CHAPTER SIX: THE JOPADHOLA CLAN COURT SYSTEM: A NORMATIVE PERSPECTIVE

Section 1: Introduction

As we saw in Chapter 5, the African Charter on Human and Peoples' Rights has not clearly defined an African notion of procedural rights. The African Commission on Human and Peoples' Rights likewise, has not translated African values into its decisions in the way the Inter American Court of Human Rights does in relation to indigenous Latin American values. Accordingly, the Charter and the Commission decisions provide insufficient guidance on communitarian values.[1]

How then should one go about integrating the values and structures of what would seem to be distinctively different court systems? This is the crux of the second question examined in this thesis. The first step is in understanding the workings of the clan courts[2] which makes traditional restorative practice more 'visible' at the international level. As Benda-Beckmann argues, when faced with imposition of alien laws on traditional systems, the locals reproduce what they consider to be their normative system in the processes of their decision making ('law out of context').[3] Scant literature exists on the manner in which this reproduction is actually done and the factors that drive it. Most scholarship tends to concentrate on issues where adjudication is governed by customary law under a national legal system.[4]

This thesis is designed to remedy this omission in the literature, as there is no doubt that clan courts merit the same depth of analysis. This is more so because the usual outcome of clan court justice is an imposition of sanctions as a consequence of breaching traditional law. Therefore their procedures should not deprive any party (including the community) of the right to a fair trial. This chapter is intended to illustrate how useful lessons may be drawn from the relationship between national and clan courts in the Ugandan context by providing a case study. I refer throughout the

[1] Communitarian values are duty to kin, reconciliation, restitution and ritual as defined in Ch. 1 S.1 *op cit*.
[2] Clan courts are defined in Ch.1 S.4 *ibid* as kinship adjudicatory bodies.
[3] F. von Benda-Beckmann (1984) *op cit*, 29 discussed in Ch. 3 S. 3 *op cit*.
[4] *Ibid*, 31-32. Academic studies on Uganda's state-managed local council courts are mentioned in Ch. 3 *ibid*.

chapter to the empirical study whose methodology is described in Chapter 1.[5] My analysis is presented through the lens of two clans: Morwa Guma and Jo-Gem, both of the Jopadhola ethnic group.

As far as I am aware, this chapter is the only legal investigation of Jopadhola clan adjudicatory structures. Following this brief introduction, I give a demographic description of the Jopadhola (Section 2) and their genealogy (Section 3). Next is an examination of the metamorphosis of the clan courts following legislative abolition (Section 4). The present clan court set up is discussed in Section 5, followed by a study of Jopadhola criminal law and sanctions (Section 6). I offer a brief conclusion in Section 7.

Section 2: The Jopadhola

In this section, I present the first part of my argument that clan cohesion is important in understanding the clan courts ability to transform their structures without compromising their own normative framework. I start by sketching the demography of the Jopadhola people in terms of population structure, geographical location and the political context in which they operate.

The selection of Jo- Gem and Morwa Guma clans, as I explained in Chapter 1, is because they are a good archetypal sample of how clan courts in 'stateless' societies achieve appropriate sentencing outcomes. The Jo-Gem, a smaller clan, is an example of good practice at a micro level. The practice of the Morwa Guma as an older, better established clan, illustrates translation of 'law out of context' at a more advanced level. Inquiring into these different clan experiences will unearth any similarities and divergence in each clan courts' composition, procedure and in their notion of rights. Such features would be missed if one were to aggregate their practices as being a single approach, as is the case in other studies.[6] Yet these differences and similarities explain in part why traditional experience has not been taken up as a different conceptual model in the international framework.

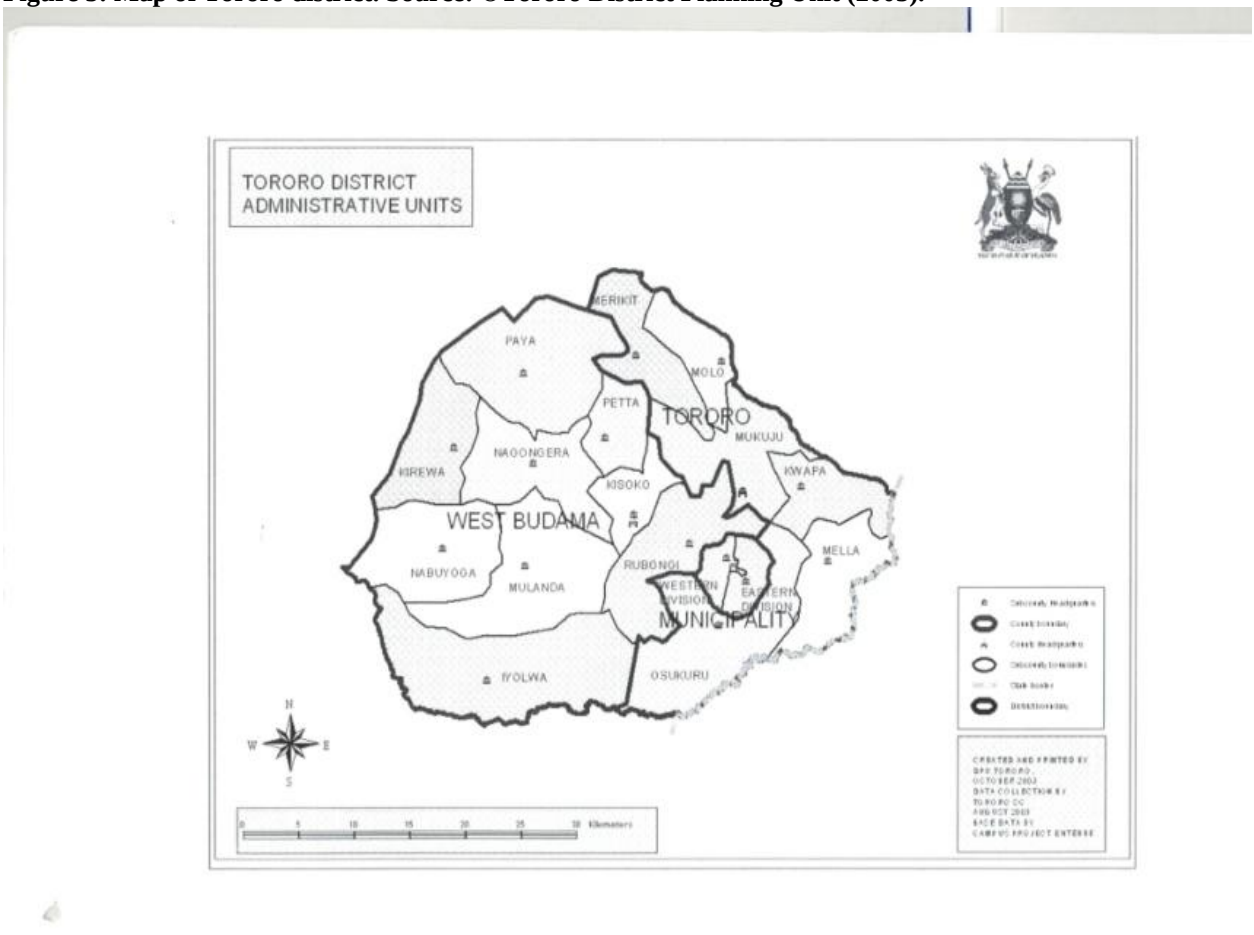
The Jopadhola ethnic group are from the Nilotic linguistic cluster. The language spoken is Dhupadhola which is similar to two other Nilotic languages of Alur and

[5] Ch. 1 S. 6 *op cit* and Appendix 1.
[6] Studies like those on the Gacaca courts, the *Bashigantahe* and to some extent the *Mato Oput* discussed in Chs. 1, 3, and 4 *op cit*, are based on conclusions drawn from aggregate studies.

Kenya Luo.[7] Jopadhola refer to the land they live in as Padhola, which according to renowned historian B. Ogot, is an elliptic form of 'Par Adhola' meaning the 'place of Adhola'. Officially the land of the Jopadhola is called Budama but according to tradition, this is the Kiganda version of 'Widooma' a Jopadhola war cry 'You are in trouble.'[8]

The Jopadhola live mainly in West Budama county, Tororo district in Eastern Uganda on the border with Kenya. Tororo district comprises Tororo county (former East Budama county), West Budama county and Tororo Municipality. The geographical location of West Budama in Tororo district is shown here in Figure 5.

Figure 5: Map of Tororo district. Source: ©Tororo District Planning Unit (2003).



Surrounding the Jopadhola are the Bantu linguistic group, with the Banyole to the North West, the Bagisu to the North East, the Samia to the South and the Basoga to the

[7] B. Ogot (1967) *op cit* 32. Figure 1 is a map showing the distribution of linguistic groups in Uganda. The other Nilotics are the Alur, Acoli, Langi and Kenyan Luo discussed in Ch. 1 S. 6 (i) *op cit*. Singular*: Japadhola*.
[8] *Ibid*, 85. The war cry was against the Baganda who invaded Padhola and were vanquished.

West. The Itesot are the only ethnic group of Nilo Hamitic origin that live with the Jopadhola in Tororo district.[9] This reflects the Jopadhola's resilience and ability to preserve its identity as a Luo island in a 'hostile' sea of Bantu and Nilo Hamitic peoples.[10]

According to the last 2002 census, the Jopadhola are 359,659 of which males are 176,438 and females 183,221, comprising 1.5 % of Uganda's population of 24.4 million.[11] Jopadhola are not considered an ethnic minority group because they are more than 25,000 people.[12] With regards to religion, most Jopadhola are Christians, with Catholics making up 58.7% of the population; Anglicans 30.6% and the rest belonging to other religions. None of the Jopadhola who took part in the census stated their religion as 'Traditional'.[13] In terms of economic development, large proportions (70-80%) of the Jopadhola live below the poverty line.[14] Their activities are mainly subsistence agricultural farming that takes place on land held under customary land tenure. The land is owned by individual families but is allocated and sold to clan members.[15]

The Jopadhola have 52 clans registered with the *Tieng Adhola*.[16] My study focused on two of the clans in Budama North constituency. The Morwa Guma, one of the largest Jopadhola clans, live scattered in all the sub counties and are estimated to number in thousands.[17] For example, the Namwaya Ssaza census of 1996 registered a total of 2,417 adults above 18 years.[18] The Jo-Gem by contrast is a very small clan that was recognised by the *Tieng Adhola* in 2006. They are considered to be '*jo-woko*'- 'those from the outside', because they migrated from Kenya. They live in Kisoko sub-county numbering 396: 44 men, 49 women, 43 women married into Jo-Gem, and 260

[9] The Banyole live in Butaleja district; the Bagisu in Mbale and Bubuulo districts; the Samia in Busia district; the Basoga in Iganga and Bugiri districts and the Itesot live mainly in Tororo County. Appendix 5- Map of Tororo district shows these neighbouring districts.
[10] B. Ogot *op cit* 70.
[11] *The 2002 Population* report, *op cit* Table A12, Chapter 5.
[12] *Ibid*, 24-26.
[13] *Ibid*, Table A14. These include Pentecostal (5.6%), Moslem (2.2%), Seventh Day Adventists (0.5%), Orthodox (0.1%), Others (2.2%) and Traditional (0%).
[14] Uganda Bureau of Statistics and International Livestock Research Institute, *Where are the Poor? Mapping Patterns of Well-Being in Uganda* (Nairobi: Regal Press, Kenya Ltd, 2003), Table 4.11A showing County-level poverty incidence in Eastern Region including West Budama in Tororo district.
[15] Field interview notes of pre-visit meeting with Mr. A. O and Mr. Y.O on 12th August 2006.
[16] *Tieng Adhola* is the cultural union of the Jopadhola. The clans are listed in Appendix III to the 2006 *Tieng Adhola* constitution. A description of the original clans is given by A. Oboth- Ofumbi, *Lwo (Ludama) Uganda: History and Customs of the Jo Padhola* (Nairobi: Eagle Press, 1960) 15-63 and B. Ogot *op cit* Ch 2 and 3, 109.
[17] Pre-visit meeting *op cit*, with Mr. Y. O, Namwaya Saza chief on 12th August 2006.
[18] Namwaya Saza clan members register: August 2006.

youth. The higher figure for youth includes those aged 18 – 25 who are not married.[19] The figures for both clans exclude babies and children.

