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Creating an Independent Traditional Court: A Study of Jopadhola Clan Courts in Uganda

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Abstract

This article examines the contribution of clans (kinship institutions) to the administration of justice within the context of standards set out in the African regional human rights instruments. Field work on the Jopadhola of Eastern Uganda is drawn upon, to explore how clans reproduce their notion of an independent court using an abridged legal doctrine of separation of powers, and partially mimicking lower level government and judicial features. The field work also shows how clans accommodate interests of women and youth. Even so, clans retain a largely customary approach to the appointment, qualifications and tenure of court officials. The main findings lead to the conclusion that, by applying an “African” notion of human rights, clans have created traditional constructs of an independent court: one that is culturally appropriate for their indigenous communities.

INTRODUCTION

Human rights standards call for independent courts. Criminal cases should be adjudicated by independent courts to ensure the prime institutional requirement for a fair trial under article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).¹ Independence is also an institutional requirement for a fair trial under article 7 of the African Charter on Human and Peoples’ Rights 1981 (the African Charter).² But what is an independent court? As Nowak concisely puts it, the independence of a court means separation of the organs of government, specifically the judge, from the control of the executive and, to a lesser degree, the legislature. Independence also relates to the appointment and impeachment of judicial officers.³ Therefore, the

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1 GA res 2200A (XXI), 21 UN GAOR supp (no 16) at 52: UN doc A/6316 (1966).

2 OAU doc CAB/LEG/67/3/Rev. 5 (1981), came into force on 21 October 1986.

3 M Nowak *United Nations Covenant on Civil and Political Rights – CCPR Commentary* (2nd edition, 2005, NP Engel Publisher) at 319, para 25 and 321, para 28. These principles are also enshrined in the Basic Principles on the Independence of the Judiciary 1985, adopted by the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan 1985 and endorsed by GA res 40/32; 40/146. G Tumwine-Mukubwa “Ruled from the grave: Challenging antiquated constitutional doctrines and values in

doctrine of separation of powers is at the nucleus of the independence of a state's judiciary.

Whilst independence is usually thought of in terms of courts of law, it also applies to traditional courts under the African regional human rights framework. To this end, section S(1) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003 (the Guidelines)⁴ defines a traditional court as: "a body which in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition."

In short, traditional courts are non-state, indigenous "judicial" institutions that decide cases according to customary norms. Such norms include an "African" notion of human rights where, as Gyekye contends, individual rights are abridged by social responsibilities in so far as abridgement is necessary to maintain the integrity and stability of the group.⁵ Individual rights are therefore interconnected with a duty to community. Despite this normative difference, traditional courts are enjoined under section Q(a) of the Guidelines to comply with international human rights standards on the right to a fair trial. An individual's right to a fair trial by an independent and impartial court is sacrosanct under article 10 of the Universal Declaration of Human Rights 1948⁶ as expounded in article 14(1) of the ICCPR.

The independence of a traditional court is provided for in section Q(c) as follows:

"The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:

1. they shall be independent from the executive branch
2. there shall not be any inappropriate or unwarranted interference with proceedings before traditional courts."

Under this section, states must pass legislation to guarantee the independence of traditional courts. Uganda has not yet enacted laws in this regard, thereby failing to comply with the peremptory requirements of section Q(c). This is

contd

Africa" in J Oloka-Onyango (ed) *Constitutionalism In Africa: Creating Opportunities, Facing Challenges* (2004, Fountain Publishers) 287 at 295-99 and G Kanyeihamba *Constitutional and Political History of Uganda: From 1894 to Present* (2nd edition, 2010, LawAfrica Publishing (U) Ltd) at 269-73 explain that separation of powers is intertwined with the rule of law. This article focuses only on the former.

- 4 DOC/OS/(XXX)247 of 2003, reproduced in R Murray and M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (vol II 1999-2007, 2009, Hart Publishing) 381. The Guidelines adopted in 2003 by the African Commission on Human and Peoples' Rights (African Commission) expound art 7 of the African Charter.
- 5 K Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (1997, Oxford University Press) at 65.
- 6 GA res 217A (III): UN doc A/810 at 71 (1948).

unexpected, given the fact that Uganda, as a signatory to the African Charter,⁷ is obliged to enforce the rights contained in the charter and the associated Guidelines. Under Uganda's Constitution of 1995 (the Constitution), the president may make conventions with any international body and Parliament may enact laws governing their ratification.⁸ Although the Ratification of Treaties Act establishes a dualist approach, where a convention must be incorporated in national legislation, Uganda has not integrated the African Charter into domestic law.⁹ Accordingly, traditional courts operate in the absence of a national prescriptive framework. Fundamentally, section Q(c)(1) stipulates that traditional courts shall be independent from the executive branch. How this may be achieved by kinship systems is not specified.

This article focuses on examining whether traditional courts are in fact "independent", as understood by the human rights approaches. It does so by shedding light on how clans create an "independent" court, and considering whether clan courts meet the emergent international standards of independence within the context of section Q(c)1.¹⁰ Such analysis is important because, while the institutional set up of "statutory traditional courts" has generated some research, that of indigenous traditional courts has been largely overlooked.¹¹ For though the Guidelines are meant to be an "interpretational and normative aid", as Baderin rightly argues, it is ambitious to expect traditional courts to apply international standards, given their practices.¹² For instance, kinship systems conflate executive and judicial functions, in contradistinction to the doctrine of separation of powers. Furthermore, a fair trial translates into a notion of procedural fairness (or even-handedness) where everyone is heard and is required to protect kinship members. This is quite unlike formal court procedures that safeguard the interests of individual litigants.

On the basis of qualitative data gathered from two Jopadhola clan (traditional) courts of the Jo-Gem and Morwa Guma Malasang (Morwa Guma)

7 Uganda ratified the African Charter on 10 May 1986, deposited the instrument on 27 May 1986 and signed it on 18 August 1986. The document is available at: <<http://www.achpr.org/instruments/achpr/ratification/>> (last accessed 3 July 2012).

8 Art 123(1) and (2) of the Constitution chap 1 (2000 edition, Laws of Uganda), as amended by the Constitution (Amendment) (no 2) Act 2005.

9 Under sec 2(a) of the Ratification of Treaties Act, chap 204 (2000), all conventions shall be ratified by the cabinet (or in specific instances by a resolution of Parliament (sec 2(b)), and then laid before parliament (sec 4).

10 In a forthcoming article, the author discusses the question of whether clan court proceedings are impartial as prescribed in sec Q(c)(2) of the Guidelines.

11 The phrase "statutory traditional courts" is borrowed from Wanda, to distinguish traditional courts created by statute from indigenous ones that operate in local communities but without legal recognition: P Wanda "The role of traditional courts in Malawi" in P Takirambudde (ed) *The Individual Under African Law* (proceedings of the first All Africa Law Conference, 11–16 October 1981) (1982, University of Swaziland) 78 at 79.

12 M Baderin "Recent developments in the African regional human rights system" (2005) 5 *Human Rights Law Review* 117 at 126.

clans, this article presents the empirical findings of a research study that examined the adaptation of legal doctrine and structures by local communities. It suggests that clans have partially reproduced, in various ways in their normative structure, features of the government system with which they are familiar. First, the clans incorporate the local government system by adopting an abridged doctrine of separation of powers. Secondly, the clans apply women and youth quotas used in local council courts to ensure fair representation. The quota provision enshrined in the Constitution is designed to address the lack of participation by women and youth in lower level and national decision making institutions. Article 180(2)(b) of the Constitution reserves one third of all local council membership for women. Youth membership is alluded to in article 180(2)(c), as is affirmative action for marginalized groups under article 32.

Concurrently, clans apply a traditional approach underpinned by the duty of kin to participate in social control. Appointments are centred on meritocracy and adult suffrage; clan members participate in the removal of officials; and clan officials manage spiritual activities. Importantly, the eligibility criteria exclude legal qualifications.

Some key definitions will be useful for the purposes of this article. *Clan courts* fall within the definition of traditional courts in section S (1) of the Guidelines. The term refers to kinship institutions that resolve cases of a criminal nature within a social group from the same extended family lineage clan. This is part of what anthropologists call kinship organization.¹³ *Lower level government* comprises the local councils and their associated courts with quasi-judicial status. *The judiciary* comprises the superior courts: Supreme Court; Court of Appeal and Constitutional Court; and the High Court; as well as lower courts - chief magistrate, grade I and grade II magistrates courts.¹⁴

The article is set out in five sections. First is the methodology to the study and a background to the Jopadhola through the lens of the Jo-Gem and Morwa Guma clans. Next, the article outlines the status of clan courts within Uganda's legal framework, and then briefly highlights the key findings from earlier research. The main discussion follows, analysing the "reproduction" process by which Jopadhola clans have assimilated national features to create their notion of an independent court. The article concludes with a brief evaluation of the wider implications of this assimilation process on the implementation of the Guidelines in the local context.

13 P Kirchloff "Kinship organization: A study of terminology" (1932) 5 *Africa: Journal of the International African Institute* 184 at 184-91.

