 19, 62-63). Sometimes, however, this informal set-up created confusion due to a lack of order and consistency. The traditional practice of *bechara* (debate) was then resorted to but it also proved ineffective as a problem-solving forum (Lubbe 1989: 63; Davids 1985: 16). Realizing the need to settle internal disputes within an Islamic context, and taking into consideration that the appointment of a single *qadi* to office would not work in the Cape Muslim community with its many congregations and leaders, it was decided that the formation of a judicial body, representative of all the religious leaders (*Imams*) in the Cape, would be the better alternative. This decision gave rise to the formation of the MJC in 1945 which, as a body, assumed the functions of a “collective” *qadi* (Lubbe 1989: 62-64; *Ad-Da'wah* 1993: 1).⁴¹ However, the decisions of the MJC (whose members are essentially conservative) are merely binding on the conscience of Muslims and therefore not necessarily effective or final. Parties are therefore free to refuse the decisions offered as this tribunal (and others of a similar nature located elsewhere) generally lacks the power to enforce the execution of its decisions. The reason for this is that the State does not confer any legal authority on decisions given by non-state institutions. As indicated in the previous section its decisions have also been contested in South

³⁷ The positions of *qadi* and *Imam* were highly sought after (even though no remuneration was given to any member of the *Ulama* which included the *qadi*), so much so that it led to much rivalry and tension within the community (Bradlow 1988: 152, 170).

³⁸ For a detailed explanation of the institution of this hierarchy which was occupied by *Ulama* and the extent to which it was considered to challenge or pose a threat to the existing parallel colonial institutions see Bradlow 1988: 153-172.

³⁹ Literally leader, normally of congregational prayers. See Lubbe 1989: 18-19.

⁴⁰ Singular for *ulama* and literally meaning “scholar” (Lubbe 1989: 83-84).

⁴¹ For more detail as to the actual formation of the MJC see Lubbe 1989: 63-65 and Davids 1985: 16-18.

African courts. The MJC should therefore essentially be viewed "... as a council of *imāms* to whom a judicial function has been assigned rather than regarding it as a specialised judiciary" (Lubbe 1989: 82).

The MJC has been described by the Supreme Court as a "voluntary association of certain Sheiks" (Lubbe 1989: Annexure 14 (A-58)). Lubbe (1989: 1) also refers to the MJC as a "body corporate". However, although one of the main clauses of the ten-point programme adopted in 1945 indicated an intention to "register the so-formed Judicial Council in order to ensure recognition by the Government", no subsequent registration took place (Lubbe 1989: 64). The state, as such, therefore plays no role in regulating the operation of this and similar bodies elsewhere in South Africa.⁴² Several references are also made to the constitution of the MJC which has been amended from time to time (Lubbe 1989: 76, 78).

Religious leaders were given membership status "... regardless of the standard which they had achieved in theological training" (Lubbe 1989: 65). In fact, and unlike their judicial counterparts in the formerly named provinces of Natal and Transvaal who basically trained at conservative schools/theological institutions in India and Pakistan, the composition of the MJC is more stratified and even includes religious leaders with no legal or theological credentials whatsoever (Lubbe 1989: 66; Esack 1988: 489). Strangely enough the fact that some of these members/judges are not professionals does not appear to be of any significance. This fact is highlighted because of its implications for the possible creation of a *Shari'a* court in South Africa as discussed below, where Muslim judges and lawyers trained in secular law and regardless of their ability might, for example, not be considered competent enough by members of this Council to serve in such a court structure. However, these "secularly-trained" Muslims were sought as counsel by the MJC to defend it in, for example, the *Ahmadiyya* issue discussed above. Religious leadership problems were also experienced between the MJC and the Muslim Assembly, which was established in 1967 to foster the spirit of Islam in the lives of Muslims (and which included members having some form of *secular* education). These leadership problems have to date not been resolved completely and are a typical example of the type of reaction to be expected from the MJC if a *Shari'a* court structure were to be established with some members having only a secular education.

The MJC itself is composed of two main bodies, namely a General Council and a Supreme Council. All the religious leaders of the MJC belong to the General Council

⁴² In contrast, church tribunals in South Africa are in fact registered and bound by the provisions of their constitutions (Moosa, N. 1996: 330-332).

which in turn is sub-divided into various committees. These committees mainly deal with matters which are more of an administrative/religious than purely legal/religious nature, for example, the issuing of *halal* certificates and the inspection of abattoirs. Included in the General Council is a committee dealing with matrimonial matters. As a result of an unprecedented increase in social problems in the 1980s, the MJC has created a full-time office and committee dealing especially with matrimonial matters (*Ad-Da'wah* 1993: 2). The MJC, however, normally resorts to a very basic form of mediation in matters of divorce, as for example expounded in Q.4: 35, and therefore it needs to become more specialized. Divorce laws, for example, are given conservative interpretations allowing the husband the prerogative to initiate a divorce at his sole discretion. These types of laws need to be reviewed, regulated and more effectively administered and controlled so that justice can prevail for Muslim women who have to bear the consequences of such laws and decisions. Often problems faced by women in matters of this nature are minimized and services offered are not responsive to the needs of women. The whole purpose of Islam making provision for a "waiting period" in matters of divorce was to allow for mediation and reconciliation between the spouses. Unlike the General Council, membership of the Supreme Council is, however, restricted to the theologically most competent *Ulama* as this Council is responsible for giving *fatwas* or legal opinions (Lubbe 1989: 66-68). It is then this part of the MJC that is strictly speaking the judicial body. "It can veto decisions of the General Council. It acts as a fatwa body, a court, an appeal court. Its decisions are said to be final and binding."⁴³ However, while there is no real system of appeals in Islamic courts, appeal to higher courts acts as a protective mechanism for courts as the matter is moved upwards (Galtung 1965: 377). The fact that the MJC considers itself to be a final court of appeal is clearly a problem.

The role of the MJC as a dispute-resolution mechanism is clear. At its inception, the main aim of the MJC was to form a structure "to which all religious matters could be referred to for a solution ...' ... [T]he MJC is thus expected ... to apply the *Shari'a* as a problem[-]solving tool" (Lubbe 1989: 68). In terms of Islamic principles, solutions would be provided irrespective of the class, sex and age of the litigants. The role of written Islamic law in these matters is not disputed. Even secular courts in, for example, the Claremont Main Road Mosque case discussed above, authoritatively refer to Islamic law as a source of law. Problems are, however, envisaged when judges and litigants subscribe to different norms and values, especially as far as an egalitarian and contextual interpretation of MPL is concerned. As already indicated and as Lubbe

⁴³ Supreme Court (CPD) Case number 1438/86: 23 February 1990: 68.

(1989: 68-69) also points out, *fatwas* are normally given by *muftis* (jurisconsults) to assist the *qadi* in his decision but here the “collective *qadi*” as the MJC refers to itself, gives the *fatwa*.⁴⁴ Since 1982 the Supreme Council has established a more structured decision-making process and method of keeping of records to increase their validity as legal precedents (Lubbe 1989: 69-70). This change in structure is probably more for administrative purposes because Islamic courts are not bound to a system of binding precedent. There is some merit and advantage in not being bound to such a system of precedent because it means that the decisions of institutionalized resolution mechanisms are not predictable (Galtung 1965: 370). This is a very important factor which must be taken into consideration when considering options for the implementation of a recognized MPL because decisions of *qadis* from different schools of Islamic law may vary significantly. As far as the decision-making process is concerned, a final ruling (*fatwa*) to a request for guidance on a particular issue normally consists of three parts: “introduction of the problem or question, exposition of legal evidence and the verdict of the MJC” (Lubbe 1989: 70). As already indicated, the MJC essentially follows the *Shafi’i* school of thought but there is a growing tendency to refer to works of a more comparative nature which do not support any particular school of (juristic) thought but which make reference to the primary sources of Islamic law. Some of these comparative works, for example, analyse the Prophetic traditions (primary source) upon which a school of law bases its opinions instead of analysing the (man-made) opinions of scholars belonging to different schools of thought⁴⁵ (Lubbe 1989: 72-73). This, although in a roundabout way, serves to address partially the problem with *ijtihad* (independent reasoning) which judges have faced since the tenth century when the doors of independent reasoning as a source of Islamic law were closed (Moosa, N. 1996: 18).

As indicated, although there have been many attempts to establish a national council of *Ulama*, no real success has thus far been achieved (Lubbe 1989: 80). Muslims have displayed unity on issues like the recognition of MPL and the *Ahmadiyya* issue (Lubbe 1989: 80-81). However, controversy surrounding the actual recognition of MPL at the moment is causing more disunity than unity. These developments do not, however, detract from the viability and validity of existing religious tribunals to continue, with some modifications, their dispute-resolving role.

In South Africa the SANZAF case referred to above, where a religious tribunal was used as an alternative to a civil court, is considered to be an exception. In the US for

⁴⁴ See also Le Roux 1981: 30 where the distinction between a *mufti* and a *qadi* is highlighted.

⁴⁵ See footnote 9.

example, civil courts are preferred over religious courts in spite of the fact that these religious institutions are adjudicative and that their decisions can be enforced either through secondary recourse to government courts or community pressure. It appears that mediation might be a better alternative method of dispute resolution (Felstiner 1974: 87-88). The existence of religious courts therefore does not necessarily mean that they will be utilized. Disputes heard in informal religious tribunals in South Africa include those of a personal law, civil law and propriety nature. The final Constitution in any event only makes provision for the recognition of MPL and not Islamic law as a whole. The decisions of these informal tribunals have sometimes also been enforced through civil courts (as in the Claremont Main Road Mosque case) or community pressure as was the case with the legal opinions given by the MJC on the *Ahmadiyya* sect. Ghani (1983: 353-357, 366), in a review of the practical implications of disputes in a *Shari'a* (Islamic) court, indicates that the state ensured that court decisions were enforced and the courts in turn consolidated and entrenched the power and authority of the state. As will be further addressed when discussing the *Shari'a* court, this shows that the relationship between law and politics is recognized in Islamic law just as in other legal systems. Because the legal remedies provided by the MJC are not enforceable in terms of South African law, they are ineffective and have very little value apart from being binding on the conscience of Muslims. However, even though opinions are expressed by certain progressives within the community of the inappropriate process and system operating presently within the MJC and despite the fact that it is being served by personnel recruited from the ranks of essentially conservative Muslim religious authorities, the MJC as a religious tribunal still enjoys significant popular support and its decisions have a strong moral binding force on the conscience of Muslims. If the focus is placed on the relationship between law and politics, it is contended that a co-operation between the national legal system and these tribunals will draw religious communities into its operation and at the same time will ensure that decisions of these tribunals be given the force of law. Whether or not the recent appointment of Muslim judges⁴⁶ to the Supreme Court (and other Courts) will make it easier for a religious minority to gain access to justice as far as MPL in South Africa is concerned, remains to be seen. It will be interesting to see if Muslim judges will be able to effectively subordinate religious commitments to constitutional commitments should such type of courts be given official recognition in South Africa. The Bill of Rights can only be effective if judges are willing to interpret the Constitution with imagination, foresight, knowledge and due regard to the gender problems and sensi-

⁴⁶ See footnote 34.

tivities, the different religions and their intricacies, the social conditions, background and customs that are unique to the South African society at large (Sellami-Meslem 1993: 73).

There is no doubt that the MJC currently functions as an effective alternative mechanism of dispute resolution with clear support from the community. Lubbe (1989: 236) concludes his study on the MJC as follows: "The jurists of the MJC are competent scholars and are able to make important contributions to Islamic jurisprudence in South Africa. *Their [future] success will [,]however[,] be determined by the following factors: ... (ii) Preparedness to face current and new problems undauntingly and to provide, in terms of Islamic law, guidance to the Muslim community. Matters which come to mind ... [include] ... the position of women in society ... (iii) The ability of the MJC to conduct its over-all organisational activities on such a level that its judicial function is not brought into disrepute due to non-judicial incompetence*" (emphasis added). By implication this will apply to the ultimate success of other Muslim religious tribunals in South Africa, especially in view of a recognized MPL being made subject to the final Bill of Rights.

8. *Shari'a* Courts: A viable option?

Since the implementation of MPL is necessary in order for Muslims to be able to manifest their religion, a further question which is briefly addressed in this paper is whether there should be separate judicial institutions catering for the application of MPL once it is recognized. Because legal pluralism is a reality in South Africa, the answer is a mixed one.

Firstly, it is advocated that use be made of *existing* religious tribunals as an alternative dispute-resolution mechanism functioning in symbiosis with other alternative methods like mediation and negotiation. In this way Muslims would continue to have access to experienced Muslim religious tribunals whose members also have some mediational skills. Islamic law supports this view. This would obviate the need to "recreate", at great cost, an elaborate judicial office for Muslims who constitute 1.1 % of the total population. Historically the recognition of MPL, exempt from constitutional provisions and human rights instruments, has necessitated the creation of separate *Shari'a* (religious) courts. The fact that some countries have separate *Shari'a* courts for the enforcement of MPL, but others do not, is further proof that there is no Islamic justification for its existence.⁴⁷ There are various other sound reasons in support of

⁴⁷ See Moosa, N. 1996: 82-85, 179 *et seq.*, 204 *et seq.*, 441.

the recommendation that recognition of MPL in South Africa does not warrant enforcement in separate *Shari'a* courts.⁴⁸

Secondly, and as indicated in this paper, state courts have a proven record of dealing (albeit with mixed success) with disputes of a religious nature. It is advocated that the integrated and working relationship between religious tribunals and secular courts should, subject to both systems of adjudication undergoing some transformation and modification to alleviate gender imbalances and biases, continue to be nurtured. This will allow for the enforcement of the decisions of existing religious tribunals without compromising the legitimacy of the secular courts or violating the constitutionally guaranteed right and choice to access (gender) justice (section 34).

9. Conclusion

Non-recognition of MPL has not only meant that Muslims have no recourse to South African law, but a certain legitimacy has also been given to informal Muslim religious tribunals, administered by conservative religious authorities, to implement Islamic law and an unreformed MPL in ways which are insensitive to the needs and rights of Muslims, especially women. While the MJC, for example, lacks credibility as representative of a judicial structure, it is often the only measure the majority of Muslims know and can resort to in order to redress their personal law grievances. While conceding that by virtue of their experience alone religious tribunals have a vital role to play in the resolution of disputes, these tribunals need to be modified and transformed so that such a role can be in line with the true Islamic spirit of justice and equality. In order to ensure observance of their decisions these judicial tribunals need to be equipped with judges who have a liberal understanding of Islam and Islamic law and not only those with a conservative understanding. In this way Muslims (including women) who endorse and wish to be judged in accordance with a liberal understanding of Islam, but who have suppressed their grievances in the past because of the conservative composition of these tribunals, will be encouraged to ventilate their grievances. Protection accorded to women's rights in international human rights instruments should be extended to apply to and include these religious tribunals (Moosa, N. 1996: 102 *et seq.*). For example, Article 15 of CEDAW⁴⁹ (which South Africa has signed and ratified) also requires state parties to ensure that religious courts with jurisdiction over civil

⁴⁸ See Moosa, N. 1996: 420-432.

⁴⁹ UN Convention on the Elimination of All Forms of Discrimination Against Women.

matters and secular courts with jurisdiction over religious matters comply with the provisions of CEDAW.

It is clear from this paper that Muslims do not consciously differentiate their religious tribunals from state courts nor do they avoid state courts. State courts in turn have had success, albeit mixed, in resolving disputes of a religious nature. Several legal systems can co-exist in the national legal system especially if they reinforce each other's legitimacy but contradictions are inevitable (Pospisil 1974: 107). An individual's access to effective remedies or secular courts to enforce human rights should not be compromised as a consequence of religious tribunals being formally recognized (Moosa, N. 1996: 102 *et seq.*). Whether it is possible for state courts, notwithstanding section 34 of the final Constitution, to impute a legal system to parties on the basis of their religiosity or lifestyle also remains to be seen (Bennett 1991: 127). While major changes have been effected to Islamic procedural and constitutional law, laws of personal status or substantive law have remained relatively unchanged. The jurisdiction of religious tribunals is usually limited to personal law matters and fixed principles of Islamic law are applied to settle these disputes (Strijbosch 1985: 333-334, 339-341). Once MPL is recognized and subject to the Bill of Rights and tribunals like the MJC given formal recognition, then it can be expected of the South African judiciary to adopt an interventionist approach in an attempt to redress problems of MPL. However, unlike customary law, religious law, because of its divine origin, ought not to be excluded in certain cases in favour of the common law to effect social change on a gradual "case-by-case" basis (Bennett 1991: 118). Because it will be extremely difficult for secular courts to adapt an unreformed MPL to social change, it is vital that religious authorities should take the lead. Furthermore, giving formal recognition to religious tribunals does not necessarily imply or ensure observance of their decisions, especially in the light of section 34 of the final Constitution which can be interpreted to give Muslims a choice/option between secular and religious courts (Von Benda-Beckmann 1981: 167-168, 172). However, as indicated above, reinforcement of each other's authority and decisions could alleviate some of these problems.

In South Africa adequate field research on ways in which religious communities settle their disputes is lacking because this is a fairly recent area of anthropological research. Legal anthropology as a discipline also needs to be given more attention at local universities. Dispute settlement for South African Muslims, while it should take cognizance of international experience and other social sciences, must be viewed in the socio-cultural context unique to South Africa where society is both culturally plural and distinct (Gulliver 1969: 23; Hosten 1991: x; Sanders 1991: 72; Bekker 1991: 79; Bennett 1991a: 34, 32). Notwithstanding the fact that religion is one of the ways in which a group can foster its cultural identity, South African Muslims do not constitute one homogeneous community, either in terms of origin and culture (Bennett

1991a: 22; Lubbe 1989: 1). Apartheid policies were partly to blame for fostering these cultural and customary differences. A call for a “deculturalization” of Islam in South Africa would be difficult precisely because stigmas of culture and custom are attached to religion. Because there is also no such thing as a single Muslim culture, local social and cultural realities should be the main factors influencing South African Muslim society in its choices of dispute-resolution methods.

Judges, religious and otherwise, cannot function without the initiative of people who seek the assistance of courts for various reasons (Aubert 1967: 42-45). “The question ... arises why and under what circumstances individuals would choose to undergo [a] process of double translation into and out of the formal legal system. One might also ask what impact this process has on customary [and religious] laws and on local society generally.” (Engel 1980: 431) Legal anthropological research can prove invaluable in answering some of these questions. Anthropological studies in fact also indicate a preference on the part of the “poor and powerless” to utilize their own informal courts because of linguistic, cultural and other reasons (Bennett 1991: 107). Factors like social ostracism from the religious community can also influence the choice of litigants to prefer religious tribunals over state courts to resolve their disputes. Other factors which can be considered to favour the continued existence of religious tribunals like the MJC include the following: the small size of the South African Muslim population (1.1%) and the fact that apartheid policies kept them in close proximity to each other; inability of disputants to absorb the costs of expensive litigation or to afford legal counsel; the “judge’s” familiarity with the character and reputation of disputants and the fact that the disputants and adjudicating party belong to the same social and religious group (Pospisil 1974: 125; 1975: 59). In secular South Africa it would be futile to create new Islamic courts for Muslims when existing tribunals and religious authorities who administer them can continue to play this role. In any event, there appears to be no Islamic justification for their creation, and this has worked well for non-Muslims in Muslim countries who, although free to decide their disputes in terms of their own personal laws, resort to Islamic courts for adjudication of their disputes (Moosa, N. 1996: 75 *et seq.*).

Given the divisions among Muslims and their leadership and the possibility that MPL might not be formally recognized, it is vital that there should be some form of formal recourse to the law for Muslims to settle disputes of a religious nature so that some sort of order can be maintained in the Muslim community (Roberts 1979: 13-14). The uncertainty surrounding the recognition and implementation of MPL could well result in secular courts being turned into major centres of dispute resolution for Muslims especially in terms of section 34 of the final Constitution, which provides that these courts must serve all South Africans equally and fairly.

With due regard to this uncertainty, negotiation and especially mediation should, in conjunction with adjudication, be given serious consideration by the Muslim community as a viable first step to dispute resolution because of the benefits that such an option can offer. Alternative dispute resolution methods like mediation and negotiation should be the norm and not the exception in personal law and other matters. As indicated below, existing Muslim religious tribunals already possess some skills in mediating disputes. With some adaptation to religious and cultural needs, mediation has the potential of becoming a specialized, long-term and cost effective method of implementing MPL in South Africa. The public image that the law belongs in “ivory towers” and is inaccessible can be obviated if lawyers become “people friendly” and skilled in the art of negotiation and mediation. Practical training in this area should become part of the transformed legal syllabi of universities. A transformed and activist legal profession, in collaboration with other professions, should also be drawn into this process so that optimum use can be made of existing human resources in a cost effective manner. The provision of mediation through state funding should also be given serious consideration. Community volunteers, who receive special training, should also play a role (Cratsley 1978: 17-18). In choosing mediators problems relating to authority and representation will be factors that need to be considered (Cratsley 1978: 33). A crucial factor making mediation worth further investigation and therefore influencing its formal sanction by both Muslim religious authorities and the state in South Africa is the fact that Islamic law appears to favour mediation over adjudication although the Muslim judge (*qadi*) acted as both arbiter and mediator (Moosa, N. 1996: 75 *et seq.*). It is expected that this function will still have some validity today. Mediation, functioning as part of existing Muslim religious tribunals like the MJC, is already being used to resolve disputes, although there is no clear line of demarcation between adjudication and mediation. It is contended that the MJC should continue its combined mediational and arbitrational functions as this will save the state the cost of having to create an elaborate judicial office. While the integration of the two forms of dispute resolution seems to be working well, international experience can provide guidance to a more specialized understanding of mediation and its planning in a South African context. However, even if MPL is not recognized, mediation can continue to play a pivotal role. Arbitration should therefore be viewed as a last resort.

Formal recognition of MPL would require its implementation. While there is very little data analyzing and observing cases in informal Muslim tribunals in South Africa, the Cape cases discussed above illustrate a good working relationship between secular courts and religious tribunals. It is imperative that such a relationship be nurtured. The symbiotic relationship between religious tribunals and alternative methods of dispute resolution (mediation and negotiation) alongside secular courts, or in conjunction with it where it might not be appropriate or adequate, should not be

disregarded in considering the implementation of MPL. It is contended that existing Muslim religious tribunals in South Africa, if improved and supplemented with alternative methods of dispute resolution, can be adapted to give effect to the implementation of an officially recognized MPL (in terms of section 34 of the final Constitution) without it being necessary to create a new set of *Shari'a* or religious courts (in terms of section 166 (e) of the final Constitution).⁵⁰ The arguments that co-operation with secular courts is not religiously permissible or that secular courts cannot adjudicate on religious disputes of a community are refuted by the fact that the MJC itself and Muslim individuals have utilized state courts when “expedient” for them. State courts have been called upon to resolve matters of MPL⁵¹ as well as of a Muslim doctrinal nature. Instances of co-operation between state courts and the MJC give positive indication that state courts and religious tribunals can work together amicably and even complement each other. Unconditional “judicial deference” on the part of the state to religious tribunals like the MJC could, however, have detrimental consequences because of the potential domination of its members (who also represent religious authority) over the individual member, especially the dissident. This creates a tension between the religious rights of the group and those of the individual which might not necessarily be completely reconcilable. The state should therefore be able to play a role in the regulation of these structures should legal recognition be given to such existing and informal tribunals alongside South African judicial structures. Co-operation with state courts and subsequent recognition will allow for more transparency, fewer jurisdictional problems and for the decisions of these tribunals to be given the force of law instead of being merely binding on the conscience of Muslims.

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⁵⁰ For detail on the benefits of such a “minimalist option” see reference in footnote 48.

⁵¹ Recent cases include *Kalla v the Master and Others* 1995 (1) SA 261 (TPD) 262 and *Ryland v Edros* 1996 4 All SA 557 C. For more detail see Moosa, N. 1996: 392 footnotes 137 and 139.

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CONFLICT RESOLUTION IN ISLAMIC SOCIETIES

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Abstract: Taking divorce mediation and victim-offender mediation as examples, the article sets out the distinctiveness of conflict solution methods in Islamic and other traditional societies as opposed to Western legal approaches to dispute settling. The author demonstrates that in accordance with the Qur'an, in Islamic societies access to justice is sought through co-operation, consensus and compromise rather than through a trial of strength between the disputing parties. Existing dissent among religious and secular scholars on the role and power of arbitrators does not diminish their acceptance as first contact points after the eruption of a conflict, be it within a family or between offender and victim.

1. Introduction

“Conflict is pervasive in human relationships. It is readily apparent in international, intergroup and interpersonal levels of interaction. It is present in relations in politics, communities, families, friendship groups, churches, social clubs, business and labour, finding expression in a wide variety of forms from war to friendly discussion. It has the potential to destroy relations or strengthen them, and is the *raison d'être* for negotiation.”²

Since the paper focuses on conflict resolution, it would not be unwise to look briefly at the meaning of the word “conflict”. The word emanates from the Latin word *fligo* –

¹ The financial assistance of the Centre for Science Development towards this research is hereby acknowledged. Opinions expressed in this paper and conclusions arrived at are those of the author and are not necessarily to be attributed to the Centre for Science Development.

² Pretorius 1993: 12.

fligere meaning to beat or dash down. The addition of the prefix *con* to *fligo* brings forth the verb *confligo* – *fligere* – *fligi* – *flictum* meaning to strike or throw together, to collide, to clash.³ The noun *conflictio* – *onis* means a striking together, collision, conflict. The Concise Oxford Dictionary defines “conflict” as “a state of opposition or hostilities, a fight or struggle”,⁴ while Webster defines it as a “clash, competition or mutual interference of opposing or incompatible forces or qualities (as ideas, interests, wills)”.⁵

Since the paper focuses, in particular, on conflict resolution in Islamic societies, the remarks made by Trollip are particularly cogent. Comparing Oriental, Islamic and African cultures to Western culture, he states:

“In the realm of dispute resolution Oriental, Islamic and African cultures eschew as far as possible externally imposed determinations and strive to achieve a negotiated, consensual solution. Western cultures have in the forefront a confrontationalist approach, a trial of strength for the disputants by adversarial or inquisitorial process.”⁶

Trollip adds that these cultural differences have existed over centuries with little interaction. However, over the last two to three decades, cultural interaction has given a new significance to the consensus-oriented approach to dispute resolution in the eyes of western lawyers. In a survey of indigenous societies in India, Australia and South Africa, Choudree has observed that a common feature in all these societies is the premium that is placed on the maintenance of harmony within the group as opposed to the western idea of the reconciliation of individual relationships in its system of conflict resolution.⁷ The Australian writer Larissa Behrendt has also made a number of pertinent remarks in this regard. Although she discusses methods of dispute resolution amongst traditional Aboriginal communities, its relevance is manifest in that the prevailing approach and values of the Aboriginal systems of conflict resolution and communal decision-making are inherently similar to the approach and values prevalent in Islamic societies. Behrendt writes:

“As in any complex society, traditional Aboriginal groups had their own legal systems and methods of resolving disputes. People lived in small communities with large extended families. There were strong kin ties and notions of community and reciprocity. Such a close-knit environment necessarily required the existence of a

³ Simpson 1977: 136.

⁴ Thompson 1997: 279.

⁵ Wright 1983: 247.

⁶ Trollip 1991: 2.

complex workable system of resolving conflict and a method of communal decision-making. Those processes needed to be able to produce effectively outcomes that members of the community would comply with.”