Figure 6 overleaf, shows the administrative divisions of West Budama County that is divided into two electoral constituencies: North and South. Budama North comprises the sub-counties of Paya, Petta, Nagongera, Kirewa and Kisoko. The study participants were from all the sub counties of Budama North. Budama South comprises the sub-counties of Nabuyoga, Mulanda, Iyolwa and Rubongi. The two clans have followed the old administrative divisions of Kisoko (village), Miluka (Parish), Gombolola (sub-county) and Saza (County)[20] to demarcate the territorial jurisdiction of their courts. These vary within the clan. For example, the Morwa Guma Namwaya Saza court has one of the largest territorial jurisdictions covering Mulanda, Nabuyoga, Pajwenda, Kisoko, Morkiswa and Namwaya; combining present parish and sub-county administrative divisions.[21] The Jo-Gem territorial jurisdiction follows the old administrative divisions up to the Gombolola level.

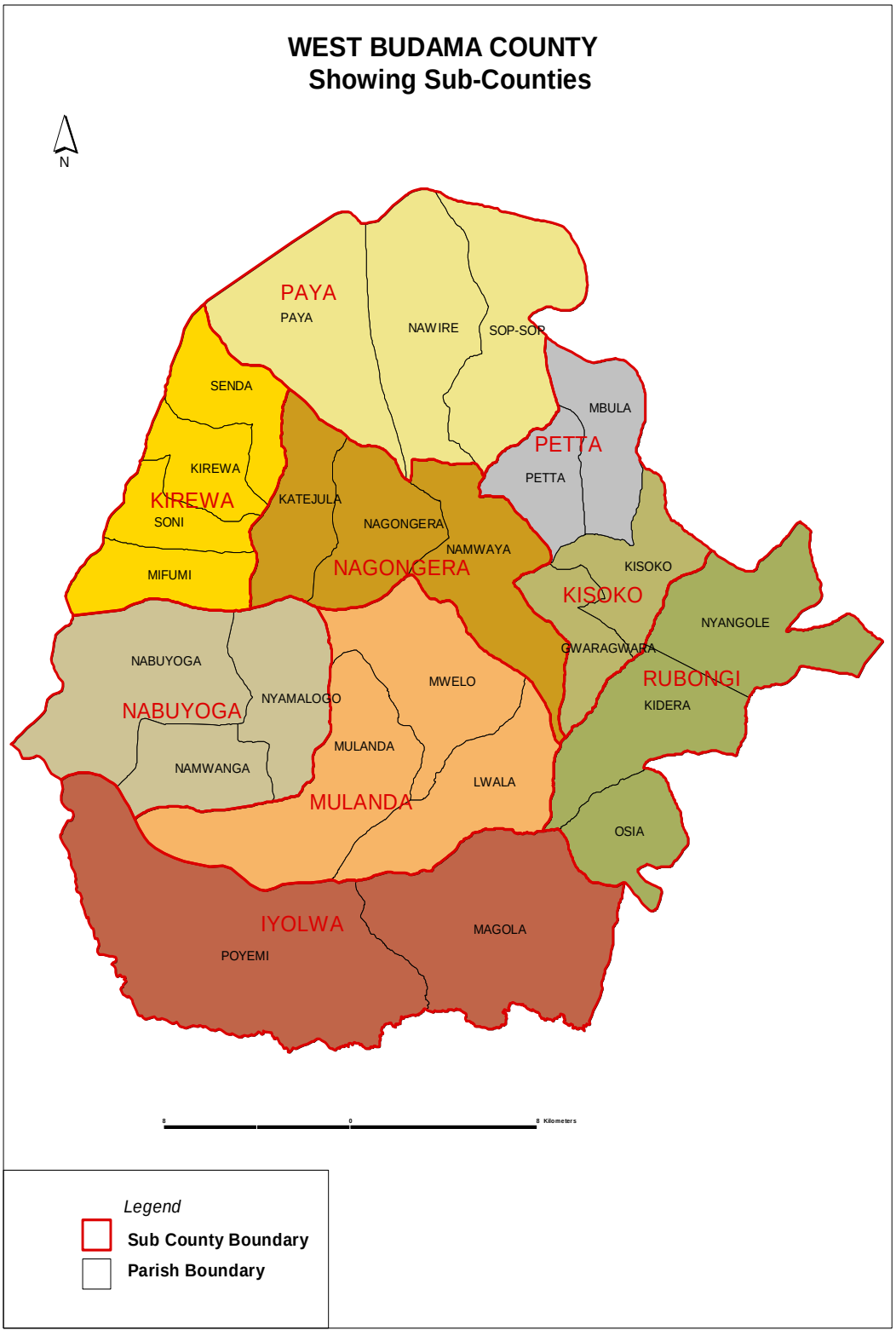
To sum up, the Jopadhola are a community whose social structure is governed very much by the clan. Features like communal land allocation and tenure are but one example of this. This cohesion is also bolstered by their poor economic status where wealth is shared among families. The significance of these characteristics and how they shape court structures becomes more apparent from the genealogy that is discussed in section 3.

Section 3: Historical background: Genealogy of the Jopadhola

In this section, I trace the historical events that led to the formation of the Jopadhola. Through their genealogy, I demonstrate that clan cohesion aided the process of integrating new normative features. The nine original clans assimilated other groups. This led to growth of the clans and brought unity among previously unrelated communities. Features like communal ownership of property and fictional agnation enabled the Jopadhola to assimilate foreign concepts like a common belief in mysticism. Equally, the Jopadhola resisted external pressure to transform their normative standards.

[19] Jo-Gem clan member register: August 2006.
[20] S. 45 (a) Local Governments Act Cap 243 provides for county, parish and village administrative divisions in Uganda. The Jopadhola have applied the present structure while retaining the old colonial divisions of sub-county (Gombolola) and the village (Kisoko).
[21] Pre-visit interview with Mr. Y. O *op cit* on 12/08/06 and interview with Mr. R. O on 16/08/08.

Figure 6: West Budama County showing sub counties & parishes.



Source: ©Department of Mapping and Surveys, Entebbe, 2007.

(i) Luo origins: a study of diversity and assimilation

The genealogy of the Jopadhola is a study of assimilation and resistance. They were part of the Luo groups *circa* 1000 AD who migrated from the Western Nilotic cradle land, west of the Nile in Bahr-el-Ghazal in Sudan, downwards to Western Uganda.[22] *Circa* 1750, the Luo groups migrated from Pawir in Bunyoro-Western Uganda, through Acoli in the north and eventually settled in the present Padhola (West Budama).[23]

The origins of the Jopadhola are the subject of conflicting accounts. Two brothers Adhola and Owiny were probably descendants of Labong'o the son of Olum who lived in Acoli. The brothers migrated from Acoli and moved together to Padhola but parted company under unclear circumstances. One version suggests that the two quarrelled, leading to a split. Owiny then went to Kenya, leaving his brother Adhola in Padhola.[24] Another version is that Adhola had an ulcer on his leg that took a long time to heal. His brother Owiny became impatient and moved on to Kenya leaving Adhola behind to nurse his wound.[25] He was named after this affliction because *Adhola* in the local language refers to an ulcer. Yet a third version is that Adhola's wife Nyajura was so heavy with child that she could not move, so Adhola decided to stay with her till she gave birth. Nyajura's children and those of Adhola's other wife Oryang are the present day Jopadhola.[26] What is not in dispute is that the Jopadhola are descendants of Adhola and that Owiny migrated to Kenya where he later formed the Ja-Luo.

From 1650 to 1700 the first nine original clans moved into present day Padhola that was empty virgin territory. These clans are the Amor, Ramogi, P'Agoya, Biranga, Loli, Nyapolo, J'Ode, Lakwar and Sule. They believed this land was preserved for them by their gods and it was the duty of every person to develop the land and protect it from invasion. This land was a forest (*lul*) so it took a while for it to be tamed. Having done so, land belonged to every person because they had all taken part in improving it 'for the benefit of life'. Any Japadhola could own land anywhere, but an outsider (*ja-wiloka*

[22] B. Ogot *op cit* 41, citing J. P. Crazzolara, *The Lwoo*, Part 1 (Verona, 1950) 31-32 and H. McMichael *A History of the Arabs in the Sudan* Vol.1 (1922) 16.
[23] *Ibid*, 46-47 citing Bere 'An outline of Acoli History' (1947) *Uganda Journal* 1-8, A. Southhall 'Alur Tradition and Its Historical Significance,' *Uganda Journal* (1954) 18, 137-165 and J. P Crazzolara *The Lwoo*, part II (Verona, 1951) 157,174-5.
[24] B. Ogot *op cit* 67-69.
[25] A. Oboth-Ofumbi *op cit* 2.
[26] *Ibid*. Also F. Burke *op cit* 184-185. The Nyapolo clan are descendants of Nyajura's sons.

or *ja-path*) had no rights so could not buy, sell or inherit the land allocated to him.[27] A distinguishing feature of the Jopadhola was their willingness to let non Nilotic groups live with them and absorb them into their clans. They did so by according them 'fictional agnation' (relations through the male line).[28] This led to a growth of clans to the present 54. Some neighbouring groups that were absorbed included the Iteso of Nilo Hamitic origin, and the Banyole, Bagwere, Bagungu, Basoga and Samia, all of Bantu origin.[29] To illustrate how this fictional agnation took place I will use the example of the Morwa Guma and the Jo-Gem clans.

(ii) Origins of the Morwa Guma clan

There are two conflicting versions about the origin of the Morwa Guma. The first is by Ogot who argues that from 1750 to 1800, there was a major invasion by the Iteso into present day Padhola land. The first Iteso families who migrated to Padhola included that of an Etesot called Guma who was adopted by the Jopadhola Sule clan and given fictional agnation. Ogot bases his argument on the fact that Morwa Guma clan have their own *kunu* (shrine) and clan names like Omoroko, Okimat and Atawuti, of Iteso extract, which are signs of long residence and original clan status.[30] Original clans are distinguishable because they possess clan emblems like the sacred spear (*tong*) used for ceremonial purposes like rain making, the sacred drums (*achiel*) and shrine (*kunu*).[31] The Morwa Guma have a *kunu* at Maundo on a hill called *Tawo Jwok*,[32] and possess their own spear, ceremonial staff and sacred drums which reinforces Ogot's claims.

