VIOLATION OF THE RIGHT OF PROPERTY: A STUDY OF THE REGISTERS OF THE BAKHCHISARAY/CRIMEA LAW COURT

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ÖZET

Bu makalede, Bahçesaray/Kırım mahkemesi tutanakları ışığında mâmeleke karşı işlenen mülkiyet hakkının ihlalini içeren suçlar ele alınacaktır. Hukuksal doktrinler kısaca verilecek, yaşayan hukuku temsil etmelerinden dolayı fetvalardan alıntılar yapılacaktır.

Anahtar Kelimeler: Ceza Hukuku, Mâmelek, Haksız Mülkiyet, Mülkiyetin İâdesi, Hırsızlık, Hanefi.

INTRODUCTION

Based on the records of the Bakhchisaray/Crimea law, this study examines the disputes over the right of property.[1] Since it aims to find out whether the *qadi* followed the legal doctrines in his decisions, it will give the main points of the law. Since this is not a study of juristic doctrines, the reader should not expect a full legal discussion.

The *qadi* court was open to anyone regardless of his/her gender, religious affiliation, or social status. Not only Muslims but also non-Muslims/*dhimmis*[2] took refuge in the court expecting a fair and impartial trial. Although *dhimmis* had several disadvantages such as not able to testify against Muslims,[3] they were able to overcome these disadvantages. For instance, in their cases against Muslims, they employed Muslims as witness.

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1 The original registers are located in the Saint Petersburg library in Russia. In Ukraine, the library of Crimean Tatars holds a copy of these registers, where I obtained my copies.

2 This refer to non-Muslims living in Muslim territory. Ibrahim al-Halabi, *Multaqa al-Abhur* (Istanbul: Güryay Matbaasi 1981), p. 217 (margin note).

3 Marghinani, *al-Hidaya* (Egypt: Matba'a Mustafa al-Halabi 1971), vol. 3, p. 124.

An examination of the different registers indicates that Muslims and *dhimmis* lived in harmony and had good relationship.[4]

The court comprised a judge who headed the court, a clerk who copied the cases into the registers and a *Muhzir* who summoned the accused to the court[5] and presumably provided the security of the court.

The *qadi* followed the doctrines of the Hanafi school of law in his judgments.[6] He might have looked at the living tradition of the law, the *fatwas* of the *muftis*. These *fatwas* might have helped him to reach a decision.[7]

Having said that let us now look a summary of the law. The question of violation of the right of property may raise a *sariqa* (theft)[8] crime amounting to a severe punishment, amputation of hand.[9] If the provisions of *sariqa* is

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4 For more, see Cigdem, R. *The Register of the Law Court of Istanbul 1612-1613: A legal Analysis*, (Unpublished PhD thesis, The University of Manchester, 2001).

5 Heyd, U. *Studies in Old Ottoman Criminal Law* (Oxford: The Clarendon Press 1973), p. 236; Jenninngs, R. C. "Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri", *Studia Islamica* 68 (1978), p. 151; Bayındır, A. *İslam Muhakeme Hukuku: Osmanlı Devri Uygulamasi* (Istanbul: İslami İlimler Araştırma Vakfı 1980), p. 81; Akgündüz, A. et al, *Şer'iyye Sicilleri* (Istanbul: Türk Dünyasi Araştırmaları Vakfı 1998), vol. 1, p. 72; Abacı, N. *Bursa Şehrinde Osmanlı Hukukunun Uygulanması (17.Yüzyıl)*, (Ankara: Kültür Bakanlığı Yayınları, 2001). Heyd, *Criminal Law*, p. 272 (footnote).

6 As we learn from the *fatwas* of Abussuud, the other schools of laws were also available to the *qadi* especially in political crimes. In a question regarding the capital punishment of the Karamanlı Sheikh, Muhyiddin Karamani (d. 1550), Abussuud states, 'the *qadis* of the protected Ottoman Empire (*memalik-i mahmiye*) are permitted and ordered to issue, in accordance with the view of the other schools of law, capital punishment and not to accept a demand of forgiveness of the ones who do not pay attention to the matters of religion.' Düzdağ, M. E. *Şeyhülislam Ebussuud Efendi Fetvalari Işığında 16. Asır Türk Hayatı*, (Istanbul: Enderun Kitabevi, 1972), p. 194. For the biography of this Sheikh see, Öngören, R. 'Muhyiddin Karamani', *Türkiye Diyanet Vakfı İslam Ansiklopedisi*, vol. 31, pp. 82-3; Öngören, R. 'Şeriat'ın Kestiği Parmak: Kanuni Sultan Süleyman Devrinde İdam Edilen Tarikat Şeyhleri' http://www.sadabat.net/makale/seriatinkestigiparmak htm.