The ability of the group to function harmoniously in its day-to-day existence was necessary for its survival. The closeness and interdependence of a community meant that it was imperative for disputes to be resolved quickly and without animosity. The resolution process had to provide a mechanism that would ensure parties would comply with the decision of the group thus ensuring that the social, political and economic status quo of the community would be maintained.⁸

Common to both Aboriginal and Islamic societies – and, indeed, most non-western societies – are values such as communitarianism, co-operation, consensus and compromise.⁹

The South African Law Commission, in its recent issue paper on Alternative Dispute Resolution,¹⁰ has unequivocally acknowledged non-western approaches to conflict resolution. Paragraph 2.10 states:

“In this regard it is to be noted that modern developed Western societies have in the last twenty years or so come to appreciate the necessity for access to justice through alternative dispute resolution techniques based on what can be called co-existential justice.”¹¹ This form of justice has however always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and as a *sine qua non* for survival.”¹²

The Law Commission’s issue paper further states that the introduction of alternative dispute resolution methods in the field of family disputes, in particular divorce, has also been significant.¹³ In paragraph 2.19, it lists the objects of ADR as follows:

- (i) to relieve court congestion, as well as prevent undue cost and delay;
- (ii) to enhance community involvement in the dispute resolution process;

⁷ Choudree 1995: 4.

⁸ Behrendt 1995: 7.

⁹ Behrendt 1995: 18.

¹⁰ Project 94 1997.

¹¹ Cappelletti 1993: 287.

¹² Project 94 1997: 5.

¹³ See para. 2.18: 7.

- (iii) to facilitate access to justice; and
- (iv) to provide more effective dispute resolution.

Paragraph 2.24 lists the three major categories of dispute resolution. These are:

- (i) dispute resolution processes involving private decision-making by the parties themselves. This would include mediation and negotiation;
- (ii) dispute resolution processes involving private adjudication by third parties, for example arbitration; and
- (iii) dispute resolution processes involving adjudication by a public authority. This includes administrative decision-making and formal litigation before the courts.

An interesting, and indeed welcome, inclusion by the SA Law Commission is its consideration of the role of alternative dispute resolution in respect of criminal disputes.¹⁴ The issue paper sets out five major differences between mediation in civil disputes and mediation in the criminal justice context. These are:

- (i) the offence has already occurred and consequently there is no continuing dispute;
- (ii) the parties are not equal in that the offender committed the offence totally on his/her terms without regard for the victim;
- (iii) mediation in the criminal justice context represents a shift towards restorative justice, which views crime as the violation of one person's rights by another;
- (iv) mediation in the criminal context contains an aspect of reparation that is not a component of mediation in the civil context;
- (v) mediation in the criminal context especially when it forms part of the sentencing process involves the final agreement being publicly aired in court. This would never occur in civil mediation where the outcome is confidential and remains simply a matter between the parties.¹⁵

The issue paper further states that ADR may be relevant to criminal justice in, *inter alia*, the area of victim-offender mediation. Paragraph 3.63 reads:

"In victim-offender mediation the primary goal is seen as compensating the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for making good this loss. The traditional system does not have this

¹⁴ See para. 3.59: 29.

¹⁵ Para. 3.60: 29.

personal focus in that the offender is made accountable by paying a fine or promising to be of good behaviour. These punishments do not relate to the personal loss of the victim. The programme gives the victim an opportunity to tell the offender how the crime affected him or her. The offender has the opportunity to apologise, explain his or her behaviour and make some reparation.”¹⁶

What this paper sets out to do is to briefly examine the foundational principles of conflict resolution in Islam and then to analyse the mechanism of mediation in two important areas, namely:

- (i) divorce mediation; and
- (ii) victim-offender mediation.

2. The Foundational Principles of Conflict Resolution in Islam

The most fundamental and primary principle or concept on which dispute/conflict resolution in Islam is based is that of justice. Almighty God declares in the Holy Qur'an:

God doth command you
To render back your trust
To those to whom they are due;
And when you judge between human beings,
That you judge with justice.
Verily how excellent is the teaching
Which He giveth you
For God is He Who Heareth and
Seeth all things.¹⁷

The following two verses, amongst others, further lay great emphasis on the significance of the concepts of justice, equity and fairness in Islamic legal thought. First,

O you who believe
Stand out firmly for justice
As witnesses to God
Even against yourselves

¹⁶ At 30.

¹⁷ Chapter 4, verse 58.

Your parents or your kin
 Whether it be against rich or poor
 For God can best protect both.
 Follow not your desires
 Lest you swerve, and if you
 Distort (justice) or decline to
 Do Justice, verily
 God is Well-Acquainted
 With all that you do.¹⁸

And secondly,

O you who believe
 Stand out firmly for God
 As witnesses to equity (fair play)
 And let not the hatred of others toward you
 Make you incline to wrong
 And depart from justice.
 Be just, that is next to piety
 And fear God
 For God is Well-Acquainted
 With all that you do.¹⁹

In addition to the principles of justice, equity and fairness, mutual consultation or *Shura* is one of the most important organizational and constitutional principles in Islam. The Quranic chapter entitled *Shura* explains:

Those who hearken
 To their Lord, and establish
 Regular prayer, who
 Conduct their affairs by
 Mutual consultation,
 Who spend from that we bestow
 On them for sustenance.²⁰

¹⁸ Chapter 4, verse 135.

¹⁹ Chapter 5, verse 9.

²⁰ Chapter 42, verse 38.

The principle of *Shura* was applied to its fullest extent by the Prophet Muhammad (on whom be peace) in both his public and private life. Indeed, the Qur'an declares that "Certainly in the Messenger of God, you have a very good exemplar."²¹ And it is to the example of the Prophet, in respect of the resolution of conflict, that one must now turn.

Afzal Iqbal observes that although there are a large number of biographies of the Prophet extant, no significant attempt has been made to analyse his life as a negotiator. He does, however, add that from a study of the Qur'an and the Prophet's life a picture does emerge of the fundamentals of diplomacy and negotiation in Islam.²² One illustration suffices.

At the age of twenty, long before he was invested with prophethood, a dispute concerning the construction of the Kaba arose. Although a number of tribes had worked together harmoniously and with a singular devotion to complete the task, the dispute revolved around who or which tribe should have the honour of putting the final touch to the construction, namely the laying of the Black Stone. After four days of heated debate and conflict, it was agreed, on the fifth day, that the first man who enters the temple the following morning would act as arbitrator in the matter. At the dawn of the sixth day Muhammad entered the temple. Showing no signs of nervousness and undaunted by the magnitude of the task, he pronounced his decision, a decision which satisfied the claims of all the contesting parties and which averted the bloodshed which had appeared imminent only a few moments before his arrival on the scene.²³ Iqbal, vividly portraying the tension of the occasion, writes:

"He asks for a sheet of cloth. When it is brought to him he takes the Black Stone, puts it inside and asks each tribe to hold an end of the cloth and lift it together. This decision associates all the leaders of the tribes with the act of carrying the Black Stone to its proper place in the wall of the Kaba. Muhammad asks each of the contesting tribes to select a representative. He then spreads out the cloth to the level of the wall where the stone has to be fixed. They all thus share the honour for which they were threatening to kill each other! And he saves the situation by himself taking up the stone and fixing it in the wall without the slightest protest from any side – in fact in the midst of grateful acclaim from all directions. Thus the highest qualities of tact and judgment save a situation that seemed impossible to

²¹ Chapter 33, verse 21.

²² Iqbal 1975: xxxii.

²³ Iqbal 1975: 2.

settle otherwise. This was the first time in Muhammad's life that these qualities found public expression and won instant recognition. Muhammad at this time was not a prophet and was less than twenty-five years of age.²⁴

This is but one of many occasions on which the Prophet acted as an arbitrator or arbiter. In particular, his social action during his early years consisted of mediating between various groups and factions. The practice of arbitration and mediation was reasserted by early Muslim communities who recommended that conflict/disputes be submitted to arbitrators and mediators.²⁵ The Arabic word for arbitrator/mediator is *hakam*. And the Qur'an, in fact, uses the verb *hakama* to refer to the settlement of disputes and conflicts, as opposed to the verb *qada* which refers to divine rulings.²⁶ The best illustration of this is in relation to divorce mediation. The Qur'an provides:

If you fear a breach
Between them twain
Appoint (two) arbiters/mediators
One from his family
And the other from hers;
If they wish for peace
God will cause their reconciliation
For God hath full knowledge
And is acquainted with all things.²⁷

The word *hakam/hakama* appears twice in this verse, the first referring to the mediator from the husband's family, the second referring to the mediator from the wife's family. Before examining in more detail the treatment of divorce mediation in Islam it is necessary to clarify the terms/concepts of negotiation, mediation and arbitration, terms that have been used in this paper. Clarification is best sought, in the writer's opinion, through definition.

²⁴ *Ibid.* at 3; see also Guillaume 1955: 84.

²⁵ Morsy 1984: 47.

²⁶ *Ibid.*

²⁷ Chapter 4, verse 35.

3. Defining Negotiation, Mediation and Arbitration

Negotiation may be briefly defined as “communication for the purpose of persuasion”.²⁸ Negotiation is the most commonly used method for the resolution of disputes. Basic bilateral negotiation involves the parties to the dispute approaching the other without the assistance of a third party. Through discussion, a mutually acceptable outcome is sought. Pretorius states that negotiation is a bargaining relationship between parties who have a perceived or an actual conflict of interest. The parties voluntarily join in a temporary relationship designed to educate each other about their needs and interests.²⁹

Mediation is an extension of the structured negotiation process, the fundamental difference between the two being the presence of a neutral, impartial third party who has the role of assisting the parties in dealing with their dispute and, where possible, to reach consensus.³⁰ The mediator has no independent authority and does not render a decision. All decision-making powers in respect of the dispute remain with the parties. By the use of a neutral facilitator, mediation is better able to redress power imbalances than negotiation. The process of mediation is able to promote a new method of communication that respects differences and encourages understanding. This is particularly significant in small close-knit communities where disputants will continue to live close to each other.³¹

Conciliation, like mediation, is a structured negotiation process involving the presence of an impartial third party. The conciliator will, in addition to acting as mediator, make a formal recommendation to the parties on the resolution of the dispute.

Arbitration is private adjudication by impartial third parties. The third party/ies decide/s the issue after reviewing evidence and hearing argument from the parties. The decision may be binding on the parties, either through agreement or by operation of the law, or it may be non-binding in that the decision is only advisory.³² Arbitration may be voluntary, where the parties agree to resolve the issue/s by means of arbitration, or it may be compulsory, where the process is, either by law or prior agreement, the only means provided to resolve the conflict. Arbitration may be conducted either on an inquisitorial or an adversarial basis.³³

²⁸ Behrendt 1995: 57; See also Goldberg, Sander and Rogers 1992 and Astor 1992: 59ff.

²⁹ Pretorius 1993: 4.

³⁰ *Ibid.*

³¹ Behrendt 1995: 60.

³² Pretorius 1993: 5.

³³ *Ibid.*

As regards family mediation in particular, Simon Roberts has identified three basic models of family mediation. These are:

- (1) minimal intervention;
- (2) directive intervention; and
- (3) therapeutic intervention.

Minimal intervention has the objective of reviving and sustaining a flow of conversation between the parties in much the same fashion as it would have continued but for the conflict.³⁴

Directive intervention involves active steps on the part of the mediator to provide additional information and to influence the content of the decision/s to be reached by the parties. In this type of mediation, the intervener's view of the conflict becomes central and energy is devoted to modifying or affirming the parties' perceptions in line with it. Roberts states that directive mediation involves three principal tasks: obtaining and assessing information about the disputants and their quarrel; identifying and evaluating the options available to them; and persuading the parties to adopt the courses of action which the mediator considers to be most suited to their particular circumstances.³⁵

Therapeutic intervention involves postponing joint decision-making on specific issues in favour of an examination of the relationship that has broken down within the family. The mediator, after an assessment of the parties' approach to each other, uses overt or covert professional therapeutic techniques to reveal and correct pathological elements in the relationships. This form of mediation involves the combination of advisory and therapeutic help with assistance in joint decision-making.³⁶

Both directive and therapeutic mediation are prevalent, as will become evident in the discussion that follows, in Islamic conflict resolution mechanisms. This is particularly true of divorce mediation in Islam.

4. Divorce Mediation in Islam

More than fourteen centuries ago Almighty God, in his Ultimate Wisdom, declared:

If you fear a breach
Between them twain

³⁴ Roberts 1998: 144.

³⁵ Roberts 1998: 145.

³⁶ *Ibid.*

Appoint (two) arbiters/mediators,
 One from his family
 And the other from hers;
 If they wish for peace
 God will cause their reconciliation,
 For God hath full knowledge
 And is acquainted with all things.³⁷

The notion of mediation and the amicable resolution of disputes is reflected in another verse of the Qur'an, which provides:

If a wife fears cruelty or desertion
 On her husband's part,
 There is no blame on them
 If they arrange an amicable settlement
 Between themselves;
 And such settlement is best
 Even though men's souls
 Are swayed by greed.
 But if you do good
 And practice self-restraint
 God is well aware of
 All that you do.³⁸

The following two verses (quoted in part only) expressly declare the most important conditions of divorce. First:

A divorce is only permissible twice;
 Thereafter, the parties should either
 Hold together on equitable terms
 Or separate with kindness.³⁹

³⁷ The Holy Qur'an, Chapter 4, verse 35.

³⁸ Chapter 4, verse 128.

³⁹ Chapter 2, verse 229.

And secondly:

When you divorce women
And they fulfil their appointed term
Either take them back
On equitable terms
Or part with them
On equitable terms.⁴⁰

Verses 229 and 231 of Chapter 2 make it abundantly manifest that the underlying principle in the matter of divorce is equity and fairness. The Arabic word used in the text is *maaruf*, which may also be translated as reasonableness or harmony. Verse 128 of Chapter 4⁴¹ clearly espouses the harmonious, peaceful and amicable resolution of family conflicts, while verse 35 of the same chapter unequivocally provides for mediation and arbitration in divorce. According to Ahmad, the arbitrators should endeavour to understand the nature and causes of the parties' grievances and attempt to bring about a reconciliation between the parties.⁴² The purpose of the arbitration proceedings, he says, is to remove ill-feelings and to re-establish, if possible, harmony between the married partners. It often happens that the dispute results from a failure to understand the viewpoint of the other spouse and a frank discussion of the grievances of both sides before an arbitrator or a mediator will enable each party to fully understand the other's cause of complaint.

Verse 35 of Chapter 4 provides the procedure to be adopted where there is an apprehension of a breakup or *shiqaq* between the spouses. The Arabic word *shiqaq* is derived from *shaqq* which means breaking asunder, breaking into two. *Shiqaq*, therefore, means conflict between the spouses of such a serious nature that the bond of marriage has reached breaking point.⁴³ At this stage which spouse is to blame is immaterial. Rather, the crucial issue is whether the spouses, during this emotional period, have the ability to reason calmly, to listen to reason and to see whether there is the possibility, however remote, of reconciliation.

The process of divorce mediation or arbitration in Islam raises a number of important issues. These include:

⁴⁰ Chapter 2, verse 231; see also Chapter 65, verse 2.

⁴¹ See fn. 37.

⁴² Ahmad 1978: 277.

⁴³ *Ibid.* at 278.

- (i) the appointment of arbitrators;
- (ii) conditions of appointment;
- (iii) the power/authority of the arbitrators; and
- (iv) the decision of the arbitrators.

Each of these four issues is now examined in turn.

Ad (i) The appointment of arbitrators

In order to comprehend the difference of opinion amongst scholars and jurists on this issue, one must bear in mind the Quranic verse which provides:

O you who believe
Obey God, and obey the Apostle
And those charged with
Authority among you (*ulul l' amr*).
If you disagree in anything
Among yourselves, refer it to
God and His Apostle
If you do believe in God
And the Last Day
That is best, and most suitable
For final determination.⁴⁴

The difference of opinion centres around who holds responsibility for the selection and appointment of the arbitrators, and the juristic conflict is based on divergent interpretations of *ulul l' amr* or “those charged with authority among you”. A number of scholars have interpreted the word “you” in “If you fear” (chapter 4, verse 35)⁴⁵ as referring to the *ulul l' amr*. They regard the state, the government or the judge (*qadi*) to be the *ulul l' amr*. Thus the word “you” contains a direction to the state or the judge to appoint arbitrators. However, in a 1952 Pakistani decision,⁴⁶ Justice Cornelius considered the words *ulul l' amr* to have been addressed to the heads of the tribes to which the spouses belong.⁴⁷ Ahmad submits that there is no authority to support this inter-

⁴⁴ Chapter 4, verse 59.

⁴⁵ See footnote 36.

⁴⁶ *Sayeeda Khanam v Mohammad Sami* 1952 PLD, Lahore 113.

⁴⁷ Ahmad 1978: 279.

pretation. In fact, the Quranic verse is of universal application to all Muslims and there are many Islamic communities which do not live in a tribal setting.

Another interpretation of the word "you" in "If you fear" is based on the fact that "you" has frequently been used in the Qur'an to address the Muslim community in general. On this interpretation, it is the responsibility of every Muslim community to appoint arbitrators to restore amity and harmonious conjugal relations as the need arises in their community.⁴⁸

Of course, verse 35 of Chapter 4 makes it incumbent to appoint arbitrators from amongst the families of the spouses. Jurists are *ad idem* that this Divine Ruling facilitates the process of mediation in that the arbitrators will be more fully acquainted with the exigencies of the case and will probably have the full confidence of the parties. The arbitrators must be appointed in consultation with the spouses.⁴⁹ There is a further difference of opinion as to the necessity of the consent of the spouses to the appointment of arbitrators. The generally accepted view is that their consent is necessary.⁵⁰ No arbitration would be effective if it were thrust upon the parties against their will. Further examining the issue of spousal consent, Ahmad writes:

Under Muslim law, arbitrators must preferably be appointed with the consent of the parties concerned. But a husband or a wife cannot be allowed to frustrate the case by refusing to appoint an arbitrator or withholding his or her consent to the appointment of one.

The verse of the Qur'an quoted above, while allowing the *qadi* to appoint arbitrators from amongst the families of the spouses, does not make it a condition that they have to be appointed by the husband and the wife or with their consent. Hence, if one of the spouses does not appoint or agree to the appointment of an arbitrator, the *qadi* can certainly appoint an arbitrator from his or her family or even a stranger to represent the husband or the wife as the case may be. It is his duty to redress a wrong. The Courts hold the same position as was held by the *qadi* in old times and in the matters of marriage and divorce they can follow the provisions of Muslim law.⁵¹

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* at 280.

⁵⁰ Jung 1926: 36.

⁵¹ Ahmad 1978: 280-281.

Ad (ii) Conditions of appointment

It is open to the parties to attach conditions to the arbitrators' appointment, such as a condition that the arbitrators make their decision within a specified time.⁵² They may further be empowered to exercise certain powers and be excluded from exercising other specified powers. Perhaps the most fiercely debated issue in this respect is the power of the arbitrators to recommend and order a divorce.

Ad (iii) The power/authority of the arbitrators

On the power of arbitrators to order a divorce there is, once again, juristic conflict. Ibn Al-Arabi has suggested a solution. He states that if the arbitrators find that reconciliation is not possible they should inform the *qadi* as to which of the parties is at fault, whereupon the *qadi* will make an appropriate ruling.⁵³ The Shia view is that since the arbitrators are appointed to settle the dispute, they may order dissolution of the marriage if reconciliation is not possible.⁵⁴

In a number of decisions, the Pakistani courts have consistently held that the arbitrators do not have the authority to dissolve a marriage, since their powers are confined to bringing about reconciliation. In the case of *Sayeeda Khanam v Mohammad Sami*⁵⁵ a full bench of the Lahore High Court, *per* Justice Cornelius, reasserted the view that the arbitrators cannot separate the parties without the husband's consent. As authority for this view, they state that three of the four principal *Imams* – namely Al-Shafi'i, Malik, Abu Hanifah and Ibn Hanbal – favoured the view that the *hakams* or arbitrators cannot grant a divorce unless they are authorized by the husband to do so. This case has been criticized by Ahmad who argues that the court did not take into account the view of the Caliph Ali who, when faced with a similar problem, advised the arbitrators thus: "If you decide to separate, separate them."⁵⁶ Ahmad further submits that it is not correct to say that three of the principal *Imams* were against the power of the arbitrators to separate the parties. The correct position is that at first Imam Shafi'i had held the same view as that held by Abu Hanifah, but subsequently relying on the instructions of Caliph Ali, he changed his opinion and held the same

⁵² *Ibid.* at 288.

⁵³ *Ibid.* at 289.

⁵⁴ *Ibid.* at 290.

⁵⁵ 1952 PLD, Lahore 113.

⁵⁶ Ahmad 1978: 292.

view as held by Malik. Thus two *Imams* hold a similar opinion, while an equal number hold the opposite view. But the instructions of Uthman and Ali carry much more weight than the opinions of any of the *Imams*. Hence the opinions of Malik and Shafi'i who have followed the view of the Caliphs are more worthy of being followed than the view of the other *Imams*.⁵⁷

Ad (iv) The decision of the arbitrators

When the two arbitrators appointed to resolve the matrimonial dispute fail to secure reconciliation, their authority to order the dissolution of the marriage may yield two situations. These are:

- (a) the arbitrators may disagree about the necessity for dissolution; or
- (b) the arbitrators may agree that dissolution of the marriage is necessary.⁵⁸

In the former situation, the marriage should not be dissolved. Although this view is put forward by one of the six authentic writers of the traditions (*hadith*) of the Prophet Muhammad (on whom be peace), Ahmad is of the view that this is not reasonable in modern times since it is likely that the arbitrator from the husband's family may not act impartially. This would unjustifiably strengthen the husband's position and lead to an undesirable and wholly unjust state of affairs.⁵⁹

If, on the other hand, the arbitrators agree that the marriage should be dissolved, no difficulty arises. However, if one of the spouses does not accept their decision, the question arises whether the arbitrators' decision still stands. This issue may be considered with reference to the following two situations, namely:

- (i) when the arbitrators are appointed by the parties themselves;
- (ii) when the arbitrators have been appointed by the *qadi*.⁶⁰

Since Ahmad has analysed these two situations in detail, extensive recourse to his work is justified. Regarding the former situation, the learned writer states:

"If the arbitrators have been nominated by the spouses, their position has been considered as that of agents of the spouses and so they cannot exceed the limits of their authority. If the husband has not authorized his nominee to divorce the wife,

⁵⁷ *Ibid.* at 293.

⁵⁸ *Ibid.* at 281.

⁵⁹ *Ibid.* at 288.

⁶⁰ *Ibid.* at 282.

the agent cannot exercise that power. Similarly, if the wife has not allowed her representative to get a Khul on her behalf, he shall not be competent to do so.”

Hence their order to dissolve the marriage will not be binding on the spouses. Abu Hanifah, his disciples, as well as some other jurists have expressed the same view. As regards Shafi'i, there are two reports. According to one, the award shall be binding on the parties. According to the other report, the award shall be binding only if they consent to it, but not otherwise.

Some Muslim jurists of the early period had laid down a general rule of law that if two persons appoint an arbitrator, qualified to decide their case according to the injunctions of the Qur'an and the Traditions, then he is seized of full authority to pass any order that he thinks proper in the matter and can wield the same power as can be exercised by a *qadi*. They considered that his award or order was binding on the parties and he could decide cases relating to all matters including divorce. But the Muslim jurists of a later period expressed the opinion that it was rather dangerous to invest ordinary people with such wide powers in certain cases, and they made an exception to this general rule so as to exclude cases relating to divorce from its scope.⁶¹

Where, on the other hand, the arbitrators have been appointed by the *qadi*, there is, once again, a difference of opinion as to whether they may dissolve the marriage contrary to the wishes of the husband or maintain it contrary to the wife's desire. Three views have been put forward, namely:

- (i) the arbitrators have no right to separate the spouses;
- (ii) the arbitrators do have the authority to dissolve the marriage;
- (iii) the arbitrators may dissolve the marriage only if they have been expressly invested with such authority.⁶²

As far as the first two views are concerned, these are dealt with in the previous section headed “The power/authority of the arbitrators”. In respect of the third view, Imams Shafi'i, Ibn Hanbal and Abu Hanifah hold that the arbitrators' decision is valid only if the husband has granted them express authority.⁶³ In the absence of such authority, the arbitrators will have to submit their report to the *qadi* who will render his decision on the basis of the report.

⁶¹ *Ibid.* at 282-283.

⁶² *Ibid.* at 284.

⁶³ *Ibid.* at 287.

5. Victim-Offender Mediation in Islam

It will be remembered that the South African Law Commission, in its recent issue paper on Alternative Dispute Resolution, stated that in the area of victim-offender mediation the primary goal is seen as compensating the victim for the loss suffered by making the offender take personal responsibility for making good this loss. The Commission added that the traditional system does not have this personal focus and that mediation gives the victim an opportunity to tell the offender how the crime affected him/her while the offender has the opportunity to apologise, to explain his/her behaviour and to make some reparation.⁶⁴

Mark Umbreit, recognising that one of the most significant current developments in criminal justice thinking is the growing interest in restorative justice,⁶⁵ states that the clearest expression of restorative justice theory is seen in the field of victim-offender mediation. He writes that restorative justice theory provides an entirely different theoretical framework for responding to crime. Rather than defining the "state" as the victim, restorative justice theory postulates that criminal behaviour is first a conflict between individuals. The person who was violated is the primary victim, and the state is a secondary victim. The current retributive paradigm of justice focuses on the actions of the offender, denies victim participation and requires only passive participation by the offender. The very definition of "holding offenders accountable" changes when viewed through the lens of restorative justice. As Zehr (1990: 168, 188, 197-199) notes: Instead of paying a debt to society by experiencing punishment, accountability would mean understanding and taking responsibility for what has been done and taking action to make things right. Instead of owing an abstract debt to society, paid in an abstract way by experiencing punishment, the offender would owe a debt to the victim, to be repaid in a concrete way.

Restorative justice places both victim and offender in active problem-solving roles that focus upon the restoration of material and psychological losses to individuals and the community following the damage that results from criminal behaviour. Whenever possible, dialogue and negotiation serve as central elements of restorative justice.⁶⁶

Umbreit further states that victim-offender mediation represents one of the most creative efforts to hold offenders personally accountable for their behaviour, it emphasises the human impact of crime, it provides opportunities for offenders to make

⁶⁴ Paragraph 3.63; see Introduction.

⁶⁵ Umbreit 1994: 1.

⁶⁶ *Ibid.* at 2.

amends to their victims or victim's family, it promotes active victim and community involvement in the justice process and it enhances the quality of justice experienced by both victim and offender.⁶⁷ He adds that victim-offender mediation and reconciliation programs focus upon providing a conflict resolution process that is perceived as fair to both parties.⁶⁸

The following three Quranic verses emphasize the need for mediation and reconciliation between victim and offender. First,

And if you do punish them,
Punish them no worse
Than they punish you;
But if you show patience,
That is indeed the best (course)
For those who are patient.⁶⁹

Secondly,

We ordained therein for them
Life for life, eye for eye,
Nose for nose, ear for ear,
Tooth for tooth, and for wounds
Retribution. But if anyone
Remits the retribution by
Way of charity, it is an
Act of atonement for himself
And if any fail to judge by
What God hath revealed
They are wrongdoers.⁷⁰

And finally,

The recompense for an injury is an
Injury equal thereto (in degree)
But if a person forgives and makes

⁶⁷ *Ibid.* at 5.

⁶⁸ *Ibid.* at 7.