The second version by Oboth-Ofumbi argues that the Morwa Guma clan are descendants of Napakere the son of Nwango alias Morwa, who was a son of Adhola.[33] Napakere had two sons Guma and Sule who settled in Matindi (Nagongera sub-county). According to legend, one day during a party, Guma denied his brother Sule some beef (a taboo in Jopadhola culture) so a disagreement arose. Sule disowned his brother and

[27] B. Ogot *op cit* 87-88.
[28] *Ibid*, 111 citing A. Southall 'Lineage Formation among the Luo' International African Institute Memorandum XXVI (1952) 5-6.
[29] *Ibid*, Ch. 2 and 3, giving details of the origins of these other clans and A. Oboth Ofumbi *op cit* 15-64.
[30] *Ibid*, Ch. 3, 116-117. Another list is given by A. Oboth-Ofumbi *ibid* 45.
[31] B. Ogot *op cit* 79.
[32] A. Oboth- Ofumbi *op cit* 46.
[33] *Ibid*, 44-45.

started his own clan: Morwa Sule.[34] This is one of the worst cases of *Kwero degi* (refusing to eat together) ever known, because it led to a permanent split among siblings.[35] Thus the Morwa Guma was formed.

Nevertheless, the fact that the two clans can intermarry, have clan emblems and clan names of Iteso extract, lends credence to Ogot's assertion that Morwa Guma clan was accorded fictional agnation and later recognised as an original Padhola clan. Notably, during the pre-visit interview and the clan workshop, no reference was made by the study participants from the Morwa Guma clan to their Iteso origin: they insist they are one of the original clans of Padhola.

(iii) Origins of the Jo-Gem clan

The origins of the Jo-Gem clan are not very clear. They appear to be part of the Luo group that migrated through Acoli land to Kenya; for there is evidence to suggest they share some names in common with Acoli clans.[36] The Luo claim to have descended from a deity called *Podho* (fall down) with *Jok* (spirit) as their eponym.[37] Podho's descendants comprise 4 divisions including the Jok-Omolo of which Jo-Gem was a sub group.[38] From Acoli, the Jo-Gem group migrated to Busoga and lived for two generations in Samia. *Circa* 1760 and 1860 they settled in Kenya, eastern Alego on both sides of River Yala, under the leadership of Rading Omolo.[39]

The Jo-Gem ('people of Gem') comprised several sub clans. Among them, political unity was based not entirely on kinship, but rather occupation of particular settled territories (*pinje*). The leader (a sort of chief) of each clan was a *Ruoth*: the jural-political leader of the *pinje* - an influential person.[40] Beyond this there is no historical documentation of the Jo-Gem movement back into Uganda.[41]

The second version of their origin as a splinter group of the Kenyan Jo-Gem is from the Jopadhola Jo-Gem clan themselves.[42] They maintain their leader Owere led them from Yala in Kenya, to Samia (Eastern Uganda) where they lived for some

[34] *Ibid*.
[35] Field notes of pre-visit interview of 12th August 2006.
[36] B. Ogot *op cit* 61. Examples are the Acoli clans of Bobi, Alero and Pader. *Jo* means 'people of'.
[37] *Ibid,* 143-144. Ogot suggests that *Podho* may have also referred to 'mother earth'.
[38] *Ibid,* 144: the other divisions were Joka-Jok, Jok'Owiny and a smaller group of the Suba, Sakwa, Asembo, Uyomba and Kano.
[39] *Ibid*, 166 -167, 221.
[40] *Ibid*, 170-171.
[41] A. Oboth-Ofumbi, who discusses the Jopadhola clans in great detail, does not mention the Jo-Gem.
[42] Document by the Jo-Gem officials, on file and given to me by Mr. A.O- supreme head of the Jo-Gem.

decades before migrating to Gwaragwara in Kisoko sub-county.[43] Owere married Namuyaga and they had one son: Kiraba. After Owere's death, Kiraba married Achola Nyaparombo and they begot five sons and three daughters. The Jo-Gem clan, descendants of Kiraba, were absorbed possibly under fictional agnation and given the land they own by the Jopadhola Oruwa Pa Demba clan.[44] This claim is supported by the fact unlike the original Padhola clans; the Jo-Gem clan have no sacred spear or drum. However, they have their own *kunu* at Sigulu in the neighbouring Bugiri district.[45] In 1996, Jo-Gem broke away from Oruwa Pa Demba clan because they wished to run their clan independently. They were recognised as a separate clan by the *Tieng Adhola* in 2006.[46]

Despite diverse origins, by the 18th century, the Jopadhola consciousness as a distinct ethnic group had developed because they regarded themselves as the children of Adhola, reducing inter-clan wars.[47] The reason for this unity is also attributed to the belief in mysticism and *Bura* in particular.

(iv)Mysticism among the Jopadhola

Jopadhola traditional belief comprised four entities: family gods, (*Were*) clan shrines (*kuni*), ancestors (*jwogi*) and a religion (*Bura*). At the family level, each home had two gods: *Were ma diodipo* (God of the compound) protected all the people in the home and their wealth. *Were Othin* and his wife *Nyalike* protected family members going out farming, on any journey; and protected the livestock. *Were Othin* had a shrine in each home. In rituals to thank these Gods for good harvests (*misia*), a feast of millet and chicken stew was eaten in each home and the local brew (*kongo*) was drunk.[48]

The shrines (*kuni*) served two purposes. The first was to mark the permanent settlement of the original clans: there were 16 *kuni* throughout Padhola.[49] The second was to provide spiritual guidance to the clan members from a fixed place. The gods of *kuni* speaking through a designated clan leader would reveal what actions needed to be

[43] *Ibid.* Mr. A.O pointed out that it has been wrongly asserted that the Jopadhola Jo-Gem originated from Samia. He stressed that they migrated from Kenya, lived for a while in Samia then migrated to Padhola.
[44] Oruwa Pa Demba are descendants of Demba, son of Oruwa- a son of Adhola: A. Oboth-Ofumbi *op cit* 59-60.
[45] Interview with Mr. A. O on 16th August 2008.
[46] Jo-Gem clan court officials.
[47] B. Ogot *op cit* 104.
[48] A. Oboth-Ofumbi *op cit* 65-69.
[49] B. Ogot *op cit* 88-90.

taken to protect the clan if attacked by enemies. The clan leader then prepared a sacrifice and a meal was shared by the community at the shrine and in the village.[50]

Jwogi were spirits of the dead relatives (ancestors) both young and old, who it was believed would always protect the home from harm.[51] Little huts (*migam*) were built in the homestead for each ancestor. At the end of the year a feast was held in their honour at which local brew *kongo* was drunk and chickens were sacrificed: one for the most senior ancestors- *Jo Dhongo*, the second for other relatives and children.

A new religion of *Bura* is believed to have originated from the Bagwere clans of Jo- Pa- Gembe and Olomole of Bantu origin who settled between 1700 and 1760 in Padhola.[52] These 'outsiders' lived amicably as neighbours before some migrated to the area inhabited by the Jopadhola and were eventually absorbed by them. They seem to have influenced the Jopadhola tremendously in matters of religion. During this time, the Bagwere introduced the *Bura* that eventually became established as a common religion to all Padhola clans. The chief priest and custodian of the *Bura* was a man called Majanga of the Nyapolo clan.[53] Majanga relocated the place of *Bura* from Nyawiyoga to the present day Nyakiriga.[54] Women were not allowed into the Nyakiriga, a tradition which is still followed to date.[55] There within the temple of *Bura* each original clan built its own shrine. Majanga's power of divination derived from his association with the *Bura* and gave him de facto authority over all Jopadhola. He was in charge of purification rituals and used the belief in *Bura* to hold Padhola settlements together.[56]

Although the rituals have undergone transformation and been abandoned by some,[57] belief in mysticism is still deep rooted among the Jopadhola, but to varying degrees. A person may believe in an omnipresent Christian god (*Were*) and simultaneously believe in the protective power of their individual gods (*Were pere*) and

[50] A. Oboth-Ofumbi *op cit* 67.
[51] *Ibid*. Singular: *Jwok*.
[52] B. Ogot *op cit* 107; A. Oboth Ofumbi *op cit* 68-69.
[53] B. Ogot *ibid*, 123- 124.
[54] A. Oboth-Ofumbi *op cit*, at 8; F. Burke *op cit*, 197.
[55] A. Oboth-Ofumbi *ibid* 68. In an interview with Mr. M Owor *Kwar Adhola*, the Jopadhola cultural leader on 15th August 2008, Mr. Owor said he had recently visited the Nyakiriga and observed this. Also a lady M. O, who visited the shrine in 2006, told me she was denied entry because she is a woman: interview on 17th August 2008.
[56] *Ibid* 8-9; F. Burke *op cit* 196-197 and B. Ogot *op cit* 124.
[57] A. Oboth-Ofumbi rightly attributes this change to the coming of Christian missionaries, *ibid* 65. The missionaries branded African religions as pagan and satanic.

the ancestors (*Jwogi*). There is continued use of the *kunu,* belief in *Bura,*[58] as well as a deep rooted fear of evil spirits,[59] all of which contradicts the earlier census figure of 0% belief in traditional religion. The historical background shows why pervasive belief in mysticism feeds into and reinforces customary law and remains an integral part of Jopadhola life as a means of social control. This point is taken up in section 6.

I have argued that historical events shaped the features of the two clans. These features include the assimilation of mysticism; independence of clan units and the collective land tenure system. Still, scant information exists on societal power relations particularly those involving women and children. In due course, there emerged a communitarian framework in which the clan was the central unifying force. This does not mean the clan system was static; it was in fact subjected to external pressure to transform its structures during the colonial and post colonial era. The next section considers the clan's ability to survive this external pressure while adjusting to the structural changes.

Section 4: Metamorphosis of Clan courts

In this section, I develop the second part of my argument. Following the transposition of English criminal law, clan courts responded by adopting those structures they could not resist (or found beneficial) resulting in a metamorphosis of their court structures. I argue that in this metamorphosis, clan courts retained their normative standards, buttressed by communitarian values and a participatory approach - with no single dominant actor. Consequently, national structures had to compete for legitimacy at the local level.

(i) Pre-colonial era

As we saw in Chapter 1, during the pre-colonial era (*circa* 1500-1890) Uganda comprised a diversity of kingdoms, chiefdoms and 'stateless' communities each with their own system of social control.[60] The Jopadhola ethnic group is an example of a 'stateless' community. Their adjudication system was well institutionalised and intra-

[58] Interviews with *Kwar Adhola* (15/08/08); Mr. R. P. O (16/08/08); Mr. A. O (16/08/08) and the discussions at the 1 day workshop on 15th August 2006.
[59] H. O Mogensen, 'The resilience of *Juok*: Confronting suffering in Eastern Uganda' (2002) 72 (3) *Africa: Journal of the International African Institute* 420-436, gives an anthropological analysis of the belief among the Jopadhola in Christianity and illnesses caused by use of evil spirits: also called *jwogi*.
[60] G. Kanyeihamba op *cit* Chapter 1, 1-4.

clan disputes were handled by the clan leaders and elders.[61] This fits the description of an acephalous or segmented society. Though segmented societies lacked centralised control, their social organisation was kin-based in which conflicts and law breaking were resolved using restorative justice. To some, this type of organisation was effective *because* it lacked a single source of overall authority. Therefore conformity with the law meant the leaders had to woo the clan because the members bore little loyalty to the leaders.[62] This was the backbone of the trial process among these segmented groups.