7 For the quotation of the *fatwas* in the decision of the *qadis*, see Cigdem, R., *A Legal Examination of The Register of The Law Court of Istanbul 1321-1324/1903-1906*, (Şanlıurfa: Şanlıurfa İlahiyat Fakültesi Geliştirme Vakfı, 2005).

8 As a legal term, *sariqa* signifies "taking by stealth out of *hirz* (custody), something of the value of [at least] ten *dirhams* [*nisab*], in which s/he has neither *milk* (ownership) nor *shubhat al-milk* (uncertainty regarding his/her ownership)". Halabi, *Multaqa*, p. 199.

9 Marghinani, *Hidaya*, vol. 2, p. 126; Halabi, *Multaqa*, p. 203; Yahya b. Sharaf al-Nawawi, *Minhaj*, on the margins of *Mughni al-Muhtaj* (Egypt: Matba'a Mustafa al-Halabi 1958), vol. 4, pp. 177-8; Muhammed al-Shirbini al-Khatibi, *al-Mughni al-Muhtaj ila Ma'rifat Ma'ani al-Alfadh al-Minhaj* (Egypt: Matba'a Mustafa al-Halabi 1958), vol. 4, pp. 177-8; Abdullah b. Ahmad Ibn Qudama, *al-Mughni*, (Beirut: Dar al-Fikr, 1992), vol. 10, pp.

not satisfied,[10] the question turns to a civil issue, restitution of property and the criminal may escape a punishment or receive lesser punishment through *ta'zir*.[11] To be precise, if a property is stolen, or lost, or taken away illegally (*ghasb*),[12] or destroyed (*itlaf*)[13] the remedy was to return the object or its value to its original owner. Since two punishments for one crime are not contemplated by the Hanafis, in *sariqa* cases, if a stolen object is not in existence, the culprit is not condemned to restitution of property.[14] The law prescribes that the vile intention is not to be protected and the criminal is not to derive advantage from the crime he has committed which means if a victim of theft finds his property in the hands of a third person/purchaser he is entitled to receive it back. The third person, is, in turn, entitled to reclaim his money from the culprit/thief.[15]

261-70; Muhammed b. Ahmed Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, (Beirut: Dar al-Fikr, no date), vol. 2, pp. 339; Bilmen, Ö. N. *Hukuku İslamiyye ve Istılahatı Fıkhiyye Kamusu*, (Istanbul: Bilmen Basımevi, 1969), vol. 3, pp. 282-3.

10 Provisions of *sariqa* include *nisab* (a minimum amount of ten *dirham*), using precise language of *sariqa* by the plaintiff and his demand of *sariqa* punishment in the court. Marghinani, *Hidaya*, vol. 2, p. 126-128; Ibn Humam, Kamal al-Din, *Fath al-Qadir*, (Egypt: Matba'a Mustafa al-Halabi, 1970), vol. 7, pp. 368-69; Nawawi, *Minhaj*, vol. 4, p. 161; Shirbini, *Mughni al muhtaj*, vol. 4, p. 161; Ibn Qudama, *Mughni*, vol. 10, pp. 293-6. Bilmen, *Hukuku İslamiyye*, vol. 3, pp. 281-2.

11 *Ta'zir* amounts to what is termed '*qadi* justice', that is to say, discretionary punishment issued by the *qadi*, covering wide range of crimes. Abu Bakr b. Mas'ud al-Kasani, *Bada'i al-Sina'i* (Beirut: Dar al-Kutub al-Arab 1982), vol. 7, p. 63; Marghinani, *Hidaya*, vol. 2, pp. 116-18.. For more see, Muhammed b. Ali İbn Senan, *Al-Janibu ta'zir fi jarimat-i zina*, (Riyad: Dar al-Ma'had,1982); Şekerci, O. *İslam ceza hukukunda ta'zir suçları ve cezaları*, (İstanbul: Yeni Ufuklar Neşriyat, no date); Ahmed Fethi Behnesi, *Al-Ta'zir fi Islam*, (Cairo: Muassasa al-Halij al-Arabi, 1988); Cigdem, R., "The Concept of Ta'zir (Discretionary Punishment) in Theory and in Practice", *Selçuk Üniversitesi Hukuk Fakültesi Dergisi*, 12/1-2, (2004), pp. 167-179.

12 *Ghasb* is viewed as a civil offence and amounted to restitution of property. If it is destroyed or consumed the usurper replaces it with a similar item or pays its value. Marghinani, *Hidaya*, vol. 4, p. 12; Halabi, *Multaqa*, p. 392; Çiğdem, R., "The Judicial Registers of The Bakchisaray/Crimea Law Court: A Study of *Ghasb* (Illegal Possession and Occupation) and *Itlaf* (Destruction)", *Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi*, 20, (2004), pp. 167-199.