14 Local councils fall under the Local Governments Act chap 243 (2000) (LGA). Local council courts are established by the Local Council Courts Act (LCCA) 13/2006. Superior courts are delineated in art 129(2) of the Constitution and the Judicature Act chap 13 (2000). Magistrates courts are established by the Magistrates Courts Act chap 16 (MCA) (2000) as amended by the Magistrates Courts Act (Amendment) Act 7 of 2007.

JO-GEM AND MORWA GUMA CLANS: METHODOLOGY AND SETTING

The data in this article derive from interviews and a workshop for clan court officials of the Jo-Gem and Morwa Guma clans of the Jopadhola in July and August 2006, and further interviews in August 2008. Respondents included the *kwar adhola* [Jopadhola supreme leader] of Tieng Adhola (the Padhola cultural union). The study¹⁵ covered West Budama County (north constituency) in Tororo district, comprising Kirewa, Kisoko, Nagongera, Paya and Petta sub-counties. In all, 25 participants attended the workshop on 15 August 2006: seven women and 18 men. There were seven groups representing seven clan courts: the *gombolola* [sub-county], *miluka* [parish] and *kisoko* [village] courts of the Jo-Gem clan, and the *p'oriwa* [supreme unifying organ], *saza* [county], *gombolola* and *miluka* (combined with *kisoko*) courts of the Morwa Guma clan. The workshop was preceded by an interview on 12 August 2006 with Mr AO, the highest Jo-Gem clan leader, and Mr YO, a Morwa Guma *saza* head. Mr RO, (acting) Morwa Guma *saza* head, was interviewed on 18 August 2008.

The study used a simulation of a reconstructed trial involving two offenders accused of incest for being related as members of the same clan. The simulation was done by participants who were real clan court officials acting as defendants, witnesses, court officials and the audience. The participants selected incest as one of the most common offences tried by clan courts. The use of a trial simulation was to illuminate the hitherto undocumented composition of clan courts and the restorative processes that lead to a particular verdict and sentence.

These two clans were chosen because they are good archetypes of how indigenous societies create an “independent” court to suit local circumstances. The Jo-Gem, a small clan formed in 1996, is an interesting example of micro level practice. They live mainly in Kisoko sub-county and number just 396: 44 men, 49 women, 43 women by marriage and 260 youth.¹⁶ “Youth” refers exclusively to unmarried individuals between 18 and 25 years of age. By contrast, the Morwa Guma is one of the larger clans. Although its total numbers are unknown, they are estimated to be several thousand, scattered in mainly Kisoko, Paya and Nagongera sub-counties. The practice of the Morwa Guma as an older, better established clan, illustrates the reproduction of “law” within a traditional context at a more advanced level. Inquiring into these different clan experiences will unearth similarities and divergence in each clan’s notion of an independent court. Such features would be missed if one were to aggregate their practices in a single approach, as was the case in other studies discussed in this article.

15 The study was prepared for the author’s doctoral thesis: M Owor “Making international sentencing relevant in the domestic context: Lessons from Uganda” (unpublished PhD thesis, University of Bristol, UK, 2009).

16 Jo-Gem clan register 2006.

Before examining the data, one caveat needs to be highlighted. The study is based primarily on interview data: on what clan officials said, rather than what they did. This limitation may affect the reliability of the findings to some extent, although the workshop discussion and trial simulation provided some grounds for confidence that claims in interview did in fact represent actual practice. That, combined with the fact that all Jo-Gem and Morwa Guma clan courts in Budama North were represented in the interviews, marks this study of traditional legal institutions of the Jopadhola people as ground breaking.

The Jopadhola

The Jopadhola ethnic group, who live mainly in West Budama County, Tororo district in Eastern Uganda, bordering Kenya, are from the Nilotic linguistic cluster. Their language, Dhupadhola, is similar to two Nilotic languages of Alur and Kenya Luo. 70–80 per cent of the Jopadhola live below the poverty line.¹⁷ Their activities are mainly subsistence agricultural farming, on land held under customary land tenure. They call this land Padhola which, according to renowned historian Bethwell Ogot, is an elliptic form of “Par Adhola” meaning the “place of Adhola”: founder father of the Jopadhola. Officially, Padhola is called Budama, but according to tradition this is the Kiganda version of “‘Widooma’ a Jopadhola war cry: ‘You are in trouble’”.¹⁸

Traditional beliefs govern Jopadhola everyday life, but to varying degrees. For instance, people believe in Were [an omnipresent Christian god], *kuni* [clan shrines] and a common religion, Bura; they also have a deep rooted fear of *jwogi* [evil spirits].¹⁹ Pervasive belief in mysticism thus remains an integral part of social organization.

The social structure of the Jopadhola can be described as polysegmentary because there is no traditional centralized government and its organization is limited to a clan. Currently, 52 clans are listed in appendix III to the Tieng Adhola Constitution. A clan is defined as a cultural sub-division known as the *nono* that shares cultural practices, common ancestry and language (Dhupadhola), but has a distinct lineage.²⁰ Jopadhola clans are

17 Uganda Bureau of Statistics and International Livestock Research Institute *Where are the Poor? Mapping Patterns of Well-Being in Uganda* (2003, Regal Press) at table 4.11 A.

18 B Ogot *History of the Southern Luo: Volume 1: Migration and Settlement 1500–1900* (1967, East African Publishing House) at 85. The war cry was against the Baganda who invaded Padhola and were vanquished.

19 H Mogensen “The resilience of Juok: Confronting suffering in Eastern Uganda” (2002) 73 *Africa: Journal of the International African Institute* 420 on Jopadhola belief in Christianity and fear of *jwogi*.

20 Constitution of Tieng Adhola (2006 edition), chap 22, paras 25(14)(a), (b) and (c). Tieng Adhola was established in 1992 by the 52 clans. Its constitution aims to unify clans under one head: *Kwar Adhola*. Interview with Mr MO: the *Kwar Adhola* (15 August 08). Owor “Making international sentencing”, above at note 15 at 195.

patrilineal. Descent is traced through the father's line and each lineage is made up of closely related families who claim ascendancy from a common grandfather or founder of the clan.²¹ What is not in dispute is that the Jopadhola are descendants of Adhola and that Owiny (his brother) migrated to Kenya where he later formed the Ja-Luo.

A distinguishing feature of clan formation among the Jopadhola was that membership of the kinship system depended on biological relationship or "fictional agnation" (relations through the male line). The Jopadhola let non-Nilotic groups live with them, absorbing them in Jopadhola clans and eventually according them fictional agnation. The Morwa Guma clan, for instance, originated from the neighbouring Iteso of Nilo Hamitic stock. They were adopted agnatically by the Sule clan. Following a split from Sule, Morwa Guma was recognized as an independent Padhola clan and possesses clan emblems like the *kumu* [sacred shrine]. The Jo-Gem, a sub-group of the (Nilotic) Luo Jok-Omolo, migrated from river Yala in Nyanza-Kenya to Padhola. The Jo-Gem was likewise absorbed agnatically by the Oruwa Pa Demba clan, but broke away in 1996 preferring to follow its sub-culture. The Jo-Gem is now autonomous and possesses a *kumu*.²²

This adaptation process continued during the colonial and post-colonial eras when clans were subjected to external pressure to transform their structures. Clans survived by absorbing features they could not change, while retaining a traditional communitarian approach to the composition of clan courts.

Metamorphosis of clan courts

Kinship courts have been investigated at the fringes of academic literature. In this regard, Elias's observations about the set up of courts being dependent on the type of society (A and B) are very instructive. The group A type of society was a strong, centralized political authority, based on the rule of chiefs or kings. The Buganda Kingdom in Uganda, for instance, had a "well ordered and regular system of courts with personnel of judges", even court orderlies. Conversely, group B types (like the Jopadhola) were a "segmentary un-centralised political community" where kinship was powerful, and cultural and ethnic homogeneity was the imperative.²³

Pre-colonial era

The traditional court system functioned within kinship, law, religion and culture, underpinned by philosophical foundations in the African variant of

21 N Sudarkasa "African and Afro-American family structure" in J Cole (ed) *Anthropology for the Nineties: Introductory Readings* (1988, Free Press) 182 at 183–87 and 198–99.

22 Owor "Making international sentencing", above at note 15 at 170–77; Ogot *History of the Southern Luo*, above at note 18; F Burke *Local Government and Politics in Uganda* (1964, Syracuse University Press) at 193, 196–98 and 240.

23 T Elias *The Nature of African Customary Law* (1956, Manchester University Press) at 11–12, 30 and 216.

humanism called Ubuntu.²⁴ Ubuntu finds expression in the rule of reconciliation that restores society's equilibrium through principles similar to group rights and natural justice. Group rights, M'baye explains, applied to societies like clans where individuals were users of collective rights by virtue of belonging to a clan, family or ethnic group.²⁵ In effect, the entire clan was involved in the administration of justice through a communitarian notion of human rights.