Scant literature exists on the conduct of criminal trials among the Jopadhola. In this regard, Elias's observations about the process of criminal trials depending on the type of society: Group A or B, are very instructive. The Jopadhola fell in Group B type, an 'un-centralised political community' in contrast with Group A that was based on the rule of chiefs or kings.[63] In Group B types, the community fully engaged in deliberations in a seemingly 'casual' manner, particularly in the giving of evidence. Most importantly, 'anyone and everyone who knows about the case would be allowed or encouraged to testify'. At the opening of the case some elders would permit people to speak on the issues in dispute between the parties. This 'elasticity' of the procedure did not degenerate into a free-for-all, but was orderly, following the rigidity of custom. The wide latitude given by the judge or elders was intended to show absolute impartiality during the hearing. The verdict was normally pronounced by the most senior of the elders and based not on theories, but on moral assumptions implicit in norms known to the entire community. The judgements were therefore a 'pragmatic' approach to societal justice of which the adjudicators and other parties were part.[64] Verdicts were arrived at after all adults present had expressed their opinions on the issues freely. Decisions could be deferred until all members of that community were present.[65]

The aim of the traditional criminal justice system was to restore the community to a near equilibrium. Nsereko argues that traditional justice focussed on vindicating the victim and their rights, so the sanction was compensatory rather than punitive. There was no need for imprisonment.[66] Even for the most serious crime of murder, the

[61] Inter clan disputes were arbitrated by leaders of a specified third clan. F. Burke *op cit* 192.
[62] J. M. N Kakooza, 'Uganda's legal history in a nutshell' (1993) cited in E. Beyaraza (2003) *op cit* 112.
[63] T. Elias *op cit:* Chapter XII, 214-215.
[64] *Ibid*, 244-245, 248, 258-259. Discussed in Ch. 2 S. 2 (i) *op cit.*
[65] O. Elechi *op cit* 66 on the right to participate in deliberations.
[66] D. Nsereko (2002) *op cit*, 22-25. The first government prison in Uganda was established in 1903: D. Nsereko (1995) *op cit* para 58 at 36. J. Roscoe, *The Baganda: An account of their native customs and*

punishment was compensatory because the elders regarded the destitute position of the victim's family as more important than the manner of death. To this end, compensation was in accordance with a customary tariff of a graduated scale of compensation or fine.[67] The punishments imposed depended on the gravity of the offence and extenuating circumstances. There was also belief in the healing force of ritual.[68]

The literature on procedural safeguards in traditional societies shows that group rights under *Ubuntu* gave all parties an opportunity to state their case under the equivalent of rules of natural justice.[69] Still, the individual depended on the kinship group who were obliged to assist in protecting these group rights.[70] Elias notes that Group A societies, like the Baganda, had legal representation in their trials and the chief could represent the community in all cases with other communities. By contrast, among Group B societies (like the Jopadhola), the clan controlled and regularised an individual's relationship with his or her kin, and also represented the community in relation to neighbouring communities.[71]

So far, this account appears to present a rosy picture of structures that applied a communitarian notion of equality of arms, permitting all parties to deliberate in proceedings and determination of the verdict and sentence. In this patriarchal setting, however, there is scant evidence of women and children's rights to participate or hold 'judicial' posts in these trials. In the absence of evidence on the Jopadhola, I will rely on accounts of trials in other communities with similar patriarchal heritage.

Driberg's account of the legal status of women, established that Nilotic women were less independent than Nilo-Hamitics because of lesser economic empowerment. Among the Nilo Hamitics, women were allowed to plead in person and even institute proceedings in a traditional tribunal. This was not the case among the Nilotics. There, a male relative or other male would represent the woman. For example, among the Shilluk (Luo of Nilotic origin), a woman could not plead her case but was represented by her husband or chief.[72] This is convincing evidence of women's inferior position in the trial structures.

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beliefs, 2nd Edition (Frank Cass and Co Ltd: London, 1965) at 259, 264-266 gives an account of pre-colonial Buganda where offenders were put in stocks and confined on orders of the King or chief.

[67] T. Elias *op cit* 142, 143.

[68] M. Gluckman, *Politics, Law and Ritual in Tribal Society* (Oxford: Blackwell, 1965) Chapter 6.

[69] Ch. 2 S. 2 (iii) *op cit*, referring to K. M`baye (1975) as cited by R. Mqeke *op cit* at 365.

[70] E. Ankumah *op cit* 160-170.

[71] T. Elias *op cit* 240-242.

[72] J. H Driberg, 'The Status of Women among the Nilotics and Nilo-Hamitics' (1932) 5*Africa: Journal of the International African Institute* 404-421, 419 citing W. Hofmayr.

With regards to the position of children in clan courts there is a dearth of literature. This may be, as Bennet points out, because children's rights were not seen as an issue since children were regarded as a welcome addition to a home and were assured of social welfare. Therefore no formal mechanisms were thought to be needed to protect children.[73] More pertinently, deliberations and decision making was done only by adults.[74] It follows that children had no locus standi in courts. Any cases that touched on their interests were handled on their behalf by a male relative. Clearly they occupied an inferior position like women.

In summary, in pre-colonial times, trial procedures emphasised public deliberations where decisions were arrived at by consensus. However, it is clear that women and children were not on an equal standing because the 'judicial' structures were located in a patriarchal society where male elders controlled the adjudication process.

(ii) Colonial rule: the sub imperialism of Buganda

In this subsection I show how clan institutions survived despite imposition by the colonial administration of foreign structures- Assessors, prosecutor and independent judge, on their adjudication framework. In the process, clan institutions retained their communitarian values within a transformed structure.

Under the 1889 African Order-in-Council, the colonial administration introduced a legal system based on English criminal law. This legislation established a Protectorate in Uganda with jurisdiction in criminal and civil matters over British subjects.[75] Later, the 1902 Order-in-Council introduced the Indian Code of Criminal Procedure (1898) that applied English rules of procedure (Section 15(2)). Lewin describes these rules as so fundamental as to be obligatory on every court of law, because they were based on principles of natural justice: the essence of British justice.[76] The 1902 Order-in-Council also established an administrative framework extending to

[73] T. W Bennet, 'Human Rights and the African Cultural Tradition' (1993) 22 *Transformation* 30-40, 33.
[74] K. Gyekye (1996) *op cit* at 153, O. Elechi *op cit* 66, and Z. Motala, 'Human Rights in Africa: a cultural, ideological and legal examination' (1989) 12 (2) *Hastings International and Comparative Law Review* 373-410, 387.
[75] H. Morris and J. Read (1966) *op cit* 8-19; E. Beyaraza (2003) *op cit* 115-120. Also H.F Morris and J. S Read, *Indirect Rule and the search for Justice: Essays in East African Legal History* (Oxford: Clarendon Press, 1972).
[76] J. Lewin, 'Native Courts and British Justice in Africa' (1944) 14 *Africa: Journal of the International African Institute* 448-453, 450.

the rest of the country. Under Article 20 (1) clan law- referred to as 'native law', was applicable in criminal matters so long as it was 'not repugnant to justice and morality'.[77] In a later enactment, Article 20 of the 1920 Order in Council retained this 'repugnancy' clause on the application of native law. In effect, this created a dual system of law where national courts existed alongside the traditional ones, each with a separate judicial framework. Article 20 has been rightly criticised as an attempt to rid traditional law of procedures that conflicted with English procedural justice.[78]

Initially these laws covered only the Buganda kingdom because it had a pre-existing centralised judicial system. The highest administrators-cum-judges were the district chiefs called *Abamasaza* and their chieftaincies were *Amazasa*.[79] Under Section 2 of the Uganda (Judicial) Agreement 1905, the *Kabaka* (King) of Buganda could constitute native courts in addition to the *Abamasaza* courts to try cases between locals. The *Kabaka's* powers were expanded under the Buganda Courts Ordinance allowing him to prescribe the composition of other courts.[80] This eventually covered all the chiefs operating in the lower councils of saza, gombolola and muluka.[81]

Buganda's judicial structure was later imposed on other parts of Uganda. Some maintain that this was a pragmatic move by the colonial administration because of the apparent lack of chiefly rule in areas[82] like Padhola. However, Mamdani argues convincingly that the scarcity of European administrators made the recognition of existing chieftainship beyond the village level inevitable.[83] In Padhola, Buganda's structure was enforced using a Muganda statesman: Semei Kakungulu, who hoped to become the king (*Kabaka)* of Bukedi.[84] Bukedi was a big province bringing together different ethnic groups: Jopadhola, Bagisu, Banyole, Bagwere, Iteso and Samia. Each group had their own system of governance, so implementing colonial rules through a

[77] J. Oloka-Onyango (2005) *op cit* para 2.2 5-8, gives an overview of the state of customary law during colonialism.
[78] *Ibid* 6-7 citing *Mwenge vs Migadde* H/Ct Misc. case No.19 of 1933 *Uganda Law Reports* 97 that confirmed the repugnancy doctrine.
[79] J. Roscoe *op cit* 233. Singular: *Saza*. The highest appellate court was the *Kabaka's* court for hearing final appeal cases; followed by the Prime Minister's (*Katikiro*) court. The Queen (*Nabagereka*) and King's Mother's courts tried cases among their own servants: 258-268.
[80] S.5 Buganda Courts Ordinance Cap 77 included the power to prescribe the composition of the saza and gombolola courts.
[81] H. Morris and J. Read (1966) *op cit* 29.
[82] *Ibid*, 39.
[83] M. Mamdani *op cit* 85.
[84] A. D Roberts, 'The Sub Imperialism of the Baganda' (1962) 3 (3) *Journal of African History* 435-450, 435 argues that the Buganda Kingdom was able to perpetuate its own imperialist objectives through the rest of the British protectorate later called Uganda, under the guise of participation in expanding the British influence.

unified customary structure and law was impracticable (unlike in Buganda with its centralised system).[85] Kakungulu ruthlessly imposed the Buganda chieftaincy and administrative hierarchy by subdividing Bukedi into twenty *saza* based on the pattern of Buganda. Therefore when the British assumed authority, they applied indirect rule but twice removed.[86]

The chief imposed by the state had legislative and judicial powers to preside over the clan courts.[87] This changed the decision making process from intra-clan arbitration to that of a chief imposed by the colonial administration. This structure was legalised in the Native Courts Ordinance that provided for the establishment of native courts in the Protectorate outside Buganda. Native courts could apply native law and custom provided it was not repugnant to natural justice or morality.[88] They could also apply native customary practice and procedure.[89]

The Jopadhola had to cope with two things: first the administrative changes at the unit level and secondly, the imposed judicial structures. With regards to the administrative changes, the clan leader was now elected at the funeral of his predecessor unlike the past where it was hereditary. Additionally, though each clan segment had its own leader, collectively the whole hierarchy of leaders adopted the official administrative system.[90] However, this organisation of Budama along administrative units of pecho (village), miluka (parishes), gombolola (sub-county) and saza (county) came only after Majanga's defeat by Kakungulu's forces in 1901.[91] Kakungulu then tried to reorganise the existing social structure of Bukedi, but the Jopadhola clans fiercely resisted (unlike their neighbours) and the attempt was abandoned.[92] This is because the Jopadhola lacked any central authority but were held together by a tribal consciousness: the worship of *Bura* and an emphasis on responsibility to the clan.[93] Through using survey methods, Southall and Burke established that Jopadhola clan colonies were independent politically of their original

[85] *Ibid*, 440. Tororo district was formerly Bukedi district whose administrative set up is discussed in detail by F. Burke *op cit* 178-180. Tororo district was carved from Bukedi in 1980.
[86] *Ibid*, 204.
[87] M. Mamdani, *op cit* 119. The fastest way to create a market economy he argues was to give the chief consolidated powers of judge, legislator and executive.
[88] S. 11 Native Courts Act (1941) Cap 76. The Act was preceded by the Native Courts (1940) Cap 40 and the Courts Ordinance (1911) that replaced the Native Courts Ordinance 1909.
[89] Native Courts Act, S. 18 Cap 40 (1950).
[90] F. Burke *op cit* 187-188 193.
[91] *Ibid*, 197- 198.
[92] A. Roberts *op cit* 442, citing an interview with B. Ogot.
[93] This was in contrast to the other tribes who surrounded them: F. Burke *op cit* 196.

settlements although they may have regarded them and their leaders as seniors. The more localised clan segments were autonomous and retained exogamy, so even where the clan was living in different parts of Padhola they acted as one unit.[94] Evidently the Jopadhola were unaccustomed to the system of chief hierarchy and exhibited strong anti-authority and anti-chief attitudes towards Kakungulu. The resistance reached its tipping point with massive riots in the early 1960s.[95]

With regards to the judicial structure, there were two major changes. One was the introduction of the Buganda centralised system in which a chief (judge) had powers to try cases and determine sentence.[96] The second was the introduction of assessors to help the court arrive at a decision. A third change, on which there is inconclusive evidence, was the introduction of the prosecutor.