13 *Itlaf* of articles in all cases entails liability of the culprit. Kasani, *Bada'i*, vol. VII, pp. 165-8; Marghinani, *Hidaya*, vol. 4, p. 196; Halabi, *Multaqa*, p. 474.

14 According to other schools of law, the *hadd* does not exclude pecuniary liability in any circumstances. Nawawi, *Minhaj*, vol. 4, 177; Shirbini, *Mughni al muhtaj*, vol. 4, 177; Ibn Qudama, *Mughni*, vol. 10, 274; Ibn Rushd, *Bidaya*, vol. 2, 338-9; Bilmen, *Hukuku İslamiyye*, vol. 3, pp. 284-6.

15 Kasani, *Bada'i*, vol. 7, p. 85; Bilmen, *Hukuku İslamiyye*, vol. 3, pp. 284-5.

In order to see the living tradition of *fiqh*, let us now quote several *fatwas* of the muftis:

1-Question: Without the knowledge of Amr, Zayd takes away Amr's donkey and sells it, does he become a thief?

Answer: His hand is not to be chopped.[16]

2-Question: Several persons carrying Muslim names and two unbelievers raid the house of Zayd and plunder some of his clothes and his 2000 akçes. Afterwards, *dhimmis* are found but not the Muslims. Is Zayd entitled to have two *dhimmis* compensate his plundered clothes and 2000 akçes?

Answer: Yes...[17]

3-Question: If Zayd takes away a stone from the wall of a castle and puts it into his house, [can he be] legally [held responsible] to pay its value?

Answer: [The stone] is to be removed [from his house] and [the castle] is to be rebuilt and [he is to receive] *ta'zir*.[18]

4-Question: Zayd steals some amount of akçes of Amr. Afterwards, Amr takes back his stolen akçes from Zayd. Bekir says to Amr 'Zayd stole some amount of akçes of mine'. Is he [Bekir] entitled to say [to Amr] 'you need to give some amount of money you have taken back [from Zayd]'?

Answer: No.[19]

These *fatwas* suggest that these were issued upon the request of real people and represent the problems of real life. The third fatwa is particularly important. Since the destruction harmed the public at large, the mufti demanded not only the return of the stone but also *ta'zir*.

THE COURT CASES

The *sicils* surveyed contain seven cases that are relevant to *sariqa*. As we shall see, although the cases can be classified as *sariqa* none of the plaintiffs demanded *sariqa* punishment, rather they wanted restitution of property.

Case 1:

22/?/10,[20] The case is as follows:

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16 Düzdağ, *Ebussuud*, p. 150

17 Düzdağ, *Ebussuud*, p. 150

18 Düzdağ, *Ebussuud*, p. 150. For a similar *fatwa*, see Salih b. Ahmed al-Kafawi, *Fatawa Ali Efendi ma'a Nuqul lil Kafawi*, (Istanbul: Matba'a 'Amira, no date), vol 2, p. 589.

19 Kafawi, *Fatawa*, vol. 1, p. 148.

When a person called Narhan, nicknamed Balaban (big), said, "I and Gök [Hizir] stole (?) [*iç eyledik*] the blind (?) [*kokir* (?)] ox of Mehmet *şah sufi* and the ram (?) of Derviş Ali," Gök Hizir confirmed [Narhan's statement].

[The case was probably recorded sometime in *Rabi' al-Akhir* 1088 [June 1677], since one of the entries on this sheet mentions this date. R. C.]

Shuhud al-hal: Abdi *efendi*, Şükrüllah *efendi* b. [illegible], Muzaffer *Kethüda*[21] *balci bat* (?), Badik *al-ma'ruf* (known), and others.

In this document, a certain Narhan admitted that he and Gök Hizir had stolen an ox belonging to Mehmet and a ram belonging to Derviş Ali. Gök Hizir confirmed Narhan's statement. The outcome of the case is not recorded, and we do not know whether the crime satisfied the conditions of *sariqa*, because it is not clear whether the animals were stolen from *hirz*, as required by law. Furthermore, the victim's claim is missing. This is important, because, otherwise, *sariqa* may not be prosecuted. Additionally, the victim's statement in the court may change the outcome of the trial. For instance, if the victim uses the word "lost" instead of "stolen," the culprits cannot be given the *hadd* punishment, even if the crime falls under the category of *sariqa*.

The case gives us the impression that they knew the owners of the animals as they precisely specified them. It is possible that they were neighbours or living in the same quarter or at least knew who the owners were. It is likely that they were their shepherd and committed the crime at the time of their business. It is not uncommon for the shepherds to take away animals which they are supposed to guard and sell them to make pocket money or slaughter an animal in order to fill their stomach.