⁶⁹ Chapter 16, verse 126.

⁷⁰ Chapter 5, verse 45.

Reconciliation, his reward is due
 From God: For God loveth not
 Those who do wrong.⁷¹

Commenting on the import of these three Quranic verses, Yusuf Ali states that those who have reached a higher spiritual state do not engage in retribution, but practice patience and restraint.⁷² He adds that processes leading to the reform of the offender or reconciliation between victim and offender are to be preferred to retribution or the law of equality.⁷³

Although Allah has clearly laid down that the law of equality regulates the infliction of bodily injuries, He constantly exhorts that patience, restraint, the remission of retribution, forgiveness and reconciliation are more pleasing to Him and worthy of great reward. Where the victim's heirs remit retribution by pardoning the offender, *diyya* is applied. *Diyya* (blood-money) may be defined as money paid to a harmed person or his/her heir/ess in compensation for a crime committed against him/her.

In order to fully comprehend *diyya* legislation in the Islamic criminal justice system, one must understand the objectives and functions of punishment. The basic objectives of punishment in the *Shari'ah* are to establish justice and to ensure an atmosphere of safety, security, peace and harmony in the community, while the functions of punishment are twofold:

- (i) deterrence – punishment deters the offender from committing further crimes. To function effectively as a deterrent, punishment should inflict enough pain to cause the offender to desist from further criminal action;
- (ii) protection of the community and reforming the offender – punishment protects society from the harmful effects of criminal behaviour. Society is protected both through deterrence and reformation of the offender.⁷⁴

As stated earlier, *diyya* replaces retaliation when the victim's relatives waive their right of retaliation. In addition to creating a great measure of understanding between the offender and the victim's relatives through the process of mediation, it enhances an atmosphere of peace, security and harmony in the community at large.⁷⁵ The basic

⁷¹ Chapter 42, verse 40.

⁷² Ali 1992: 670.

⁷³ *Ibid.* at 1257.

⁷⁴ Zveki 1994: 80.

⁷⁵ *Ibid.* at 85.

rule is that the offender pays the blood-money. However, there are instances in which the *diyya* will be paid by the offenders' relatives or from the state treasury. Blood-money was originally paid in camels, ranging from five camels for a minor wound or injury to one hundred camels for the murder of a Muslim male. In modern times, of course, *diyya* is best settled by the payment of an equivalent sum of money.⁷⁶

6. Conclusion

As Trollip has stated, western legal cultures have always adopted a confrontational approach in the resolution of disputes, a trial of strength for the disputants by adversarial or inquisitorial process.⁷⁷ Only in very recent times have western legal systems sought alternative or appropriate means for conflict resolution. On the other hand, Islamic, African, Aboriginal and other non-western cultures have as far as possible eschewed externally imposed determinations and striven to achieve a negotiated, consensual solution through processes of mediation and arbitration.

Islamic societies have always, following upon the teachings of the Qur'an and the example of the Prophet Muhammad (on whom be peace), adopted the mechanisms of arbitration, mediation and negotiation in the resolution of disputes. This paper has taken a brief, general look at two of the areas in which mediation has provided effective conflict resolution, viz. divorce mediation and victim-offender mediation.

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⁷⁶ *Ibid.* at 89.

⁷⁷ Trollip 1991: 2; see Introduction.

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DECIDING FOR CHILDREN: THE FAMILY ADVOCATE AND THE CARING PROFESSIONS

Sandra Burman and Lauren Derman

Abstract: Drawing from a set of interviews with professionals involved in custody assessment in Cape Town, South Africa, the authors describe the multi-faceted working relations that evolve around the regional Family Advocate's Office. Work load and multidisciplinary approaches for custody assessment make it indispensable for the Office's staff (Family Advocates and Family Counsellors) to consult with outside private caring professionals, i.e. psychologists, psychiatrists and private social workers. In the best interests of the child, a release of government funds for these contracted services is called for as well as engagement by dedicated caring professionals. The article illustrates the dependence of the judiciary on non-judicial personnel.

1. Introduction

South Africa has one of the highest divorce rates in the world for most sections of the population, with major consequences for the children involved (Burman and Fuchs, 1986; Burman, 1992; Bosman, 1992a). As a result, various related initiatives have been introduced this decade. One is that of the Family Advocate's Office, which is responsible for vetting arrangements relating to dependent children in every divorce in the High Court. The role of the Family Advocate is to assist the judiciary in the determination of guardianship and custody of, and access to, children, and to propose improvements. How the brief of the Family Advocate is being interpreted in South Africa's rapidly changing multi-cultural society has not yet been studied. The Centre for Socio-Legal Research is therefore engaged in an in-depth assessment of the operation of the Family Advocate's Office, including an exploration of their interaction with their clients and with the legal and caring professions. An investigation of the Office from many viewpoints enables a multi-faceted understanding of the Family Advocate's function to be obtained; this paper therefore focuses on the functions and views

of such caring professionals in relation to the Office. As it is a preliminary investigation, we have concentrated on those in Cape Town, although the Centre's study embraces both Western and Eastern Cape.¹

The Family Advocate's Office was established in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 (hereafter referred to as "the Act"). The Chief Family Advocate is based in Pretoria, and regional offices serve the various High Courts in South Africa. Each office is staffed by Family Advocates, who are qualified Advocates of the High Court, and qualified social workers of the Provincial Administration, who are appointed as Family Counsellors.²

Private caring professionals – psychologists, psychiatrists, and private social workers – interact with the Family Advocate's Office as a result of a variety of circumstances. They contribute significantly to the process of deciding the fate of children in divorce.

What follows is derived from a series of in-depth interviews, held during 1997 with 24 caring professionals, approximately 50 per cent of those in Cape Town regularly involved in custody assessments and/or with the Family Advocate's Office. (There is no official list of such professionals.) Our sample was drawn from those we were told worked in the field, supplemented by professional directories. Fifty per cent were social workers and the other 50 per cent comprised 11 psychologists and 1 psychiatrist. These interviews are set against in-depth interviews with 100 per cent of the Cape Town Family Advocates and Family counsellors at the time of interview (there have since been some recent changes), and a sample of 16 attorneys (from 16 different firms) selected from those most involved in family law work. It was chosen to cover a wide range of firm sizes and geographical areas in greater Cape Town, and to include both sexes and all race and major religious and language groups in the area. As interviews were granted on assurances of confidentiality, identifying details are not disclosed.

¹ We wish to record our sincere thanks to all the psychologists, psychiatrists, social workers, attorneys, and staff at the office of the Family Advocate who gave us interviews, valuable time, and assistance with this research. The research was sponsored by the University of Cape Town Research Committee and the Human Sciences Research Council, which we acknowledge with thanks. The views expressed in this work and the conclusions drawn are those of the authors and should not be regarded as those of the sponsors.

² In terms of the Act the role of the Family Counsellor is to "assist the Family Advocate with an enquiry". Despite the vagueness of this description, it may be assumed that particular functions are inherent in the office (Schäfer, 1993).

2. The Family Advocate's Office and the Involvement of Caring Professionals

The Family Advocate's Office commenced operating in Cape Town in October 1991. At the time of writing it is staffed by four Family Advocates and two Family Counsellors. Input at the Office is also received from trainee social work students supervised by a social worker at the Afrikaanse Christelike Vroue Vereeniging (ACVV).³ The Family Advocates and Family Counsellors come from a range of backgrounds spanning several languages.

There are three ways in which the Family Advocate's Office may become involved in a matter. It may ascertain that there is a problem in a case by perusing detailed information in the compulsory Annexure A which is attached to every divorce summons and which is automatically sent by the court to the Family Advocate for perusal and approval. A second route is that the parties involved in the matter may request that the Family Advocate investigates their situation or, third, the Supreme Court itself may request the involvement of the Family Advocate when a relevant case comes before it.

The aim of the Family Advocate is to settle matters between the parties on terms that will reduce conflict and be most favourable to the welfare of the children (Bosman, 1992b). Research indicated that in Cape Town there is no set procedure when commencing an enquiry. The Family Advocate usually interviews the parents together; teenagers may be interviewed by either the Advocate or a Family Counsellor; and young children are often seen only by a Family Counsellor. The Family Advocate gets involved in discussion and mediation with the family in order to try to settle any issues in the divorce which relate to the children and which are impeding settlement. If necessary, other social workers who have been involved with the family and anyone else who can contribute information, such as teachers, are contacted. The Family Advocate will observe the relationships between the children and parents and will discuss the custody and access arrangements with all parties involved. Finally, the Family Advocate will make a recommendation to the court, by means of a written report, as to the best custody and access arrangements to be made for the child or children (Burman and McLennan, 1996).

Psychologists, psychiatrists, and private social workers may be drawn into cases by various routes. Which professional is used is determined by a variety of considerations, but disciplinary training is seldom a decisive consideration. Rather, the

³ A family welfare organization.

individual's abilities and experience play a major role: frequently psychologists' and social workers' recommendations are regarded as interchangeable. As a psychologist expressed it, "the boundaries are blurred". There is a transgression across the boundaries, but education is not important. In general, social workers concentrate on living, social, and material environments. Psychologists are better equipped to assess personalities, interactions, and psychological aspects of behaviour. (Interview of 30 April 1997) However, where an issue requires the expertise of a particular disciplinary training, a professional of that discipline will be chosen.

A Family Advocate who feels that a psychological, psychiatric, or private social work report is required has various options. She or he may either, if the parties are unable to pay for one, find a state psychiatrist or psychologist or a practitioner in a state-subsidized organization who provides an assessment without charge, or a private practitioner who might charge a low rate or even nothing, though this latter is very rare. Where such assistance is obtained, Family Counsellors told us of long delays in receiving reports because of the professionals' heavy caseloads. If a party requested a particular practitioner, the Family Advocate would investigate the reason for the request before acceding. The best case scenario is for the Family Advocate to obtain permission from both parties to appoint a practitioner who will represent the child and be paid by both parties. The practitioner may be appointed to do either a full assessment of the situation or to report on only a particular aspect. The practitioners might also be appointed by the Family Advocate to serve on an interdisciplinary panel of experts to resolve points of dispute in a matter.

Alternatively, if an unfavourable Family Advocate's report is anticipated or should a party wish to dispute the Family Advocate's report, additional evidence will be needed. The attorney might therefore brief a private practitioner to investigate further and submit a report. This would be sent to the Family Advocate, who might reconsider his or her report or mediate a settlement to avoid lengthy and costly court proceedings.

3. Problems Identified by the Private Caring Professionals

For most private practitioners, contact with the Office is primarily as a result of objections by parties to Family Advocates' reports. In such a case the practitioner is requested to provide a second opinion on the issue. By the nature of such referrals, the matters are likely to be complex and acrimonious, so inevitably the practitioner deals with the cases that all professionals, including the legal, find most difficult. He or she will receive the Family Advocates' reports from the attorneys and this provides many practitioners with their only view of the function of the Family Advocate and Family Counsellors. The caring professionals' observations quoted below are therefore their personal opinions and neither comprehensive nor necessarily representative.

Considerable reservations were expressed about the quality of the reports, with criticisms falling into four main groups. First, the complexity and depth of reports were challenged. It was repeatedly observed that facts of the case were not properly investigated, with the result that recommendations were made on the basis of insufficient evidence and extensive diagnostic reference was made to parties not interviewed. In particular, several practitioners stressed the undesirability of the current lack of home visits by Family Counsellors in Cape Town. This was attributed to lack of adequate funds for staffing, leading to heavy caseloads and time pressure.

Second, we were told that reports revealed lack of essential theoretical training in child and developmental psychology, with the result that inappropriate interview techniques were employed and issues pertaining to child development were underplayed or ignored. Again, this was partly attributed to lack of funding to employ specialized staff.

Third, it was felt that some reports embodied ill-considered social attitudes, such as the report-writer's religious and moral bias, social prejudices, and a tendency to overstress parental needs at the expense of those of the children. This, it was suggested, was aggravated by the limited time available for interviews. As one practitioner put it, "Decisions are made on the basis of how a person presents. If one doesn't have middle-class values, is highly emotional or in distress, the interviewer – either Family Counsellor or Family Advocate – develops a negative impression of the candidate. The Interview process is superficial. The level of distress exhibited by the parties is seen as pathological." (Interview of 24 April 1997) There was also a perception prevalent among the professionals that the Family Advocates' opinions of what the judges would accept strongly influenced the nature of the recommendations, tending toward the conservative and away from the pioneering.

And fourth, private practitioners criticized the reports as falling below professional standards of presentation. They felt that some contained poorly constructed arguments, were sometimes cursory, and on occasion unstructured and badly presented.⁴ This was seen as partly attributable to time constraints and heavy caseloads, again traceable to lack of adequate funding.

Whether brought into contact with the Office as a result of a request for an opinion on a Family Advocate's report or at some earlier stage in the case, the practitioners had criticisms of more than the reports. All related to office staffing and procedure in various ways.

⁴ It should be noted that certain psychologists interviewed also spoke of the submission of poor reports by private professionals involved in custody work. Some reports, we were told, were jargon-laden, superficial, and included unsubstantiated conclusions.

Many practitioners stated forcefully that the failure of the Certain Divorce Matters Act 24 of 1987 to establish a post for a psychologist on the Family Advocate's staff was a strikingly ill-judged omission. They felt that the complex nature of the custody and access disputes dealt with by the Office necessitated specialized skills. As one practitioner expressed it, "Where any subtlety exists, the Family Advocate is not equipped to pick up parents who are narcissistic or irresponsible. ... They will not pick up these subtle psychological diagnoses. They will only view the person on face-value." (Interview of 17 April 1997) At least one attorney in our sample also stressed the need for an in-house psychologist. The Family Advocates themselves spoke of psychologists as being vital to the work of the Office.

The private professionals told us that psychological and psychiatric evaluations should be done by specially-trained professionals able to offer free service similar to that of the Family Counsellors. It was stressed that the nature of the disputes were multi-faceted and frequently required the skills of a diverse range of professionals. The cost of such assessments, however, is substantial, and well beyond the financial abilities of many in South African society who do not qualify for legal aid assistance. Currently it is very difficult for the Family Advocate to obtain the services of private social workers, psychologists, or psychiatrists without pay: Unless the professional is willing to act *pro amico* (which is uncommon), the only way to obtain such services is for one of the parties to become a client at a subsidized organization or state hospital or department. Unfortunately, cuts in welfare finance have led to understaffing and ever-larger case loads in such institutions, making it increasingly difficult to obtain free assessments. As custody assessments may involve time-consuming court appearances, overworked state health professionals are often unwilling to become involved in such cases. In an attempt by the Family Advocates' Office to circumvent this, some professionals were requested to do assessments at very reduced rates or *pro amico* but there is no assured referral of paid work in return.

Many practitioners noted that the current ratio of Family Counsellors to Family Advocates was insufficient. It was felt that more Family Counsellors were needed if they are to be able to investigate cases adequately. In particular, many practitioners felt that home visits were essential but that at present they were the exception rather than the norm due to understaffing. As one psychologist explained, "I want to work out what makes people tick. I do home visits around supper-time, for a few hours so that I can get a feel of the interactions and daily events. Home visits are affected by an awareness of me as a psychologist – an alien person in the home – but I am aware of this. People can't hold up their facade for too long. At first they will be well-behaved, then the real personalities and reactions creep in." (Interview of 13 May 1997)

The point was also made that time pressures prevented Family Counsellors from doing detailed follow-up of custody or access recommendations, or monitoring of

cases. Nor were most outside organizations able to offer this service. Cases usually had to be closed once the custody recommendation had been made, preventing practitioners from making recommendations that allowed for a later reassessment of circumstances in the light of child developmental changes. As one practitioner explained, "I have tried to make more dynamic interim recommendations in terms of later developments. But the question is: Who monitors this? The work is impossible. Things are always going wrong, custody and access disputes never settle down, the legal process continues and parents continue to be antagonistic." (Interview of 30 April 1997) Similarly, while practitioners were in principle in favour of supervised access in cases where the child would be at risk without it, most of them identified the practical difficulties involved. Professionals are not necessarily available to do it, or even always considered desirable for supervising access, and family members are frequently not suitable. Practitioners also noted that Family Advocates and attorneys preferred recommendations that implied closure of the case, rather than ordering an on-going monitoring procedure. On the other hand, our interviews with attorneys indicated that while some were receptive to setting up multidisciplinary panels, this was extremely expensive, especially those involving private psychologists. We were also told that psychologists tend to abdicate responsibility from any unpaid monitoring function.

It was suggested that pressures on time also resulted in a procedure too tight to give mediation a chance to work. As one professional expressed it, "Divorce is a process and people arrive at the Office when they are at different stages of this process. One can't bring people to insight and agreement before they are ready. If one pressurizes them into agreement about the children, there is a backlash." (Interview of 21 Feb. 1997) If mediation failed at the initial interview, the focus of the process would become more adversarial. Certain psychologists believed that the system remained essentially adversarial.

A frequently-voiced concern was the lack of training in psychology and child development issues of the staff of the Family Advocate's Office. It was felt that this resulted in inappropriate decisions being made on custody issues, especially by Family Advocates. They also were generally not trained in mediation, which practitioners felt should form a crucial part of the custody assessment.

Many practitioners observed that there was no clear delineation of roles in the Office. While they felt it was desirable that Family Advocates should gain a better understanding of the behavioural sciences and Family Counsellors more knowledge of law, the specialists in each field should not usurp the expertise of the other. Rather, it was argued, each speciality should have enough training to be sensitized as regards the issues of the other. The sensitization would enable the referral of particular matters to appropriate experts. Similarly, where proper training had not been received, non-professional staff should not offer specialist advice. A related point was that practitioners

were disquieted by the confusion of roles where the person who assessed a case sometimes also attempted to mediate it.

Apart from the confusion of roles, many practitioners felt that the Family Counsellors lacked adequate experience in the type of work performed. As one professional said, "They are generally inexperienced and have not had a lot of work in child and family matters. ... They need guidance and supervision in dealing with cases." (Interview of 29 April 1997.) Further, as reported above, social work students were contributing to custody and access assessments, supervised by a social worker from the ACVV. According to the practitioners, this was a recent development; those who knew of it were deeply disapproving. As one put it, "The student has no experience in one of the most difficult areas. They will have no time ... They will not argue with the Family Advocate. They will be faced with an Advocate who is older and more experienced." (Interview of 6 May 1997)

The absence of a psychologist at the office resulted in the regular referral of work to psychologists on an unofficial list selected by the office. Some practitioners felt that a more open selection procedure should be used to avoid a bias towards certain perspectives. It was also felt that the Office lacked the diagnostic skills to match particular problems with appropriate experts.

Teamwork and multi-disciplinary co-operation were seen as being crucial to the successful completion of custody cases, and professionals felt that this was often lacking. It was suggested that on occasion interdisciplinary conflicts led to pressure on Family Counsellors to accommodate the psycho-sociological input of Family Advocates, who were not qualified in this area.

Lastly, the understaffing of the office was seen as perforce resulting in a shift in focus from the problems of children to the processing of caseloads. Certain professionals suggested that conflictual office interactions had resulted in loss of staff but that the previously conservative tone of the organization was changing under the influence of both a racially and culturally representative staff and the new constitution.

4. The Practitioners' Views of the Benefits of the Office

Despite the criticisms listed above, most practitioners felt that the Family Advocate system was an improvement on the system that had operated previously. It was remarked that the resolution of custody disputes had speeded up considerably with the Office's intervention, and comments included such approbation as "I'm a great fan of the Family Advocate" (Interview of 23 February 1997) and "The Family Advocate is looking for the truth. They really want to know what is going on. This differentiates them from attorneys." (Interview of 5 June 1997)

The Office was generally seen as being a neutral and independent party which often took on the role of case manager, in so far as it decided whether further outside experts were required and negotiated to obtain them. Its role as protector of the best interests of the child was viewed as largely well-executed. As a practitioner characterized it, it served as a "good breast". (Interview of 16 April 1997) Some practitioners praised its staff as being in tune with current developments in child psychology in South Africa: As one put it, "They are fitting in with the general *zeitgeist* around children and children's rights." (Interview of 5 June 1997)

Practitioners stressed the fact that the Family Advocate's Office offered a much needed free service, which was identified as generally operating effectively in uncomplicated cases. The staff provide an interdisciplinary team of lawyers and social workers to examine the custody issues, provide advice, and sometimes mediation. Even in complex cases it was pointed out that the office could curtail some of the acrimony by stepping in and obtaining a court order for an independent psychologist or a panel of experts. As one practitioner put it, "The whole crazy system before the Family Advocate, where the Supreme Court was a forum for debate, wasn't practical. ... Custody disputes typically involve four lawyers in an adversarial system. The whole process was crippling to the whole family, and especially children, who would be the ones who would eventually suffer from material disadvantage." (Interview of 11 June 1997) Furthermore, practitioners felt that the Family Advocate's central function in resolving custody disputes places them in a strategic networking position to access the occasional *pro amico* services of private practitioners. This alleviated the necessity for parties to seek such services themselves. Together with the creation of the post of the Family Counsellor, it reduced pressure on state psychologists or social service state departments. Private practitioners stressed that ethically they were bound to do as thorough work for such cases as for those that paid the full rate.

The effectiveness of the Family Advocate's office was felt to be further enhanced by the procedure it used. It provided the divorcing parties with a forum for the resolution of points of dispute. Additionally, it provided all professionals involved in a case with an informal mediatory setting where necessary. This helped to prevent unnecessary court proceedings. Practitioners spoke of the flexibility of the Office in emergencies, providing reports for Rule 43 applications.⁵ The flexibility of Family Advocates and

⁵ "Rule 43 of the Uniform Rules of court makes provision for 'preliminary procedural skirmish[es] between two spouses intent on divorcing each other'" (Schäfer 1996, Issue 17. 48, quoting Swil 1978). The form of relief that may be obtained include any matter concerning the interim custody of a child or interim access to a child. The aim of this procedure "is to adjudicate the matters referred to in it, expeditiously and inexpensively" (Barnard, Cronje, & Olivier, 1986: 268).

Counsellors was also indicated by an openness to the modification of recommendations where challenged with new evidence. Their sensitivity to the complexity of custody issues was remarked upon. Furthermore, we were told that the Office was usually aware of its inadequacies in resolving intricate issues, and called on outside experts where possible.

5. Professionals' Recommendations on the Family Advocate's Office

5.1. Internal Organization

Professionals were unanimous in urging that the number of staff be increased: specifically that the ratio of Family Counsellors be increased against that of Family Advocates in order to enable the Family Counsellors to do more thorough investigations. There was general agreement that Family Counsellors needed more time per case, and certain practitioners stressed that Family Counsellors should routinely undertake home visits, which does not currently occur. Some practitioners also urged that they should contact more people able to provide information on the parties.

Further, it was widely felt that a post should be established at the Family Advocate's office for a psychologist, at the very least in a part-time or consultative capacity, who should be responsible for the briefing of practitioners where necessary. In the words of one psychologist, "It is an injustice that there is no psychologist in the Family Advocate's Office. ... If people can't afford litigation or private psychologists, they are stuck." (Interview on 2 May 1997) A concomitant would inevitably be that considerably more funding would be needed for the Family Advocate's Office, but practitioners were clear that they regarded this as essential.

5.2. Internal Procedure

It was suggested that the office should develop a set of guidelines for the management of cases. Certain practitioners noted an absence of standard procedure relating to how the first interview with parties should be conducted, by whom, and when and by whom matters should be decided. As noted above, the point was made that there was a need for role delineation between the roles of the Family Advocate and the Family Counsellor.

It was felt that there should also be guidelines relating to the use of mediation, as mediation theory suggests that mediators should be separated from evaluation: The same person should not both mediate and assess the case. One suggestion was that the Family Advocate should more frequently refer couples to outside mediators or employ mediators themselves.

Several practitioners suggested that the office could work more effectively by matching the strengths of individual Family Advocates and Family Counsellors, thereby building strong working relationships. It was suggested that more contact between staff professionals in a relaxed environment, such as a tea-room (currently lacking) could also encourage good relationships and dialogue. Furthermore, a need for case conferences was identified, involving the outside professionals involved in the case. Private practitioners also felt that a system was needed whereby they received feedback on reports submitted and the outcome of cases. In addition, they suggested that a better system be set up to enable the monitoring of recommendations in certain cases. "Monitoring of the relationship between parents and children is needed as changes to visitation and access may occur. Recommendations need to be better handled. One needs to have a look at follow-up – who does the reconstruction and therapy, for example, a psychologist?" (Interview of 28 April 1997) Moreover, as another practitioner pointed out, "The nitty-gritty of implementing the court order is glossed over. It is very important to keep access rights in place. Access has to be set out clearly and very specifically, for example, when, where, and how people should meet. ... A person should be appointed who monitors the process." (Interview of 30 April 1997)

5.3. Training

There were many suggestions regarding additional training which it was felt that the staff of the Office needed. The Family Advocates in particular should receive training in the organization of the welfare system and mental health structures in order to be fully conversant with all available resources. Family Counsellors should be trained in relevant aspects of the law and play therapy. Both should be jointly trained wherever possible, and specifically in child development and basic mental disorder diagnosis so as to recognize where and to whom outside referrals were necessary. They should also be trained in how to evaluate psychological reports, appropriate interviewing techniques, mediation, and the multicultural aspects of South African society. This training, it was suggested, could take the form of lectures and workshops by outside professionals and academics. "Family Advocates can't know everything about psychology, just as psychologists can't know everything about the law. Both need to constantly learn from the other. ... There is an insight lacking in both professions." (Interview of 30 April 1997)

5.4. Contact with Outside Professions

It was suggested that a roster be created listing the names of all practitioners involved in custody assessments and that, when such professionals were required, they should be called upon in time or that the entire list be made available to people requiring the

services of a professional. Practitioners remarked that more referrals to outside professionals would relieve pressure on the Family Counsellors. However, such services do not normally come free or even cheaply.

It was also suggested that the Family Advocate's staff should become actively involved in training African social workers about the role of the Family Advocate in divorce cases, in preparation for the abolition of the Black Divorce Court. Such a programme has successfully operated in Johannesburg.

5.5. Contact with Outside Lay People

One practitioner also identified the benefits of involvement with the wider lay community. The Office should be made more visible to the public, as well as legal and caring professionals. Suggestions for accomplishing this included TV and radio programmes, becoming involved with community organizations, and seminar and workshop presentations.

5.6. External Changes needed for the Better Operation of the Family Advocate's Office

A number of changes which were suggested to make the Family Advocate system operate more effectively were beyond the control of the Family Advocates and would need action from outside bodies.

The employment of Family Counsellors by the Social Services division of the Western Cape Provincial Administration rather than the Department of Justice was seen as counterproductive. As the Department of Justice does not control the wages, employment conditions, or promotion of Family Counsellors, it was felt that there was insufficient communication between Family Counsellors and their professional supervisors. It was therefore suggested that the Family Counsellors be employed by the Department of Justice.