In the case of the judge, the Jopadhola adjudicatory system, as we have seen, had no place for a dominant court official, only elders who pronounced the decision after public deliberations. The only change noted during this period is that the Jopadhola in isolated instances left the power of determining guilt to be exercised by one individual.[97] However, there is no evidence to suggest this was a widespread practice, particularly since the clan courts could apply customary practice and procedure under the existing laws.[98] On the contrary, the newly re-constituted state courts like the saza and gombolola courts could not exact public coercion in the form of sanctions, because remedial sanctions depended more on the relationship between parties than universal explicit laws.[99]

Assessors were introduced in the Indian Criminal Procedure Code of 1898. Their use started with the Courts Ordinance (1909), by District courts and the High Court, in civil cases involving natives.[100] This was extended to criminal cases by the Native Courts Act 1941, giving the option for courts to sit with the help of assessors appointed by the Senior Courts Advisor.[101] Apart from assisting the court to arrive at a decision, there were no other specified powers for the assessors. Following the repeal of the Native Courts Act by the African Courts Act 1957, the Chief Justice controlled the

[94] *Ibid*,188. Exogamy is the custom of marrying outside the tribe, clan or other social unit.
[95] *Ibid,* 219. K. Benne and A. Loveridge, *Report of the Commission of Inquiry into disturbances in the Eastern province 1960*, on the riots because of local discontent with the chiefs and their operations.
[96] J. Roscoe *op cit* 241.
[97] F. Burke *op cit* 218.
[98] Native Courts Act, Cap 40 *op cit* S. 18.
[99] F. Burke *op cit* 236.
[100] Courts Ordinance Cap. 4 (1909), S. 51 and 52.
[101] S. 4 (1), Native Courts Act Cap 40 came into force on the 2nd June 1941.

composition of the District African Courts set up at sub-counties.[102] The courts could sit with the aid of two assessors whose opinions were not binding on the presiding official.[103]

District African courts, whose officials were appointed by the colonial administration, were now moving away from the flexibility in the delivery of justice that was facilitated when all parties (litigants, assessors and judge) were personally acquainted.[104] By now the scope of native law- renamed customary law, was simultaneously being whittled down. The sentences passed by the District African Courts were by law, limited to imprisonment, corporal punishment, fines, forfeiture or compensation in cash (Section 16). This attempt at legal centrism[105] robbed clan courts of the jurisdiction to apply restorative justice within their context.

The Jopadhola fought to protect their diminishing jurisdiction. Clan courts continued to operate because they still wielded authority over crimes like witchcraft, warfare and criminal violence.[106] Although they adopted structures like assessors, clan courts continued to use a participatory approach in decision making. The outcome was the operation of clan courts 'conjoined' with the District African courts. Most Jopadhola believed kinship organisation was everyday government responsible for sanctioning certain behaviour and prohibiting others. They did not differentiate between the official government system and the clan courts.

The official chiefs found that they had to rely on the authority of the clan leaders to do their work. To indulge them, the official chiefs would sometimes imprison individuals handed over to them by the clan leaders. This led the people to believe that clan courts possessed the power of official imprisonment which was a contradiction given that clan courts traditionally had no powers of imprisonment. They only took advantage of the available state penalty. Failure to comply with the order of the clan court could result in litigation in a formal court, although the decision of the clan court was rarely overturned.[107] In addition, each clan court protected communitarian values

[102] African Courts Act, Cap 38 (1957), S. 37.
[103] *Ibid*, S. 4(1), 4A (1) and (2) (f).
[104] F. Burke *op cit* 66: established in a study carried out in Padhola.
[105] J. Oloka Onyango *op cit* 7 citing J. Okumu Wengi, *Women's Law and Grass roots justice in Uganda: Essays in Women's' law* (Kampala: Uganda Law Watch, 1997) 1.
[106] F. Burke, *op cit* 189,193.
[107] *Ibid*, 189.

like restitution, by exacting compensatory tariffs in the form of money and cattle. Compensation was the responsibility of the individual's kin.[108]

The Morwa Guma clan assert that the position of prosecutor existed since the 1960s and was probably present in pre colonial times.[109] There is, nonetheless, little evidence to confirm the latter aspect of this claim. I suggest that this structure was *assimilated* in the 1960s but not before. That said, the Jopadhola probably used it in much the same way as they did the Assessors and judge: integrating the prosecutor in a participatory process of adjudication.

This discussion shows how the state manipulated traditional justice to keep it abreast with 'westernised justice' as part of modernisation. As Oloka-Onyango puts it concisely, the emerging customary law was suited to retaining social cohesion, law and order, and economic production, rather than promotion of individual equity and rights.[110] The cost was a weakening of traditional normative standards. In spite of this, clan courts were able to sidestep the legislative changes by retaining their normative structures for resolving social problems. So strong was their influence that national courts even integrated some of their structures and procedures, during the post independence period.

(iii) Post independence

The post independence government sounded the death knell to the clan courts at a constitutional and statutory level. Firstly, the 1962 Independence constitution provided that offenders could only be convicted for offences defined and penalties prescribed in written law.[111] Secondly, the Magistrates Courts Act created a single hierarchy of courts with powers to administer customary law in their areas of jurisdiction[112] in so far as customary law was not 'repugnant to natural justice, equity and good conscience'.[113] Lastly, the District African courts ceased to operate.[114] As Oloka-Onyango concludes, both constitutional and statutory developments meant that

[108] *Ibid*, 215-219.
[109] Mr. Y. O, pre-visit interview, *op cit*.
[110] J. Oloka-Onyango *op cit* 7-8.
[111] Article 24 (8) 1962 Independence Constitution introduced the principle of legality of *nullum crimen nullum poena sine lege*.
[112] S. 3 and S.9 (1) Magistrates Courts Act (MCA), Cap 36 Laws of Uganda (1964).
[113] *Ibid*, S. 15(1) (a).
[114] *Ibid*, S. 35. S. 38(2) also abolished courts set up under the Buganda Courts Ordinance and the Native Courts Act *op cit*.

the state had taken over the adjudication of criminal matters irrespective of whether or not they had a customary element.[115] This effectively transferred the adjudication of clan criminal law from clan leaders to formal courts.

Legislative abolition did not end the role of clan courts. They continued to operate filling in the gap left in the adjudication of clan criminal law. Their significance re-emerged, when in 1987 the National Resistance Movement government established Resistance Committee Councils replacing the previous local administrative units. These councils that also had women and youth representation[116] were later granted judicial powers because magistrates' courts were allegedly corrupt. The resistance committee courts (later renamed 'local council courts') also had legislative and executive powers.[117]

As Barya and Oloka-Onyango argue, local council courts were only created to provide a *semblance* of a traditional approach to judicial power. In fact, the courts were based on the model that was transplanted from the popular justice models of Mozambique, and elsewhere.[118] To this end, some structural features were borrowed from traditional courts but with modifications. For instance, the Local Council Courts Act (2006) prohibits legal representation (like in clan courts), but simultaneously enjoins local council courts to apply principles of natural justice.[119] Additionally, there are no provisions on communitarian participatory 'rights', or rituals for reconciliation, restitution and purification.

These legal developments are significant because they show yet another attempt at standardisation of customary process,[120] but the evidence strongly suggests that this may not be feasible. Take the example of a survey on user perceptions of local council courts in Tororo district (including Kisoko sub-county within the study area) in 2005.[121]

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[115] J. Oloka-Onyango, *op cit* para 3.1 on the effect of S. 9 (1) MCA *ibid*.

[116] Resistance Councils and Committees Statute: No.8/ 1987. S.2 established councils at village, parish, sub-county, county and district level. S. 10 (1) (d)-(e) provided for (among others) women and youth representatives. A background to the local council courts is in Appendix 10.

[117] B. J Odoki, 'Reducing delay in the administration of justice: the case of Uganda' (1994) 5 (1) *Criminal Law Forum* 57-89, 64. Judicial powers were conferred under the Resistance Committees (Judicial Powers) Statute 1/1988. Ch. 1 S. 5 *op cit* discusses the jurisdiction of the present local council courts.

[118] J. Barya and Oloka-Onyango *op cit* at 46. In Cap 3 of their study, they discuss the development of popular justice tribunals and demonstrate how the model failed to take account of normative structures in the local communities.

[119] The Local Council Courts Act *op cit* (LCC Act) S. 16 (2) prohibits legal representation except in proceedings on infringement of a by-law; and under Regulation 23 (2) Local Council Courts Regulations 2007 in proceedings involving a child. Rules of natural justice in S. 24 are discussed in S. 5 (i) *infra*.

[120] J. Barya and J. Oloka-Onyango *op cit* 49- 56; 64 discussing lack of procedural justice in these courts.

[121] Nordic Consulting Group (2006) survey *op cit*.

The survey established that a 'working relationship' exists between the clan leaders and local council courts, and there is a pervasive influence of customs in decision making.[122] This finding illustrates the ability of clan leaders to influence the decision making processes in national court systems.

In sum, the belief that the centralised Buganda model of social control could be imposed on a society that lacked a central authority, proved to be too optimistic. The Jopadhola adopted some of the structures, but retained their processes that allowed for debate and checking of any abuse of power by court officials. Therefore government legislation did little to change the fundamental characteristics of public participation, accountability and collective decision making. Let us now explore the extent to which the present clan court set up accommodates distinct features of national structures.

Section 5: The present clan court framework

In this section, the third part of my argument analyses the clan courts set-up to establish the extent to which national procedural structures[123]are 'borrowed'. I illustrate how on the one hand, assimilation of national structures has not whittled down the participatory approach and communitarian values, thus indicating the resilient nature of traditional clan law. On the other hand, the assimilation process highlights the ability of the clan courts to reproduce national structures and adapt them to suit their values. I conclude that the transfer of national structures has not distorted the normative framework of the clan courts. Rather, it has enriched their composition with, among others, wider representation and quasi judicial oversight.

(i) The Jo-Gem courts

The Jopadhola word for court: '*koti*' is from the English word 'court'. Study participants explained that a *koti* hears cases affecting only clan members, who all have a stake in decision making. The Jo-Gem clan have three clan courts as illustrated in Figure 7.

[122] *Ibid*, Part 9.

[123] The assimilated structures are: Assessors; Local Council 1 chairman; women and youth representatives; the prosecutor and judge.