If there was an employment contract (shepherd), their action is considered as *khiyana* (embezzlement), not satisfying the conditions of *sariqa* even if they described their act as *sariqa*. If the case was as we suppose, it is likely that their employers asked them to go to the court to make a confession as this entitles them to recover their animals. It is also possible that there was no employer and employee or other relationships between them. It was a theft, so the owners of the animals reported it to the

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20 I use the following system to identify a case: "1/49/3," means *sicil* 1, page 49, entry 3. A question mark e.g., "22/?/10," indicates that the number is illegible. Elsewhere a question mark indicates that the text is difficult to read and that I am giving my own reading.

21 Jennings states that "it is not clear whether the *kethüda* was an independent officer...or whether he just acted in place of an absent *sancak begi*...[or] whether the office was permanent or temporary." Jennings, "Kadi", p. 168.

authorities who were looking for the criminals. Once they caught the suspects, they interrogated them. Upon their confession, they brought them to the court to have it recorded. Since there was no time to inform the owners of their arrest, no plaintiffs were present in the court.

Case 2:

Case two is recorded in three different entries. The first reads:

16/?/3 The case is as follows:

Yuşa v. (*veled-i*/child of)[22] Yasef summoned Kelef bt. (*bint-i*/daughter of) Süleyman to the court and stated:

"I found my *şah destiri* (an embroidered or woven hand towel)[23] in Kelef's [possession]. In addition, [she has] some of my other goods. I request that they should [be taken for me] and that she should be interrogated."

After interrogation, Kelef stated:

"The *şah destiri* was brought to my wedding ceremony [as a present]. I do not know who gave it [to me]. I did not take any other of his goods."

When evidence confirming his claim was sought [from the plaintiff], he was not able to produce any evidence.

When [the defendant] was offered the oath, she swore by God who sent down the Torah to Moses (peace be upon him).

She was acquitted.

Written in the last ten days of *Shawwal* 1082 [February 1672].

The aforementioned *shuhud al-hal*. [This refers to the witnesses of the previous entry on this sheet. They were: Abdulgaffar *efendi* b. Ömer *çelebi*, Mustafa *sufi (mystic)*, Ömer *çelebi*[24] b. *Haci* Osman, Devingeldi b. Devin Ali, and others. R. C.]

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22 A Muslim is identified as Ahmed *bin* (son of) Recep while a *dhimmi* is identified as Atnos veled-i (child of) Nikola, the word *bin* being replaced by the word *veled-i*. However, the word *bint-i* 'the daughter of' is used for identifying the father of both Muslim and *dhimmi* women. Cigdem, *The Register of the Law-Court of Istanbul*, p. 52.

23 Düzdağ, *Ebussud*, p. 186.

24 *Çelebi* is a title given to literate people as a sign of respect from the 17th century onwards. However, according to Zilfi, it "probably denotes association with a trade". Sertoğlu, M. *Resimli Osmanlı Tarihi Ansiklopedisi* (Istanbul: Istanbul Matbaası 1958), p. 65; Bayerle, G. *Pashas, Begs, and Efendis: A Historical Dictionary of Titles and Terms in the Ottoman Empire* (Istanbul: The Isis Press 1997), p. 30; Zilfi, M. C. "We do not get along: Women and Hul Divorce in the 18th Century" in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*, Zilfi, M. C. (edt.), Netherlands, (1997), pp. 280, 294.

The second document reads:

16/?/5, The case is as follows:

From the residents of the castle, a Jew called Yuşa v. Yasef summoned a Jew called Avraham v. Yako to the court and stated in his presence:

"One year prior to this document, my *şah destiri* along with some other goods were lost. Now, I have found [them] in the hands of the aforementioned Avraham. I request that they should [be taken for me], and that he should be questioned."

After interrogation, Avraham replied with a denial.

When evidence confirming his claim was sought from the aforesaid plaintiff Yuşa, Şalma v. Babar was present in the court for the deposition. After he testified confirming the claim, it was recorded that another witness is required.

Written in the last ten days of *Shawwal* 1082 [February 1672].

Shuhud al-hal: Abdulfettah *efendi* b. Mustafa dede, Abdurrezzak *efendi* b. Arslan *efendi*, Devingeldi *sufi* b. Devin Ali, and others.

A note was added:

Marka bt. Semha and Sultan bt. Babar were present [in the court] for the deposition. After they testified confirming the claim, it was recorded that it was legally established that the aforementioned *şah destiri* had been Yuşa's personal property.