Concern was expressed about various aspects of the judiciary in custody cases. Some practitioners felt that judges needed training in psychological issues. "Judges are conservative regardless of how well a case is argued. They jealously guard their upper guardianship status of children. Judges tend to reduce psychological opinion to common sense, which is often inappropriate. They tend to ignore the input of psychologists where they will not ignore the expert opinion of, for example, a fingerprint expert. Judges need education in child psychology. They need to be trained in areas of child and human development, psychopathology, value of psychometric test assessment, [and] gender issues." (Interview of 2 May 1997) It was suggested that this problem could be alleviated by the use of expert assistance in adjudicating custody cases. As one practitioner said, "I have found that, in my court appearances, judges don't

look beyond their traditional viewpoint. Judges are not experts in these areas and need to appoint assessors to assist them in these kinds of cases.” (Interview of 29 April 1997) On the other hand, another practitioner (not the only one) expressed an opposing view: “I love the judges! They have sufficient intelligence to know what questions to ask. I don’t think that they need special training in child psychology. They are perfectly able to make judgements about other areas, for example, mineral rights, without an indepth knowledge into geography.” (Interview of 6 May 1997)

Many practitioners also advocated that lawyers should be sensitized to basic issues in child psychology so as, among other reasons, to improve their ability to elicit the best interests of the child. “Lawyers do not usually know how to brief a psychologist correctly. They do not know the correct questions to ask.” (Interview of 6 May 1996)

As regards the caring professions, concerns were expressed about the standard of reports, which it was felt needed regulation according to professionally-established criteria. We were told of a committee for private practitioners who were attempting to establish a standard for custody assessment reports. The Family Advocate’s Office was strongly in favour of this to make their task of comparing reports in a case easier. As regards the need to obtain more assistance from caring professionals in custody cases, it was acknowledged that the forensic fees charged by private practitioners were high and that they should be encouraged to do more *pro amico* work or charge on a sliding scale according to the incomes of their clients. (Similarly, a change in the legal aid rules was felt to be necessary to accommodate the middle-income group who typically do not qualify for legal aid.)

6. Law Versus Psychology – Law and Psychology

What emerged very clearly from the interviews with practitioners was their awareness of the gulf between the legal profession (including the Family Advocate and the judiciary) and the caring professions. This was seen as operating on two levels: that inherent in the nature of the disciplines, and that resulting from the different roles they played in relation to custody cases.

As regards the nature of the disciplines, psychologists were sensitive to the fundamentally different way the two professions viewed the world. “The social sciences and the law interface is very problematic. The law seeks to establish fact in a very different way to the social sciences. Many difficulties emanate from basic principles. The nature of the Family Advocate’s work is dominated by the law. Lawyers are not trained in communicating and understanding the work of the social scientists. This tension results in many misunderstandings arising, often out of issues of prestige and status.” (Interview of 18 April 1997) While not necessarily accurately, the practitioners saw law as bound by exact rules and procedures which dictated how individual cases

would be decided. The contradictions and ambiguities in the psychological world were not seen as being tolerated legally. The caring professions, on the other hand, were characterised as more likely to take into account individual differences, underlying psychological dynamics, and personal circumstances. As one psychologist put it, "Psychology is not an exact science. Neuropsychology, for example, is more exact. Instruments are more exact to define and quantify what is to be described. I haven't got the foggiest idea about what is exact in the context of measuring human relationships. When assessing parents, I can make a decision after seeing one parent and then I will see the other and the entire picture that I have formed will flip." (Interview of 18 April 1997)

On the other hand, the clash between lawyers and the caring professions that became apparent in practice was of a different order. In the first place, practitioners felt that they and lawyers were engaged in different exercises in court. "The judicial system in this area is not objective at solving or sorting out human problems. Rather, it is designed to regulate the interactions between people. The judicial system is based on the adversarial process which exacerbates the pain and destruction of divorce, which is already most stressful and taxing. Divorce is one of the most painful and destructive experiences and affects the lives of so many people. It is one of the most difficult areas in psychology. The pain and anger is so severe. People's reactions become so primitive when it comes to divorce and custody. The legal system is not designed to solve or address this primitive response. The psychologist has to act in the best interests of the child, but the lawyer acts in the best interests of the parent in alleviating problems." (Interview of 18 April 1997) One practitioner highlighted the corollary that an adversarial system rewarded lawyers financially for winning the battle in court. "I've worked with some bad attorneys from real cut-throat firms. They are old school. They are trained to make money. There is more money in war than in peace. When attorneys specialize, they should specialize in divorce mediation. There should be money for attorneys in mediation. The whole legal system of divorce needs to be reviewed." (Interview of 28 April 1997)

Practitioners objected strongly to the way they felt that lawyers' agendas resulted in the incorporation of professional custody assessments into legal strategy. "Attorneys play a double game with psychologists. Psychologists can be seen as dispensable. If the lawyer does not agree with a professional recommendation, it can be easily dispensed with. However, if it conforms to what is needed, it can be used, integrated into the legal strategy, and strongly defended. Attorneys weight their case before and hitch their case with the psychologist." (Interview of 5 June 1997) It was noted that some practitioners' views on custody allocation in specific circumstances were well known to lawyers, who would call on them in appropriate cases in order to obtain the type of report desired.

As was repeatedly stressed however, all practitioners felt under pressure to give a favourable report to the briefing party. "This pressure is applied by one or other attorney. The subtlety of threat is great. The threat of not paying fees is there if you do not report in favour of the client. At the point where I have informed the attorney that I will be putting forward a recommendation that is against their client, they have stopped paying me. I have always completed and submitted these reports despite this." (Interview of 24 April 1997) Practitioners also spoke of pressure to change reports once they had been submitted to the attorney. Other practitioners spoke of the pressures they were subjected to as a result of the trial procedure. "Few attorneys receiving recommendations against their client will not attempt to discredit the person who writes the report. They will go and get a 'better' report, more consistent with their argument ... Divorce is an adversarial process." (Interview of 24 April 1997) Some spoke of "the cross-examination techniques of advocates where they will present impossible and ridiculous hypothetical situations to you." (Interview of 29 April 1997) There is also pressure where another psychologist is brought in on the other side. "This results in one psychologist attempting to discredit another psychologist." (Interview of 24 April 1997)

Easy discrediting of psychological reports results in psychology being seen as unscientific. "Psychologists' opinions do not carry much weight in the judicial system because the psychologists involved join the process and become partisan to emotional matters. Therefore lawyers can get opinion A from one person and opinion B from another. It forms part of the legal strategy." (Interview of 18 April 1997) It was also noted that some practitioners may unconsciously empathize with their client. "I don't necessarily think that [writing reports in favour of clients] is a conscious act on their behalf and that they mean to be biased. But many experts sympathize with their client and are drawn into the view of the person who approached them first." (Interview of 17 April 1997)

To avoid such scenarios, some practitioners adopted various procedures. "I always tell lawyers right at the beginning that my assessment will be of the child. I make it clear that the child is my client and no one else. This safeguards me against an attorney who thinks that they can contest my recommendation. The pressure from attorneys is subtle but is always there. When money is involved the pressure is even greater. ... This pressure doesn't exist if I am brought in by the Family Advocate to assess the child for both parents." (Interview of 24 April 1997) Another practitioner uses a different tactic. "I will not take on work for one party only. When the attorney calls me, I tell the attorney to call the opposing attorney and ask him to agree to have my report represent both sides. I don't like taking on one-sided cases. I suggest that the other party is approached. I do this because parties will fight over the report. It also prevents my report being seen as that of a 'hired gun'." (Interview of 23 April

1997) Yet a third tactic adopted was consciously to present psychological evidence in such a way as to be acceptable to the legal profession. "One has to convert the psychological approach to a legal approach in order for it to be admissible in court. Psychological language has to be converted into a language which the court can understand. The psychological angle is very different from the legal angle." (Interview of 23 April 1997)

Practitioners noted, however, that lawyers were in turn subjected to demands from their clients. "Some attorneys will fall into the trap of the pressure that their client puts on them, this isn't always conscious. They just become very wrapped up with their stories, allegations, and opinions of their own client." (Interview of 24 April 1997) It was suggested that such pressures could eventually have serious results for lawyers. "I feel sorry for lawyers as the whole process and system could be dealt with differently. Lawyers lose their integrity somewhere along the line. They begin law with compassion and empathy but it becomes hard to survive on that level. The lawyers who survive lose their empathy and warmth. Or the others burn out and go into something else." (Interview of 28 April 1997)

With such a view of the pressures experienced by both disciplines, some of the behavioural scientists felt that common ground existed between them. "In principle, lawyers and psychologists try and do the same thing. The approach of each discipline gives something to the other. Psychologists are required to substantiate their statements and lawyers have their attention drawn to the complexities and uncertainties of psychology and human relations and personalities. The differences have to be weighed up against each other and the law is ultimately tempered in relation to children." (Interview of 13 May 1997) Or, as another professional phrased it, "The expectations of the caring professions are not realistic and need to be tempered with hard, legal realities." (Interview of 30 April 1997)

As can be seen, there are indeed tensions and complementarities between the legal and caring professions in the area of custody assessment. Without an awareness – and acknowledgment – of them, it is unlikely that any of the professions involved can contribute its maximum potential to solving the issue of what is in the best interests of the children caught up in divorce.

7. Caring Professionals for the Future

The co-operation of the legal and caring professions is soon likely to face even more taxing conditions when the Black Divorce Court is finally abolished in practice and the new Family Court comes into operation. It is assumed that the Family Advocate will also be attached to the latter. Not only will there be a considerable increase in cases coming to the Family Advocate's Office, but they are likely to involve new and

complex issues. As one psychologist said of the current situation, "Many cases that occur in South Africa don't go anywhere near the office, for example, Black divorces. Most of the lower- and middle-class stuff goes to the Office. The issues being addressed by the Office are not the issues affecting the proletariat." (Interview of 13 May 1997) As Africans urbanize and change their cultural patterns, the nature of the problem in divorce cases will require additional knowledge and skills from the Office: These would include a knowledge of customary law, wider linguistic proficiency, and an awareness of the rapidly changing social and cultural mores in African society. Furthermore, the same will be required of private practitioners called upon to provide custody assessments. In addition, the new Family Court judges will require training in the evaluation of the assessments.

The Family Advocate's Office, lawyers, and caring professionals all felt that the contribution of the private practitioner was currently essential for custody assessments in complex cases. They were able to provide thorough evaluations over a longer time period than available to Family Counsellors and brought to them specialist skills and experience. Ideally these services should be available free from the Family Advocate's Office, but at present largely only those who can afford the high fees are able to access them. Moreover, current government spending cuts have seriously curtailed even those resources available.

It is a gross injustice that any dispute over something as important as the future care of a child should depend so much on the amount of income the parents have. In practice it derogates from the constitutional right of equal access to the law. A parent unable to obtain the services of a private psychologist or social worker is usually advised by lawyers that the recommendations of the Family Advocate's report must be accepted, however defective. Unless new expert evidence can be produced, the report is most unlikely to be reconsidered by the Family Advocate or rejected by the judge. For all parents to have a more equal opportunity to dispute the report, the services currently provided largely by the private practitioners will have to be made available to all income groups.

There are various possible routes to achieve this. Legal aid to cover them could be greatly expanded and the means test increased to extend aid to a much greater proportion of the population. More Family Counsellors, sufficiently qualified and experienced to provide equivalent services, could be appointed to the offices of the Family Advocates, preferably with additional appointments for psychologists. There may, however, be some difficulty in filling the psychology posts with linguistically proficient professionals. In Cape Town there is currently no psychologist whose home language is Xhosa and who specializes in custody assessments. Another possible source of free or inexpensive expertise would be provided if the guidelines laid out in the Proposed Code of Professional Conduct of the South African Medical and Dental Council and

the Professional Board for Psychology in respect of Psychology (1992) were followed by all. This provides that psychologists should "contribute a portion of their services to work for which they receive little or no remuneration" (Principle 10.5.3). A combination of these solutions might begin to meet the anticipated caseloads, although they will obviously take scarce resources from other needs.

Nonetheless, given the dislocation caused to children's lives by divorce, it is essential that the arrangements made for them at such a time should be the best available. For this, it is generally agreed that the Family Advocate's Office is essential in South Africa, but it cannot perform to maximum effect without the services of the caring professions. Despite the many other calls on the nation's finances, the government will need to reassess the allocation of funds if it is to provide for these. The care taken now is likely to pay invaluable dividends in the future.

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CHILDREN'S COURT ASSISTANTS: AN EVALUATION OF THE SOUTH AFRICAN EXPERIENCE

F. Noel Zaai

Abstract: The dependency of judges on fact-finding officers with special competency is well-illustrated in this article about a unique South African court, the Children's Court, instituted in 1937, long before the era of children's human rights and the right to representation. Provision was made for mandatory representation for the child and the parent opposing removal of the child. These representatives were court assistants, trained as social workers, whose task was to control the evidence brought to the judge by child welfare investigators. This article explores the fate of these assistants over time and presents dilemmas facing them because of the new constitutional right to legal counsel. The judges' haphazard implementation of the constitutional obligation has led to confusion in the role of these key non-judicial officers in realizing children's and parents' human rights.

1. Introduction

This chapter offers a discussion of the role and functions of a unique curial officer, the South African children's court assistant. Although their potential has not yet been fully exploited in South Africa, the work of children's court assistants may well be of interest to those involved in investigating cost-effective reforms for other legal systems. As will be seen, the use of a full-time, specialised assistant to complement the work of the adjudicating court officer can solve many of the procedural problems that tend to occur in child care cases. However, it will be shown that there have been many deficiencies in the South African approach, and these may also be instructive to those who work in other systems and have an interest in, for example, child advocacy.

The discussion that follows below is divided into four parts. In order to understand the constraints which have been placed on the functioning of children's court assistants in South Africa it is essential to appreciate the recent historical context from

which their work has evolved. The next part of the chapter below thus traces the origins of the office of the children's court assistant and assesses the impact of the apartheid period from 1948-1993. The third part of the chapter deals with attempts by the courts to find substitute assistants in the post-apartheid era, and the fourth part of the chapter reviews a current problem in South Africa which arises from uncertainty about who should serve as children's court assistants and what should be the nature of their prior training and experience. The fifth part of the chapter shows what precisely children's court assistants are required to do by tracing and analysing the specific provisions of South African law which govern their functions. In the conclusion to the chapter, some general recommendations are offered which arise specifically from the South African experience but which may perhaps be of relevance where reforms are being considered for other legal systems also.

Children's court assistants, as their name implies, work only in the children's courts. The South African children's courts, which pre-date the present Constitution, are perhaps unique in the nature of their jurisdiction. Local accessibility to the children's courts and a wide range of geographical coverage have been insured by the simple expedient of enacting that every magistrate's court in South Africa shall be a seat of the children's court for the area of its jurisdiction.¹ Except at a few major urban centres where the case load justifies it, ordinary magistrates act as the adjudicating officers in the children's courts. When undertaking this function, they are referred to as children's court commissioners. The children's courts rank as lower-tier courts from which cases can (in appropriate circumstances) be taken on appeal or review to the high courts.²

In regard to the work that they do, the children's courts are highly specialized. They are not criminal courts and deal only with a narrow but important range of child-centred matters, which are non-penal or civil-law in nature. Section 28(1)(b) of the South African Constitution accords to children the right "to family care, parental care, or appropriate alternative care when removed from the family environment". It is the children's courts which deal with children who appear to be in need of such alternative care and removal from the family environment. They conduct adoption and fostering inquiries and deal with any matter where it is necessary to consider whether a child should be removed by the state from her present guardian into alter-

¹ See s5(1) of the Child Care Act 74/1983.

² For further discussion regarding appeals against or reviews of children's court decisions see Zaal, F.N. 1997: 114-115. See also Zaal & Matthias 1996: 66.

native care.³ Children's courts also entertain applications to marry by persons under twenty-one years old who do not have a guardian available to provide such consent.⁴

2. Historical Background

2.1. The Origin of the Concept of Children's Court Assistants

Children's courts, with their focus entirely upon child care matters, were first set up in South Africa in 1937. In that year, a new Children's Act was promulgated.⁵ This was well before apartheid became an official policy in 1948 and there was thus still considerable room for creativity in the development of child care law which was non-racial in the sense that it was drafted so as to be of assistance to all children in a multi-cultural society. As Van Reenen stated in 1953, the 1937 Act was so implemented as to be "of general application throughout the Union and applies equally to natives, even if they are living under tribal conditions".⁶ Important features of the 1937 Children's Act were the formulation of the concept of a "child in need of care" as a basis for state intervention and the setting up of specialised, non-racial children's courts.⁷ These courts were to be staffed by adjudicative officers who would include "native commissioners" familiar with African customs and thus able to assist black children and, where such a commissioner was not available or where further expertise was required for any other reason, the adjudicative officer could be assisted by an assessor who, from the wide definition could be a black person familiar with African cultural norms.⁸

³ For a discussion of the functions of the South African children's courts see Zaal, F.N. 1997: 96-102.

⁴ Inquiries in regard to marriage applications are provided for under s25(1) of the Marriage Act 25 of 1961. Since both the UN Convention on the Rights of the Child and the present South African Constitution set the age of adulthood at 18 years, it has been suggested that the requirement of parental (or substitute-children's court) consent to marry should only be required prior to 18, rather than 21 years of age. See generally, Sloth-Nielsen 1998: 2-3.

⁵ The Children's Act 31 of 1937.

⁶ Van Reenen 1935: 5. See also *R v Komgana* 1939 EDL 246; and *R v Nakwena* 1947 (1)SA 154[N].

⁷ See sections 1-7 of Act 31 of 1937.

⁸ See s5(2) of Act 31 of 1937.

In addition to the commissioners and assessors, a third officer was provided for and named the “children’s court assistant”.⁹ In order to allow for the new children’s courts to function efficiently, the 1937 Act made provision for one or more such “children’s court assistants” in every magisterial district.¹⁰ These assistants were to provide general support for the children’s courts in all their functions and were expressly empowered to represent parties and aid with the leading of evidence. The allowance of more than one assistant at a court was particularly useful, and catered for situations where not only a child, but also an opposing adult party, might each need their own representative at a hearing of the children’s court.

The creation of a court advocacy function for the “assistants” meant that impoverished persons who could not afford to hire a lawyer would nevertheless have representation when appearing before the children’s courts. As experienced, full-time officers of the court, the children’s court assistants were placed in a good position to see that the needs and circumstances of the particular child under investigation by the welfare authorities were properly put forward at a child care inquiry. They could help to ensure, for example, that the child was only removed from her family where absolutely necessary and that, where it was essential to remove the child, a suitable alternative placement was proposed to the court by welfare social workers. Children’s court assistants were also well placed to help ensure that children were not subjected to avoidable secondary, systemic abuse whilst their cases were being investigated and processed, for example, in the form of unnecessarily long delays between court hearings.

The assistants were expressly required to support mothers who brought applications to have the paternal power of the father rescinded in cases where the father had ill-treated, deserted and/or failed to maintain either the child or the mother. Unless an assistant decided that the mother’s application was frivolous or fraudulent, the mother had a right to be represented by an assistant at a hearing before the children’s court.¹¹ Furthermore, in order to shield the mother from possible abuse or litigational intimidation, “any notice required to be given or served upon the mother” would instead have to be conveyed to the assistant.¹² In a real sense, then, assistants served as defenders to mothers who sought to terminate the parental powers of abusive or neglectful fathers.

⁹ See s1 of the Children’s Act 31 of 1937.

¹⁰ The Act established a children’s court in each such district.

¹¹ Regulation 5 of the Children’s Act 31 of 1937.

¹² See Van Reenen: 16–17, 33.

The system of full-time children's court assistants as provided for in the 1937 Children's Act had much to commend it.

By using salaried state employees as assistants, the Act allowed for representation of parties in a much greater proportion of cases for far less expense to the state than would have been required if private lawyers had been hired on a case-by-case basis for indigent persons.¹³ As specialist members of the court staff, assistants had the opportunity to learn to work appropriately and supportively with traumatised children. Since the aim in many children's court inquiries was to preserve the last vestiges of damaged child/parent relationships, it could be claimed that their presence was often more appropriate than that of lawyers whose stock in trade was the hostile, adversarial manner of conducting proceedings that was required in other courts.

As has been shown, the system of dealing exclusively with child care cases via children's courts as set up in South Africa in 1937 had many excellent features. However, although there were even resources specifically designed to assist black litigants, it needs to be recognised that South Africa was a white-ruled, neo-colonial nation throughout the period of the applicability of the 1937 Children's Act. It is undoubtedly true that children of colour were often discriminated against by those responsible for the conduct of child care proceedings in such a way that they suffered more secondary, systemic abuse than white children who were also the subject of care proceedings.¹⁴ However, in terms of the formulation and wording of the law itself, the 1937 Act did not imply or envision discrimination based on the race or culture of children in need of care.

2.2. The Apartheid Era 1948-1993

When the Nationalist government came to power in 1948, it implemented an official policy of racial discrimination which was to have a significant impact on the work of the children's courts. During the apartheid era, the government left the children's court infrastructure in place as an inexpensive way of dealing with children in need of alternative care. Such children were predominantly those of impoverished and disadvantaged sectors of the community and thus, to a large degree, were children of

¹³ There was, however, nothing in the 1937 Children's Act which prevented a party who could afford to do so from employing a private legal representative.

¹⁴ For example, in the city of Durban in the late 1930s and early 1940s there were instances of abandoned children of colour being separated from abandoned white children and then kept in dark, locked rooms with no proper toilet facilities whilst awaiting the processing of their cases. See Anon. 1942: 1, 5.

colour. The children's courts continued to deal with children of all races, although the welfare resources that could be made available on behalf of a child in need of care increasingly came to depend on whether or not the child was white. In relation to the numbers of children in need, there were, for example, many more places of safety and children's homes maintained for white children during the apartheid period.¹⁵

Although a new Children's Act replaced the 1937 one in 1960, the government maintained a cautious, veiled approach by not initially placing obviously discriminatory provisions in this new child-care statute. However, in 1965 the racism which was already policy became more blatant when a new section 32(2)(c) was introduced into the Children's Act 33 of 1960. In terms of this section, no child could be placed by a court in even the temporary legal custody of any person who had been racially classified differently from the child.¹⁶ As a direct result of this amendment, children's courts ceased to function non-racially. No longer were the court staff merely in the business of applying the best interests standard in order to find alternative placements for children in need of care. They were henceforth obliged to match children and prospective caregivers according to racial criteria. Significantly, it was now their official duty to accord higher priority to racial matching than to the needs and best interests of the child whose case was being dealt with. Thus, in a contradiction of their previous role, it was not infrequently their duty even to order the removal of a child who had bonded with a perfectly suitable substitute parental figure who happened to be of a different racial appearance from the child.¹⁷ Destruction, rather than promotion of the best interests of the child was the direct consequence of the children's court order in such cases.

Yet further damage to the quality of services provided by the children's courts came about as a result of an ill-thought out amendment to child care law which was promulgated as section 14 of the Child Care Act 74 of 1983.¹⁸ Since as early as 1913, children had been identified as candidates for state welfare intervention in their lives on the ground of them being "a child in need" or, from 1937, "a child in need of care". But

¹⁵ For a historical overview of racism as a factor in South African child care law, see generally Zaal, F.N. 1992.

¹⁶ Racial classification of all children as soon as possible after birth was implemented by government officials required to act in accordance with the criteria contained in the Population Registration Act 30 of 1950.

¹⁷ The author had personal experience of many such cases whilst acting as legal advisor to an anti-racist child care workers' group, The Children of Nowhere Association, in the 1980s.

¹⁸ This Act replaced the Children's Act 33 of 1960.

with the publication of the Child Care Act 74 of 1983, the legislature completely removed the child in need of care concept.¹⁹ The new basis for removing children into state care became that a parent or guardian was "unfit or unable" to be a caregiver. Aside from being fully involved in racial matching and racial classification processes as shown above, the children's courts were now thus also forced to become forums of adversarial proceedings where the best interests of the child had to give way to contentions about the unfitness of the child's previous care giver. By introducing a parental fault-based approach rather than focusing entirely on the needs of the child, the new provision engendered parental defensiveness and hostility and thus, in many cases, actually helped to reduce the chances of a removed child subsequently being reunited with her parents.²⁰

Aside from the introduction of racial matching and the substitution of a parental fault approach for the child in need of care ground, a third significant change was introduced during the apartheid period which directly affected the work of children's court assistants. A policy was implemented in terms of which the children's court assistants, whilst continuing to be usually social workers rather than lawyers, had to be, wherever possible, of the same racial classification as the child who was the subject of the hearing. Whilst this had the advantage of increasing the chances of the presence of a representative from the same cultural background as the child, it had the disadvantage of causing a constant rotation of children's court assistants on a case-by-case basis according to whether the child had been classified as black, Asian, white or "coloured" (mixed race).

The practice which developed in many jurisdictions was to have local government employ social workers as part-timers on call to come in and serve as children's court assistants in individual cases, according to the race of the social worker and child. However, because of the sheer inconvenience and impracticality of this procedure, the notion of having a professionally trained assistant present for all cases largely disappeared. Despite some uncertainty about whether the courts could even be properly constituted without the presence of an assistant, it became the practice in most districts to dispense with the presence of an assistant except where cases were unusually complex or else strongly contested between opposing parties. The concept of a full-time, specialised children's court assistant thus disappeared in many jurisdictions. The rotating children's court assistants tended to be less experienced and thus were

¹⁹ For the reasoning of Parliament see Republic of South Africa House of Assembly Debates (Hansard) 9 May 1983, second reading of the Child Care Bill, col. 6559 at col. 6561.

²⁰ For criticism of the new approach see Zaal, Noel 1988.

generally less effective as child advocates during the conduct of children's court inquiries.²¹ This, in, turn, further encouraged the tendency to do without them.

Having reduced the effectiveness and availability of children's court assistants as shown above, in 1992 the apartheid government took the further drastic step of removing social workers completely as children's court assistants.²² So rigorously was this decision implemented that, when the author conducted surveys in 1996-97, only one children's court out of 103 contacted reported that they had been able to retain a qualified social worker as an assistant.²³ It may thus be concluded that by the end of the apartheid period the use of professionally qualified welfare personnel as children's court assistants had almost completely ceased, and the work of the children's courts had in this and other ways (as indicated above) been gravely compromised. Consequently, the majority of children in need of alternative care – and especially black children – were not being rendered subject to care proceedings and were simply being left in their present circumstances. The lack of priority accorded by the government to the children's courts eventually had the outcome that, in many jurisdictions – especially in the so-called “Black Homeland” areas, children's courts ceased functioning completely. And in many other rural areas where there was a predominantly black population the caseload might be as low as six matters a year, with court staff being mainly employed in other courts. Unfortunately, this is a situation which still obtains in some jurisdictions today.

3. Attempts by the Courts to Provide Substitute Assistants in the Post-Apartheid Period

Fortunately, the enabling statute law in regard to children's court assistants was never repealed. It was carried forward in the Child Care Act 74 of 1983,²⁴ and was inherited in this form by the new democratic government of national unity which came to power in 1994. The new government most appropriately repealed the previous regime's imposition of parental fault as a basis for removing children into state care. The apt formulation of the 1937 Children's Act was revived, and the “child in need of care”

²¹ The information in this and the previous paragraph is drawn from the author's personal experience and interviews with respondents in the author's 1996 and 1997 field research.

²² This instruction was issued in the Department of Health and Welfare Circular 1\2\2\3\5 of 1992.

²³ The jurisdiction which had retained such an assistant was Pretoria.

²⁴ For discussion, see Part 5 of this chapter, below.

ground became, once more, the basis of child care proceedings.²⁵ Also, in an attempt to improve the situation in the former "Homeland" districts, these were all rendered subject to the Child Care Act.²⁶ The apartheid regime had, as a result of mounting international pressure, itself softened the bar on transracial placements. On 19 June 1991 it had replaced the prohibition upon transracial child placements with a new s40 of the Child Care Act which merely required, somewhat ambiguously, that "regard shall be had" to the race and culture of the child and any proposed new caregiver.²⁷ The position today is that the new government has retained this provision and, indeed, most of the Child Care Act – with the exception of the return to the child in need of care ground (as noted above).