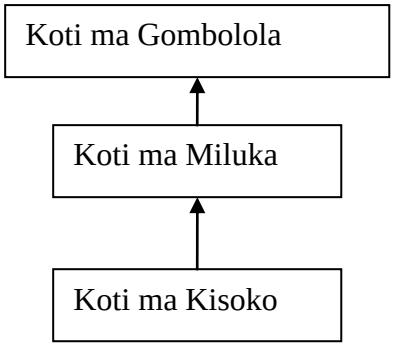


Figure 7: Jo-Gem clan court set up

The highest court is the Gombolola court. Lower down is the Miluka court, then the Kisoko court. Each clan court has unlimited original and local territorial 'jurisdiction' over all criminal matters in the clan. The only exception is the Kisoko court that lacks the jurisdiction to hear a matter where the offender pleads not guilty. In such a case, the matter is automatically referred to the Miluka court. The courts all have the same composition:

> 'Each court has four people: the chairman and three helpers. All the courts have at least one woman in each court. This started in 1986 with the Movement Government. Each court has the Local Council 1 chairman sitting as a government official. The three officials are called "Ja Kony pa chairman" meaning "helper of the chairman" but also called an *Assessor*, a title borrowed from the courts of law. They may ask questions and cross examine witnesses together with the chairman. The Local Council chairman may also ask questions: that is his role.'[124]

The English word 'chairman' is sometimes used interchangeably with *Woni Komi* literally 'the owner of the chair' and refers here to a clan head who sits as the ex officio chair of the clan court. The 'helpers' or *Jo-Kony*, (called Assessors), give advice on clan law and participate in decision making. Each court has a secretary *(Ja-Kalani*) to take minutes.

Two structural transformations can be discerned. The first is the adaptation of Assessor as a 'helper' to the court and the second is the inclusion of the chairman of the Local Council 1. In the magistrates' courts, the role of Assessors is to advise the lay magistrate on customary law in civil proceedings,[125] while in the High Court, assessors give advice on issues relating to criminal trials though not necessarily of a customary

[124] Written document prepared by Jo-Gem leaders, presented by Mr. A. O at the pre-visit interview *op cit*. The same response was given by the rest of the Jo-Gem participants in the workshop.
[125] MCA *op cit*, Third Schedule: Civil Procedure Rules for courts presided over by Magistrates Grade II- Rule 26 (1) in respect of customary marriage, recovery of dowry and custody of children.

law nature.[126] Assessors (Magistrates' courts and the High Court) take an oath to impartially advise to their best knowledge, skill and ability on the issues before the court.[127] For trials in the High court, assessors are pre-selected for appointment from a list prepared by the Chief Magistrate. Only those who are proficient in English - the language of court -are selected so that they can follow proceedings.[128] In the Magistrates courts, assessors are selected by the Chief magistrate in consultation with government sub county chiefs.[129] By contrast, the assessors in the clan courts are selected by adult suffrage: they must be proficient in the local language and need not have formal education. Among the study participants, for instance, it emerged that all the assessors were semi-literate farmers while all the secretaries were teachers.[130]

In the Magistrates' courts and the High Court, assessors may ask questions for clarification. Still, assessors do not participate actively in the deliberations although they do give a non binding opinion to the judge.[131] By contrast, as the quote above shows, the *Jo-Kony* (Assessors) are elders whose role, apart from examination of witnesses, is to determine the moral culpability of the offender, give advice on the sentence and rituals in accordance with clan law.[132] Clearly their role bears little resemblance to their non clan-court counterparts.

The role of the Local Council 1 chairman was described as follows:

> 'The clan call a representative of government like the Local Council 1 Chairman, the clan chair of the area then they sit during that time to hear the case. The Local Council Chairman helps the clan to ensure that they decide the case *without breaking the law of the government*.'[133]

This excerpt points to quasi- governmental oversight during clan court decision making, through the appointment of the Local Council chairman. At first glance the chairman's role in the clan court does not seem to be much different from the official one performed ordinarily. The Local Council 1 chairman is head of the lowest government administrative unit and functions as the political head of the council.[134] The chairman sits *ex officio* as part of the executive committee and chairs the local council

[126] TIA *op cit* under S. 3(1) there can be two or more assessors but in practice only two sit in a trial. Under S. 68, assessors may give advice to the court.
[127] *Ibid*, S. 67 TIA and Rule 26 (6) MCA *op cit.*
[128] Assessors Rules in the Schedule to the TIA*:* Rule 2(1).
[129] *Ibid*, Rule 1. Also MCA *op cit* Rule 26(4).
[130] Attendance sheets for the clan workshop. Details are in Appendix 3-List of study participants.
[131] MCA *op cit* Rule 28 (2) and TIA *op cit* S. 82 (2).
[132] Kisoko, Miluka and Gombolola Jo-Gem court groups. The title *Jamich rieko* (the giver of knowledge) is used interchangeably.
[133] Gombolola Jo-Gem group. Emphasis is mine.
[134] Local Governments Act Cap 243, S.50

court.[135] Other committee members include women and youth representatives (who also sit on the local council court) and participate in the deliberation of court cases.[136] Theoretically, the chairman is very well placed to enforce government laws and protect procedural rights, because local council courts must apply principles of natural justice during the trial.[137]

All appointments are done by the supreme governing body of the clan called *Nono* which endorses decisions of the -whole clan (*Jo Nono*). No campaigns are permitted as one must demonstrate the ability to serve the community selflessly. As Jo-Gem leader Mr. A. O put it concisely: "You cannot simply *want* this job."[138] The elections, though not held at regular intervals, are based on adult suffrage. The Jo-Gem clan do not have specific posts for youth, but they ensure that all courts have a woman representative. Reason being: "The government laws do not permit women to be denied representation in anything nowadays".[139]

To summarise, we can see that structures adapted from the national courts have been assimilated, but only insofar as they fit within participatory process and communitarian values. I now turn to the Morwa Guma courts.

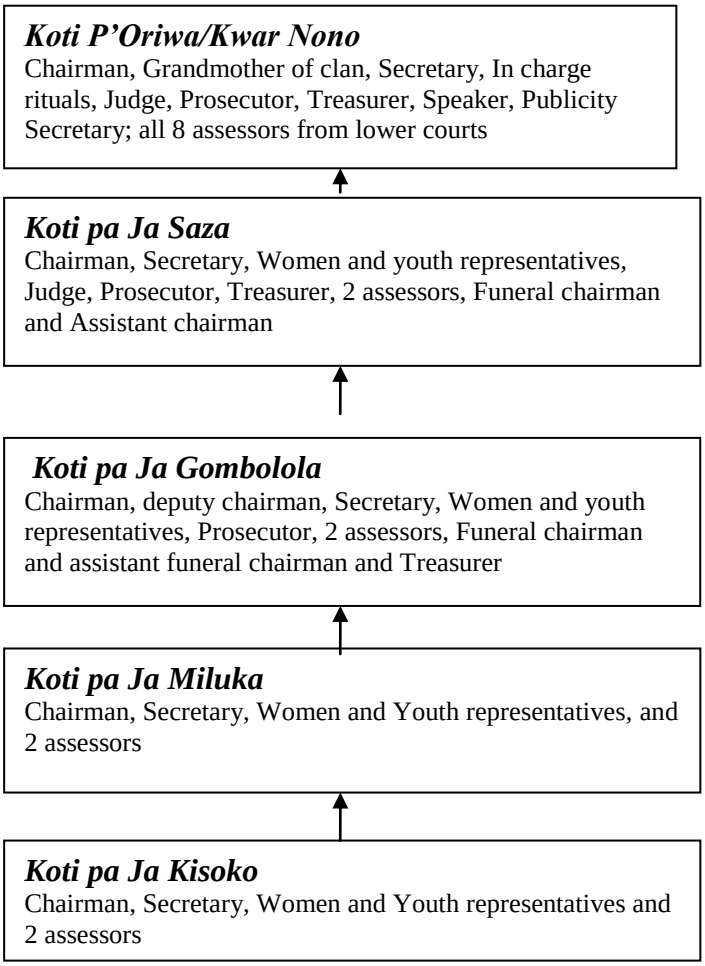
(ii) The Morwa Guma courts

Morwa Guma has a different set of structures to Jo-Gem clan. Figure 8 overleaf, depicts the lower *Kisoko* and *Miluka* courts; both presided over by a clan head (*Ja Kisoko* and *Ja Miluka*).[140] Other members are: a Secretary (*Ja Kalani*), a women representative, youth representative *(Soye*) and two helpers or Assessors.

The Morwa Guma higher courts comprise a *Gombolola* court is presided over by the clan head: *Ja Gombolola*. Others include: deputy chairman (*Ja kony pere*), secretary, women and youth representatives, funeral chairman (*Ja Kika or Jadwong Ywaki*)[141] and assistant (*Ja kony pere*), treasurer (*Ja Kani*) and a prosecutor (*Ja kiosa*).

[135] LCC Act *op cit* S.4.
[136] *Ibid* S.4 and Local Governments Act *op cit* S. 47.
[137] LCC Act *ibid* S. 24 (a)-(d): The principles permit each party: an opportunity to be heard; to be given notice of the proceedings and the case against them; to call witnesses and adduce evidence in support of his or her case. Also any member of the court with an interest of whatever nature is disqualified from hearing the case. This matter is taken up in Chapter 7 *infra*.
[138] Pre-visit interview *op cit*. Emphasis added.
[139] *Ibid*.
[140] For instance, *Koti pa Ja Kisoko* literally means the court of the chairman of the Kisoko clan unit.
[141] The role of the funeral chairman is to collect bereavement money from clan members to help with funeral expenses of a deceased clan member.

Figure 8: Morwa Guma clan court set up



Higher up is the Saza court (*Koti pa Ja Saza*) chaired by the *Ja Saza*. Although there is no deputy chair, there is a secretary, women and youth representatives, funeral chair and assistant, treasurer and prosecutor. The Saza court also has a judge *(Ja thumi banja*) who presides over court sessions.

The highest court is the P`Oriwa[142] chaired by the supreme clan elder (*Kwar nono*)- also the custodian of the Morwa Guma ceremonial staff. Other members include the Grandmother of the clan (*Adha nono*), judge, prosecutor, secretary, treasurer, all assessors from the lower courts, the speaker (*Ja Luwo*), publicity secretary *(Ja Kowi wachi)* and a person in charge of rituals *(Ja Chowiroki*). The latter's job is to ensure that purification or reconciliation rituals are performed properly. This composition reflects a conflation of executive and judicial functions where a clan leader can equally preside over court cases as the judge, while other members represent their

[142] It may also be called the court of the *Kwar Nono* (Grandfather of the clan). The term is used interchangeably with *P`Oriwa*.

constituents.[143] The Morwa Guma constitution likewise provides for the judge as a position in leadership, but not as a separate judicial entity.[144]

Three structural transformations are evident here: representation of women and youth; and the inclusion of a judge and prosecutor in the higher courts. Unlike the Jo-Gem, there is no ex officio post for the Local Council chairman. Local council officials participate in decision making like any other clan member.

The Morwa Guma clan have positions for women and youth in all the clan courts. Youth positions are excluded only from the final appellate court of P`Oriwa. Women and Youth representation is a recent development in this patriarchal society, one that is aimed to ensure equality of representation in clan courts, previously lacking. According to the respondents, women and youth representation was adopted in 1992 because of the government's emphasis on equal representation in all forms of governance.[145] Whether this is translated in real terms will be explored in the next chapter.