The third document reads:

16/?/6 The case is as follows:

Yusuf, the son of Kelef bt. Süleyman, as her agent, his agency being established by the testimony of Sebti v. İsak and İlya v. Yasef, stated in the court:

"My principal, Kelef bt. Süleyman, gave a *şah destiri* to Avraham v. Yako."

After interrogation, it was recorded that Avraham confirmed [Yusuf's declaration].

[Written on the] aforementioned date. [The last ten days of *Shawwal* 1082 [February 1672]. R. C.]

Shuhud al-hal: Halvet odlan (?) b. Mirzaş odlan (?) *Muhtesib*,[25] Nasif b. Abdullah, Devingeldi *sufi* b. Devin Ali, Mulhem b. İlya, Şemail b. Danyel, *Seyyid*[26] Mehmet b. *Sheikh* (leader of a spiritual path) Seydi, and others.

According to the first entry, a *dhimmi* called Yuşa brought a case against a woman called Kelef, stating that he had found some of his clothes and his *şah destiri* in her possession. Upon interrogation, the woman denied the charge stating that the *şah destiri* had been given to her as a wedding present. Following her denial, the plaintiff was asked to produce evidence, but he failed to do so. In accordance with standard judicial procedure, the woman was offered the oath, and she performed it, as requested. The defendant was thereby acquitted.

After failing in his first suit, the plaintiff brought another one. This time, he accused a Jew called Avraham of taking possession of his lost *şah destiri.* When the defendant denied the accusation, the plaintiff was asked to produce evidence. A man named Şalma testified in his favour. However, this was not sufficient, and our document specifies that another witness was required.

We learn from the note attached to this document that the plaintiff was able to bring two women along with one man as witness to the court. This satisfied the law and established that the item was the plaintiff's personal property. The evidence of two women is accepted in civil disputes but not in criminal ones. This indicates that the case was civil one and they came to the court to corroborate the plaintiff's claim that *şah destiri* was his personal property.

The third entry is a notary document (*hüccet*) that records the innocence of the accused Avraham. A man named Yusuf, as an agent of his mother, Keïef, stated that Kelef had given the aforesaid *şah destiri* to the aforementioned Avraham. This confirmed that Avraham did not steal the *şah destiri* from Yuşa. This declaration supported the defendant's version of the facts, thereby causing the plaintiff's claim to be dismissed. For this reason, the plaintiff did not bring any further charges.

We do not know how the plaintiff found out that his item had been with a woman. It is possible that he told neighbours about it and was looking for

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25 The *muhtesib* was a market inspector who attempted to ensure that the markets conformed to the official price (*narh*) and standard forms set up by guild regulations. He was under the supervision of the *qadi*. Akgündüz, A. *Osmanli Kanunnameleri ve Hukuki Tahlilleri*, (Istanbul: Fey Vakfi 1990), vol. 1, p. 212; Bayerle, *Pashas*, p. 112.

26 The title of *seyyid* was given to the descendants of the Prophet Muhammad. Bayerle, *Pashas*, 136.

it. He might have gotten a tip off about its whereabouts and followed it. It was their dispute about its ownership which brought them to the court.

It is possible that she was right in her claim that it had been given to her in her wedding. Equally, the opposite is also true. The third document gives us the impression that her claim was not substantiated and that she had some doubts about its consequences. That is why she took *şah destiri* out of her possession by transferring the ownership to another person. This transaction might have been a fictitious one, as her secret intention might have been to get it back once the situation cools down. The documents do not make it clear the relationship between Kelef and the donee. However, it is likely that there was a close relationship, otherwise why should she make her donation to a complete stranger, especially when she had the intention of taking its possession soon?

The transfer of the ownership suggests that there was a suspicion about the way in which she got its possession. We do not know whether she was known as a thief by the community. It is possible that this was her first case to try. Her intention might have been to continue should this go smoothly. It did not go as she expected. So she did her best to get rid of the crime by giving it to someone else. She must have known that if she was not able to establish a legal ownership, it would continue to cause trouble.

It is also possible that it was given to her as a present. If this is the case, it means that it was stolen or taken away by the donor. This shows that the donor had relationship with the donee since relatives and friends make the presents and donations. She must have been lying when she said that she had not known the identity of the donor. In other words, she knew the donor but did not want to identify him as s/he was her relative or friend.

The case was within the *dhimmi* community as all parties were *dhimmis*. This raises the question of social relations within the community. Although it is possible that every community has trouble makers, it is not expected to be wide spread. Further research is required to find out how common the problem was within the *dhimmi* community. However, my examination of the cases indicates that there were trouble makers in *dhimmi* community, disturbing their counterparts, co-religious people. It is possible that economic circumstances dragged them into this.