Although the Child Care Act thus remained largely unchanged, the new Constitution contained significant provisions with important implications for child care law. The final Constitution of 1996 differed from the interim Constitution of 1993 by adding an express right for children to be provided with alternative care where necessary and also gave children the right to be represented in civil proceedings "if substantial injustice would otherwise result".²⁸ This latter provision created a dilemma for children's court commissioners who realised that, at least in complex or disputed cases, children now had a constitutional right to legal representation. In the absence of other sources for the provision of such representation, there have been attempts to revive the use of children's court assistants in many jurisdictions since 1996. As will be shown, however, the means which have, perforce, been utilized for the return of these officers have hardly been satisfactory in many instances. Commissioner-respondents interviewed by the author indicated that after 1992 they were forced to adopt desperate

²⁵ See s14 of the Child Care Act 74 of 1983 as amended by Act 96 of 1996.

²⁶ During the apartheid era, as part of the policy of "separate development", different child care legislation had been in effect in the "Homeland" areas from that which was applicable in the rest of South Africa. All areas were now rendered subject to the Child Care Act by means of the Child Care Amendment Act 96 of 1996.

²⁷ See the Child Care Amendment Act 86 of 1991. For a discussion of this provision, see Zaal, Noel 1994: 378. For a recent discussion of transracial child placements in South Africa, see Mosikatsana 1998.

²⁸ The relevant parts of s28 of the 1996 Constitution read as follows:

28(1) Every child has the right – ... (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; ...

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.

measures to fill the gap created by the removal of professional children's court assistants.

A total of 55% of the children's court jurisdictions randomly surveyed by the author in 1996 and 1997 had attempted to fill the gap caused by the departure of social workers as children's court assistants by using prosecutors from the local magisterial 29 criminal courts to serve as children's court assistants.²⁹ Although the magistrates' courts occupy the same building as the children's courts in most districts, only a few of the jurisdictions investigated had been able to use prosecutors on a full-time basis because they are primarily employed by the Department of Justice to work in the magisterial criminal courts. However, commissioners, being themselves regular magistrates, often had sufficient authority and influence to arrange for a prosecutor to be temporarily allocated to the children's court on an ad hoc basis where the children's court functioned only occasionally, or when a particularly difficult or contentious matter was due for consideration.

In particular, commissioner-respondents indicated that they tended to call upon the services of a prosecutor when an adult party was disputing the removal or placement of a child and had appointed a private lawyer to represent him/her. An advantage of using prosecutors which was asserted by the commissioner-respondents who used them is that no additional costs for either the child or the state are involved. Because the prosecutors are state employees who are available in the very same building, it is often convenient to make use of them when they are not undertaking their regular duties in the criminal courts.

Of the jurisdictions surveyed by the author, 42 were specifically investigated in regard to the degree of their use of prosecutors as children's court assistants.³⁰ From this sample of 42 courts, 6 had managed to use prosecutors in all children's court matters. These were all courts with very low caseloads of only a few matters each month. At 2 of these 6 jurisdictions prosecutors were used because the commissioners

²⁹ This was not a new solution. Under s5 (6) of the Children's Act of 1937 prosecutors were, *ex officio*, children's court assistants. In regard to their functions under that Act, see Van Reenen 1953: 32, 135. Under subsequent Acts, and even whilst social workers were available to serve as children's court assistants, prosecutors were used on occasion – particularly if difficult cross-examination or argument in regard to a point of law was likely to be required.

³⁰ This sample was that of the author's 1996 field research. The results of the study, which dealt only peripherally with children's court assistants, can be found in Zaal, F.N. 1996 and 1997. The author acknowledges with appreciation funding from the Community Law Centre, which made the study possible.

were under the impression that they had to have someone serving as a children's court assistant in order for the children's court to be properly constituted. The reason for using prosecutors was thus primarily a formal one with the aim of satisfying the requirements of the Child Care Act 74/1983.

Of the remainder of the 42 jurisdictions which were sampled in regard to the degree of use of prosecutors as children's court assistants, 17 did so in at least some cases. Commissioners at these jurisdictions were questioned about the criteria that they used for having a prosecutor present. The main criteria used were, generally, if a case was a disputed matter and particularly if the parents employed a lawyer to represent them.

A majority of 10 out of the 17 commissioners in this category felt that it was absolutely essential to have a prosecutor to represent the child and thus "even the balance" where an opposing adult party had a private legal representative. Other criteria mentioned by commissioners who used prosecutors as assistants in some cases only were if the investigative social worker recommended the presence of a prosecutor, where a matter had been transferred to the children's court from the juvenile courts (criminal courts), where a matter was difficult or complex, or in any case where child abuse had been alleged.³¹

The 1996 sample of 42 children's court commissioners referred to above and also another sample questioned in 1997 were asked to rate the effectiveness of prosecutors in serving as children's court assistants. Overall, only 12% of the commissioners considered prosecutors to be generally effective.

The remaining commissioners readily conceded that prosecutors were a less than ideal substitute for the previous full-time social worker assistants. The reasons for this generally negative view were largely based around the type of training and experience which prosecutors receive as a result of their normal functions in the criminal courts. They were described by commissioner-respondents as tending to import to children's court proceedings the aggressive and strongly adversarial approach to conducting court matters that is generally required in criminal cases.

In the view of the commissioner-respondents, the majority of prosecutors found it very difficult to change their courtroom style to the less formal and familial-supportive approach often needed in the conduct of child care inquiries held before the children's courts. A large majority of 88% of the commissioner-respondents considered that the idea of trying to preserve the last vestiges of a dysfunctional parent-child relationship was quite foreign to the approach of most prosecutors. Aside from a completely inappropriate work-style, the other major criticism of prosecutors was the

³¹ For further discussion see Zaal, F.N. 1996 and 1997: 25-26.

insufficiency of their knowledge of child care law. Again, this seems understandable because children's court work is a specialized field and prosecutors work mainly with the criminal law.

A third criticism levelled by many commissioners was that prosecutors, taken as a group, tend often to be insufficiently child-oriented and thus lack the appropriate interpersonal skills for children's court work. For example, they do not take proper instructions from the child (where the child is able to give these) and they allow the child to be harshly cross-examined by an opposing party or a lawyer representing an opposing party. When questioned about why they continued to use prosecutors as children's court assistants in the light of the negative factors, commissioners who use prosecutors indicated both the formal reason (discussed above) of having the court properly constituted and the fact that prosecutors at least see to it that sufficient evidence comes to light for the commissioner to make an informed decision.

In order to test the data derived from commissioners in regard to prosecutors, the author decided to survey an external group of respondents. Such a group was available in the form of social workers. In almost all children's court cases, a social worker (who is not attached to the court) is required to investigate the circumstances of the child and then present herself as an expert witness at the court inquiry. In 1996-1997 the author interviewed 25 social workers in order to seek their assessment of the effectiveness of the prosecutors as children's court assistants. Twenty-two of these social workers had been present as expert witnesses at children's court enquiries where prosecutors had served as the children's court assistants.

In a most striking finding, the sample of 22 social workers were unanimous in a view that prosecutors are ineffective when used as children's courts assistants. Six of them cited examples of children being exposed to punishing psychological abuse in the form of harsh cross-examination by an opposing party which the prosecutor concerned made no attempt to prevent. It may thus be concluded the practice of using prosecutors as children's court assistants, extant since the period of application of the 1937 Children's Act, is, by virtue of the training of prosecutors, undesirable and will often not be in the best interests of the child concerned.

Both the difficulty of obtaining prosecutors and a realisation by many commissioners that they are generally less than ideal as children's court assistants have led to attempts to avoid reliance upon them. In less important cases, commissioners in most jurisdictions now struggle on without an assistant.

Although they are intended to serve solely as adjudicating officers, they take on an extended role and decide which witnesses should appear, and cross-examine those witnesses when they do appear. They even, perforce, often take on pre-inquiry functions involving advice to parties, private legal representatives and investigative social

workers. As commissioner-respondents unanimously pointed out in the author's studies, this places them in an unethical position.

Given both the ethical problem indicated in the previous paragraph, and the urgent need in practice to have someone available to fulfil the important statutory functions of a children's court assistant, where more serious cases arise, some commissioners attempt to provide substitute-assistants by desperate measures. A large majority of 81% of the commissioner-respondents reported that they had resorted to pressing their court clerks into service as assistants where it appeared to be absolutely essential that the child have a representative. Of the 81 commissioners who admitted to using clerks, 71 stated that they had subsequently discontinued using them. Of these commissioners, 55 stated that this was because of the range of other duties which clerks carry, namely, their normal administrative duties, which left them with insufficient time to develop the skills needed to serve effectively as a representative. The other commissioners who ceased using clerks cited a lack of appropriate qualifications as rendering them quite unsuitable.

There have also been difficulties with using clerks to undertake the pre-hearing functions of children's court assistants. A significant majority of 89% of the social worker respondents interviewed by the author in 1996-1997 complained that they felt that it was inappropriate for unqualified clerks to be checking their investigative reports with a view to deciding whether these reports were sufficiently complete to form the basis of a child care inquiry or not. In other words, unqualified persons were being used to assess the work of social workers. This practice, which still continues at the present time in some jurisdictions, is surely improper, but is understandable where the courts no longer have professionally qualified assistants to check reports.

It may be concluded, therefore, that the field study results show that, just as has been the case with using prosecutors, children have tended to derive insufficient benefits from most attempts to use clerks as children's courts assistants. In the light of the problematic aspects of using either prosecutors or clerical staff as children's court assistants, a few commissioners have developed the practice of using the investigative social worker to undertake some of the statutory functions of children's court assistants at child care inquiries. Although it has only been used as a measure of last resort in a few districts, pressing in the investigative social worker to serve as a substitute assistant is most inappropriate. As has already been noted, the investigative social worker appears with the role and status of an expert witness.³²

³² See also Bosman-Swanepoel and Wessels 1995: 26.

Although children's court procedures are somewhat more flexible and informal than in other courts, the investigative social worker cannot legally be compelled to act as a court officer. Ms F Williams, a Durban social worker who has appeared in children's courts for more than ten years, has stated:

"The investigative social worker is aware of the fact that she or her agency will need to do reconstruction work with the parent after the children's court hearing. She therefore does not want to say things about the parents that will reduce the chances of working constructively with them later on. She is compromised by a need to keep her relationship with the parents as positive as possible. This is why we need a different person from a different organisation, to be the child advocate at a children's court hearing. The advocate will then be completely free to speak out on behalf of the child and tell the commissioner, in no uncertain terms, what problems the parents have."³³

It is clear from the remarks of Williams that the effectiveness of social work organisations which need to do post-inquiry reconstruction work with the child and her family can be compromised if their members are pressured into undertaking the court advocacy functions which are a crucial part of the work of children's court assistants in many cases.

It must be concluded that the decision in 1992 to remove professionally qualified children's court assistants impacted negatively upon the functioning of the children's courts in the immediate post-apartheid period. Attempts to find substitute-assistants by utilising criminal court prosecutors, court clerical staff and investigative social workers have, by and large, proved to be unsatisfactory. As will be shown below, the present South African legislature is aware of the need to find suitably qualified personnel to supply at least the child-advocacy function required at children's court inquiries. Also, in the light of problems such as those noted above, there have been calls for the return of full-time, professionally qualified children's court assistants, and discussion about whether they should be legally trained officers. These issues are considered in the next part of this chapter.

³³ For further discussion of this problem see Zaal, F.N. 1996: 21.

4. The Current Dilemma: Who Should Serve as Children's Court Assistants?

The reaction of the new democratic government to the crisis caused by the withdrawal of children's court assistants by the previous government was a cautious one. With limited financial resources available, it sought to deal first with what it perceived to be the most serious aspect of the problem, namely, the unavailability of appropriate personnel to serve as representatives and advocates for children who were subject to child care proceedings in the children's courts. In June 1995 the legislature published a Child Care Amendment Bill.³⁴ It was proposed in the Bill that criminal court prosecutors should become *ex officio* children's court assistants for the districts in which they hold office. A second provision made it mandatory (where a child did not have legal representation) for a children's court to determine whether legal representation was desirable to protect the child's interests and whether legal representation should be provided for the child at state expense.

Sloth-Nielsen and Van Heerden, in an article published in the South African Journal on Human Rights, criticised the proposal to use prosecutors as children's court assistants. Citing research by the present author and by Matthias, they pointed out that it had been shown that prosecutors were not usually appropriate persons to serve as children's court assistants.³⁵

In the light of this and other criticisms, the June 1995 Child Care Amendment Bill was withdrawn. Further bills appeared and culminated in the promulgation of the Child Care Amendment Act on 22 November 1996.³⁶ Still maintaining its cautious approach, the legislature, although it had promulgated the amending Act, did not immediately implement it. This amending Act fortunately did not carry forward the idea of using prosecutors as children's court assistants. It did, however, introduce a new section 8A which was to be inserted into the Child Care Act 74 of 1983. Under this new section, an allowance was created for a child to "have legal representation at any stage of a proceeding" under the Child Care Act. It was further indicated that such representation could be provided at state expense if the commissioner considered this to be "in the best interests" of the child and if the child's present legal guardian could not afford to pay for such representation.

³⁴ For general discussion of the Bill see Sloth-Nielsen and Van Heerden 1996: 247.

³⁵ *Id.*: 250.

³⁶ See the Government Gazette 17606 of 22 November 1996.

The author offered criticism of the new section 8A of the Child Care Act on several points. Firstly, that the best interests of the child test was too broad to offer commissioners sufficient guidance about when they should or should not appoint a private legal representative to the child at state expense. Secondly, the author contended that it should not be the commissioners, as the adjudicating officers in the same case, who should have to make the decision about whether a legal representative should appear before them or not. Thirdly, the author offered the substantive criticism that the new section 8A did not sufficiently address the wider problem of supplying personnel to fill the gap caused by the removal of professionally qualified children's court assistants in 1992.³⁷ Possibly in the light of the criticisms offered, and also being concerned about the costs that may be required from the appointment of private legal representatives to indigent children in child care cases, the legislature has withheld s8A of the Child Care Amendment 96/1996.

Section 8A was thus not rendered operational when the rest of the Act was implemented in April 1998. At the present time, therefore, the related questions of whether full-time children's court assistants should be returned and how best to supply representation in child care cases remain open ones in South Africa. The debate now appears to centre around whether children's court assistants should be returned or whether private legal representatives should be rendered available to children – if necessary at state expense – in appropriate cases. Relevant to this debate, and perhaps also of interest to those involved with the reform of other legal systems, are the actual statutory duties as laid down for children's court assistants in the Child Care Act 74/1983. In the next part of this chapter below, those statutory provisions will be noted and briefly considered.

A perplexing dilemma which partly accounts for the current governmental indecision on the question of children's court assistants is the matter of how they should be qualified. Essentially, the uncertainty has been whether to appoint legally or social work trained professionals if full-time assistants are to be returned. On behalf of social workers, it can be claimed that their training prepares them for working in a non-adversarial manner in sensitive situations where there are dysfunctional familial relationships which must not be subjected to further damage by inappropriate interaction with the individuals involved.³⁸ A second major point in favour of using workers as children's court assistants is that they are qualified to assess both the report and *vive*

³⁷ See Zaal, Noel 1997: 336 and 344.

³⁸ See Matthias 1996: 243.

voce evidence of the investigative social worker who (as has been above) is almost invariably appointed to appear as a witness at children's court hearings.³⁹

On the other hand, on behalf of the employment of legally trained personnel as children's court assistants, it may be noted that children's courts are first and foremost courts of law where a legally binding decision will be taken about the child's future placement. Court procedural skills, such as the ability to engage in effective cross-examination and the ability to shield the child from improper (perhaps abusive) questioning by an opposing party may often be as essential to the proper conduct of an enquiry as ensuring that the truth is discovered.

In situations where an opposing adult party has employed an aggressive private lawyer, it may be particularly important that the child who is the subject of the enquiry has a competent, legally trained person to represent her. The task of protecting evidence of such a child from being unfairly discredited by technicalities and other ploys resorted to by an opposing party's lawyer, may well be beyond the training and capabilities of any social worker who might be appointed to act as children's assistant. It must also be kept in mind that it is specifically a "legal practitioner" that a child has a right to at state expense in terms of s28 (1) (h) of the South African Constitution. Thus, if assistants who are not legally trained are employed in the children's courts, the state may be faced with the additional expense of providing a legal practitioner to represent a child when there is already a children's court assistant available. To avoid such duplication of costly resources, it may be better to employ children's court assistants who are legal practitioners.

Given that there are weighty practical considerations on behalf of using both social work and legally trained personnel as children's court assistants, it may be useful to note the statutory functions of children's court assistants as laid down in the Child Care Act 74/1983. These provisions are therefore discussed in the next part of this chapter, below.

5. The Law Applicable to Children's Court Assistants

Children's court assistants are entirely creatures of statute, and the law in regard to their functions is to be found as it appears intermittently in different sections of the Child Care Act 74/1983 (hereafter referred to as "the Act"). What might be described

³⁹ On the role of investigative social workers in South African child care cases see Matthias 1997: 30-32.

as the founding provisions are to be found in s7 of that Act. The relevant parts of s7 read as follows:

“The Minister may for every children’s court appoint any officer in the public service, or two or more such officers, as a children’s court assistant or children’s court assistants, who shall at any proceedings of the children’s court to which he is or they are attached, perform the function assigned to the children’s court assistant by or under this Act, and who shall generally assist the said court in performing its functions.

If a children’s court assistant is for any reason unable to act as such or if no children’s court assistant has been appointed ... the commissioner concerned may designate any competent officer in the public service to act as a children’s court assistant as long as the said children’s court assistant is unable to act or until a children’s court assistant is appointed ... as the case may be.”

A point of interest is that s7, following the original wording of the 1937 Children’s Act, expressly allows for two or more assistants in one court. The presence of two children’s court assistants would obviously be of great assistance at a busy urban children’s court or at any court where two opposing parties each need their own representative at an enquiry.

However, from the author’s interviews with children’s court commissioners and with other professionals in the period 1995-1997 it does not appear that any South African children’s court has ever had two children’s court assistants assigned to it during the currency of the Child Care Act 74 of 1983. Rather, as has been shown, they are likely to have at most one person who is likely to be a non-professional person who has been pressed into the role. Thus, although s7 allows for more than one assistant in theory, in practice this is not presently attained in South Africa. An unresolved question where there is one assistant available to act is which of two opposing parties should be represented by that assistant? Presumably the child should take priority, but that might leave, for example, an indigent parent unrepresented.⁴⁰

In South Africa, as in many other systems, regulations may be promulgated under any particular Act in order to spell out its application in more detail. Regulation 2 of the Child Care Act relates to s7 in that it lists some of the main duties of children’s

⁴⁰ Section 28(2) of the Constitution states that: “A child’s best interests are of paramount importance in every matter concerning the child.” It would thus presumably be a grave procedural irregularity to allocate an assistant to represent the parent if the child did not have any other representative.

court assistants. Under Regulation 2, an assistant "may attend any sitting of the children's court and may examine or cross-examine the child concerned, a parent or adoptive parent of the child, a respondent or any witness". This regulation appropriately empowers the assistant to take on an advocacy function at proceedings. The wording is sufficiently broad to allow the assistant to act on behalf of any party. For example, if a private legal representative happens to have been appointed to represent the child, the assistant could switch her services to represent the other party, and where there are no other representatives the assistant could attempt (although this is less than ideal) to assist both parties to present their cases.

A curious provision is Regulation 2(c) of the Act which allows for children's court assistants both to "give evidence" and "be examined or cross-examined by a party to the proceedings". It seems most strange that the legislature has allowed for the assistant, who is, after all, an officer of the court who is present to assist in its functioning, to be treated like a party or witness in that the assistant may give evidence or be examined (questioned) by any party to the proceedings. This provision brings confusion to both the role and the status of the assistant and ought to be deleted. The role of the assistant at a hearing ought only to be that of an advocate and there should be no confusion with that role.

Another inadequate regulation is Regulation 2(d) which states that the assistant may, "with the concurrence of the presiding commissioner", address the court. Again, this considerably waters down the status and the independence of an officer who should have the right and not have to seek permission to address the court at the end of a hearing. The role of unimpeded advocacy assumes particular significance in a society such as South Africa where linguistic or cultural barriers and low standards of education mean that many parties are quite unable to present their cases properly without the assistance of a representative. The assistant can hardly carry out this function properly if s/he has to get permission from the commissioner in order to address the commissioner. So, Regulation 2(d) also needs to be deleted.

An interesting part of Regulation 2 is Regulation 2(2) which states that, if a social worker has been appointed as a children's court assistant by the Minister of Justice, then "all reports by social workers intended for that court shall be canalised through that assistant". The wording of this regulation is again less than ideal. As has been seen from the part of s7 of the Act quoted above, it is possible for either a commissioner or the Minister to appoint an assistant. Therefore, it is clumsy to have a reference in Regulation 2 (2) only to social workers appointed by the Minister – social workers appointed by a commissioner should have exactly the same capabilities to screen reports by investigative social workers at the pre-hearing stage. What is, however, interesting about Regulation 2(2), is that it shows clearly that it was envisaged by the

legislature that social workers would be amongst those persons from the public service appointed to work as children's court assistants.

The term, "canalised", in Regulation 2(2) as quoted above is not defined, but is to some extent clarified by Regulation 2(3), which states that:

"A children's court assistant may require such further information, report or documents from the social worker who compiled such report or from any other person as he may deem necessary for the proceedings in the children's court."

Regulation 2(3) effectively requires the assistant to check the quality of any pre-enquiry documentary evidence and to see that there is sufficient such evidence for the proceedings to be held. The role of assessing and collecting written evidence will be a crucial one in many enquiries. Assessing its likely weight and need to be complemented by *vive voce* evidence at a future hearing requires skills traditionally associated with experienced legal officers, but assessment of the investigative social worker's report (usually the main pre-hearing documentary evidence) could generally best be done by a person with social work training and/or experience.

Section 8(4) adds appropriately to the pre-hearing functions of the children's court assistants by empowering them to require the clerk of the children's court "to subpoena any witness to give evidence or to produce a book or documents". The decision-making here required in regard to selection of witnesses and evidence would again seem more appropriate for a legally trained officer. Section 8(4) is also useful in that it shows that the drafters of the Act envisaged a clear distinction between the roles of the assistant and the clerk, with the former having power to instruct the latter. The combining of the tasks and status of these two officers, currently resorted to at some jurisdictions (as noted above), is thus arguably against the structure set up by the Act.

The next reference to the assistant to be found in the Act is at s12 (2) (b) and concerns the situation of an emergency removal of a child where there was no time to obtain a warrant of removal beforehand. In such situations, the person undertaking the removal (usually a policeman or social worker who has encountered the child in a situation of imminent harm) must inform the local children's court assistant "of the reasons for the child's removal". Section 12(2)(b) must be read together with regulation 9 (2) (c). The latter provision indicates that it is the task of the assistant to receive the reasons for removal in written form and then forward them to the commissioner for "review as soon as possible". In commenting on these provisions, it is clear that the assistant plays an important part in emergency removal situations. She/he will (in practice) need to check that the reasons of the removing officer are given in full and then see to it that the commissioner is immediately alerted so that a preliminary hearing can be held as soon as possible in situations of emergency removal. By removing the vital linking officer (by withdrawing children's court assistants in 1992) the gov-

ernment took away an important procedural check and balance in situations of emergency removals where mistakes may easily be made or delays occur that may be prejudicial to the child concerned. Here, clearly, is an important function imposed upon assistants and it is most unfortunate that they are usually no longer present or else qualified to carry it out properly.

Bosman-Swanepoel and Wessels point out that another pre-inquiry function of the assistant is to ensure that interested parties have been informed about the inquiry and that witnesses necessary to present evidence relevant to the child's placement have been instructed to be present. The assistant must also consider whether the child her/himself should be present because it is the assistant who must inform the court if there are pertinent reasons why the child cannot be present (such as ill health).⁴¹ The responsible task of deciding who should attend and seeing that the clerk serves these persons with subpoenas is therefore that of the assistant. Unfortunately, with the present absence of suitably qualified assistants, it is either the clerks or the commissioners themselves who must make decisions about who shall attend. It is submitted that for reasons of training and ethics neither of those officers should have to undertake that task.

The last two references to the duties of assistants in the Act refer specifically to the matter of adoption cases. In s18(4)(g) it is stated that, where an application is made to adopt a child who is presently under the care of a foster parent, the assistant is required to give written notice of at least one month to the foster parent so that the foster parent will have the opportunity to oppose the adoption if she/he wishes. This seems to be purely a clerical function requiring the filling out and serving of a standard form, and thus it is peculiar that it has been made a duty of the assistant rather than that of the court clerk. Here, there seems to be a confusion between the roles of the assistant and the clerk.

In s21 of the Act, the children's court assistant is included, along with adoptive parents and legal guardians or natural parents, within the class of persons who may apply to the children's court for a rescission of an adoption order where the grounds laid down in s21 exist. Such applications are rare in practice, and the grounds are narrowly circumscribed.

The decision to launch an application to rescind an adoption that has already been granted is obviously a drastic one fraught with serious implications for the child concerned. Under the wording of s21, where a children's court assistant is to be the applicant, she/he may only launch the application with the consent of the Minister of

⁴¹ Bosman-Swanepoel and Wessels 1995: 13.

Justice. This is another of those provisions which diminishes the status of the assistant. It effectively reduces her/him to a mere instrument of the Minister's will. Given that the ground for a rescission application will often be a failure to carry out correct children's court procedures that has produced a situation contrary to the best interests of the child, it seems inappropriate that the assistant should not have the right to decide her/himself about whether to launch the application. By the very nature of their duties, assistants will tend to become quite familiar with children's court procedures. In any event, the assistant is given the power to appeal against the children's court if it refuses her application for rescission of an adoption order – and from the wording of s22(5), the assistant does not need the permission of the Minister to undertake such an appeal. Such a decision to take the court on appeal would involve a weighing of the reasons given by the children's court commissioner in refusing the application and thus would appear to be a decision which could most suitably be taken by a legally trained officer. On the other hand, it might be argued that a person trained in social work or child psychology might be best placed to decide whether an adoption should be terminated.

The evaluation of the statutory provisions undertaken in this part of the chapter indicates clearly some degree of confusion in regard to the status and roles of children's court assistants. In regard to training and experience, some of the duties imposed appear to require a legally qualified officer, others a person trained in social work and allied disciplines and yet others could best be carried out by a person with both legal and social work training.

6. Conclusion

The racist aberrations and watering down of resources which have been shown to have occurred during the apartheid era should not be allowed to detract from the importance of the concept of a specialist child care officer. The notion of children's court assistants, as conceived in the 1937 Children's Act, was surely an excellent one. In support of the concept of children's court assistants, it certainly can be said that they performed a vital role before they were withdrawn. As has been noted above, in 1996 and 1997 the author interviewed 103 children's court commissioners. In an almost unanimous finding, 101 of these commissioners stated strongly that the removal of professional persons as children's courts assistants had struck a severe blow to the functioning of the children's courts. The commissioner-respondents pointed out that prior to 1992 the assistants had carried out basic and important functions, including that of acting as an advocate of the child where this was required at inquiries.