Since the Jopadhola had no centralized government, there was no separation of powers. Jopadhola law was not legislated as such, but derived from custom that was tied to the supernatural. Societal norms applied to the well-being of members and cohesion of the unit.²⁶ New norms were generated in these acephalous societies, most probably by tribal compact or a public assembly where chiefs, elders and the public would debate the community's affairs.²⁷

Group B societies had no permanent court. Nevertheless, scant evidence exists of an organized judicial system that recognized certain elders "as traditionally qualified and entitled to participate in the adjudication of disputes", based on their seniority as members of the social unit.²⁸ Mair argues, convincingly in the author's view, that clans recognized the authority of older *men* as the elders to resolve disputes. The most essential quality of an elder was his ability to soothe angry feelings and prevent fights.²⁹ Among the Jopadhola, disputes were handled by the clan leaders and elders who regularized an individual's relationship with their kin and other communities.³⁰ Therefore, it seems evident that the pre-qualification and appointment to the court (an executive function) was determined by clan leaders who were all elders (that is to say, old men). To Kakooza, this segmentary organization was effective *because* it lacked a single source of overall authority. To ensure conformity with the law, traditional leaders had to woo the clan as its members bore little

24 "Umuntu ngumuntu ngabantu" [a person can only be a person through others]: Y Mokgoro "Ubuntu and the law in South Africa" (1998) 1/ 1 *Potchefstroom Electronic Law Journal* 1 at 2, citing L Mbigi and J Maree *Ubuntu: The Spirit of African Transformation Management* (1995, Sigma Press) at 1-7. The concept of Ubuntu is also discussed by Judge Mokgoro in *State v T Makwanyane and M Mchunu* CCT/3/94, delivered on 6 June 1995, 1 at 171, para 308.

25 R Mqeke "Customary law and human rights" (1996) 113 *South African Law Journal* 364 at 365, citing M Gluckman "Natural justice in Africa" (1964) 9 *Natural Law Forum* 22 at 25 and K M'baye "The African conception of law" in R David (ed) *International Encyclopaedia of Comparative Law* vol II chap 1 (1975, Martinus Nijhoff) at 138, para 225 and 148, para 257.

26 Burke *Local Government*, above at note 22 at 240.

27 A Allott "The people as law-makers: Custom, practice, and public opinion as sources of Law in Africa and England" (1977) 21/1 *Journal of African Law* 1 at 8-10; Elias *The Nature of African Customary Law*, above at note 23 at 198-99.

28 Elias *id.*, at 11-12, describing the Ibo of Nigeria.

29 L Mair *Primitive Government* (1970, The Scholar Press) at 49, on the Luhya of Kenya.

30 Burke *Local Government*, above at note 22 at 192.

loyalty to them.³¹ For this reason, clan members may have had a voice in determining the security of tenure and removal from office of clan officials.

Equally important was the control of supernatural activities. Jopadhola traditional belief included the Bura and *kuni* [clan shrines]. The gods of *kuni* speaking through a designated clan leader provided spiritual guidance by revealing what actions needed to be taken to protect the clan if it were attacked by enemies.³²

In communities with patriarchal heritage, power relations emasculated the group rights of women and youth to sit on the clan courts. Driberg's account of the legal status of Nilotic women established that they had to be represented by a male relative or other male.³³ This implies that women could not preside over or sit on the clan courts: convincing evidence of their inferior position in the clan. It appears that youth similarly had no position on the clan court. The dearth of literature on this point is most likely because deliberations and decision making were done by adults who did not consider the lack of youth representation to be worthy of comment. Clearly, youth occupied a lesser position, like women.

Thus, in pre-colonial times, kinship was the central unifying force. There was no formal separation of powers. Qualification, appointment and removal of clan court officials were determined through adult suffrage based on a communitarian notion of rights. Managing spiritual activities was equally important for the protection of the clan. Nevertheless, it is evident that clan courts were controlled by male elders, so women and youth were not on an equal standing.

Colonial era

On 19 June 1894 Uganda became a British protectorate. The country was subjected to "indirect rule" through which the different ethnic groups continued to administer their territories using customary law, and adjudicate their crimes in a like manner.³⁴ Still, there were major changes regarding administrative and judicial features.

First, in 1901, a Muganda chief, Semei Kakungulu, ruthlessly imposed the Buganda administrative system that divided Budama into *saza*, *gombolola*,

31 JMN Kakooza "Uganda's legal history in a nutshell" (1993) 1/1 *Makerere Law Journal* at 2, cited in E Beyaraza *Social Foundations of Law: A Philosophical Analysis* (2003, Law Development Centre Publishers) at 112.

32 A Oboth-Ofumbi Lwo (*Ludama*) *Uganda: History and Customs of the Jo Padhola* (1960, Eagle Press) at 67–69.

33 H Driberg "The status of women among the Nilotics and Nilo-Hamitics" (1932) 5 *Africa: Journal of the International African Institute* 404 at 419.

34 Kanyeihamba *Constitutional and Political History*, above at note 3 (1st edition, 2002, Fountain Publishers) at 7–10; J Oloka-Onyango "Law, custom and access to justice in contemporary Uganda: A conceptual and analytical review" (paper prepared for New Frontiers of Social Policy World Bank Conference, Dar Es Salaam, December 2005) part II, paras 2.1–2.2.

miluka and *pecho* [village].³⁵ Secondly, the Buganda centralized system was introduced, in which a chief (judge) had the power to try cases.³⁶ This changed the decision making from kinship units to a chief with legislative and judicial powers to preside over clan courts. For, as noted above, the Jopadhola adjudicatory system had no place for a dominant court official.³⁷ Thirdly, assessors were introduced in civil cases involving locals under the Courts Ordinance of 1909. In 1941, criminal cases could be heard with the help of assessors appointed by the senior courts advisor under the Native Courts Act.³⁸ Later in 1957, the African district courts, at sub-county level, could sit with the aid of two assessors whose opinions were not binding on the presiding official.³⁹ These courts, whose officials were appointed by the colonial administration, gradually moved away from the traditional public participatory approach that applied when all parties (litigants, assessors and judge) were personally acquainted. A fourth change was the introduction of a prosecutor. The Morwa Guma clan asserts that the position of prosecutor in its courts existed since the 1960s. Based on the legislative reforms noted above, the author suggests that this structure was most likely assimilated in the 1960s from the African district courts.

Although the Jopadhola fought to protect their diminishing jurisdiction, they adapted to Kakungulu's imposed administrative structures by creating a hierarchy of clan leaders to mimic the local government system. However, the authority of clan leaders' did not necessarily coincide with the government administrative regions. Moreover, the Jopadhola did not differentiate between the official local government system and clan courts. To them, kinship organization was the everyday government responsible for sanctioning certain behaviours and prohibiting others. The official chiefs found that they had to rely on the authority of clan leaders to do their work.⁴⁰ The outcome was the operation of clan courts "conjoined" with the African district courts.

Despite legislative reforms, Jopadhola clans continued to determine the qualification, appointment and tenure of their "judicial" officials and to use an abridged notion of separation of powers. The combined effect of colonial rule was to reinforce women and youth's subordinate position in the clan courts.

35 Burke *Local Government*, above at note 22 at 197–98.

36 J Roscoe *The Baganda: An Account of Their Native Customs and Beliefs* (1965, Frank Cass and Co Ltd) at 241.

37 In isolated instances, the Jopadhola left the power of determining guilt to be exercised by one individual (Burke *Local Government*, above at note 22 at 218), but there is no evidence to suggest this was a widespread practice.

38 The Courts Ordinance 1909, secs 51 and 52. The Native Courts Act (chap 40), sec 4(1).

39 African Courts Act (chap 38), secs 4(1), 4A(1) and (2)(f).

40 Burke *Local Government*, above at note 22 at 188–89.

Post-independence

The legislative abolition of traditional courts was finalized following Uganda's independence. Under article 24(8) of Uganda's 1962 Independence Constitution, all laws were subject to the doctrine of legal certainty: *nullum crimen sine lege, nullum poena sine lege* [any offence or punishment must be written in law]. This doctrine was ill suited for the communitarian nature of societies like the Jopadhola, whose laws were oral and unwritten. Yet legal certainty was retained in the subsequent constitutions of 1966 (article 15(8)), 1967 (article 15(8)) and the present 1995 constitution (article 28(12)).

Constitutional disenfranchisement of traditional courts was followed by similar moves at the statutory level. The Magistrates Courts Act 1964 (MCA) created a single hierarchy of magistrates courts with powers to administer customary law in their areas of jurisdiction, in so far as it was not "repugnant to natural justice, equity and good conscience".⁴¹ The MCA arrogated the jurisdiction of traditional courts to administer criminal justice in accordance with customary practices and oral laws. Although indigenous communities lost their autonomy to make decisions about their legal system, clan courts survived. So, in post-independence Uganda, two different normative systems (traditional and national) co-exist, each with divergent ideologies.

To conclude, this demographic and historical background shows how clans assimilated and resisted external pressure to change their structures. Clans transformed by accommodating features from the state, while preserving traditional methods of clan participation in the creation of "their" independent courts. This *modus operandi* still applies today.