Theft remained a community problem, and rarely went beyond the borders of the community. They did not commit theft against Muslims as much as they did against their fellow believers. This may indicate that they did not want to have trouble with Muslims since it may cause more problems than that they can predict. They might have wished to keep a good

relationship with Muslims. As long as the problem stays within the community, it is possible that it can be cured by the intervention of the leaders or respected people. Also, it does not produce a lot of reaction. Otherwise, it may bring a lot of trouble to the community.

Lastly, the description of the act as "lost" by the plaintiff in the third document indicates that his intention was to get back the possession of his item but not the application of the *hadd* punishment even if it satisfied the conditions of *sariqa.*

Case 3:

1/26/12 The case is as follows:

Eso b. Abdullah[27] summoned Todor v. Petro [to the court] and stated:

"The black horse, which has a soil mark [sic] on its right back side, and its right ear is sharp (*kez*), and which is in the possession of the aforementioned Todor, is my personal property. I purchased it from a person called Kasım in Karasu (Belagorsk). It was stolen from me. I claim it."

When [Todor] was questioned, he said, "I purchased it from a person called Murtaza from Kefe (Feodosiya)".

When evidence was sought from the aforementioned Eso, Murtaza b. Yusuf, and Mehmet *gazi* (war veteran) b. Yusuf were present [in the court] for the deposition.

They bore legal witness confirming the aforesaid Eso's statement from the beginning to the end.

When the aforementioned Eso was asked to swear that he had not sold the aforementioned black horse and had not terminated his ownership [of the horse] by any transaction, he swore by God.

A judgment was passed that the black horse had been Eso's personal property.

Recorded during the last ten days of *Jumad al-Akhira* 1018 [September 1609].

Shuhud al-hal: Mehmet *efendi*, preacher, İbrahim *efendi*, the judge, Mansur b. Bali, Perviz, *Muhzır.*

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27 It is possible that Eso was a convert as implied by his patronym 'b. Abdullah', this is because the patronym "son of Abdullah" was commonly borne by converts and slave-borns. Jennings, R. C. Zimmis (Non-Muslims) in Early 17th Century Ottoman Judicial Records - The Sharia Court of Ottoman Kayseri', *Journal of the Economic and Social History of the Orient*, XXI/3 (1978), pp. 241-3; Zilfi, "We do not get along', p. 286

This case records the accusation of a certain Eso of a *dhimmi* Todor of stealing his horse. Upon the reply of the defendant that he purchased it from someone else, the plaintiff presented his evidence. In a normal procedure, the evidence of the witnesses must be sufficient to establish the plaintiff's claim. Here, however, we see the plaintiff taking an oath along with the testimony of the witnesses. This is because the witnesses testified that the horse was his personal property. Yet there remained a possibility that the plaintiff might have sold the horse without informing the witnesses of the transaction. For this reason, the court asked him to take an oath that he had not made any transaction that would have terminated his ownership. This was a requirement of the law, as the Hanafi law entitles the *qadi* to offer the plaintiff to take an oath to the effect that he has not sold or donated or it has not passed from his ownership in any way. If he does not take it, his claim is to be refused.[28] The testimony of the witnesses and the plaintiff's oath led the court to conclude that the plaintiff was in fact the owner of the horse. This establishes another fact that the animal was somehow illegally taken from its owner.

The defendant did not receive a *hadd* punishment because the defendant's counter-claim that he purchased the horse from a third party caused the *hadd* punishment to drop. If the defendant established his claim that he had purchased the horse from Murtaza, he would be entitled to recover his money from him [Murtaza], in accordance with Hanafi legal doctrine.[29]

The defendant *dhimmi* refuted the allegation claiming that he had purchased it from someone called Murtaza in Kefe. The defendant may have thought that he could get away with his crime if he he brings a counter claim. It is very likely that he was aware of the legal principle that a counter claim drops the *hadd*. This must have been a way of escaping the punishment. The defendant mentioned Kefe from where he claimed he had purchased the animal. The distance between Karasu and Kefe is approximately 163 km and the distance between Bakhchisaray where the case is heard and Kefe is 240 km. Furthermore, Kefe was under the authority of the Ottomans. It was not under the authority of the Crimean Tatars. It is

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28 Ibn Nujaym, Zayn al-Din b. İbrahim, *Al-Ashbah wa al-Nazair*, (Beirut: Dar al-Maktaba al-'Ilmiyya, 1985), vol. 2, pp. 422-3; Abdullah b. Sheikh Muhammad, Damad effendi, *Majma al-Anhur fi Sharh al-Multaqa al-Abhur*, (Istanbul:Matbaa al-Amira 1316), vol. 2, p. 254; Bilmen, *Hukuku İslamiyye*, vol. 8, p. 181.