The judge and prosecutor go through a different appointment process from their counterparts in the national courts of law. Firstly, as I have stated above, all appointments to the clan court are through adult suffrage and based on meritocracy. The constitution provides that: 'leaders who rule the clan must be people who are good clans' [sic] people'. However, what makes a 'good' clan member is not defined.[146] Elections by adult suffrage are held by the governing body (*Nono*) every 5 years with no term limits. The last elections were held in June 2007.[147] Canvassing and campaigns are permitted, but personal attributes like: "The contribution of the individual to the community, their ability and behaviour,"[148] count more. This is similar to appointment criteria of the Jo-Gem. This contrasts with national courts where selection, nomination and appointment are based on an individual's legal qualifications and experience,[149] not

[143] Mr. Y.O, at the pre-visit interview *op cit*. This was confirmed by Morwa Guma members in the clan workshop and in an interview with Mr. R Odongo on 16/08/08.
[144] Constitution of the Morwa Guma clan (24th August 1985, edition), Chapter 13 (34)(vii).
[145] Pre-visit interview, with Mr. Y.O *op cit*.
[146] Morwa Guma constitution *op cit* Chapter 11.
[147] *Ibid*, Chapter 11 S. 31. Elections are held at all the clan units of Kisoko, Miluka, Gombolola, Saza and Kwar Nono: interview with R. Odongo *op cit*.
[148] Pre-visit interview, *op cit*, with Mr. Y. O.
[149] Appointment criteria is spelt out in Article 143 (1) (c) (d) and (e) of the Uganda constitution *op cit*. For the High Court and Court of Appeal, appointees should be advocates of a minimum 10 years standing. For the Supreme Court, one must be an advocate of 15 years standing. For both the Supreme Court and the Court of Appeal, the appointee may alternatively have served as a Judge of the High Court, or be a distinguished jurist (for Court of Appeal). An advocate is a person qualified to practice law and entered on the Roll of Advocates under S.1 and S.8 of the Advocates Act Cap 267.

contributions made to the community and certainly not by adult suffrage. The appointment of Magistrates and Judges is by the Judicial Service Commission.[150] Judges are nominated by the Commission, vetted by the Parliamentary Legal Committee and appointed by the President.[151] The judiciary is also subject to executive oversight of the Ministry of Justice.[152] Secondly, youth (aged 18+) may be appointed to the clan court. By contrast, in the judiciary, youth in their late teens, early twenties or thereabouts, cannot be appointed to serve as judicial officers on a superior court.

With regard to the role of the judge, there is a stark difference. In the clan court, the judge has no powers of judicial oversight but only chairs the court proceedings and does not make unilateral decisions in sentencing. Even where the judge has powers to come to a verdict, for instance in the P`Oriwa court, this is subject to deliberation by *Jo piny* (the people). By contrast in the court of law, a judge or magistrate makes a unilateral verdict and decides on sentence.[153] Both verdict and sentencing decision is not open to public deliberation.

The prosecutor in the Morwa Guma court is appointed by adult suffrage based on meritocracy. Conversely, the appointment of the national Director of Public Prosecutions is not by adult suffrage nor is it based on contribution to the community. The nomination is by the Public Service Commission; the nominee is vetted by Parliament, and appointed by the President.[154] The Director heads the Directorate of Public Prosecutions (DPP) made up of state attorneys (qualified advocates) assisted by lay prosecutors. All staff perform under delegated powers.[155] The staff are selected and appointed by the Public Service.

Under the Directorate of Public Prosecution Policy, a prosecutor does not involve the community as a party to the prosecution.[156] Rather, the Policy provides safeguards for the protection of the victim (and offender) while representing society's

[150] S. 5 Judicial Service Act (Cap 14) refers to the constitution Article 147 (3) *ibid* on the appointment of judges and Article 148 for appointment of other judicial officers (including magistrates).
[151] *Ibid*, Article 142.
[152] N. Bazaara fittingly points out that control over finances and general decisions regarding the welfare of judicial officers is a mechanism used by the executive to erode independence of the judiciary: 'Mixed results in Uganda's Constitutional Development: An assessment of the year 1999' in K. Kibwana, C. Maina and N. Bazaara (eds.) *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999* (Fountain Publishers: Kampala, 2001) *op cit*, 19-20.
[153] S. 133 MCA and S. 82 TIA *op cit.* The mode of adjudication is also discussed in Ch.1 S.5 (iii) *op cit*.
[154] Uganda constitution *op cit* Article 120 (1).
[155] *Ibid*, Article 120 (4) except for discontinuance of cases. Details of the district offices are available on their website at http://www. dpp.go.ug.
[156] Interview with Assistant Directors of Public Prosecutions (Commissioners) on 22/08/06. The Prosecution Policy 2002 is on the file with the author.

interests.[157] To the contrary, in Morwa Guma clan courts, the prosecutor only presents an opening statement and announces the witnesses to the court. The prosecutor does not present the case on behalf of society, represent the victims' interests, or cross examine the defendant. This is done collectively by *jo piny* (locals).[158]

Like the Jo-Gem, the role of the Assessors (*Jo-Kony*) is to give advice on punishments under clan law, rituals to be followed and the effects of non compliance. This ability of clan courts to retain their normative framework arises from the type of policy making bodies that exist within the clans.

(iii) The *Nono*

The lack of uniformity in the structures of clan courts demonstrates their independence. Each clan has a supreme governing body called *Nono* comprising the leaders of all clan units. All adult clan members are collectively called *Jo-Nono*. This type of traditional government is described by some as government by discussion and consent, because it does whatever possible to ensure cohesion of the group. Its legal proceedings are a community affair aimed at reconciling parties.[159]

The findings support the literature. The study participants explained that *Nono* is a policy making body that passes regulations for coherence of the clan. *Nono* has more executive and judicial, than legislative functions. Their role is executed by facilitating discussion, arriving at a consensus on all issues and ultimately submitting to the decision of the majority clan members.[160] The *Nono* organise elections of court office bearers, clan heads and other officials;[161] decide the amount of court fees and funeral dues; oversee allocation of land; organise funerals and register clan members. Voting at all clan gatherings and elections is organised by *Nono*. The study participants explained that though they were part of *Nono*; they lacked the jurisdiction to make or change penal laws, procedures and rituals, as clan law is fixed and rarely changes. Within this context, the setting up of the *Tieng Adhola* as an overarching body raises interesting issues.

[157] *Ibid*. This is standard practice.
[158] My observations in the trial simulation on the 15th August 2006 and field notes from the groups *op cit*.
[159] A. J. G. M Sanders, 'Comparative Law and law Reform in Africa, with special reference to the law of criminal justice' in P. Takirambudde (ed.) (1981) *op cit* 150-151.
[160] Field notes of plenary discussion in clan court workshop.
[161] Morwa Guma constitution *op cit* S. 31 even provides for an electoral committee to handle elections.

(iv) The role of *Tieng Adhola*

Despite individual clan autonomy, the establishment of the cultural union – *Tieng Adhola* ('lots of people') – as a body corporate in 1992; was an attempt to unify the clans under one umbrella body.[162] After an interim leadership for 2 years, in September 1998, elections took place at which *Kwar Adhola*: the head of all the clan leaders was elected.[163] The *Kwar Adhola* is recognised nationally as the cultural leader of the Jopadhola.[164] This unity was not without contention. The Nyapolo clan have in the past contended that such an institution circumscribed clan autonomy, and in any case as descendants of Majanga they were the rightful heads of this union.[165] The Nyapolo refused to recognise the union, but later recanted.[166]

There is little evidence that *Tieng Adhola* has sufficient social legitimacy to influence the structures of clan courts due to its lack of historical ties to the clan. For example, one of the functions of the union is to 'advise and settle all disputes of a cultural nature' and set up institutions to effect this.[167] In this respect, a legal department was established, but it seems to have little power to give legal advice to clan courts on their jurisdiction. The legal department instead handles land disputes and minor criminal matters, acting as a quasi-review body whose mandate appears to interfere with the independence of the clan courts. Subsequently, this renders the *Tieng Adhola* ineffective in ensuring that there are procedural safeguards in clan courts trial process. There are plans, however, to try to foster closer ties with all clan heads to discuss legal issues.[168]

To conclude, the process of translating legal structures into clan courts has been a deliberate one. The structures absorbed were selectively reproduced to suit the traditional functions of clan court as decision makers, preserve a communitarian approach to adjudication and retain local methods of resolving of social problems. These social problems are defined under Jopadhola clan law, replete with punishments.

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[162] The *Tieng Adhola* was registered in 1995. Interview with the *Kwar Adhola* also called *Kwar Nono*- Mr. M. Owor on 17th August 2006.
[163] *Kwar Adhola* is established under Article 9.05 of the Constitution of *Tieng Adhola* (2006). A copy of the constitution given by Mr. M. Owor is in my file.
[164] The *Kwar Adhola* is also entitled to all benefits listed in Article 246 constitution *op cit*. Interview with Mr. M. Owor conducted on 15th August 2008.
[165] F. Burke *op cit* 196 suggests that before the arrival of the British, the Jopadhola were moving towards a centralised system where the Nyapolo clan led by Majanga had pre-eminence among the rest.
[166] Interview with Mr. M. Owor on 15th August 2008.
[167] Constitution of Tieng Adhola *op cit*, Article 6.05.
[168] Interview with Mr. M. Owor on 17/08/06 *op cit*.

Section 6: Overview of Jopadhola criminal law and punishments

I give a brief background in this section, to Jopadhola criminal laws and sentences as a tool of social control. The law combines transplanted penalties as well as traditional ones. In this respect, Jopadhola substantive law represents Nabudere's 'New traditionalism' where African customary law was socially engineered by colonialists and has survived.[169]

(i) Jopadhola criminal laws

We saw in Chapter 3 that scholars like Drumbl discount traditional punishment schemes because they are seen as prone to manipulation or arbitrary application. Yet local practices are arguably vital to the process of reconstruction of social norms, and to avoid 'externalisation of justice'.[170] Moreover, traditional clan law is not altogether irrelevant, because under Article 126(1) of Uganda's constitution, local norms and values must be applied by national courts in arriving at their decisions. Jopadhola law has survived social engineering by reproducing some state punishments into their own context while retaining traditional ones. National laws have also reproduced aspects of clan penal law, yet little is known about precisely *what* aspects have been adopted. An overview of the contemporary laws of the Jopadhola will demonstrate my point.

The nature of Jo-Gem law is oral laws. Conversely, the Morwa Guma's written constitution provides for some crimes, taboos, and penalties- *Matemwa*.[171] In both clans, there is no distinction between civil and criminal matters: a characteristic of segmented societies that remains unchanged from pre-colonial times.[172] This characteristic may be attributed to the restorative inclinations of the clan, for both civil and criminal matters, which made such a distinction largely pointless. There was no need for a penal code or procedural rules setting a burden of proof. The law was not debated or legislated upon, but was derived from custom that was in turn related to the supernatural.[173] Deviation from community values was viewed as a sin against the supernatural force of law, so supernatural devices were used as a means of social

[169] D. Nabudere (2002) *op cit* 4, referred to in Ch. 1 S. 4, *op cit.*
[170] M. Drumbl *op cit* referred to in Ch. 3 S. 3 *op cit*.
[171] Morwa Guma constitution *op cit:* Chapter 7 on Incest and Chapter 8 on murder.
[172] L. P Shaidi, 'Traditional, colonial and present day administration of criminal justice' in T. Mwene-Mushanga (ed.) (2002) *op cit* 2 and T. Elias discussed in Ch. 2 S. 2 *op cit*.
[173] F. Burke *op cit* 242.

control to ensure conformity within the traditional sector.[174] Rituals are an example of supernatural devices that were reinforced by belief in ancestors and gods.