CLAN COURTS UNDER UGANDA'S LEGAL FRAMEWORK

The full force of the Guidelines that obligate clan courts to apply international human rights law is somewhat diminished in the case of Uganda, because the state does not accept liability for their shortcomings. For example, there is no law that guarantees the existence of clan courts, far less their independence. The Constitution only provides for a standing committee on cultural matters under a regional assembly of districts. The committee, comprising representatives of cultural interests, is intended to have exclusive jurisdiction on cultural matters, including traditional and cultural practices that are consistent with the Constitution. This regional tier of governance is not yet in force because Parliament has yet to prescribe the composition of the Regional Assembly.⁴² Besides, customary criminal matters fall outside the remit of this assembly.

Under article 37 of the Ugandan Constitution, the state as the primary duty bearer has an obligation to ensure the continued existence of a cultural

41 Magistrates Court Act chap 36 (1964), secs 3, 9(1) and 15(1)(a). Under sec 10(1) of the MCA (2000), civil customary law is applicable, subject to the "repugnancy" clause.

42 The Constitution, art 178 and 5th schedule, clauses 2(1) and 3(3)(h). Cultural affairs are handled by district councils under schedule 2 part 2, sec 5(z) of the LGA.

community and to support cultural institutions. Despite this manifestation of constitutional recognition, criminal jurisdiction is not granted to cultural institutions. This is because, under article 28(1) of the Bill of Rights, a person is entitled to a fair hearing before an independent court or tribunal “established by law”. Also, article 28(12) of the Constitution prohibits the conviction and punishment of offenders for offences that are not written in law. Traditional criminal laws are unwritten and clan courts are not established by law. Absent a constitutional amendment to article 28, any clan court exercising criminal jurisdiction in accordance with traditional criminal laws acts outside the scope of the Constitution.

RESEARCHING CLANS’ ADAPTATIONS OF HUMAN RIGHTS STANDARDS

The lack of interest in how clan courts that operate *outside* state law might protect (rather than jeopardize) international human rights standards, is mirrored in the paucity of academic scholarship in countries where such traditional courts exist. As Benda-Beckmann notes, most analyses tend to focus on issues where social life and adjudication is governed by customary law under a national legal system, leading to deficiencies in the socio-legal analytical framework when studying western “law out of context”. The interpretation and application of state (“western”) law by local communities is not viewed as a proper process since it takes place outside national legal frameworks. He makes the empirical argument that: “[v]illagers reproduce what they consider to be ‘their’ normative system in everyday activities and processes of decision making”.⁴³ While the imitation may be quite different in substance and composition from traditional laws created in other contexts, Benda-Beckmann persuasively argues that such reproduction of normative conceptions outside state law or original traditional law must be treated at the same analytical level to give a fuller understanding of local traditions and their laws.⁴⁴

What’s more, as Woodman convincingly argues, the abolition of customary law brought about by legislative reforms, does not change the social conduct of its observance. Rather, there exist recorded instances, such as M Bussani’s study on tort law in Ethiopia and Eritrea,⁴⁵ of customary law being effective during periods when the state followed policies of non recognition. To Woodman, a concern with justice requires a methodological examination of social justice of which the primary aspect is “the basic structure of society”.

43 F Von Benda-Beckmann “Law out of context: A comment on the creation of traditional law discussion” (1984) *Journal of African Law* 28 at 29.

44 Id at 29–33.

45 M Bussani “Tort law and development: Insights into the case of Ethiopia and Eritrea” (1996) 40/1 *Journal of African Law* 43 at 47, cited in G Woodman “Legal pluralism and the search for justice” (1996) 40/2 *Journal of African Law* 152 at 164, note 38.

Such an examination, he correctly points out, is rare.⁴⁶ For example, the most comprehensive studies in Uganda are those of the state-governed local council courts, which only apply national penal laws using limited customary processes. However, as Barya and Oloka-Onyango persuasively argue, these “popular justice” courts were not an attempt to revert to tradition, but only to provide a semblance of a traditional approach to judicial power.⁴⁷ Such studies do not delve into the independence of traditional courts.

Elsewhere, the South African Law Commission (SALC) has examined the independence of statutory traditional courts presided over by chiefs and headmen. SALC identified normative divergence, specifically the lack of separation of powers, absence of legal qualifications of officials and exclusion of women from the composition of traditional courts.⁴⁸ Koyana also notes the inferior position of women in the headmen courts, where decisions were based on the opinions of wise men of the community.⁴⁹

Scholars like Elechi have conducted a methodological examination of social justice of the type that Woodman suggests. Elechi’s seminal work on the *ekpuke essa* [age-grade] courts among the Afikpo of Nigeria, gives insight into indigenous traditional courts operating outside state law despite the existence of statutory traditional courts. *Ekpuke Essa* courts are made up of middle and senior sub-grades with elderly men (in their 50s and 60s) who are drawn from the age sets. The men are elected based on their knowledge of customs, oratory skills and wisdom. Most importantly, *ekpuke essa* courts combine legislative and judicial functions. Of equal significance is Elechi’s finding that women are not among the *ekpuke essa* judges. Despite having equal *locus standi* [legal capacity] as men and being able to bring cases in their own right or on

46 Woodman, id at 157–59 and 163–64. The legal character and social significance of customary law remains firmly established. Even in the African variety of “deep” legal pluralism, where state law co-exists with customary law, the imposed state law was very different from pre-colonial indigenous laws.

47 J Barya and J Oloka-Onyango *Popular Justice and Resistance Committee Courts in Uganda* (1994, New Vision Printing and Publishing Corporation) at 46. See also B Baker “Popular justice and policing from bush war to democracy: Uganda 1981–2004” (2004) 32 *International Journal of Sociology of Law* 333; Nordic Consulting Group “Survey of LC courts and legal aid providers findings: Tororo district” (2006) and L Ekirikubinza “Juvenile justice and the law in Uganda: Towards restorative justice” in L Lindholt and S Schaumburg-Müller (eds) *Human Rights in Development Yearbook 2003: Human Rights and Local / Living Law* (2005, Martinus Nijhoff Publishers) 295.

48 SALC “The harmonisation of the common law and indigenous law: Traditional courts and the judicial function of traditional leaders” (discussion paper 82, Project 90, May 1999) at 13–15, available at: <http://www.justice.gov.za/salrc/dpapers/dp82_prj90_tradl_1999.pdf> (last accessed 3 July 2012). The memorandum of the South Africa Traditional Courts Bill [B 15-2008], introduced in the National Assembly on 7 July 2009, seeks inter alia to “provide for the structure and functioning of traditional courts in line with constitutional imperatives”. The bill is available at: <<http://www.justice.gov.za/legislation/tradcourts/B15-2008.pdf>> (last accessed 3 July 2012).

49 D Koyana *Customary Law in a Changing Society* (1980, Juta Publishers) at 130.

behalf of other people, women do not sit on the court.⁵⁰ Elechi's findings demonstrate that *ekpuke essa* courts bear similar normative features to South Africa's traditional courts: conflation of powers, lack of legal qualifications and inequality in representation.

Comparatively, Griffiths's study on the gendered power relations in marriage among the Bakwena of Botswana exemplifies that *kgotla* [public assembly] courts are perceived as a "men's space". There, the mediator is a man, usually the headman of the family *kgotla*, the ward head or official of the chief's *kgotla*.⁵¹ Likewise, Chase's examination of oracular justice among the Azande in Central Africa highlights the unequal position of women and children. They are not permitted to consult or operate *benge* [the poison oracle used to determine contested facts], a process controlled by the (all male) chief's court.⁵² Griffiths and Chase, however, do not conduct a legal analysis on the independence of the *kgotla* and chief's courts.

Further, in a survey of public perceptions about traditional leaders in Africa, Logan makes one important finding: customary societies are adept at integrating incompatible institutional structures. While accentuating the irrefutable importance of customary leaders in localized socio-political life, including local justice,⁵³ Logan does not systematically consider how societies integrate mismatched structures (such as judicial features) into their institutions.

This review of academic scholarship reveals three underlying problems. First is the use of legal intervention by the state to enforce "rationalization" of traditional courts with national law. This approach fails to accommodate the traditional notion of an independent court. The second problem is a principal legal objection to traditional courts: their normative features are inimical to international human rights standards for an independent court. More importantly, the review reflects the gaps in knowledge on how traditional normative frameworks adapt "foreign" laws to create their notion of an independent court. For that reason, there is much to learn about how local communities do this.

CREATING AN "INDEPENDENT" CLAN COURT

In presenting the main findings, this article sets out a thematic appraisal of the study participants' views on an independent court, particularly their approach to the separation of powers, manner of appointment, qualifications,

50 O Elechi *Doing Justice Without the State: The Afikpo (Ehugbo) Nigeria Model* (2006, Routledge) at 75–80, 118–21, 136–42 and 166–71. An age grade is an organization of people born in a village within roughly a three year period. Women have analogous institutions to resolve conflicts arising among themselves.