29 Kasani, *Bada'i*, vol. 7, p. 85; Bilmen, *Hukuku İslamiyye*, vol. 3, pp. 284-85.

very likely that he chose Kefe for its distance. He may have had in mind that there is no way to investigate the matter in order to find out his lies.

In normal circumstances, *sariqa* cases are brought to the court as civil cases. The plaintiffs simply demanded the return of their stolen objects. They are not concerned with the application of the *hadd*. Here, unlike the cases above, the plaintiff described the act as "theft" stating "it was stolen from me". This might have been because either the plaintiff was not aware of the consequences of the *hadd* punishment and did not know much about the procedure of the court or he deliberately described the act as *sariqa* intending that the criminal be punished for the *hadd*. If this is the case, it could indicate that the plaintiff had severe anger against the person who stole his animal.

Case 4:

22/?/12, The case is as follows:

From the village of Şevka, sub-district (*nahiye*) of Bakhchisaray, Ömer b. Şaban stated in the court in the presence of Ömer b. Yahya, from Şahkerman:

"The grey horse, which has a comb mark (*tarak*) on its one side, and whose bridle is pulled behind, and which is in the possession of the aforementioned Ömer b. Yahya, is my personal property. I lost it fourteen years ago. Now, it is in the possession of the aforementioned Ömer b. Yahya without justification (*bi ghayr-i haqqin*). I demand that justice should be established and that the horse should be taken for me (*îsal al-haqq ila al-mustahiqq*)."

After interrogation, the aforementioned Ömer b. Yahya replied:

"I bought this horse from Hüseyin *ağa*,[30] the *ağa* of Şahkerman boldur. I have no knowledge of its belonging to him."

When evidence confirming the claim was sought, Bayram *gazi* b. Cemsid and Abdulkadir [b.] Ahmet, upright persons, bore witness in the court, stating:

"The aforementioned comb marked and bridled grey horse was lost from the possession of the aforementioned Ömer b. Şaban".

They bore legal witness, saying, "in this case we are witnesses and bear witness," and their testimony was found acceptable.

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30 The title of *agha* was borne by numerous officers or officials of rank. Bayerle, *Pashas*, 2.

When the aforementioned Ömer b. Şaban swore by God Almighty that he had not ended his ownership [of the horse] by any transaction, the judgment was issued in the required manner.

Recorded in *Rabi' al-Akhir* 1088, from the migration of Mustafa [the Prophet] [June 1677].

Shuhud al-hal: Bekir Mirza *ağa*, pride of the peers, Ali *efendi* [b.] Damad *derviş* (member of a *sufi* order) Mehmet *efendi*, Ahmet *çelebi*, Ivaz *efendi* [b.] Süleyman *efendi*, *Hacı* İsa [illegible], Kasım *efendi*.

Here, a certain Ömer b. Şaban filed a complaint against Ömer b. Yahya. The plaintiff told the court that he had lost his horse fourteen years ago. Then in 1088/1677, he found his horse in the defendant's possession. He asked the court to order the defendant to return his horse. After the plaintiff completed his statement, the defendant stated that he had purchased the aforementioned horse from a man called Hüseyin. The plaintiff supported his version of the facts with the testimony of two witnesses. As in the previous case, the plaintiff was asked to take an oath, and he did so, thereby winning the case. The *hadd* was dismissed, because the case was brought as a civil dispute, and the defendant brought a counter-claim.

The plaintiff said that he had lost his animal but did not specify the way in which it was lost. Was it actually stolen and he preferred the expression "lost" in order to avert the *hadd*? He waited for 14 years to get his horse back. He probably was looking for it over all these years. When he came across his horse, he brought its present holder to the court to get its ownership back, as the owner of a stolen property is entitled to reclaim it from its holder regardless of the criminal nature of the offence.

The defendant and the seller of the horse were from the same region namely Şahkermen. This means they knew each other. The defendant should have known or heard of the background of this beast and the way in which it was stolen or taken away. It is possible that he was the thief and kept it in his possession for so many years. He might have thought that the original owner had forgotten the animal and brought it to the market or came with it riding on it. Once the original owner saw his horse, he informed of the authorities whom brought it to the court. If this is the case, it is very likely that the defendant gave the name of the *ağa* as the seller and produced a fictious transaction in order to aver the punishment.

There is another possibility that the *ağa* himself involved in the act of theft. He might have set up an organisation for this purpose, or hired people to commit *sariqa* crimes. He might have been getting away with his crime

by selling the stolen things or animals. It might have been the way of making money for him.

It is also possible that a third person found or stole it and sold it to the *ağa* from whom the defendant purchased it. He might have been innocent and have not been aware of its being stolen. It is not clear, from the way in which the case appears, how many times the transfer of the ownership took place. It is possible that the chain of the transaction involved so many people and so the thief was forgotten.