Particularly for countries where financial resources are in short supply, full-time, specialist officers who can undertake pre-hearing screening of documents, interview-

ing and other forms of preparation, and who can subsequently elicit evidence (if necessary on behalf of both parties) during the hearings themselves, can be most cost-effective. To have a small cadre of such officers will undoubtedly be much less expensive in terms of providing representation in a large number of cases, than appointing private lawyers on a case-by-case basis. Indeed, from as early as 1937, it has been found that private lawyers have tended to be highly expensive, adversarial to an inappropriate degree, lacking in the ability to interact effectively with children, and lacking in knowledge of the specialist area of child care law.⁴² The problem of a huge expense to the state disproportionate to the results achieved from using private lawyers in care proceedings has also bedeviled other legal systems.⁴³

Aside from withdrawing many of these officers in 1992, the other major mistake in South Africa has been a failure to consider ways to make them optimally cost-effective. The very name, "children's court assistant", is inappropriate because it implies someone who is entirely subservient to the adjudicating officer of the children's court. Rothman has suggested that the name of children's spurt assistant be changed to that of, "family law officer".⁴⁴ Aside from the maintenance of outdated terminology, a more substantive failing in South African law has surely been the failure to make maximum use of children's court assistants in the formulation of our law. There seems to be no reason why their services should be confined only to child care matters when there are so many other types of court cases that regularly involve children. An extremely expensive and entirely separate network of specialist officers, known as family advocates, has been set up in South Africa to provide representation for children whose parents undergo divorce in the High Courts. There seems no good reason why the duties of family advocates and children's court assistants should not be combined. Specialised "family law officers" who specialise in advocacy, in family law matters and those involving children could also be employed to represent indigent children who are charged in the criminal courts. Yet another function which they could usefully undertake is applications for maintenance on behalf of children and perhaps also on behalf of other dependants. In view of financial constraints, these officers need not be situated at every local centre. Instead, they could be based at selected centres and go on circuit in other districts at regular intervals.

⁴² See Van Reenen: 1 and, for the same problem in modern times, Zaai, F.N. 1996 and 1997: 35-46.

⁴³ See Timms 1995: 193; and Kelley and Ramsey 1985: 606.

⁴⁴ Interview with D.S. Rothman, Commissioner of the Durban children's court, 24 February 1995.

The actual notion of children's court assistants is thus one which offers considerable potential for many additional applications and a new formulation in South African law, and surely it must be of considerable interest as a subject for consideration in other legal systems where difficulties have been experienced in providing cost-effective pre-hearing support and court advocacy in family law matters and in other matters involving children.

In terms of training, the South African experience as reviewed in this chapter has clearly shown that a legal training for specialist child and familial advocates is essential. However, qualifications in social work methodologies, child development and familial psychology may be said to be equally important. If such a multi-faceted training is not provided, there is a real danger (as has emerged from many of the findings noted in this chapter) that "family law officers" may sometimes be ineffective to the extent that their involvement is counter-productive. The training of the new officer proposed thus presents challenges to tertiary educational institutions which may be accustomed to streaming students according to a particular discipline. The effort to formulate new, multi-disciplinary programs, in order to train and supply such officers is surely worthwhile for, as Timms has rightly said:

For the many thousands of children who are disadvantaged, dispossessed, alone, unhappy and ill-treated, rights are their only hope and effective representation the only way of making their voice heard.⁴⁵

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THE ROLE OF THE BRITISH COURT CLERK

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Abstract: The article describes the legal profession of a Court Clerk under the British legal system. The importance of the profession for court users as well as for justices is emphasized in a portrayal of the Court Clerks' responsibilities, ranging from administrative support to provision of legal advice to Magistrates. For court users, Court Clerks often are the first and main contact with the Court before and during proceedings. In their role as advisers to litigants and justices, Court Clerks remain judicially independent.

I. Introduction

When I first joined the British Magistracy some twelve years ago, it did not take me long to describe the Court Clerk as "... the life supporter of the court room". That remark became evermore justified as I sat in various courtrooms and courthouses within the Inner London Circuit as a Justice of the Peace. Then I began to wonder what it would be like without the knowledge of the Court Clerk.

The term "Court Clerk" is often confused with "Justices' Clerk". From the lay person's point of view, the officer who may be a male or female and sits obliquely or more often at right angles to the Justices' bench may conveniently be referred to as the Justices' Clerk or the Court Clerk. Strictly speaking, this is not so.

¹ Bill Annan, born in Accra, Ghana, is a Justice of the Peace at the Inner London Circuit and was appointed by the Lord Chancellor to the new Family Panel of Justices created under the Children Act of 1989. His interests include the comparative study of courtroom behaviour by court users in different countries, and the influence of the English legal system on the African judicial process.

The roles of the two positions may appear to be similar in so far as practice and directions in the courtroom are exercised. But it goes beyond that by a number of significant ways.

2. Appointments and Duties

The appointments, administrative powers and accountability of the Justices' Clerk are set out mainly in the Justices of Peace Act 1998, section 43 of which, for example, provides that a person may not be appointed as a Justices' Clerk unless he or she is a barrister or solicitor and has served for not less than 5-years as assistant to a Justices' Clerk or has a 5-year Magistrates' Court qualification.² On the other hand, the appointment of the Court Clerk mainly comes under the auspices of the Justices' Clerk (Qualifications of Assistants) Rules 1979.³ The Court Clerk, therefore, is effectively an assistant to the Justices' Clerk. He or she acts in place of the Justices' Clerk in proceedings before a justice or justices.

For administrative purposes, the Justices' Clerk is the chief legal adviser on law, practice and procedure relating to Magistrates' Courts. He or she has the overall responsibility to manage the court support system; and he or she is accountable to the Justices' Chief Executive even though his or her judicial and legal functions are independent. The Court Clerk on the other hand reports to the Justices' Clerk or in some cases, to the Deputy Justices' Clerk – an intermediary officer of the courts' judicial hierarchy. There are about one hundred and eighty full-fledged Justices' Clerks in England and Wales and roughly only 13 per cent are females. Significantly, there are far more Court Clerks in the United Kingdom with a relatively sizable representation of women.

In the eyes of the ordinary person, the distinction between the Justices' Clerk and the Court Clerk is somewhat obscure. Most court sessions are assisted by the Court Clerk who is able to exercise a great number of the responsibilities of the Justices' Clerk. This paper will therefore be restricted to the role of the Court Clerk as seen from the Justices' point of view.

² Within the meaning of section 71 of the Courts and Legal Services Act 1990.

³ As amended by SI 1992/709 and 1834. Some Court Clerks may be unqualified but this is about to change. A timetable has now been set by the Lord Chancellor for uniform qualifications for both Justices' and Court Clerks within the next ten years.

3. Duties

While the Magistrates rely on the Clerk for her/his highly skilled professional and good quality legal advice, those appearing before the court – whether defendants or witnesses, also see her/him as their main or first contact before and during the proceedings of the court, perhaps even as a “cushion” or a “referee” to the often dreaded Magistrates. Needless to say, defence and prosecuting Counsels and Solicitors take their share of reliance on the Court Clerk.

But the role of the British Court Clerk is not only restricted to the practice in the courtroom. In her/his duty to assist the Justices’ Clerk, the Court Clerk may have the responsibility to manage the overall business of the court. The Clerk is required to utilise available resources economically and cost-effectively, thereby providing a better service to the public at large.

There is a tremendous amount of interpersonal networking by the Court Clerk with other court officials. Such collective efforts make the courts function efficiently. For example, the Court Clerk may decide that a particular defendant may need an interpreter – whether linguistic, sign or other. Through networking, she or he may arrange for such representation effortlessly. The Clerk is responsible for the preparing of court documents, issuing summons, collecting court fines or transferring of court fines to other courthouses.

What then makes the British Court Clerk so efficient in his/her work? What makes her/him so reliable and effective? All British Court Clerks have a key purpose that is embodied in their training, performance and competences. It is to “ensure the effective and efficient provision of summary justice by providing the highest quality advice and support to magistrates, staff and court users”.⁴ This constitutes a mission statement that is incorporated in the training and competences of the Court Clerk in order to maintain that very high standard.

4. Training

In the United Kingdom, Court Clerks may be barristers or solicitors, although some clerks may only hold diploma in magisterial law. Furthermore, there are other provisions that may lead to a person being appointed to the post of a Court Clerk. These provisions are set out in specific rules.⁵ For example, a Magistrates’ Court committee

⁴ Court Clerk Competences, produced by the Lord Chancellor’s Department, 1994.

⁵ See fn. 2 above.

may grant a certificate of competence to a person who may then be qualified to practice as a Court Clerk.

Furthermore, a person may be deemed qualified as Court Clerk if he or she has successfully completed a relevant course, or has been employed as an assistant to a Justices' Clerk for not less than two years (whether or not continuously) and has passed a preliminary professional examination.

In order to maintain a high quality of service, training and development programmes are carried out throughout the working life of the British Court Clerk. These programmes or training activities may take the form of mentoring by senior and experienced personnel, work shadowing, coaching, meetings with other court personnel, visits to other establishments, discussions with colleagues and magistrates as well as undertaking individual studies.

Some very essential factors in the training process involve frequent reviews and evaluations of the training programmes. Feedback is often sought from all participants after each training session, analysed and communicated to Clerks, thereby enhancing the value as well as the contribution each of them make towards training.

5. What Does the Court Clerk Do?

The role of the Court Clerk is by no means restricted to the courtroom. In theory, Court Clerks are expected to sit for not less than six half-day sessions in court during an average week. In practice, though, this may be exceeded due to circumstances beyond the general control of the administration of the court, notably staff shortages and sicknesses.

The rest of the week is spent on administrative matters. The Court Clerk works in close consultation and partnership with the court administrative staff so as to form an effective integrated team.

The Clerk familiarises her/himself with the administrative system by liaising with all other administrative staff. This liaison helps to maintain consistency in court procedures. Furthermore, the British Court Clerk is empowered by the Justices' Clerk Rule of 1970 to exercise a range of judicial functions, which may not be carried out in court. The Clerk may, for example, grant legal aid for unrepresented defendants; is able to deal with the taxation costs as appropriate; may grant adjournments out of court; may issue summons and even order committals, and may also direct contesting parties to submit their respective reports by due dates.

6. Preliminary Role Before Court Sessions

Before the Magistrates enter the courtroom, the Court Clerk would have already prepared the way for some preliminary organisation of the business of the day. The Clerk is responsible for the preparation of the courtroom, making sure all facilities for conducting court business are in place. She or he seeks up-to-date information from all court users including prosecuting and defence counsel and solicitors, ushers and list callers. In effect, the British Court Clerk does not only prepare for the court sessions of the day, but plans for the business of the day as well.

The Court Clerk checks all the required papers for the day, identifying them and where necessary addresses or researches them accordingly. The Clerk is responsible for assessing the length of each trial case and in conjunction with the List Caller, may arrange the order in which cases are heard. The Court Clerk takes great care for and has regard to the needs of all the court users; this ultimate care is reflected in the efficient running of the court. All these activities take place before the start of the court proceedings, and the Court Clerk may not have consulted the Magistrates yet!

7. Pre-Court Consultation with Magistrates

The Court Clerk's first point of contact with the Magistrates is in the Justices' retiring room. Here Magistrates are given a brief about the number of cases and the contents of each case for the court session, and any other relevant information, which, in the opinion of the Court Clerk, should be brought to the attention of the Magistrates. This is perhaps the appropriate point to dismiss the slightest perception that the Court Clerk is involved in influencing the Magistrates in any way. This initial contact is for briefing purposes only. The importance of the judicial independence of the Court Clerk is always uppermost in the mind of the Clerk her/himself as well as the Magistrates. The Court Clerk has no influence whatsoever on the Magistrates, either during the initial briefing, during the proceedings of the court or when the Magistrates retire for their consideration.

8. Function in the Courtroom

The Court Clerk, having briefed the Magistrates, returns to the courtroom and waits for the Magistrates' entry. In the United Kingdom, the Court Usher would announce "Court stand", whereby all persons in the courtroom are expected to stand until the Magistrates have taken their respective seats on the bench. The Court session then commences.

By previous arrangements with the List Caller, the first case is called. It is the Court Clerk's responsibility to establish the identities of the person or persons about to be charged or answer to a complaint. This marks the beginning of the true expertise of the British Court Clerk. The British Court Clerk adapts a fair but firm system of communication in dealing with every court user, including defendants. The Clerk exercises courteousness and sensitivity. The ordinary language is used while routine or specific utterances are made clear and easy to understand by all.

In the courtroom, one cannot fail to observe the judicial independence of the Court Clerk in action. The Clerk gives guidance when pleas are taken. Unrepresented defendants often receive advice in the open court. Where, for example, legal aid is deemed necessary to assist a defendant in her/his deliberation, the Court Clerk may advise so in the open court. It cannot be ignored that some advocates may be led astray or attempt to use inappropriate procedures, albeit not always inadvertent, in order to reach their desired ends. It is always the wit of the Court Clerk that helps to guide such seemingly clever advocate back in the line of relevance.

The British Court Clerk is responsible for taking all notes verbatim in the courtroom, making sure that accurate court decisions are recorded. The Clerk advises advocates and Magistrates alike in open court unless inappropriate. It is often the case that counsel cite legal precedents during their final speeches to the bench. These citations may be contentious in nature or improperly inapplicable. It is at this point that the Court Clerk's knowledge and skill, wit, competences and professional skill are focused. The Clerk may challenge, question or doubt the validity of such references. She or he may even cite more relevant passages from authority.

In cases where adjournment is sought, the Court Clerk provides all information, including the history of the case, to the Magistrates and when agreed, proposes an adjournment date.

The Court Clerk constantly monitors the progress of the court session. The Clerk is able, therefore, to transfer listed cases to other courts within the courthouse in order to maintain the expected progress of the day. The Clerk may likewise, with the consent of the Magistrates, accept cases from other courts to make up for shortfalls where their own court list is unexpectedly completed before the scheduled time.

9. Advice at Retiring Room

The British Court Clerk does not retire with the Magistrates. The Clerk is not involved in the decision-making process of any case either in court or in the retiring room.

Decisions are arrived at solely by the Magistrates. However, the Court Clerk may be asked to join the Justices in their retiring room. When this occurs, it would purely

be for the purpose of advising the Magistrates on any legal point or points, which may not have been clear to them during the course of the hearing. It may be possible, at times, that Justices may have overlooked some legal references cited by counsel when the bench is addressed. The question that arises in the minds of the Justices is whether these references are authentic in application. In my experience and certainly in those of many Justices, it is at this point that Justices may want to double check with the Court Clerks in the retiring room.

The Court Clerk always returns to the courtroom alone and certainly not with the Magistrates. The Clerk is always aware that her/his action or omission should be perceived in neutral terms so as to diffuse any impression, however slight, of partiality or leniency towards any party. Indeed, the British Court Clerk is seen as a fair-minded, independent individual of the Judicial System, a true life supporter of the mechanics of the courtroom.

THE ADMINISTRATIVE JUDICIAL PERSONNEL
AND COURT PROCESS:
THEIR ROLE IN THE COLLECTION OF EVIDENCE
AND EXECUTION OF JUDGEMENTS IN TANZANIA
MAINLAND

*Addy Nyambo Lyamuya*¹

Abstract: This article presents the practical daily problems facing a senior resident magistrate in one of the most developed regions of northern Tanzania. It illustrates how an excellent system of laws and conscientious judges and magistrates harms the legal interests of litigants when the infrastructure and training, even for the most basic non-judicial personnel like watchmen, messengers, and cashiers, are lacking. The many practical suggestions give us insight into the most basic of implementation problems.

1. An Introduction to the Tanzanian Court System

1.1. The Court of Appeal, the High Court, the High Court of Zanzibar and the Constitutional Court

This article examines the role that court officials other than the professional judges and magistrates, hereinafter “supporting staff”, play in the collection of evidence and execution of judgments in the state courts in Tanzania Mainland. In this country today there are no traditional or native courts, as they were still commonly known before their abolishment through the overall codification of customary law in 1963.²

¹ As Principal Resident Magistrate in Charge of Kilimanjaro Region, Tanzania.

² The Local Customary Law (Declaration) Order, 1963 & GN 436, 1963.

In order to be able to visualize how the staff assists the judges and magistrates, it is pertinent to give a general overview of the courts in the country.

Tanzania lies in East Africa, made up of the United Republic of Tanzania (URT), a Union between Tanganyika (now Tanzania Mainland) and Zanzibar Islands. Under the Constitution of the United Republic of Tanzania, Zanzibar has its own High Court and Tanzania Mainland its own. The Court of Appeal is common for both. Its decisions are binding on both Zanzibar and Tanzania Mainland.

The Constitutional Court is entrenched in the Constitution.³ This court has the sole jurisdiction for hearing and making reconciliatory decisions in respect to any dispute submitted before it as to the interpretation or implementation of the Constitution of the United Republic of Tanzania between the Government of the United Republic and the Revolutionary Government of Zanzibar.⁴ It should be noted here that no such court has sat since its inception.

The author utilizes the word "Court" to include judges,⁵ magistrates,⁶ assessors and all persons (except arbitrators) who are legally authorized to take evidence.⁷ It includes as well a Justice of the Peace.⁸

Within the judicial system in Tanzania Mainland, qualified lawyers sit on the Bench of the higher, but not all subordinate, courts. The persons presiding over the courts thus have been given different names. The person who sits in the High Court and the Court of Appeal is called "Judge". At the next level, a Resident Magistrate is also a lawyer. The Resident Magistrate may also be assigned extended jurisdiction⁹ with the same powers of a High Court Judge. A lawyer presides at times at the District Court. None of the Primary Court magistrates or chairpersons of the Ward Tribunals are lawyers. For that reason one calls the Primary Court magistrates "lay magistrates".

³ The URT Const., (1977), Ch. 5, pt. VI, section 125.

⁴ The URT Const., (1977), Ch. 5, section 126.

⁵ Judge means a judge of the High Court and includes an Acting Judge. See The Interpretation of Laws and General Clauses Act, 1972, No. 30, section 3.

⁶ Magistrate means a Resident Magistrate, District Magistrate and a Primary Court Magistrate. See The Interpretation of Laws and General Clauses Act, 1972, No. 30, section 3; Magistrates' Court Act, 1984, No. 2.

⁷ Tanzania Evidence Act, 1967, No. 6, section 3.

⁸ The Magistrates' Court Act, 1984, No. 2, sections 51-62.

⁹ *Id.*, section 45. The author has Extended Jurisdiction.

The High Court has supervisory powers over all its subordinate courts¹⁰ as well as powers to revise records of its subordinate courts under the law.¹¹

1.2. *The Magistrates' Courts*

The Magistrates' Courts are regulated by the Magistrates' Courts Act. These courts are the Primary, the District and the Resident Magistrate's Courts.

1.2.1 Primary Courts

The Primary Courts are established in every district defined for that court.¹² These courts are the lowest magistrates' courts.¹³ The Primary Courts have appellate jurisdiction¹⁴ over Ward Tribunals,¹⁵ which hear trivial cases.¹⁶ The Ward Tribunals are established under the Ward Tribunal Act 1985, No. 7 (section 20). A Ward consists of such number of villages as may be specified by an Appropriate Officer.¹⁷

Appeals from the Primary Courts lie to the District Courts.¹⁸ The second appeal goes to the High Court and finally to the Court of Appeal.

The Primary Courts are the largest in number, since in almost every Ward there is at least one such court. In Kilimanjaro, for example, there are forty Primary Courts, the largest number in any Region in Tanzania. This arose out of the fact that in the pre-Independence era, the local chiefs had built local courts (formerly known as

¹⁰ The Magistrates' Court Act, section 30.

¹¹ *Id.*, section 31 & 32.

¹² *Id.*, sections 3, 18 & 19.

¹³ *Id.*, sections 8-24.

¹⁴ The Ward Tribunal Act, 1985, No. 7, section 20.

¹⁵ *Id.*, sections 8-10, 22-23,

¹⁶ *Id.*, Schedule pt. 1, Offenses under the Penal Code, Pt. II Offenses under other laws, and Pt. III Civil Jurisdiction.

¹⁷ Local Government (District Authorities) Act, 1982, No. 7, section 30. It is a part of a Division, the latter being a part of a District. Magistrates' Court Act [hereafter MCA], section 29. For Urban Wards see Local Government (Urban Authorities) Act, 1982, No. 8, section 14.

¹⁸ MCA, sections 20-23; see *Paul P. Sokav v. Stephen P. Soka*, High Court of Tanzania at Moshi, Civ. App. No. 6 of 1998 (Original Civ. Case No. 34/97 at Hai Kati Primary Court & first appeal No. 45, Hai District Court (unreported)).

Native Courts) in each chiefdom in this Region. Out of the 40 courts, Moshi District has the largest number, 15, while Mwanga District, only four.¹⁹ Based in both rural and urban areas, most of the Primary Courts are in the rural areas. In Kilimanjaro region, there are five Primary Courts in the urban and thirty-five in the rural areas.²⁰

The minimum qualifications for being a Primary Court lay magistrate is completion of a Form Four education or its equivalent, not below eighteen years of age, and with good character.²¹ They were trained for one year at the Institute of Development and Management Mzumbe at Morogoro in Tanzania (IDM)²² until the establishment of Lushoto Institute of Judicial Administration in 1998.

One phenomenon, which is unique to the Primary Courts, is that the law forbids any advocate (lawyer) or a public prosecutor to appear or act for any party in these courts.²³ However, the relatives or members of the household of the parties with the permission of the magistrate may appear on their behalf in civil cases only. It is only in the Primary Court where an accused person may refuse to have his criminal case tried and elect to go to the District Court.²⁴

The Primary Courts sit with a minimum of two assessors, respected members of the community. The procedure of conducting cases in these courts is simple and not with set and fast rules like other courts.²⁵ Unlike the other courts, the official language of these courts is Kiswahili, Tanzania's national language.²⁶ Whereas the rest of the courts can speak both Kiswahili and English while the session is on, the court record and the judgment shall be in English.²⁷

¹⁹ Self-counted by the author.

²⁰ Based on the author's personal knowledge who is also the supervisor and administrator of these courts in the region.

²¹ This is based on general knowledge.

²² The author once taught Primary Court Magistrates at Mzumbe from 1975-78 on a part-time basis while she was a Resident Magistrate at Morogoro.

²³ MCA, section 33.

²⁴ *Id.*, section 47 (2b).

²⁵ *Id.*, section 37.

²⁶ *Id.*, section 13(1).

²⁷ *Id.*, section 13(2).

1.2.2. District Courts

A District Court is set up in every District²⁸ whose jurisdiction is specified by the law.²⁹ This court has an appellate and revision jurisdiction over the Primary Courts and the Ward Tribunals.³⁰ This court has supervisory powers over the Primary Courts and has to confirm some of the sentences before they can be executed legally in criminal matters.

1.2.3. Resident Magistrate's Court

The constitution and jurisdiction of a Resident Magistrate is set up under law.³¹ Currently there are only twenty of these courts in the entire Tanzania Mainland. The Chief Justice appoints the Resident Magistrate in charge. The Resident Magistrate in charge has powers to give general or specific directions relating to places and times of sittings and distribution of court business in the region.

The ensuing sections of my paper discuss the role of the supporting staff in collecting evidence. The first section deals with the criminal matters, the second with civil. The final part discusses the over-all problems facing the supporting staff and suggests what could be done to increase efficiency in their performance.

2. Role of Supporting Staff

2.1. General Duties

The role of the supporting staff in the collection of evidence in criminal and civil matters is very important. They work in symbiosis to make the court process function smoothly. The list of the supporting staff is enormous. However, the author singles out a few for the purposes of this article:

- The **watchmen**,³² who, as their name indicates, keep watch to ensure that there is security in the court buildings. In the courts are kept all the court case files for keeping court exhibits, receipts, fees, fines, and deposits, copies of

²⁸ *Id.*, section 4.

²⁹ *Id.*, section 40.

³⁰ *Id.*, section 20 (4).

³¹ *Id.*, sections 5, 41-43.

³² Incidentally there are no females in this work due to biases and also insecurity especially at night.

summons, committal warrants etc. There are office stationary, equipment like typewriters, and telephones, to mention but a few. By keeping guard over the court, the watchmen are crucial in the collection of evidence and execution of judgments.

- The **messengers** or **process servers** clean the offices and go on errands. Errands for the purposes of the collection of evidence in criminal matters may take the form of delivering summons³³ and assisting compliance with court's orders.
- There is supposed to be at least one **telephone operator** in each court where there are telephones to attend to calls and even summon a witness by phone.
- The **drivers** are stationed in every court where there is a motor vehicle. Not all the courts have such facilities. They are pertinent to the collection of evidence and execution in that they transport judges and magistrates to the scenes of crime in criminal and in land or civil disputes.
- The court **stenographer** makes a shorthand record of the whole of, or any part of, the substance of the evidence of any witness.³⁴ The shorthand record should be typewritten and certified by the stenographer or any other **typist** and is made part of the record.³⁵
- The court clerk (registry assistant) may act as an **interpreter**.³⁶
- The **librarians** have a role in the collection of evidence and execution of judgments by mainly supplying court case authorities and documents to be relied upon by the judges and the magistrates.
- The **registry assistants** (court clerks) are those who directly serve the judges and magistrates by preparing cases, recording and maintaining them in the registers,³⁷ receiving cases for admission by the judges and magistrates, affixing court seals,³⁸ preparing court rooms,³⁹ and complying with the court orders by

³³ The Criminal Procedure Act, 1985, No. 9, sections 130, 142, 263, 294(2).

³⁴ The Civil Procedure Code, 1966, Supp. 66-86, Order XVIII, R. 9(1).

³⁵ *Id.* R. 9(2).

³⁶ *Id.* The Criminal Procedure Act, 1985, No. 9, section 211; MCA, Third Schedule section 26. The clerk may also look for a competent interpreter.

³⁷ MCA, section 11.

³⁸ MCA, section 12; Tanzania Appellate Jurisdiction Act, 1979, No. 15(GN 102, 1979), section 21.

³⁹ MCA, sections 10 & 14. They have to exclude children other than infants in arms. See

issuing summons to the accused, arrest warrants, witness summons, commitment warrants or release, probation, or compensation. They follow up court matters on behalf of the judges and magistrates.

2.2. Role of Supporting Staff in Criminal Matters

The clerk/registry assistant asks the accused person whether s/he admits or denies the truth of a charge.⁴⁰

At times, a witness, summoned to give evidence, refuses to appear without a lawful excuse. In that case, the clerk/registry assistant writes the warrant for arrest of the witness for the signature of the judge or magistrate and affixes court seals. The messenger or the process server sends the name of the same to the police or other authority bound to arrest.

The court may commit a person who refuses to enter recognizance to appear as a witness under the custody of the prison or any other officer of the court.⁴¹ Normally it is the court clerk/registry assistant, court watchman, process server/court bailiff, or the messenger, who will keep such person in their custody. A magistrate may commit an accused for trial in the High Court. The magistrate shall certify the statements made by an accused and such statements shall, without further proof, be admissible in evidence before the High Court. Custodian of this record is again the court clerk and sometimes the cashier, who stores the same in the safe. The watchman again is crucial for ensuring safe custody. A judge or a magistrate may collect evidence when in the course of the hearing she/he visits the scene of the crime.⁴² If there are any measurements to be done, the court clerk plays a great role in this.

2.3. Supporting Staff in Civil Proceedings

Parties to the suit⁴³ are indicated in the law. Should the claimant sue the wrong defendant⁴⁴ the suit may end up being dismissed. The court must have jurisdiction to

Tanzania Appellate Jurisdiction Act, 1979, No. 15 (GN 102, 1979), section 27(3)); The Criminal Procedure Act, 1985, No. 9, section 187.

⁴⁰ The Criminal Procedure Act, section 228(1).