51 A Griffiths *In the Shadow of Marriage: Gender and Justice in an African Community* (1997, University of Chicago Press) at 113 and 117.

52 O Chase *Law, Culture and Ritual* (2005, New York University Press) at 24–25.

53 C Logan "Traditional leaders in modern Africa: Can democracy and the chief co-exist?" (Afrobarometer working paper no 93, February 2008) 1 at 5 and 23, available at: <http://pdf.usaid.gov/pdf_docs/PNADL326.pdf> (last accessed 3 July 2012).

security of tenure, equitable representation and mysticism. It starts by establishing the normative considerations that underpin Jopadhola administration of justice.

Jopadhola clans apply their own concept of a fair trial based on Ubuntu, where individuals are users of collective rights by virtue of belonging to a clan. This view is also in line with the definitions of Gyekye (discussed previously), Cobbah and Sudarkasa. Cobbah maintains that social roles within kinship are rights which each member possesses and duties which each member has towards his kin; so entitlements and obligations underpin the kinship system.⁵⁴ To Sudarkasa, the right of one kinship member is the duty of the other. The duty for the other kinship member is the right of another.⁵⁵ In fact the word “right” is a misnomer, for participants described human rights as *chik ma yiko kwo pa ji jie* [laws that protect the lives of all people]. *Jie* denotes “everybody” as contrasted with *dhano* [a person] or *ani* [me]. The use of *jie* therefore reflects a communitarian nature of self that, as Ikuenobe correctly puts it, has the notion of a moderate sense of individual autonomy that avoids extreme independence or the lack of it.⁵⁶ This ensures that the trial is fair to both the individual and the community. Within this communitarian setting, Jopadhola clans reproduce what they regard as their normative standard of an independent court.

The Jopadhola notion of separation of powers

At first blush, section Q(c)(1) of the Guidelines obliges states to ensure that traditional courts remain separate from the state’s executive branch. This means that customary courts conform to human rights standards of independence. Viewed more critically, section Q leaves open the question of what comprises an independent traditional court. The resolution of this issue is left to the vagaries of kinship government.

Non-separation from the state’s executive

There is no guidance from the African Commission on the precise meaning of “independence from the executive” as set out in section Q(c)(1). However, in *Bahamonde v Equatorial Guinea* the Human Rights Committee considered that, where functions of the judiciary and executive were not clearly distinguishable or where the executive is able to control the former, this is incompatible with the idea of an independent and impartial tribunal within the context of article 14(1) of the ICCPR.⁵⁷ If the Human Rights

54 J Cobbah “African values and the human rights debate: An African perspective” (1987) 9 *Human Rights Quarterly* 309 at 320–21.

55 N Sudarkasa “African and Afro-American family structure: A comparison” (1980) 11 *Black Scholar* 37 at 44.

56 P Ikuenobe “Moral education and moral reasoning in traditional African cultures” (1998) 32/1 *Journal of Value Inquiry* 25 at 40–41.

57 *Olo Bahamonde v Equatorial Guinea* comm no 489/1991: UN doc CCPR/C/49/D/486/1991 (1993), para 9.4.

Committee's definition is extrapolated to section Q(c)(1), then clan courts should be completely separate from the state's executive branch. This is more so because, under Uganda's legal framework, clan courts are not "statutory" traditional courts, being neither regulated by law nor a part of the government.

The Jopadhola word for a clan court is *koti* (plural: *koti*), borrowed from the English word "court". Participants explained that a *koti* belongs to every clan member because, collectively, each person has a stake in determining the criteria for qualification, appointment and tenure of *koti* officials. Ostensibly, a *koti* comprises clan members only.

An unexpected finding then was that all three tiers of Jo-Gem clan courts (figure 1) include a local government village executive official: the local council chair.

According to Jo-Gem respondents: "[t]he clan call a representative of government like the LC [local council] 1 chairman, and the clan chair of the area then they sit during that time to hear the case [sic]. The LC 1 chairman helps the clan to ensure that they decide the case without breaking the law of the government."⁵⁸ The chair of the local government village council level 1, referred to in this quote as the "LC 1 chairman", sits ex-officio in all Jo-Gem clan courts. The LC 1 chairman's role in the clan court is different from the official one performed ordinarily. The chairman is head of the lowest government administrative unit, political leader of the council and chairs the local council court.⁵⁹ The chairman therefore combines legislative, executive and judicial functions.

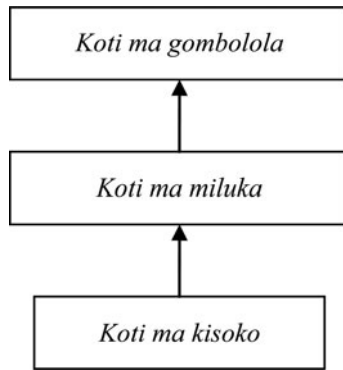
Inversely, in all Jo-Gem *koti*, the LC 1 chairman is only invited to sit in a quasi-judicial capacity (though not as chair) to ensure that the *koti* adheres to national law. It may be suggested that the LC 1 chairman oversees the protection of the right to a fair trial by the *koti*. The clan head called *ja gombolola*, *ja miluka* or *ja kisoko*, sits as the ex-officio chair of their *koti*, assisted by three *jo kony* [helpers] called assessors who advise on clan law and make decisions. The *ja kalani* [secretary] takes minutes. Of note, in Morwa Guma courts, local council officials are only invited like any other clan member to participate in proceedings. As depicted in figure 2, the LC 1 chairman is part of the audience, seen here welcoming clan members to his village. He is not one of the *koti* officials.

Thus, in the context of section Q(c)(1) of the Guidelines, the presence of the LC 1 chairman on the Jo-Gem *koti* signifies an "abridged" notion of the legal doctrine of separation of powers: one that combines the lower level state executive with traditional "judicial" officials. In this sense, Jo-Gem *koti* do not meet regional standards for an independent court that demand separation of traditional courts from the state's executive.

58 Jo-Gem *gombolola* court participants.

59 LGA, sec 50. LCCA, sec 4 and Local Council Courts Regulations (SI 51/2007), rule 13(1).

Figure 1. Hierarchy of Jo-Gem clan courts



Conflation of executive and judicial functions

In order to adopt a more expansive reading of section Q(c)(1) as referring to the independence of traditional courts from kinship government, then *koti* should be independent of the executive organ of each clan: the *nono*. However, Jopadhola courts are not independent of their executive bodies. As Sanders states, traditional government is by discussion and consent, doing whatever possible to ensure cohesion of the group. Likewise, traditional legal proceedings are a community affair aimed at reconciling parties.⁶⁰ Extrapolating Sanders's reasoning to Jopadhola clans shows that, in adhering to the principle of governance by public participation, traditional government combines legislative, executive and judicial functions.

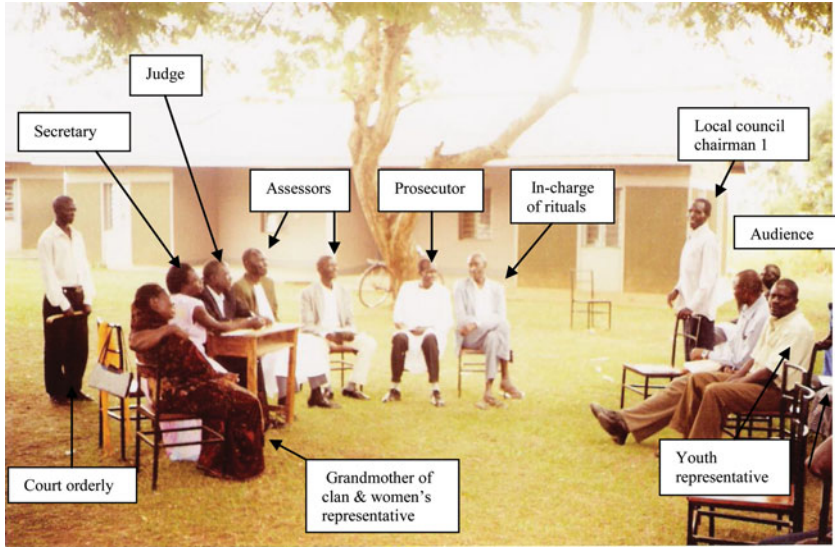
This conflation of powers also present in the Jopadhola courts was explained as follows. The *nono* comprises the heads of all clan units who are answerable to adult clan members, collectively called the *ju nono*. Participants pointed out that the *nono* has no legislative authority to repeal or amend *chik* [law] because of the mystical nature of Jopadhola *chik*, derived from custom. Still, as the supreme policy making body of each clan, the *nono* carries out executive and judicial functions. In its executive capacity, the *nono* organizes elections of clan heads and court officials and oversees their appointment and dismissal. Any clan head also exercises judicial functions while sitting as the (executive) ex-officio chair of the *koti*. This point is best illustrated by the Morwa Guma courts' composition outlined in figure 3.