Some writers suggest that traditional African communities categorise crimes either as 'ordinary' or 'anti-social'.[175] Responses from the study participants, show that Jopadhola law comprises ordinary crimes, anti social crimes and a host of taboos; all tempered with mystical beliefs. So in practice, the two categories of crime are not strictly distinguished. Ordinary crimes like murder, theft, sexual assaults and assault, have no supernatural causes because it is deemed that the individual had *mens rea* to carry out the *actus reus*.

Anti-social crimes, like witchcraft are considered grave firstly because of its use of magic. Secondly, the use of such supernatural powers brings misfortune to the entire clan or neighbourhood. Ekirikubinza notes that legislation was first passed in 1957 recognising witchcraft as an anti-social crime. Since then Uganda's superior courts have taken judicial notice of people's fears and belief that misfortune is caused by witchcraft.[176] In *Attorney General v Salvatorio Abuki* the offence of witchcraft as defined in Sections 2, 3 and 6 of the Witchcraft Act, was interpreted by the Supreme Court to be the 'exercise of supernatural powers by a person in league with the devil or evil spirits'.[177] Though the appellant, Abuki did not challenge his conviction on witchcraft, Judge A. Oder found that under the Witchcraft Act, punishing persons practising witchcraft was a 'laudable objective'.[178] Ultimately, both the legislature and the courts have adopted traditional standards of social control to gain social legitimacy.

Taboos, as Beyaraza explains, are comparable to crimes attracting punishment in positive law, where norms of the do's and don'ts are clearly prescribed.[179] Examples of taboos among the Jopadhola are: incest, (*nywomo wat*) beating a daughter-in-law; abusing parents, son or daughter-in-law (*yeti manya ori*); lying down on the bed of a

[174] *Ibid*, 64-65.
[175] H. Driberg (1932) *op cit* and L. Shaidi *op cit*. I adopt Driberg's definition of anti-social crimes as those crimes that cannot be dealt with by normal methods because of the illegitimate use of magic and supernatural powers as discussed in Ch. 2 S.3 *op cit*.
[176] L. T Ekirikubinza, *Women's Violent Crime in Uganda*: *More sinned against than sinning* (Kampala: Fountain Publishers, 1999) 191-195. She also gives an analysis of witchcraft as a motive and defence.
[177] *Attorney General v Salvatorio Abuki* Supreme Court Constitutional Appeal 1 of 1998, per Wambuzi C.J, Lead Judgement of 25th May 1999 at 263, citing the Witchcraft Act Cap 108 (1964 Edition) now Cap 124 (2000 Edition).
[178] *Ibid*, at 289-290.
[179] E. Beyaraza, *Contemporary Relativism with Special Reference to Culture and Africa* (Makerere University Printers: Kampala, 2004) 165, persuasively argues that these taboos were to maintain respect and decency within communities. Taboos were also intended to train people to gain spiritual and moral adulthood: P. Ikuenobe *op cit* 32-33.

child by the parents, or on a parent's or in-law's bed by a married person; and refusing to share a meal because of a bitter quarrel between two people (*kwero degi*).[180] These taboos are based on mystical beliefs intended to instil morals and respect in the community. Consequently, breaching taboos particularly in familial or marital relationships is believed to bring bad luck (*lusiwa*).

Incest, for example, is defined under traditional clan law as having sexual relations with someone from the same clan.[181] The actual meaning of *nywomo wat* is 'marrying a relative'. This definition is wider than the prohibited degrees of kinship set out in the offence of incest in the state's Penal Code,[182] because it includes *all* members of the same clan. Clan members are regarded as close as blood relatives. To the Jopadhola, such relationships are believed to bring extreme bad luck (*lusiwa*) to the individuals, their family and their clan, unless the offenders are purified. The rationale for the taboo against such relationships is to prevent hereditary diseases from being passed on through inbreeding, but this is buttressed with mystical beliefs.[183] This traditional definition of incest was affirmed in 2006 in *Kiwuwa v Serunkuma and Namazzi*.[184] There, the High Court declared that an intending marriage in the Church of Uganda, between two people from the same clan (*Ndiga*) of Buganda, was null and void under Buganda customary law.[185] This shows that national law (albeit relating to marriage) has reproduced elements of traditional law so as to compete for local legitimacy.

In sum, Jopadhola criminal laws are socially constructed to maintain family and clan cohesion, by stressing deference towards one another. In some ways the punishments reflect this social control.

[180] Pre-visit interview, group and plenary discussions *op cit*.
[181] Morwa Guma constitution *op cit* Ch. 7 para 17 proscribes sexual relationship among clan members.
[182] Under S. 149 (1) Penal Code *op cit*, incest is a sexual relationship between parents, siblings, children and in-laws.
[183] E. Beyaraza *op cit* 165-166 discusses a similar taboo among the Bakiga of Western Uganda, and suggests that taboos also reflect a desire to maintain group unity.
[184] *Bruno L. Kiwuwa v Ivan Serunkuma & Juliet Namazzi*, High Court civil suit No. 52 of 2006.
[185] *Ibid*, per Kasule J, at page 35. This decision is in respect of customary marriages that are legally recognised under the Customary Marriages (Registration) Act Cap 248.

(ii) Punishments under Jopadhola laws

Most literature refers to traditional punishments being restorative in nature, largely compensatory with fixed tariffs, fines, and an obligatory reconciliation feast to conclude the sentencing process.[186] The Jopadhola are no different. Sentences under Jopadhola law for taboos and ordinary crimes are largely compensatory with fixed tariffs. Likewise, requirements for reconciliation rituals are fixed and none may be changed, not even by *Nono*.

The Morwa Guma constitution for example, provides that offenders will be given a suitable punishment like paying money, a cow, a sheep, a chicken, whipping, or payment of other items in the specified colours (*pieso*).'[187] Take the case of marrying a relative (incest). The punishment for comprises a fixed tariff of one cow (*dhiang luk*), a sheep, one white and one red cockerel and local beer payable by the father of the male offender to the woman's family. Apart from the cow, the rest of the items are given to the maternal nephew (*Okewo*) who performs the purification ritual.[188] For beating of a spouse, the offender pays cash compensation and takes an oath (*kwongiroki*) never to do it again. If a tooth is broken, the offender must pay for it. In short, punishments are clearly prescribed under traditional clan law.

Some punishments like imprisonment and whipping (*chwado powo*), however, reveal the retributive element of traditional law. Both punishments as we discussed earlier, were assimilated by the Jopadhola following their imposition during Kakungulu's rule under the colonial administration.[189]

With regards to imprisonment, the Morwa Guma constitution provides that whoever breaks the law may suffer 'imprisonment at the hands of the government' (Chapter 15: Paragraph 36). Study participants explained that imprisonment may occur when the clan court convict a person of witchcraft, or where an offender fails to honour

[186] The restorative philosophy is discussed in Ch. 2 s. 3(iii) *op cit*. The definition of a fine in a communitarian sense is regarded as a compensation to both the victim (and their family) and as we shall see, sometimes to the community.
[187] Morwa Guma constitution *op cit* Chapter 9 para 23. *Pieso* are used in purification rituals.
[188] *Ibid*, para 17. Also stated by the clan groups and in the plenary discussion. .
[189] Under S. 16 African Courts Act *op cit.*

the sentence agreements made before the court.[190] Although imprisonment may seem an appropriate alternative sentence in such circumstances, it shows that clan courts can manipulate the system thereby inflicting punishments unknown to traditional clan law. As we saw in section 4 above, imprisonment is a relic from the colonial era when local government courts imprisoned offenders sent to them by the clan courts. However, it was difficult to ascertain the frequency with which this imprisonment was taking place.

Whipping (Corporal punishment) is another punishment retained from colonial legislation.[191] According to the study participants, whipping is administered to instil respect among the youth for clan court decisions, as a punishment for theft and for removing bad luck.[192] In the trial simulation, for example, two adult Morwa Guma offenders, Ms. N and Mr. O, pleaded guilty to living together for a year. They were convicted on their pleas of marrying a relative (incest) and sentenced. The man in charge of rituals (*Ja-Chowiroki*) outlined the purification process that follows:

> 'The *Okewo* will build a grass hut (*kayindi)* 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.'

The act of whipping (and stripping naked) underpins the punitive philosophy of the purification process, even when aimed at removing bad luck from the perpetrators-ostensibly to protect the clan.[193]

To conclude, I have shown how Jopadhola laws retain restorative underpinnings, but may manipulate the state's penal system to take advantage of existing retributive punishments like imprisonment. Equally, the state has recognised traditional anti social crimes like witchcraft in its legislation and judicial decisions. Even so, some Jopadhola sanctions and purification rituals are in violation of substantive international human rights. The outcome is a 'melded' structure with a potential for protecting some individual rights, while maintaining a parochial approach to communitarian values. I take up this point in the next chapter.

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[190] Saza and P`Oriwa Morwa Guma groups. Study participants cited refusal to pay the fines or taking their time to pay them as reasons for imprisonment. A. Skelton and M. Sekhoyane fear that under restorative justice, victims may not achieve the right to a punitive remedy if the offender refuses to honour the agreement: *op cit* 582. The Jopadhola appear to have found a 'legal' solution to this problem.

[191] S. 16 African Courts Act *op cit*.

[192] Mr. C. O an elder in Jo-Gem and the Saza Morwa Guma group.

[193] This is similar to rituals among the Mende in Sierra Leone, where offenders found guilty of theft are subjected to treatment that may be qualified as torture Ch. 4 S. 5 (i) *op cit*. Retributive philosophy in sentencing is discussed in Ch. 2 *op cit*.

Section 7: Conclusion

I have shown in this chapter how clan courts have adopted features of national courts, while maintaining local legitimacy and social control without compromising on their normative standards. This innovative approach seems more integrative than that pursued by national and international tribunals. For example, gender and age representation within the clan courts are non-traditional features. Their integration has done much to blunt the critique that customary justice often turns out, on inspection, to be patriarchal justice. Yet this is no procedural accident. The historical evolution of clan courts reveals clan cohesion and adaptation to survive, which explains the creation of a semi-regulatory framework and quasi-governmental oversight. This is tempered by mysticism and communitarian values.

The re-constituted structure is a result of a democratic process of participation developed within a framework that may protect the right to a fair trial during sentencing. The clan court structure has metamorphosed over the centuries through the pre-colonial to colonial and post colonial times. Despite these changes, the supreme governing body of each clan: the *Nono*, has no mandate to direct the lower clan courts to develop a procedural structural framework. Therefore each clan unit has their own unique structures. The *Tieng Adhola* appears to be equally ineffective in promoting a translation of structures from national to clan courts, perhaps due to weak grass-roots support. The state has even passed legislation that adopts traditional crimes. This is evidence of the robustness of the non centralised system.

This chapter provides insights into the nature of adaptations that international law may have to follow if it is to have local legitimacy. Most important is the question how these 'reproduced' structures can act as a mechanism of accountability in a strict legal sense, by protecting procedural guarantees. Against this backdrop, the next chapter examines how the clan courts grapple with interpreting the right to a fair trial during the sentencing process without distorting their traditional normative standards.