⁴¹ The Criminal Procedure Act, 1985, No. 9, section 199(1)(a) & 251.

⁴² See *Yahaya Bakari v. Republic*, H/C. of Tanzania at Dar es Salaam, 1977, Cr. App. No. 237 (unreported), which was the author's original case No. 185 of 1976.

⁴³ The Civil Procedure Code, 1966, Supp. 66-86, O. 1.

⁴⁴ *Id.*, O. 1, R. 3.

deal with the matter. If the court has no jurisdiction to try the matter and the court clerk misses this point it may mislead the judge or the magistrate, who could come to a wrong conclusion.⁴⁵

To take evidence other than at the hearing at the place where a witness is living, the clerks have to write and send a notice to this effect to be given to the other party of the date of such a hearing.⁴⁶ The court may request another court in the country to take evidence, where such a witness is residing. Such a court shall comply and remit the evidence to the court that made the request. The evidence so taken shall be read at the hearing of the proceeding and shall form part of the record.⁴⁷ The clerk reads the same to assist the magistrate.

2.4. Role of Supporting Staff in the Execution of Criminal Judgments

The conviction, acquittal, or other order may be drawn up and shall be signed by the court making the same, or by the court clerks/registry assistants or other officer of the court.⁴⁸

The court may inquire into previous convictions of the offender for the purposes of determining an appropriate sentence against the offender.⁴⁹ Previous convictions may be proved by an extract certified under the hand of the officer having the custody of the records of the court. Usually the court record would be kept by the court clerks/registry officers.

An accused person in a criminal case is entitled to be supplied with the copies of the judgment free of charge.⁵⁰ Such applicant of the copy is also entitled to have the judgment translated into that person's own language free of charge.⁵¹ However, any other interested party or person affected by the judgment may be provided with the same on payment of necessary fees unless the court for some reason directs that the

⁴⁵ See *Arusha Municipal Council v. Lyamuya Construction*, Court of Appeal of Tanzania, Civ. App. No. 25 of 1988 (unreported) where a case was filed against the Municipal Authority in contravention of The Local Government (Urban Authorities) Act, No. 8, section 97 in the High Court, Civ. Case No. 23 of 1986, and on appeal it was dismissed.

⁴⁶ The Civil Procedure Code, 1966, Supp. 66-86, Order XVIII, R. 11(2).

⁴⁷ Criminal Procedure Act.

⁴⁸ *Id.*, sections 238 & 298.

⁴⁹ *Id.*, section 141(1).

⁵⁰ *Id.*, section 313(1).

⁵¹ *Id.*

same be supplied for free.⁵² Here is one instance in the criminal matters where the accounts section is involved to receive the fees. The messengers send the copies requested.

A court clerk/registry assistant has to prepare a warrant of commitment in case of imprisonment for a judge or a magistrate to sign⁵³ as part of the execution of a sentence. The same has to have the seal and the stamp of the court⁵⁴ put there by the court clerk. The clerk has a duty to ensure that the prison officers issue a prisoner a receipt upon admitting her/him in prison and record the same in the criminal register. If the convict paid a fine, the cashier has to issue a receipt and the clerk has to record the same in the criminal register and file a copy of the receipt in the court case file.

2.5. Role of Supporting Staff in the Execution of Civil Judgments

After the judgment has been pronounced, a formal order has to be drawn by clerks/registry assistants for the signature of the judge or the magistrate.⁵⁵ Appeal is a crucial part of execution of judgment. After an appellate court has delivered judgment, a certified copy of the judgment shall be sent to the trial court.⁵⁶ Here the secretaries, typists, and recorders have to produce copies, while the accounts section has to facilitate transportation and postage money. The messengers dispatch the same assisted by the drivers.

A decree may direct that movable property be delivered to a certain person and order the amount of money to be paid in the alternative if delivery cannot take place.⁵⁷ A court bailiff or a messenger may effect the delivery. The cash section may be involved in receiving the money and handing it over to the person entitled.

A judgment debtor should inform the court of the payments and the court has to summon the decree holder to show cause why such payments should not be recorded

⁵² *Id.*, section 313(2).

⁵³ *Id.*, section 327 for subordinate courts; section 328 for compensation; section 330 for the suspension of execution of sentence of imprisonment in default of fine; section 331 for commitment warrant for want of distress; section 332 commitment in lieu of distress; section 335 indicating that a warrant for the execution of sentence may be issued by the trial Judge or Magistrate or his successor in office.

⁵⁴ MCA, section 12.

⁵⁵ The Civil Procedure Code, 1966, Supp. 66-86, Order XX, R. 6-10. See Court of Appeal Rules, section 39(2) where the parties to the suit must agree to the order so drawn.

⁵⁶ Court of Appeal Rules, s 110(3).

⁵⁷ *Id.*, R. 11.

as certified. Here the cash section staff receives the money and facilitates payment to the decree holder; the court clerk issues the notice, while the messengers and process servers facilitate the delivery.

3. Assessment of Over-All Problems

The preceding sections show the respective roles played by the supporting staff in the collection of evidence, execution of judgments and the court process. This part examines the over-all problems facing staff and suggests what could be done to increase efficiency in their performance. These problems are:

1. They are not qualified for the jobs and have little education. Some are not trained for the job before employment. Nor are they given in-service training.
2. The salaries are meagre compared with the amount of work. So there is lack of incentive.
3. The staff is not vetted for the job.
4. In some areas there are no supporting staff at all, yet over-staffing in other areas.

Qualifications in any job are crucial for efficiency in the work place. The supporting staff are supposed to be employed after considering their qualifications as per the Civil Service Regulations. However, this is not always the case. In Kilimanjaro Region there is no court clerk/registry assistant with the minimum qualification of having completed a Form Four education (Standard Twelve), with a certificate from the Civil Service School at Dar Es Salaam and a pass in the Lower Registry Assistant Examination, or with a Form Six education with or without a pass.⁵⁸

In the Kilimanjaro Region none of the watchmen, messengers, and process servers⁵⁹ is qualified for their jobs. Messengers and process servers are supposed to have at a minimum a Class Seven school leaving certificate.⁶⁰ Most of them in the Kiliman-

⁵⁸ See Civil Service Regulation, 1991, No. 14, section 4.

⁵⁹ See Civil Service Regulation, 1991, No. 14.

⁶⁰ This is in the author's personal knowledge after studying their personal files recently. None of the clerks in Moshi Resident Magistrate Court (my office) has this qualification, yet two of them are called Registry Officers.

jaro Region are underqualified, hence messing up their jobs. Their little education makes it hard for them to train on the job and to catch up with technological changes.⁶¹

It is important for good performance not only to be trained for the job before being employed, but also while on the job. The supporting staff are never trained in service. Therefore, the judges and magistrates have to teach them what to do all along. This is a lot of work and deters progress of the court processes.

The clerks/registry assistants are supposed to be the keepers of the exhibits and register and secure them. However, this is not always done, leading to the disappearance of exhibits. The court process is obviously impaired when exhibits disappear. In *R. v. Constanatine Mlay*, Moshi DC. 1995, Tr. Cr. C. No. 94, (unreported), where the accused was charged with the offense of causing death by reckless driving contrary to section 42, Road Traffic Act, 1973, No. 30, the judgment was delivered on 17 November 1995. The court file was not found despite a search since then. The trial Magistrate had to take a lot of pains to trace the file because she was sharing her court clerks with three other magistrates. The victim's relative had applied for a copy of judgment and proceedings so that he could get paid through the insurance. He also wanted to file a civil suit for damages. There was a lot of correspondence regarding this issue. The author made a personal effort to trace the file and at long last on 27 May 1998, the file was found.

In *R. v. Salum Tesha*, Moshi District Court, Cr. C. No. 371/97 (unreported), the accused was charged with stealing by agent contrary to section 273 of the Penal Code. The victim, one Congest, had her motorcycle stolen. The original registration card of this motorcycle was tendered in court as an exhibit. The court convicted the accused on 31 October 1997. The court clerk had failed, however, to record the same in the exhibit register as required. After judgment, the victim wrote to the court to get her document back immediately. To date the exhibit has not been found. However, the court file has been traced, but without the exhibit. Therefore, the victim cannot institute a civil action accordingly to recover damages immediately. Unfortunately, she had no copy of the same. The author saw the actual file.

A good salary is a motivation for better performance. In the case of the supporting staff, their salaries are meagre as none of the staff gets a minimum of \$60. It is a salary that suffices for one week. There are no incentives given to the employees like social security and insurance. This is demoralizing, as they cannot survive with such a salary. This leads to corruption too.

⁶¹ This is personal knowledge as the Magistrate In Charge of the administration of the region. The author has also been in charge of Dodoma and Kivukoni courts.

Job satisfaction can be obtained where there are proper working facilities and tools. However, due to financial problems facing the Government, the staff is not equipped with proper working tools:

- Clerks have been going to court without writing papers, pens, and file covers.
- There are no typewriters or computers for the typists. Theft of the court's typewriter can delay typing. In Crim. Case No. 1 of 1998 (unreported) in the Moshi Resident Magistrate's Court, a watchman was charged for failure to prevent a felony at Kihuo Primary Court. To date the typewriters have not been recovered.
- Lack of working space is a hurdle.
- Communication tools like telephones are not available.
- Motorized vehicles, even non-motorized vehicles, are not available.
- The watchmen are never equipped with up to date weapons. They use torches and they are never supplied with money to buy the batteries even for their torches. Whereas thieves usually are armed with guns and other sophisticated ammunitions, the watchmen use swords and bows and arrows. This affects performance of their work, and endangers their lives and the safety of court records. The author knows personally of two watchmen being killed in the Moshi Resident Magistrate's Court between 1993 and 1994.

The court buildings are not secured in that they are not fenced and not lit. In the courts that are in the rural areas, there is no electricity. In Kilimanjaro region all the Primary Courts, be they in the urban or rural areas, have no electricity. Most of them had the electricity disconnected for lack of money to pay electricity bills.⁶²

Storage facilities for court files and valuable exhibits are not adequate. Each court is supposed to have a cash section with a cash box and a strong room to keep such money and valuables. It is interesting to note that very few courts have such facilities. It is convenient for each magistrate to have a cupboard and a filing cabinet well secured to store the case files and other exhibits temporarily before they are handed over to the exhibit keeper. It is very difficult now to find such facilities around the courts. Therefore, the security of court case files is not always there.

In some areas there are no watchmen at all. In each station there must be four watchmen. However, financial problems have made this impossible. It is usual for

⁶² This is based on the personal knowledge of the author, who has gone to all courts for inspection.

most of the court stations not to have watchmen. Examples in Kilimanjaro region are in the District Courts of Mwangi, Moshi, Hai, It, and Rombo.⁶³ This endangers security of the courts building, personnel, court records, exhibits, etc. Sometimes the courts are set afire after theft in the absence of a watchman. This occurred at the Nudge Primary court in Same District, Kilimanjaro Region, which was set into flames in 1998.⁶⁴ There are a lot of problems pertaining to absence of a watchman related to the collection of evidence and execution of judgments in the court process, such as occurred at the Kihurio Primary Court in Kilimanjaro Region on the night of July 8, 1998.⁶⁵ All the pending court case files and the registers⁶⁶ where criminal and civil cases are recorded were stolen. Evidence collection and execution came to a halt until the parties filed their cases afresh. This is a serious miscarriage of justice.

There is a doubling of functions of staff. There is only one process server in Kilimanjaro Region. Therefore, even clerks/registry assistants act as process servers,⁶⁷ despite their volume of work. Clerks are shared by more than two magistrates so the clerks cannot keep pace with the court work.⁶⁸ In most of the Primary Courts, which the author visited recently, there are no court clerks at all: Old Moshi, Kibosho, Masama, Marangu, Himo, Kilema, Lembeni and Chekereni.

Librarians are allocated to only a few courts. Their work in many courts is done by the registry officers and sometimes by messengers as in the case of many Primary Courts. For example, the Old Moshi Primary court in Kilimanjaro Region has had no subordinate staff other than the messenger (Foya) for the past five years. The author

⁶³ See Kilimanjaro Resident Magistrate's Court Staff disposition for May, June July, and August 1998 from all the District Courts including the Primary Courts.

⁶⁴ This information is known to the author in her capacity as the Magistrate In Charge of these courts.

⁶⁵ See Cr. C. No. 34 of 1998, Kihurio Primary Court (unreported). The Author inspected the actual file.

⁶⁶ The Magistrates' Court Act, 1984, No. 2, section 11 making it compulsory for each court to have such registers.

⁶⁷ This is based on the author's personal knowledge as the Magistrate In Charge of the administration in Kilimanjaro Region. Almost all the Primary Courts have this problem, whereby the Primary Court Magistrates have to perform the duties of the supporting staff on top of their magisterial work.

⁶⁸ In the court of the Resident Magistrate, Moshi, Kilimanjaro Region, there are 16 Magistrates, while the court clerks are 10. This is in the author's personal knowledge as she is the Magistrate In Charge for this court and all the rest in the Region.

visited this court in her usual supervision duties, and discovered that this uneducated lay person was performing the work of the court clerk, registry officer, cashier, accountant, recorder, process server, court bailiff, messenger, and even the work of the magistrate. The latter was just visiting the station as in many Primary Courts in the country. The messenger would even record in the case files and do all sorts of illegal things.

There is over-staffing in some courts in the country, especially in Dar es Salaam. Whereas there are supposed to be four typists at Singida Resident Magistrate's court, there is only one, and four working typewriters.⁶⁹

There are three drivers sitting in the Moshi courts daily who have no cars to drive because they were grounded for lack of money to service the same. Yet they are paid each month.

Social-legal problems face most of the female supporting staff, especially court clerks, typists, personal secretaries, and messengers, the major reason being that most of them are not qualified due to their low level of education they got as a result of discrimination against them.⁷⁰ Most of them are young and have families. They play a double role of being court officials and mothers, taking care of extended families. They are entitled to a paid maternity leave of eighty-four days every three years. In case the officer gives birth before the expiry of three years she will not get such leave except her usual annual leave. This reduces her ability to concentrate in the office and her chances for further training.

The supervision is poor due to lack of incentives, transport and communication facilities, even communication with the police stations in case of emergency.

⁶⁹ This is information from the Resident Magistrate in Charge, Singida Region, whom the author interviewed in late July 1998 while in a meeting in Arusha.

⁷⁰ In this country like many others, discrimination against females is part of the tradition and customary laws. Females were denied a right to go to school as opposed to the males who were given preference in this matter. Therefore, in most low paid sectors females form the majority. Tanzania has ratified the United Nation Convention on the Elimination of all Forms of Discrimination against Women. However, it has not complied with the requirement of legislating, modifying or abolishing all existing laws, customs, and practices that discriminate against women as per the Convention. See the UN Convention on the Elimination of all Forms of Discrimination against Women (Art. 2(f)).

4. Suggestions for Solutions

Having seen the problems above, the author suggests the following to be done to solve the problems:

- Since most of the staff have been employed without the necessary qualifications, they have to be trained on the job.
- As the staff retires or leaves the service, the policy should be to employ graduates, as many of them have no jobs.
- Restructuring and down-sizing the Civil Service should be speeded up as well as redistribution of competent staff from other departments.
- The staff should be vetted for good performance, as the role of supporting staff for collection of evidence and execution of judgments is very crucial.
- Staff from other departments who are excess, yet qualified, should be redistributed instead of being declared redundant.
- Short courses on computer use for every staff are essential.
- For the less educated or trained, on the job training would alleviate elevate problems.
- As for meagre salaries, the Government should increase salaries and speed up the current Government Restructuring.
- The court administrators should be given finances to transport staff to and from the office, supply office tea and working facilities.
- Insurance schemes for the staff, especially watchmen, are important because the current pension is too little as an incentive.
- The Government has to increase the judiciary budget and to create a Directorate of Planning and Buildings to facilitate planning and keeping the court buildings and equipment up to date.
- The officers who supply and purchase sometimes are not qualified for the job and are unfaithful, hence they are responsible for shortage due to theft.
- There are courts with more typewriters than typists, like Singida Resident Magistrate's Court, unlike Kilimanjaro region, where there are more typists than typewriters. A stock should be taken by the Head Office of the Judiciary and distribution be according to the needs.
- The police who are duty bound to guard all Government buildings should be assigned to each court house and the current watchmen should be trained on the job and be equipped with proper guarding tools.

- The typists and personal secretaries should be motivated by giving them computers and photocopiers to reduce the amount of typing and even save paper and time. By using computers they would improve their English. Instead of typing proceedings and judgments, if the case files were computerized, the secretaries could in a matter of seconds download the same to any other court needing the file for revision, appeal, or confirmation of sentence.
- There should be a library in each court well equipped with books and court decisions and sufficient competent staff to man them. If the library were computerized, then research could be easy and cheaper.
- In some areas there are no supporting staff at all, so the Head Office of the Judiciary should redistribute the staff according to the needs. There are regional courts which are less busy and yet they have the same number of supporting staff.
- The judiciary should be decentralized so that at the regional and district levels hiring and discipline can be effected, instead of the current trend where everything is done at the Head Office. The regional and district court magistrates should have power to employ suitable people to suit the local environment as an incentive.
- We need to embrace the era of science and technology by supplying the staff with mobile telephones, walkie-talkies, etc.

5. Conclusion

The introduction started out with a brief description of the court system in Tanzania Mainland. The roles of the supporting staff in the court process in the collection of evidence and execution of judgments were shown generally as supportive of the judges and magistrates. All the same, the judges and magistrates have to do on-the-job training for the supporting staff who are not trained or qualified. Libraries are practically non-existent. This means that no one can get court case authorities for the judges and magistrates. Shortage of staff and working and storage facilities should be solved. The Government has to adopt the new era of science and technology if the courts are to improve in the collection of evidence and the execution of judgments.

COURT ADMINISTRATION AND DOING JUSTICE IN TANZANIA

*Andrew Nehemiah Mwakajinga*¹

Abstract: This article also presents the practical problems facing a district magistrate in southern Tanzania in an undeveloped, not easily accessible area. Drawing on a long experience in other courts in the country, the author illustrates how the public view of the court staff is essential to achieving justice and how political influence on the judicial staff can sometimes be corrected. It draws parallels between the popular participation in pre-colonial non-state dispute settlement with contemporary popular participation in state judicial settlement of disputes, but raises doubts as to whether this is an efficient means of inculcating the rule of law in the public's mind.

1. General Role of Administrative Staff

Court administrators in magistrates' courts are those officers who have no judicial powers or legal qualifications (at least in lower magistrates' courts), but are working in court to serve judicial officers. They concentrate on court administration, that is, they bring about good relations among court staff members as well as between the public and the staff.

The key court administrator is the registrar or assistant registrar, sometimes known as the court clerk. They perform court administration according to their individual talents and knowledge of the law gained through experience. When it comes to public relations, much depends on the individuals' personal social attitude and common sense. When the registrars are poor in public relations, a bad image in the general public is created and thus destroys the court's reputation. Their ignorance of the law

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can be a source of public complaints against the judiciary. A case may be delayed due to the negligence of an assistant registrar to include it in the Cause List. Sometimes an assistant registrar may not advise a person in a manner pleasing to the litigants. However, many who are appointed registrars are trying to maintain the dignity of the judiciary at a reasonable standard.

In Primary Courts, however, the situation is different. Court administration is primarily conducted by judicial staff. A Primary Court magistrate makes sure that on a specific date cases must be heard. He takes measures to make sure that summonses are issued and served to the parties and their witnesses. Sometimes, where possible, he personally writes down the summonses and hands them to a messenger for service. The same applies to an arrest warrant. For most of his work, he does not rely on administrative staff.

At times, due to lack of man-power, assessors help in the court administration in Primary Courts, though officially, this is not part of their job. Assessors are supposed to sit with the judge and vote on decisions. Their duties shall be described below.

This problematical situation is known to the central authorities. Already in 1975 the Judicial Review Commission sent questionnaires to the registrars inquiring about certain problems.² It was asked specifically: "What administrative tasks do magistrates in charge of districts or regions perform? Do these tasks occupy considerable time of the magistrate as to affect their out-put in the discharge of their judicial functions? Would it be wise to relieve the magistrates concerned of these tasks and assign the same to court administrators?"

The response was: "The magistrates in charge have to perform all that is necessary for the functioning of the courts." The Judicial Review Commission was dissatisfied with the answer: "Although the registrars seem to find nothing wrong with a system [where] magistrates spend so much time dealing with administrative paper work, we cannot but feel that their administrative functions, vital as they are to the working of the system, cannot be allowed to take precedence over their court work. If the magistrates cannot do both their judicial and administrative duties equally well, and to the satisfaction of the community, we submit, the proper thing to do is not to go on regardlessly, but to find ways and means of relieving them ..." Up to now no changes have been effected and magistrates are over-burdened with a lot of work in addition to their judicial work.

² *Report of the Judicial Review Commission of 1977.*

1.1. Problems in Protocol Recording

While the Magistrates' Courts Act specifies that the record shall be in English in the District and Resident Magistrates' Courts, but in Kiswahili in Primary Courts (section 12(2)), the law does not specify how court records can be obtained. The present practice is that the magistrate records the protocols in a case file in handwriting. Later these are typed when there is an appeal. At the trial the magistrate has to listen and write simultaneously. The magistrate has to be succinct, reasonably fast and accurate in writing, and be quick in sorting out relevant facts from the evidence. Finally, the magistrate reads the recorded evidence to a witness for corrections.

This present method of protocolling is conducive to errors, omissions, or irregularities, which may amount to injustice. The proceedings should be taped – better yet even video-taped – so that in case of an error or omission, the tape will clarify the matter. Video taping has the advantage of showing the demeanor of the witness. At the moment, using such equipment would raise the costs of court proceedings.

1.2. Translation Duties of Administrative Staff

The need for translation in dispute settlement has a long history in Tanzania. In traditional dispute settlement, translators became very important when the Confederal Council, which was a supreme organ made up of tribal heads or chiefs, worked under the following principles:

- (1) Each tribe was represented by its head, and voting was by tribe, so that each tribe and all of the council members in each tribe had to agree before a binding decision could be made. Furthermore, all decisions of the Confederal Council had to be unanimous and its meeting took place before the public so that every member of the public had the right to speak, although the Council alone made the decisions.
- (2) The Confederacy had no office-head or chief executive but it used to have two supreme war chiefs enjoying equal authority and equal power.
- (3) When a dispute arose between one tribe and another, they had to have translators during the traditional mode of settlement of disputes.

Today, in the present judiciary, which has a monopoly over official dispute settlement, it is the assistant registrar who must be a linguist. The assistant registrars function as translators. None of these persons undergo proper training in translation of legal technical terms, e.g. bailment, interrogatories, mens rea, certiorari, per incuriam, fructus naturales, etc.

However, in Primary Courts, which number 1200 in the country, there is less of a translation problem because the court language is the national language Kiswahili.

But not all complainants, accused, and witnesses know Kiswahili very well. Villagers from remote areas can express themselves better in court in their vernacular languages than in Kiswahili. An interpreter or translator is needed. At this stage the court will rely on the trustfulness of a translator, unless the magistrate himself is conversant with the vernacular language. This is a problem even in District Courts, Resident Magistrate's Courts, the High Court, and the Court of Appeal. Most translators of languages other than English or Kiswahili are not employees of the judiciary. They are either picked from the audience in court or by prior arrangement if it is known that such an interpreter would be needed in the proceedings. If a translator of this type creates or has interests of his own to serve, he is likely to mislead the court. There are some African languages like Wamasai that are complicated to understand. Thus, the assistant registrars, when acting as translators, play an essential part in access to justice as far as trustworthiness is concerned.

2. Public Participation: Role of the Assessors

Sections 6(1)(a) and 7(1) of the Magistrates' Courts Act (No. 2/84), when read together, provide that a Primary Court is duly constituted when held by a single Primary Court magistrate sitting with assessors. Assessors were intended to introduce people's participation and increase their confidence in the administration of justice. It was felt that it was not only important that the people should feel that justice was being meted out to them by a person who more often than not was a total stranger to them, but it was also necessary that they should, through members of their own neighbourhood, the assessors, see it actually done. In this way, it was felt, would the rule of law be inculcated in people's minds.³

Section 7(2) of the Magistrates' Courts Act requires the decision-making to be by consensus. This requirement applies to all findings on any issue, e.g. the question of adjourning the hearing, an application for bail, the question of guilt or innocence of any accused person, the determination of the sentence, or the assessment of any monetary award. In case there is a difference of opinion between the magistrate and the assessors, or any one of them, the matter will be decided by the votes of the majority of the magistrate and assessors present. In the event of a tied vote, the magistrate has the casting vote.

³ This was expressed in more articulate terms in the then Second Vice-President's speech before the National Assembly when introducing the Bill for The Magistrates' Courts (Amendment) Act, 1969.

Where two assessors concur in their opinions, a magistrate does not have the casting vote. He must then decide the case according to the opinion of the assessors. It is my experienced view that this is the most dangerous area where justice is being fettered. Assessors do not undergo any training in law. Section 8(1) of the Magistrates' Courts Act stipulates that all persons between the age of thirty and sixty years are liable to serve as assessors in court. They do not have qualifications other than their respective age. Thus, Primary Court Magistrates sometimes must decide cases against the law merely because assessors have concurred in their opinions.⁴ An innocent suspect may be sent to jail on the assessors' opinions alone even if the evidence on record does not support it.

A good number of assessors are illiterate, and are very old persons. In most cases, they do not concentrate much on the summing up of cases by the magistrates. Most of them dose in court during the trial. Assessors represent the public in the decision-making in Primary Courts, which affords them some sort of political stand, but many assessors do not appear to understand their role in court. They come at their pleasure, on the allegation that they are not paid their allowances. Cases frequently have to be adjourned because sections 6(1)(a) and 7(1) of the Magistrates' Courts Act do not allow a Primary Court Magistrate to preside over a case without assessors.

Therefore, at the Primary Court level independence of the judiciary is not fully exercised by magistrates. Secondly, some cases, whether criminal or civil, are not decided according to the evidence adduced in the proceedings and the law applicable to each case. Thirdly, tyranny may rule if the assessors choose to hate a suspect in a criminal case or a litigant in a civil case. They may decide to defeat the magistrate for the sole purpose of victimising the person whom they hate. Fourthly, the system is conducive to corruption, because once two assessors conspire to concur, they decide the judgment in court, i.e. their opinions will be the judgment. Nobody will overrule them except on appeal, which in reality is always too late.

In District and Resident Magistrates' Courts, assessors may be summoned to serve where the presiding magistrate is of the view that in a case before him there are issues of customary or Islamic law. The assessors give their opinions as to all questions relating to customary or Islamic laws in issue. In determining the case, the court is not bound by the opinions of the assessors. This is the major difference between the role of assessors in the Primary Courts and the District and Resident Magistrates' courts.

⁴ See *Ali Nyambwe v Mwanaidi Rashidi*, (1987) Tanzania Law Reports 131, where it was held that a magistrate may not ignore assessors however perverse their opinions may appear to the magistrate (s. 7(2) Magistrates' Courts Act).

4. Ward Tribunals

The establishment, jurisdiction, powers, practice and procedures of Ward Tribunals are governed by the Ward Tribunals Act (No. 7/1985). Section 3 of the said Act establishes in every ward in mainland Tanzania such a Tribunal. Ward Tribunals deal with trivial criminal and civil cases by means of arbitration, mediation, and conciliation between conflicting parties in the village and in some areas in town.