The Morwa Guma Constitution provides for a judge as a position in leadership, but not as a separate judicial entity.⁶¹ As a result, in the higher *saza* and

60 AJGM Sanders "Comparative law and law reform in Africa, with special reference to the law of criminal justice" in Takirambudde (ed) *The Individual*, above at note 11, 148 at 150-51.

61 *Chik Ma Pa Nono Morwa Guma Malasang* [Constitution of the Morwa Guma Malasang clan] (1985), chap 13(34)(vii).

Figure 2. Trial simulation re-enacting a clan court session. © Maureen Owor (2006)

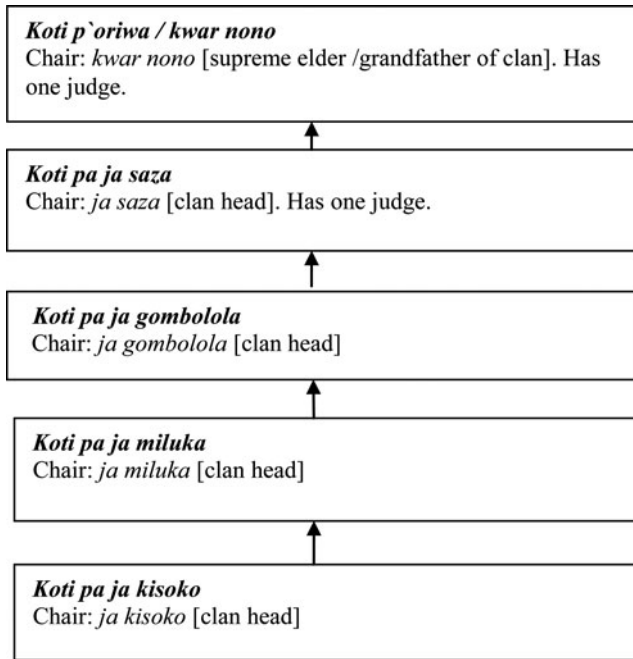


p'oriwa courts, positions exist for both judge and clan head. The latter has judicial powers to hear cases on a par with a judge. For instance, the *ja saza* has the same judicial powers as the *ja thum banja* [judge] of the *saza koti*. In the appellate *p'oriwa koti*, the *kwar nono* has equal judicial authority as the judge. Like the Jo-Gem, the *gombolola* and the lower *miluka* and *kisoko* courts are all chaired by a clan head (see figure 3). The *gombolola* court also has a deputy chair. Notably, all (eight) *jo kony* from the lower courts (two assessors per court) sit in the *p'oriwa*. Similar to the Jo-Gem, *jo kony* here have powers to hear evidence and determine both verdict and sentence.

Executive members, some of whom are pictured in figure 2, sit in the *koti* and participate in decision making. In the *p'oriwa* they are the: *adha nono* [grandmother of the clan], *ja kiosa* [prosecutor], *kalani* [secretary], *ja kani* [treasurer], *ja luwo* [speaker], *ja kow wach* [publicity secretary] and *ja chowiroki* [person in charge of rituals]. The *saza* and *gombolola* courts have the: *adha nono* [women] representative and *soye* [youth] representative, secretary, treasurer, prosecutor, *ja kika* [funeral chair] and *ja kony pere* [assistant] who collects *kika* [money to help with funeral expenses of a clan member]. The lower *kisoko* and *miluka* courts each have a secretary, and women and youth representatives.

Clearly then, the composition of the Morwa Guma and Jo-Gem clan courts, viewed in the context of section Q(c)(1), partially mimics the composition of courts of law by having a judge, assessors and a prosecutor. The hierarchy of courts of both clans retains the colonial local government divisions of *saza*, *gombolola*, *miluka* and *kisoko* (formerly *pecho*). Additionally, the lower level

Figure 3. Hierarchy of Morwa Guma clan courts



local government LC 1 chairman is invited to sit in Jo-Gem courts. That a clan leader wields executive power and also exercises a judicial role as the ex-officio chair of the *koti*, demonstrates the lack of separation of powers between executive and judicial functions of the *nono*. These findings support the SALC literature, Elechi's study of *ekpuke essa* courts, and Burke and Elias's descriptions of segmentary societies. This lack of separation extends to the manner of appointment where, in carrying out executive functions, clan leaders use a participatory approach that accommodates *ju nono* decisions.

Manner of appointment

The underlying assumption in section Q(c)(1) of the Guidelines is that the appointment procedure for national courts can be *replicated* in a traditional context. This supposition is explicit in section Q(c)(1) that reproduces section A(4).⁶² Under section A(4)(h), the process for appointment to judicial bodies shall be transparent and accountable and an independent body shall be created for this purpose. This body also aims to safeguard the independence and impartiality of judicial officers. As the Human Rights Committee has

62 Under sec A(4)(a), national laws shall guarantee the independence of judicial bodies. Sec A(4)(g) protects the autonomy of judicial bodies from the executive branch.

stated, the manner of appointment determines whether a court of law is independent and fair.⁶³ That way, the individual's right to a fair trial by an independent court is protected. The fact that no guidance exists in section Q(c) on the manner of appointment may be because, as implied in section S(1), traditional courts are created in accordance with cultural norms and customs. Yet, modernists criticize customary forms of governance, maintaining that traditional authorities rely on deference and place the community ahead of the individual, thereby hampering the growth of a just and democratic society.⁶⁴

A surprise result then was the egalitarian manner of appointment by the *nono* of each clan. Participants made clear that appointments are based on adult suffrage and meritocracy (the exemplary performance of social obligations), or "[t]he contribution of the individual to the community, their ability and behaviour".⁶⁵ Meritocracy and adult suffrage aim to achieve transparency and a democratic appointment process.

The Jo-Gem clan follows a conservative traditional approach. Appointments are by the *nono*, through adult suffrage of the *ju nono*. There are no regular elections and no campaigns are permitted. Meritocracy is an imperative, for as Mr AO, the supreme Jo-Gem elder said: "[y]ou cannot simply want this job." The only exception is the LC 1 chairman who sits *ex-officio*.

The Morwa Guma appointments depict an innovative approach that combines meritocracy with democratic elections. To this end, chapter 11 of the Morwa Guma Constitution provides that leaders "must be good clans' people [sic]". In this respect, the Morwa Guma underscores meritocracy in much the same way as the Jo-Gem. The main distinction is the election of court officials by an electoral committee. The concept of an electoral body, according to Mr RO, was borrowed from the government in 1985. In the author's view, the idea of a specific institution to oversee elections was probably copied from Uganda's first ever multi-party elections in December 1980, organized by the commission for the 1980 general elections. Though the composition of the Morwa Guma's electoral committee is not specified, the presiding officer is an *okewo* [a nephew to the clan]. An *okewo* is perceived as neutral, since he is not a clan member. Canvassing and campaigns are permitted, and voting is by lining up [*bol*] behind a candidate.⁶⁶

63 Human Rights Committee "General comment 13": UN doc HRI/GEN/1/Rev.1 (1994) at 14, para 3.

64 Logan "Traditional leaders", above at note 53 at 3–4, citing R Mattes "Building a democratic culture in traditional society" (paper presented to the International Conference on Traditional Leadership in Southern Africa, at the University of Transkei, Umtata, South Africa, 16–18 April 1997) at 6 and M Owusu "Tradition and transformation: Democracy and the politics of popular power in Ghana" (1996) 34(2) *Journal of Modern African Studies* 307 at 330.

65 Interview with Mr YO.

66 Morwa Guma Constitution, above at note 61, chap 11, para 32.

As noted earlier, under Morwa Guma law, a judge is not separate from leadership functions. To this end, the appointment of judges is, as for other clan office bearers, by election, in contrast to national courts. Appointment of magistrates by the Judicial Service Commission (JSC)⁶⁷ is based on an individual's legal qualifications and experience, not contributions to the community and certainly not by adult suffrage. Likewise, under article 142 of the Ugandan Constitution, judges are nominated by the JSC, vetted by Parliament and appointed by the president. Kanyeihamba correctly observes that the appointment process for judges in Uganda is "rigid".⁶⁸ To Madhuku, subjecting the nominees to parliamentary approval (people's representatives), is intended to be a check against the "spectre of political pressure on the appointment process".⁶⁹ Thus, Parliament may reject an appointment to obtain a more reasonable proposal. For the Morwa Guma, appointment of judges is by adult suffrage of the *ju nono*. To them this is a democratic, transparent process in which those who lack a sense of social obligation are rejected.

The concept of a prosecutor (as representative of society's interests) in the higher Morwa Guma courts is adapted from the state's director of public prosecutions (DPP). Appointment of the DPP and staff, however, differs significantly from that of the prosecutor in the Morwa Guma courts. The latter is appointed by the *nono* based on meritocracy, following election by adult suffrage. Conversely, the DPP is nominated by the Public Service Commission (PSC), vetted by Parliament and appointed by the president under article 120 (1) of the Constitution. Other employees, state attorneys and lay prosecutors are appointed by the PSC.

Participants explained that the term "assessor" used by both clans, is borrowed from the courts of law. In the magistrates courts (for civil customary matters) and the High Court, assessors are pre-selected from a list prepared by the chief magistrate,⁷⁰ then appointed by the presiding judge or magistrate. By contrast, assessors in both clans are elected by adult suffrage based on meritocracy.

To summarise, the clans use traditional and modern approaches where the *nono* guarantee that the *ju nono* participate through adult suffrage in the appointment of all clan court officials including assessors, judges and the prosecutor. The appointment process that borrows from national structures is based on meritocracy. As Oomen contends, if participation and the "ability to debate one's destiny" can be regarded as essential to democracy, then customary leadership may be "more democratic than the elected local

67 Judicial Service Act chap 14 (2000), sec 5. Art 147(3) and 148 of the Constitution refers to the appointment of judges and other judicial officers.

68 Kanyeihamba *Constitutional and Political History*, above at note 3 at 291–93.

69 L Madhuku "Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa" (2002) 46/2 *Journal of African Law* 232 at 237.

70 MCA, rule 26, 3rd schedule. Schedule to the Trial on Indictments Act chap 23 (2000), assessors rules 1 and 2.

governments with which they supposedly compete”.⁷¹ These findings confirm that the procedure of appointment is democratic and accountable in the local context.

Qualifications

Section Q(c) does not specify the requisite qualifications for appointment to a traditional court, leaving its determination to the customary institutions. As noted earlier, the absence of legal qualifications is one weakness of statutory traditional courts identified by SALC. As Madhuku argues, appointing from a restricted group who are subjected to professional standards and qualifications, aims to ensure that appointments are made on merit.⁷² For instance, judicial officers in Uganda must be qualified to practise law under the Advocates Act.⁷³

The Jopadhola, by contrast, have no minimum educational qualifications as eligibility criteria to serve on the *koti*. Rather, they use a traditional approach where positions are open to *any* clan member, including the illiterate, to guarantee equity. Important considerations for all posts are an in-depth knowledge of Jopadhola clan laws and proficiency in Dhupadhola. This finding is consistent with Elechi’s study of the *ekpuke essa* which established that court elders must be erudite in local customs. A third consideration is one’s ability to pacify angry litigants. As study participants explained: “[t]he clan must strengthen the heart of the complainant so that he does not feel very upset”.⁷⁴ This statement is significant because it illustrates the competencies expected of a clan court official: a conciliatory approach that fosters reconciliation between the parties.

By excluding legal qualifications, clans apply a communitarian notion of rights where every clan member (aged 18 or older) has *locus standi*. As such, judicial and prosecutorial functions are shared between the judge, prosecutor, assessors, other clan officials and the community. Under shared jurisdiction, every kinship member has a “right” to be heard and to participate in the adjudication process. This principle of even handedness is the benchmark for considering whether a trial was fair to the individual and community. Public participation contrasts rules of natural justice applied in local council courts that emphasize the right of individual litigants to be heard.⁷⁵ One may argue that the consequential lack of legal expertise implies that clan courts may not protect individual rights during a trial. The clans’ counter-argument may be that, since their eligibility criteria are not pegged to formal and legal

71 B Oomen *Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa* (2000, Netherlands Institute for Southern Africa) at 64, cited in Logan “Traditional leaders”, above at note 53 at 23.

72 Madhuku “Constitutional protection”, above at note 69 at 241–42.

73 The Advocates Act, chap 267 (2000), secs 1 and 8.

74 Morwa Guma *miluka* court participants.

75 LCCA, sec 24.

qualifications, it is appropriate to their non-technical public nature of customary deliberations.

Although formal “westernized” education (and legal qualifications) are irrelevant, both clans have successfully combined these two contrasting levels of informal and formal education. For instance, assessors in the High Court must understand the language of the court (English) with a “degree of proficiency”,⁷⁶ which indicates they must have a formal education. By contrast, information provided by the study participants showed that all *jo kony* were semi-literate farmers. The same applied to the *ja chowiroki* in the *p’oriwa* court and all but one of the clan heads. Equally, the *kalani* were primary or secondary school teachers. The benefit of this mix appears to be that the *kalani* can record court proceedings in both Dhupadhola and English. To this end, two copies of court records (on land matters) availed to the author by the Namwaya *saza koti* had translations in English. This is convincing evidence of how the traditional system transforms itself to suit both local and modern circumstances.

To summarise, the eligibility criteria for appointment are conservative as they focus on individual disposition, proficiency in the local language and clan law. Additionally, educational and legal qualifications are disregarded because formal or legal training is not required due to the uncomplicated participatory nature of *koti* proceedings.

Security of tenure and removal of officials

Section Q(c) makes no mention of security of tenure for traditional court officials. By contrast, section A(4)(n), (p) and (q) provide that judicial officials must not be appointed for a fixed term and can only be removed following stringent procedures and a fair hearing. Madhuku underscores the importance of security of tenure, arguing that, if judges can easily be removed from office, then there is in reality no independence of the judiciary. Such a strict process also exists in Uganda to prevent judges being “beholden” to any authority or person.⁷⁷ The Jopadhola process has similarities and differences.

The Jo-Gem clan has no fixed term of office. This appears to give some measure of security of tenure for the officials, as they may serve for as long as they are capable. The Morwa Guma clan by comparison has fixed tenure for all officials. Under paragraph 31 of the Morwa Guma Constitution, elections of clan office bearers are held every five years. A person is only eligible for re-election twice, giving a maximum tenure of 15 years. This practice is

76 Trial on Indictments Act, rule 2(1).

77 Madhuku “Constitutional protection”, above at note 69 at 240. Kanyeihamba *Constitutional and Political History*, above at note 3 at 291. The Constitution provides for the removal of a judicial officer by an independent tribunal appointed by the president. Alternatively, the president may suspend or remove a judicial officer: art 144 (3)(4) and (5) of the Constitution.

consistent with Nowak's reasoning that judges need not be appointed for life, but should serve for a relatively long period.⁷⁸

Removal of officials under the Jopadhola procedure is subject to the decision of the *nono* following consultations with the *ju nono*. To illustrate: under chapter 12, paragraph 33 of the Morwa Guma Constitution, the grounds for removal of a clan leader include breaking clan law, such as: "[h]aving a relationship or eloping with a relative or any other behaviour that the other leaders deem to fit into that category".

One example given was of the dismissal of a clan official by the *nono* for concealing the fact that his son married a relative, in direct contravention of Morwa Guma law. The leader was dismissed in disgrace and was not permitted to stand for any office again.

In summary, security of tenure and removal of an official is parochial, subject to the *nono* acting on the consensus of the *ju nono*. Questions may be raised from a legal perspective about the extent to which public participation in determining the tenure and removal of "judicial" officials guarantees the independence of traditional courts. In response, the clans may argue that public participation ensures integrity of the *koti*, as its officials are ultimately accountable to the *ju nono*.

Representation of women and youth

The Guidelines are silent on posts for women and youth on traditional courts. Nonetheless, one significant finding was the transformation of *koti* from bastions of patriarchy to institutions that ensure fair representation of women and youth (aged 18 or older). Participants spoke of how *koti* accommodate these interests through provision for women's and youth representatives to ensure their constituents are protected. These representatives are appointed in both clans in much the same way as other *koti* officials: through adult suffrage based on meritocracy. This new development was adopted in 1992 from the government's policies of equal representation in governance, concretized in the local councils and their associated courts. Under the LCCA, one youth and two women's representatives sit on lower level local council courts as ex-officio members of the village or parish executive committee. A local council court comprises all members of that village or parish executive committee. Women and youth quotas in these executive committees are specified under section 47(2)(h) and (i) of the Local Governments Act (LGA), following constitutional provisions in article 180(2)(b) and (c) of the Local Council Courts Act.⁷⁹

The Jo-Gem clan does not assign posts for women or youth. Rather, it ensures that *all* courts have women and youth members. The explanation given by Mr AO was that "[g]overnment laws do not permit women to be

78 Nowak *United Nations Covenant*, above at note 3 at 319–20, para 25.

79 LCCA, secs 4(1) and 8(4)(a); Local Council Courts Regulations (2007), rule 19(1)(a). Youth representatives are only provided for under the LGA, where the chair of the youth council may sit on the village or parish executive committee.

denied representation in anything nowadays”.⁸⁰ Any clan member is eligible to hold any post regardless of age or gender. Ultimately, each of the Jo-Gem courts had at least one woman official. In the case of the court at the *kisoko* level, there were two women (both of them assessors), quite unlike the Morwa Guma where *all* the assessors were men. The secretary to the Jo-Gem *gombolola* court was a young man. By not “compartmentalizing” positions for women or youth, the Jo-Gem guarantees wider representation for them at all levels. By contrast, the Morwa Guma has specific positions for women and youth in all clan courts, although youth do not sit in the *p’oriwa* court.