According to section 4, a Ward Tribunal consists of no less than four and no more than eight members elected by the Ward committee from amongst the list of names of persons residing in the ward. Certain categories of persons are excluded by section 5 of the Act from being nominated as members of the tribunals. These include members of the National Assembly, civil servants, legally qualified persons or those employed in the judiciary, persons under the age of eighteen years, the mentally unfit, persons with bad moral turpitude, and foreigners. The quorum at a tribunal as per section 4(3) (as amended by Act No. 12/90) is one half of the total number of members.

As per section 4, the Tribunal is headed by the chairman elected from among members of the Tribunal. It must also have a secretary, who is appointed by the Local Government Authority in which the ward in question is situated upon the recommendation by the Ward Committee. The person must be sufficiently literate and educated to discharge the duties satisfactorily. Section 6(1) fixes the tenure for all members at three years with eligibility for re-election. The only exception is the secretary, who under section 4(3) (as amended by Act No. 12/90) is a permanent employee in the service of the Local Authority.

The primary function of each Ward Tribunal as per section 8 of Ward Tribunal Act 1985 is to secure peace and harmony by amicable and just settlement of disputes within that ward. Its first task is to settle disputes by mediation before it exercises its compulsive jurisdiction. The tribunal also has jurisdiction in relation to disputes arising under all laws and directives passed by the Local Government Authority. Section 9(1) gives the Tribunals specific jurisdiction to inquire into and determine disputes relating to offences and civil disputes as specified in the schedule of the said Act. The schedule is divided into three parts. Part I contains selected offences under the Penal Code, Cap. 16 of the Laws. Part II lists other offences under the laws. Both parts specify maximum penalties that may be imposed by the Tribunals. Part III confers on the Tribunals civil jurisdiction in specified matters. The most important provision is Part III (ii) which empowers Ward Tribunals to discharge all functions of Marriage Reconciliation Boards.

In the exercise of its functions, a Tribunal may impose fines subject to pecuniary jurisdiction limitations as provided for under section 10 (amended by Act No. 12/90). It also may make orders of imprisonment, which, under section 19(1), must be sent for

endorsement by the Primary Court Magistrate for the area in which the tribunal is situated.

The decision of the Ward Tribunal is final and conclusive, except on points of law. Under section 20 (amended by Act No. 12/90), an aggrieved person may appeal against the decision of the Tribunal in writing to the Primary Court. The Primary Court has revisionary power over records of any proceedings of the Tribunal in order to make sure that the Tribunal's decision is according to law and does not conflict with the principles of natural justice. People who man the Ward Tribunals are more or less like assessors in the Primary Courts. A number of them cannot read and write, and are old. It cannot be expected that they know the law or the principles of natural justice without learning.

The chairman and the secretary are administrators while the chairman exercises judicial functions in addition to administrative. The impact of this division of labour depends on the mode of operation they choose, their temperaments, and social standing. This is to say that where the chairman or secretary deals with people in a rude manner, their behaviour will give the public a bad impression of Ward Tribunals, leaving people without any hope that the Tribunal can discharge its duties properly.

Many of these tribunals are proving a failure because the manpower is totally ignorant of law and works without a definite system as to their remunerations. Also, lack of funds to run those tribunals plays a big role in their demise. They are existent in law but dead in practice.⁵

5. Comparing Pre-Colonial Dispute Settlement and Judicial Settlement

Before colonialization there was no established system of judiciary as it is today. There existed different modes of settling disputes, among them mediation and conciliation, shaming and sorcery, i.e. invocation of supernatural forces against the deviant individual. Settlement could also be by means of ordeals, contests or retaliation. In the pre-colonial societies the running of public affairs was a matter of concern for the whole community, which was characterised by equality. In that society public power therefore was not institutionalised but rather a function of the social organisation as such. Sanctions for violation of rules were not implemented by the use of coercive power but via reactions of the whole society, for example, by declaring a deviant individual an outcast. During this period, women were not involved in the settlement of

⁵ Editors' note: A study on four Ward Tribunals in northern central Tanzania showed that nearly half of the decisions of the Tribunal were appealed, and half not (Lawi 1997).

disputes. With the help of some examples, we can understand pre-colonial methods and procedures of dispute resolution and their impact on the administration of justice today.

5.1. *The Kadume Land Dispute*

Gulliver in his book *Social Control in an African Society* (1963: 255) writes of the Arusha. He describes a land dispute between Kadume and his father's half-brother, Soine.

Kadume's mother had separated from her husband Makara some ten years before the dispute arose. She took her son Kadume and went to live in her brother's home – Kadume's uncle. Makara's life depended on his half brother, Soine and Soine's wife. On the death of Makara, Soine took Makara's land. Kadume got married and was given two herds of cattle and three goats from the estate of Makara. Kadume agreed with Soine that Kadume's herds would graze at Makara's paddock. Kadume was therefore accepted as one of the members of the lineage.

One year after the grazing agreement, Kadume claimed possession of all of his father's land, which Soine had taken. Soine disliked this and a quarrel ensued between them. As a consequence, Soine barred Kadume altogether from grazing his herd in Soine's paddock. Kadume went to the lineage counselor to present his case. The lineage counsellor convened the inner conclave of the lineage. Further quarrels ensued, and the inner conclave failed to reconcile the disputants. Soine argued that Kadume had no right over the land because he had not cultivated it. Soine further argued that since Kadume's mother deserted her husband Makara, Soine had been looking after Kadume and that Kadume has already acquired land in his uncle's farm while Soine has got only a small plot of land. The lineage counselor decided in favour of Soine. Kadume was aggrieved with the decision and insisted that the lineage counselor should convene the internal moot.

At the internal moot, Kadume was represented by Kirevi, who argued that Kadume was the only adult son of Makara and because he was now a big man ("olokitok") and had inherited Makara's animals, he should also inherit the land. Soine advanced the same arguments he had presented at the conclave of the inner lineage and emphasised that he suffered shortage of land, entitling him to take the disputed land. Kadume cautioned that in principle, "Brothers do not inherit, sons do. That is a custom of long ago." Soine answered back, "Not always." Kirevi stood up and advanced three points:

- (1) that Soine in refusing to give the land to Kadume was going against established customs of the ancestors;
- (2) that Soine must honour the young generation for they will not honour him when he is dead, and

- (3) that Kadume, having come of age, should be given full responsibility to look after his own life.

These arguments met with approval from among the members with a word by the lineage counselor that sons should honour their elders irrespective of what wrong the elders do to them. This was further re-inforced by Olamel, Kadume's paternal cousin. According to him, Kadume should be given responsibilities as a full and grown up member of the family and that norms should be honoured.

The internal moot finally reached a conclusion after examining all the evidence and relevant facts and divided the land into two parts, of which both Kadume and Soine got a share. The internal moot retired for beer in a cordial way and members congratulated each other for the final settlement of Makara's inheritance.

5.2. "Drumming the Scandal" Dispute

Bohannan in his book *Justice and Judgment Among the Tiv* (1989: 142-144, Instance No. 71) gives another example from West Africa of similar dispute settlement approaches. This dispute arose in 1950 between Torgindi of MbaYar and Mtswen of MbaGishi. Both were of the lineage contained within MbaDuku. Mtswen, who was the secondary marriage guardian of the wife of Torgindi's son, was accused of high-handed tactics that caused the marriage to fall through. Mtswen refused to act as an intermediary to get Torgindi's bridewealth refunded.

Torgindi and Mtswen therefore exchanged harsh words. Torgindi went home and sung a song, in which he said that Mtswen was a skunk. During the night, Torgindi drummed and sang the song as loud as he could for the whole countryside to hear. Mtswen, who lived only a quarter of a mile away, did the same the next night and all the members of his compound and other compounds of his lineage joined in the chorus.

Mtswen was not a good songmaker. So he hired the best songmaker in Shangev Yar to stay at his place and compose scurrilous songs about Torgindi and all his kinsmen and wives. Torgindi also hired a songmaker. The two disputing men held dances and song contests every night. Each brewed beer and made food in order to attract dancers to come to dance and sing songs directed at the other.

There was a specified rule for these songs. It was: If an act attributed in such a song was possible of human performance, it could be true, and the slandered person could call a *jir* (a kind of formal pleading before a moot or court). However, if the act was not humanly possible, anything could be said.

For instance, one of Mtswen's songs accused one of Torgindi's wives of stealing yams. The particular wife mentioned in the song was of the Udam, a tribe of reputed

thieves. So by local consensus, this could be true. If not true, Torgindi and his wife could call a *jir* against Mtsweni and the songmaker.

In another song Mtswen told how Torgindi changed himself into a pig at night and made it unsafe for every sow in the countryside. Torgindi could not actually do that. Hence, such a song could not be the basis for a *jir*.

The Shangev songmaker had actually thought of much worse things that were in Torgindi's nature to do, but Mtswen had stopped him because what he wanted was to win the contest, yet not spoil Torgindi's heart permanently, as they were, after all, neighbours.

The drumming contest continued every night for more than three weeks before the chief and a member of the Mbatarev (village chiefs and elders assisting in a judgment), named Change, took notice. Change decided that if the contest were allowed to continue as such it would end up in a fight, for which he himself would be answerable to the District Officer. Change sent a note both to Mtswen and Torgindi that they and their people were to come to his compound the following afternoon, and both would sing and drum and he with the other Mbatarev, would decide the case.

Both sides came fully prepared. Torgindi's group dragged a large local drum for two and half miles in order to accompany their songs and dances. Mtswen's songmaker and one of his sons hurried across to Udam and bought two small wooded figures of the sort the Udam people use in divination, a small black male and a large painted female. The black figure represented Torgindi, who was small and a very black man, and the red figure, his wife, who was tall, fat, and light coloured. These figures were tied together at the top of a long pole in a somewhat compromising position and were waved frantically in accompaniment to all the songs.

The Mbatarev walked back and forth between the two performing groups. After two hours they called for attention and said that they would now hear the *jir*. Torgindi began his story. The man carrying the two figures put them up in the air and waved them; a roar of laughter followed. Change took the figures from the offender and put them under his chair until the hearing was over.

The Mbatarev announced the winner of the song contest. Mtswen had the better songs, but Torgini won the case. Both parties concurred in the judgment. The Mbatarev then advised both songmakers to go home immediately and not to return to MbaDuku for a couple of months until the feelings that had been aroused had died down.⁶

⁶ Cf. *Kapangu v Mwandilemo* (1968) High Court Digest (Tanzania), No. 88, where the amicable solution suggested by the assessors between the parties was rejected on appeal as contrary to legal principles; *Isaack s/o Nguvumali v Petro Bikulako* (substituted by Mtalikwa s/o Bikulako) (1972) High Court Digest No. 139, upholding an amicable solution whereby

Members of the internal moot and village elders in the above cases did not have any literate education and were flexible in their decision-making. The modern-day assessors at Primary Courts and the chairpersons of the Ward Tribunals function in the same way. Thus, the traditional mode of dispute settlement still takes effect in the modern judicial world.

6. Law Enforcement and Public Confidence in the Judiciary

In Tanzania law-enforcing officers are police officers and state attorneys under the direction of the Director of Public Prosecutions. In this part it is my intention to show their role in the judicial proceedings and how this affects public confidence in the judiciary.

Upon receiving a report on a crime, the police are duty bound to proceed to the locus in quo and investigate (s. 10(1), Criminal Procedure Act). Police officers are empowered to summon any relevant person within the local limit of their police station to appear for purposes of interrogation. The period available for interviewing a person under restraint is normally four hours (s. 50(1), Criminal Procedure Act), unless extended to eight hours or such hours as the magistrate may reasonably determine. The interviewing officer must therefore make an application to a magistrate for extension of time. No order can be made without hearing the-to-be interviewed person (s. 51(3), Criminal Procedure Act).

In my experience on the bench, I have never seen a police officer applying in court for extension of time for an interview which he conducts. This is the reason why so many suspects who appear before a magistrate in court during the trial raise a number of complaints against police officers about mistreatment. Complaints of this type interfere, somehow, with the judicial proceedings, for they may entail “a trial within a trial” in the proceedings.

After police investigations, arrests, and searches, the duty to formulate an appropriate charge or information lies with the prosecutor and not the court, unless it is a case under section 128(4) of the Criminal Procedure Act, where a complaint is made without a formal charge accompanying it. However, under s. 91 of the Criminal Procedure Act, the Director of Public Prosecutions, at any stage in the criminal proceedings, may:

title to the disputed land went to the plaintiff, but compensation ordered for the defendant for improvements made on the land.

“... enter a *nolle prosequi* either by standing in court or by informing the court concerned in writing on behalf of the Republic that the proceedings shall not continue, and thereupon the accused shall at once be discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released, or if on bail his recognizance shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.”

This means that as soon as the Director of Public Prosecutions enters a *nolle prosequi* before the case is decided, a magistrate or judge shall discontinue the trial and discharge the accused. The Director of Public Prosecutions is not subject to interrogation by any body. In the eyes of the public, this reflects badly on the judiciary. What the public sees is merely the withdrawal of the case. It knows nothing about the directives of the Director of Public Prosecutions. For people presume that courts are never ordered what to do in their decisions. For example, on 15 April 1997 I was mentioning in the murder case No. 10/96. Suddenly I was given a *nolle prosequi* from the Director of Public Prosecutions to withdraw the case under section 91(1). I had nothing to do but to comply with the law. I withdrew the case and discharged the accused. On 4th -10th May 1997 complaints against me were printed on the front page of the local newspaper *Taifa Letu*,⁷ with a picture of the alleged murdered person. The relatives and sympathisers of the deceased were angry with my withdrawal of the case. They did not know that I was compelled by law to do so. In fact, I was not pleased to withdraw that case. In my opinion, section 91 interferes with the independence of the judiciary, which makes the administration of justice difficult.

Prosecutors' intrigue or laziness constitutes basic problems of administering justice in court. Sometimes a prosecutor may have an interest in a case. If witnesses appear for the trial, he may tell a magistrate that these are no proper witnesses, which means the case is to be adjourned. The process may continue until witnesses get tired and decide to leave the matter as it is. In the long run the case is withdrawn for want of prosecution.

7. Independence of the Judiciary

A court case in 1978 illustrates *prima facie* maladministration which hampers the independence of the judiciary. In *Ally Juuyawatu v Loserian Mollel* (No. 6 in (1979)

⁷ No. 081, ISSN 0856 5740.

Law Reports of Tanzania) the presiding judge was determining an issue of eviction and costs. After hearing the parties he fixed a date to deliver his ruling. This is what transpired before the ruling. I quote the same, *in extenso*, to give a clear picture because it is an interesting story:

“Instead of proceeding in the normal way as any other civil litigation, this case turned out to be a matter of rumour mongering, gossip, and vindictive activities tainted with acts of humiliation ...

After several hearings on preliminary points which involved allegations and counter-allegations ... I reserved the ruling, but promised that the same would be delivered on my way back from Dar es Salaam and Mahenge where I had to go to attend the funeral of the then Arusha Zonal Immigration Officer Mr. Jack Maji, who had been shot dead in Msumbiji.

It is what transpired almost immediately thereafter that has plunged this litigation into unprecedented chaos.

Somebody, so far undisclosed to this Court, referred the case to the Regional Commissioner, then by the name of Abdulnuru Suleimani. This gentleman deemed it fit to refer the matter to the Regional Security Committee commonly referred to in Swahili as ‘Kamati ya Ulinzi na Usalama ya Mkoa’. The chairman of that committee happened to be the said Regional Commissioner. He chose to summon the State Attorney, who was asked to use his good office to cause the withdrawal of this case file from the court and have it transferred to the Security Committee for its discussion and determination of the matter. The State Attorney dutifully and rightly responded to that invitation by telling the said Committee that this was against the procedure laid down by our laws and that his office did not enjoy the power of calling court case files from any court of law.

No sooner before I got breath to sit down and write the pending ruling another bombshell fell, this time, strange as it may appear, at the instance of the High Court of Dar es Salaam. At the material time I was the only judge at this station since the judge in-charge of the zone was at Moshi presiding over High Court Sessions cases there. As I was later on told, the Chief Justice telephoned Judge Mnzavas at Moshi and the latter had to rise from the High Court sitting, for the matter to be communicated appeared to have been treated under ‘certificate of urgency or emergency’.

It was communicated to him that the case file under reference was urgently required in Dar es Salaam and that it should be sent there physically by a court official, a registry officer, who was believed to know the whereabouts of the case file in question. Judge Mnzavas took the opportunity to inform the Chief Justice that to the best of his recollection the case file was with me for writing a ruling on a

chamber application and further suggested that since the matter was then sub judice it would have been procedurally convenient to have the ruling delivered first and then the whole case file could be carried to Dar es Salaam. Judge Mnzavas was reportedly told that the case file was urgently required in Dar es Salaam for action to be immediately taken on it by the Chief Justice on instructions of His Excellency the President of the United Republic of Tanzania. On hearing such a grave directive, Judge Mnzavas had no appropriate course open to him save to concede to it. I, on my part, would have done exactly the same put in his position. In the panic that ensued the District Registrar without even contacting me, presumably because he had no time allowed to him by the 'urgency' of the matter, and in view of the fact that at the material time I was in court hearing cases, thought it proper and expedient to command court clerks and messengers to get the file as soon as possible.

In that spirit of 'urgency', as I could later on gather from the state of affairs in my chambers, papers and files were left haphazardly sprawled and scattered around in the course of searching for the said file. They got it, for it was on the side table on which I usually stock files in which decisions to be written are pending ...

That was not the end of my ordeal. On the following day a court official from the High Court Dar es Salaam called at Arusha to announce he was to collect the same file which somebody had already taken to Dar es Salaam the previous day. The court official, from our Head Office of the judiciary began bragging that he had specifically been sent to inspect Judge Mowesimo's work and that he was confessedly disappointed to learn that the file he had come to check and collect had already been dispatched to Dar es Salaam. When narrating that incident to me, the Resident Magistrate in question expressed surprise as to what was happening and expressed his fears that if a court subordinate official enjoyed the latitude of inspectorate powers over judicial work of a judge then what would happen to the judicial work of magistrates, especially Primary Court Magistrates. I mildly answered him that could have been a demonstration of projection of power in its delegated form. I told the said Resident Magistrate that I was not interested in hearing about that case file any more and would not lose a minute of my sleep. But, in fact inwardly that sort of treatment meted to me without being told even a gist of what was happening disturbed my sleep day in day out, for I was at a loss as to what was the motive for such arrogant, pompous and unpruned behaviour on the part of that court subordinate member of staff towards me ...

Then followed complete silence on the matter till 23rd September, 1978, when early in the morning during office hours one of the court clerks in the registry of this Court knocked on the door of my chambers. Immediately behind him entered a young man dressed shabbily in jeans and some fancy shirt holding a big thick

envelope. After greeting me he stretched out his hand and told me to receive that envelope which was addressed in my personal name. He pulled out a small note-book from one of his pockets, opened it and said: 'I am instructed to tell you that you must sign in this note-book to acknowledge the receipt of this case file.' That note-book turned out to be a dispatch book from the High Court Dar es Salaam. I asked that young man: 'Why are you people treating me like a primary school child? Even a Primary Court Magistrate deserves more decent treatment.'

The said poorly dressed junior court official appeared so shocked and scared stiff like a wet chicken confusedly soaked in heavy thunderstorm rain. For the sake of peace, I received the dispatch book, signed it against already prepared entries, gave it back to him and I told him to get out of my chambers immediately.

When I was left alone in my chambers I opened the big envelope and inside on top of the case file was a letter addressed to me by the Chief Justice. The gist of that letter was that the said file had been called by him and that after having gone through it he was forwarding it back to me for me to continue with the case accordingly. There was no scintilla of information in that letter as to why the said file had been so urgently called for.

That left me puzzled all the more, for one would naturally have expected that at least in the name of natural justice to which I believe I am entitled, I had some residual human right to being told what had been complained about that case that reportedly prompted His Excellency to direct the Honourable the Chief Justice to intervene when the matter was sub judice.

Still the impact left on my feelings was not of a small degree for the way I looked at the whole trend of the matter portrayed ostensible threats directed to me as regards any further handling of the case but at the same time I was fully aware of my duty according to my oath of office that I would do my work judiciously without fear, among other things.

The question now is can I pretend that those ostensible threats and acts of humiliation directed to me in connection with this case have not effected some genuine fear in me? Can I really venture to continue with this case without danger of being biased? My conscious right from the bottom of my heart tells me that I cannot continue with this case without the influence of fearing what might erupt next ... I feel constrained to declare myself incompetent to continue with this case and I direct that the same should be pursued before the Court of Appeal to be formed to resolve the two legal questions I have posed."

We have to agree that in the above case there were abnormalities. The Chief Justice had all the necessary reasons to call for and inspect the records. However good the intention of the Chief Justice was, the learned trial judge was angry with the steps

taken. So by this alone it was proper for him to disqualify himself from presiding over the case. Otherwise he would have delivered a biased judgment to the detriment of one party or all because his decision would have been tainted with fear.

Another typical example of political interference with court decision-making is in *R. v Idi Mtengule*, (PC) Criminal Revision No. 10/79, High Court at Dodoma, (unreported). In this case the accused Iddi Mtengule stood before the Mpwapwa Primary Court charged with “disobeying lawful order c/s 124 of the Penal Code – Cap 16”. He pleaded not guilty. The accused had offered for sale buns, “maandazi”, in disobedience of an order issued by the Mpwapwa Area Commissioner banning the sale and/or consumption of edibles to prevent the spread of cholera in Kibakwa and Lukinda Wards. The Primary Court Magistrate when perusing the list made by the Area Commissioner found that the item maandazi was not in the list of the prohibited articles. The accused was acquitted. When the matter reached the Area Commissioner, he became furious and wrote a letter to the trial magistrate accusing him of bias and a deliberate attempt to frustrate efforts of the authorities to eliminate the dangerous disease. In response, the aggrieved trial magistrate stood firm, reminding the Area Commissioner of the provisions of the Constitution of the United Republic of Tanzania on the independence of the judiciary. A copy of the letter of the trial magistrate and the case file were sent to the District Magistrate at Mpwapwa for perusal and inspection. The District Magistrate opened a revision case and ordered a retrial before another Primary Court Magistrate. The matter reached the High Court. Judge Chipeta perused the Area Commissioner’s Order and found that maandazi were not included in the order and found that the accused had not committed the offence. He wrote on the importance of the independence of the judiciary:

“As I understand, the constitutional position in our country is the judiciary is supposed to be an independent institution ... free from all kinds of pressures, regardless of the corners from which those pressures come. The judiciary must be free from political, executive or emotional pressures if it is going to work with the smoothness and integrity expected of it under the supreme law of the land – the Constitution. It must not be subject nor succumb to intimidation of any kind.”

The only way to deal with politicians who interfere with the independence of the judiciary is being tough by applying the laws. The Constitution assures non-interference in two ways: by asserting the independence of the judiciary, and by prohibiting magistrates and judges from being members of any political party in the country (Art. 113A, Constitution). Exempted are court clerks, translators, and other non-judicial staff. Though non-judicial personnel can be members of any political party, it is still doubtful whether the public will appreciate this. It is not possible for a member of one party who has a legal problem in court to have faith in a court clerk or assistant

registrar, who is a member of another party, to serve him in court. This vitiates the assurance of impartiality in the judiciary. All judicial and non-judicial personnel should not be allowed to be members of any political party.

8. Public Confidence in the Judiciary: Corruption and Bias

Corruption is the main reason that makes the public lose faith in the judiciary. There are many complaints from people and the executive that magistrates are receiving bribes. When magistrates handle a case, say, of a rich man against a poor man and it happens that according to law a rich man wins the case, the public automatically has the impression that a bribe has played a part and not justice. This is a very unfortunate situation.

A number of researches were undertaken on the allegation of corruption against the judiciary. In 1977 the Judicial Review Commission asked the Registrar of the Court of Appeal the following question:

“Question 8. – There is a general belief among members of the public that there is a lot of corruption going on in the judiciary, particularly in Primary Courts. Is this belief justified by the known facts? If it is, what are the possible major causes of this unfortunate situation? What steps should be taken at least to reduce that trend?”

In reply the Registrar said:

“It is not true that there is a lot of corruption in the judiciary.”

It seems that the Commission was not happy with the reply of the Registrar. It said:

“While it may be said that statistics produced to us by the Registrar do not support the claim that members of the judiciary receive bribes with abandon, we cannot but express our anxiety even at the fact that there have been as many as 15 magistrates suspected of having taken bribes.”

In 1996, there was the Report by Warioba on Public Complaints Against Corruption in Tanzania. The judiciary was included in the institutions which were suspected of being corrupt. Many complaints were levelled foremost against Primary Court Magistrates, then District Court Magistrates and Resident Magistrates' Courts. From 16-17 December 1996 the Chief Justice convened a Judges' and Magistrates' Conference in Dar es Salaam to discuss exhaustively the problem of corruption in the judiciary. Several reasons were advanced as to why there were accusations of corruption and as to cures. This conference was announced in the radio news and published in almost all internal and external newspapers. This step was an attempt to tell the public and

the world at large that magistrates and judges are trying their level best to solve the problem, if any, and at the same time to deny the allegation. This was one of the steps to win the confidence of the public. But complaints are still there.

Sometimes the public suspects that delays in court proceedings are due to corruption. It is not my aim to repeat why delays are in court because I have discussed this matter very well in this paper above. Even if magistrates happen to be faithful, it will not be seen by the public. In view of this, I venture to say that it is not easy to win the confidence of the public in the judiciary because the entire set-up, known by the public and the executive, is in a poor organizational state. The public has also the impression that since the members of the judiciary are poor, they cannot be safe from corruption. The Judiciary Review Commission has suggested that it can counter these views of the public by educating the people about law and how the judiciary works. This was done for a short while, but has ceased. In my opinion, teaching people what law is, does not by itself work, as long as the judicial personnel are not motivated to counter these views.

Another source of lack of confidence in the judiciary is a perception of bias on the part of the judge. It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to have been done.⁸ Justice cannot be done if there is a likelihood of bias on the part of a judge or magistrate or any person sitting in a judicial capacity.⁹ The test for bias was most lucidly stated by Lord Denning:

“In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did, in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people ... There must be circumstances from which a reasonable man would think it likely or probable that the justice or the chairman ... would or did favour one side unfairly at the expense of the other ... Suffice it that reasonable people might think he did ... Justice must be rooted in confidence: And confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’”¹⁰

⁸ Lord Heward, *Rex v Sussex Justices Ex Parte McCarthy* (1924) 1 King’s Bench 259.

⁹ Chipeta n.d.: 284.

¹⁰ *Metropolitan Properties Co. (F.G.C.) Ltd. v Lannon* (1969) 1 Queen’s Bench 577, at 599.

The test, thus, is when right-minded people go away thinking after hearing an allegation of bias by one party: "The judge was biased." Many allegations appear *prima facie* to create a likelihood of bias. For example, a party to a case may raise an awkward allegation against the trial magistrate, such as, "I would not like you to try my case because at one time we quarrelled over a certain woman in a bar." The allegation may be perfectly false, but right-minded people will go away thinking that the judge would be biased.

The present practice in Tanzania is such that allegations of bias are not subject to investigation as to whether they are true or not. It is not easy for right-minded people to know the truth of an allegation. People of unscrupulous character use this chance to embarrass trial magistrates.

My submission is that there should be a procedure whereby a party to a case who feels that the trial magistrate is biased should make an affidavit with or without relevant evidence and produce it in court before trial or at any stage in the proceedings when bias is detected. In this way people who merely allege falsities in order to have the case transferred to another magistrate of their choice should not be allowed to make such allegations so easily.

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