To conclude, age and gender parity is one area where clans in the post-independence era have adopted lower level government features. This is in contradistinction to studies like that of Griffiths, which establish that traditional courts (*kgotla*) are a “men’s space”. One explanation could be that, in an era of democratization, traditional leadership adapts to meet the needs of modern day society in an effort to strengthen its position within local communities.⁸¹ Accordingly, giving positions to women and youth in Jopadhola patrilineal society ensures some semblance of fair representation in clan courts, which was previously lacking.

The spiritual overseer

The Guidelines are silent on the position of a spiritual overseer in traditional courts, yet supernatural activities are integral to localized African societies. For example, Jopadhola clans have *kuni* at which rituals take place, and the Bura temple at Nyakiriga is still in use. As Chase contends, rituals are ceremonies that are used to gain legitimacy in society. Using shared normative values and involving leaders and the audience in the performance of the rituals, help to authenticate a dispute process.⁸²

It is worth mentioning that no distinction exists between civil and criminal matters as is the case in a formal legal system. This characteristic of segmented societies⁸³ may be attributed to the restorative inclinations of the clan in punishing the breach of social norms, like taboos, which make such a distinction largely pointless. Beyaraza explains that taboos are comparable to crimes attracting punishment in positive law, which clearly prescribes rules of what to do or not to do.⁸⁴ One such example is *nywomo wat* [incest]. Clan members

80 Interview with Mr AO.

81 Logan “Traditional leaders”, above at note 53 at 6, citing JM Williams “Leading from behind: Democratic consolidation and the chieftaincy in South Africa” (2004) 42/1 *Journal of Modern African Studies* 113 at 115–16.

82 Chase *Law*, above at note 52, chaps 2 and 7, at 114–16.

83 L Shaidi “Traditional, colonial and present day administration of criminal justice” in T Mwene-Mushanga (ed) *Criminology in Africa* (2nd edition, 2002, Fountain Publishers) 1 at 2.

84 E Beyaraza *Contemporary Relativism With Special Reference to Culture and Africa* (2004, Makerere University Printers) at 165–66. Such taboos aim to prevent hereditary diseases from being passed on through inbreeding and to maintain group unity.

are regarded as being as close as blood relatives. *Nywomo wat* is believed to bring *lusiwa* [extreme bad luck] to the offenders, their families and entire clan. The sanction for such breach is largely compensatory. This taboo is buttressed with mystical beliefs, so that only *chowiroki* [ritual cleansing] of any person afflicted by *lusiwa* removes the iniquity. Other social norms the breach of which necessitates ritual cleansing include *yeti manya ori* [abusing an in-law] and *lami* [verbal cursing].⁸⁵

One noteworthy finding was that *koti* sit in judgment on the breach of social norms within the court's jurisdiction, "[f]or example: cursing, theft, witchcraft, adultery / fornication, murder or the ghost. All this behaviour if the clan does not cleanse as it is required, even if the government imprisons a person for ten years still the tendencies listed above will remain. This behaviour retards the clan until the person is cleansed in accordance with traditional rites."⁸⁶

This excerpt demonstrates that, whereas clan jurisdiction covers "ordinary" crimes like murder, rituals take a central place in validating the clan court process. The passage portrays clearly that *koti* engage in "trials" that include a communal therapeutic style of social control where "criminal" acts may be attributed to supernatural forces. The whole community is then involved in the "treatment".⁸⁷ Communal therapy therefore deals with deviance through rituals where clan leaders and the community participate. The affected parties are returned to normality and reconciled with the community.

Customary trials are not very different from the therapeutic intervention described by Roberts, where family relationships that have broken down are examined using professional techniques. Once the latent problems have been dealt with, the parties' relationship is transformed using therapeutic techniques.⁸⁸ Thus, in both models, the affected parties are reconciled with the community, although therapeutic intervention, unlike communal therapy, neither uses mythical intercession nor involves kin in dealing with deviance.

Consider the trial simulation where two members of the same clan were tried for *nywomo wat*. Following their plea of guilty, the *adha nono* said: "[t]his act is a big curse called *lusiwa*. It can only be treated and finished in accordance with the rites on *lusiwa*."⁸⁹

The *adha nono*'s avowal underscores the *koti*'s responsibility in removing *lusiwa* thereby protecting offenders and their kinfolk. In this regard, the function of the *ja chowiroki* found only in the *p'oriwa* (pictured in figure 2) is of

85 Owor "Making international sentencing", above at note 15 at 199–200 and 222–26.

86 Morwa Guma *p'oriwa* court (15 August 2006).

87 A Horwitz *The Logic of Social Control* (1990, Plenum Press) at 80–81 and 86–88. Traditional societies also apply conciliatory and compensatory styles of social control: id at 22, 47–49 and 65–74.

88 S Roberts "Three models of family mediation" in R Dingwall and J Eekelaar *Divorce, Mediation and the Legal Process* (1988, Clarendon Press) 144 at 145.

89 Excerpt from the speech of the *adha nono* at the trial simulation.

special interest. His role is to guide the *koti* on the prescribed punishment and the procedure for ritual cleansing, and to ensure that rituals are carried out in accordance with clan law. The *ja chowiroki* proclaimed:

“There are four requirements: a cow called ‘Luk’, *rombo* [a sheep], a dog and a *kayindi* [small hut]. The first two are payable by the father of the boy. The *okewo* will build a hut and the couple will strip naked, leave their clothes in the hut, and remain in the hut with a dog. The hut is set alight and they all run out naked where *okewo* will be waiting to whip them. As they run out the *lusiwa* is removed and they are cleansed.”⁹⁰

The *ja chowiroki*'s declaration shows that, after compensation is paid by the male offender's father to the father of the female offender, the ritual cleansing is conducted by the *okewo*. As the naked couple escape from the burning grass hut, the *okewo* whips them. The *lusiwa* is removed and the offenders are reunited with the clan.

It is conspicuous that women are debarred from performing these ceremonies which are conducted by a male *okewo*. This may be likened to women among the Azande who are prohibited from taking part in oracular justice. Clearly, women's participation in rituals remains peripheral.

This data leads to the conclusion that *koti* are not independent in the framework of international human rights standards, where courts of law have no place for a spiritual adviser, far less supernatural beliefs. Although nowadays *all* clan officials are responsible for spiritual affairs, the exclusion of women from the performance of rituals affirms their subordinate position within this social framework. The control of divine matters therefore represents the preservation of traditional roles, reminiscent of pre-colonial times.

CONCLUSION

The evidence presented in this article raises a number of distinct features of the independence of clan courts. The similarities and divergence in each clan's notion of an independent court adds to the inconsistencies and strengths identified here and elsewhere. Jopadhola *koti* do not qualify as independent courts by international human rights standards because they do not adhere to the legal doctrine of separation of powers. The Jo-Gem clan, for instance, merges the lower level state executive with the *koti* officials, similar to the “combined” African district courts of the colonial era. The Morwa Guma courts exhibit a conflation of executive and judicial functions. Furthermore, legal qualifications are largely irrelevant in both clans. In this respect, the SALC comments aptly sum up their status in law. SALC contends that, if traditional courts are regarded as courts of law, they could be viewed as courts

90 Excerpt from the speech of the *ja chowiroki* at the trial simulation.

sui generis [in their own right] which need not be subject to the doctrine of separation of powers and which do not give audience to legal practitioners.⁹¹

Equally, the clans' strength is in reconciling normative differences in legal doctrine with a communitarian notion of human rights that permits every clan member to participate in the creation of clan courts. One may argue that features like age and gender parity, election of office bearers based on fulfilling social obligations to kin (meritocracy), protection of the clan from evil through ritual, and the fact that court and litigants are personally acquainted as kin, all make clan courts independent *within* the traditional framework. Jopadhola clans have thus created an "expanded" notion of "judicial" independence: one that is culturally appropriate in the local African context.

In view of these findings, there is need for a rethink concerning the enforcement of the Guidelines by traditional courts. At the national level, this would involve an amendment of articles 28(1) and (12) of the Constitution, and laws⁹² to bring traditional courts within the ambit of the Guidelines. That way, clan courts could receive guidance on how to protect the right to a fair trial as prescribed in section Q(a) of the Guidelines. Even so, some caveats are in order.

On the one hand, safeguarding the independence of traditional courts through legislation risks creating "statutory" traditional courts that become an extension of the state's executive. For instance, statutory traditional courts in Malawi are aptly described by Wanda as an "extended arm of the executive" because they are subjected to "excessive" control by the Ministry of Justice.⁹³ Cultural norms would be diluted in the process. On the other hand, leaving compliance with the Guidelines to the vagaries of clans may undermine an individual's right to a fair trial, more so since judicial functions are shared by clan heads and judges alike.

This article has shown how clans accommodate elements of an independent court by borrowing from the state using a traditional construct of human rights. The differences and similarities identified here enable us to appreciate that, within the milieu of the African regional human rights instruments, what pertains now may be defined as a "hybrid" clan court system, influenced by outside factors, yet retaining dominant customary control.

91 SALC "The harmonisation", above at note 48 at 15, para 4.3.

92 MCA, sec 10.

93 Wanda "The role of traditional courts", above at note 11 at 81 and 90–91.