Case 5:

1/?/9 The case is as follows:

Aksarı b. Cafer [brought a case against] Allah Virdi b. Abdullah in the court:

"The black cow which is [now] in the possession of the aforementioned Allah Virdi was stolen [from me] by Allah Ahmet (?), musket maker or seller, because of [my] two *guruş*[31] [debt to him (?)]. He [Allah Ahmet] sold it to Allah Virdi. I found it in [Allah Virdi's] possession."

When Allah Virdi was questioned, he replied with a denial.

When evidence was sought from the aforementioned Aksarı, Çerkez *sufi* b. Ali testified [in his favour].

It was recorded that another witness is required.

This happened on the aforementioned date. [The second ten days of *Rabi' al-Awwal* 1018 [June 1609]. R. C.]

Shuhud al-hal: Kasım *dede*, Muzaffer b. Abdullah, Ali b. Hüseyin, and others.

The register tells us that a man called Aksarı filed a complaint against a man named Allah Virdi, stating that he had found his black cow in Allah Virdi's possession. He added that a certain Allah Ahmet had stolen the aforementioned cow from him because of his (Aksarı's) debt to him; Allah Ahmet sold the cow to Allah Virdi. The defendant denied the charge. The plaintiff then brought one witness who testified in his favour. The court noted that another witness is required.

Although the plaintiff described the act of Allah Ahmet as theft, it does not qualify *sariqa*, as it was in return for a debt. In law, debt averts *hadd* since it creates *shubhat al-milk*. [32] In other words, even if the act of theft

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31 *Guruş* refers to several types of European silver coins circulated in the Ottoman Empire. For the circulation of foreign currencies in the Ottoman empire, see Pamuk, Ş. "Money in the Ottoman Empire, 1326-1914" in *Economy and Social History*, ed. H. İnalcik and D. Quataert (Cambridge University Press 1994).

32 Marghinani, *Hidaya*, vol. 2, 122.

qualified *sariqa*, the thief here cannot be charged with *sariqa* for two reasons; firstly, because he stole the cow in exchange for the debt owed to him by the plaintiff, secondly, because the plaintiff did not file a complaint against him, which is one of the principles of *sariqa*.

On the question of why the plaintiff did not bring his case against the thief himself, it is likely that they had severe quarrels and fights about the payment of the debt, so the debtor did not want to face him in the court. He might have thought that taking the case to the court might inflame the situation further and may bring about fatal consequences. So, he was probably scared of filing a complaint against the thief.

I would like to speculate over what might have happened and how the case might have developed. The register indicates that the main problem was the payment of a debt owed by the plaintiff. He was unwilling to make the payment. His unwillingness and stubbornness might have led the defendant to recover his money by other means such as theft. The plaintiff was not able to prevent his creditor from stealing his animal. He did not take this issue to the court for the reasons mentioned above. Rather, he waited until the beast is sold to a third person. He probably was aware of the fact that the thief is going to sell the animal as he needed cash. Once it is sold, he took this opportunity and brought the case to the attention of the court. It is very likely that he was aware of the legal principle that the owner of a stolen property is entitled to reclaim it. In this respect, the law does not protect the third person except that it entitles him to claim his money back from the thief.[33]

It is worth mentioning that the thief and the defendant bore the same nickname or title "Allah". This may indicate that they were either from the same family or close relatives. This indicates that the thief sold the beast to a friend. The defendant's job involved making guns. The theft might have thought that he can deal with the debtor much better and his business may scare him to go further. The case was not turned out to be as he expected. The plaintiff was not scared of taking the issue to the court. This could indicate that people found refuge in the court, and that they knew that the court protects and enforces their rights.

Case 6:

Case six contains two documents. The first reads:

1/49/11 The case is as follows:

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33 Kasani, *Bada'i*, vol. 7, p. 85; Bilmen, *Hukuku İslamiyye*, vol. 3, 284-85.

Captain (*re'is*) Perkin v. Mahter summoned Yağmur v. Danil to the court and [stated]:

"Previously, in the time of Selamet Giray Khan[34] (may God's mercy and forgiveness be upon him), while unbeliever Basdik (?), from Balkalağı, was travelling with a cart loaded with several bulls (*boğa*), a number of bulls dropped off of the cart, and were left behind. At the present time, I have found twenty bulls in Yağmur's possession. He should be interrogated."

When Yağmur was questioned, he stated:

"It is correct that [Perkin found] twenty bulls in my house (*evimde*). A *dhimmi* called *Hoca* gave them to me, saying, 'Let us be partners'".

This happened in the first ten days of *Muharram* 1021 [March 1612].

Shuhud al-hal: Ömer b. Ali, Kasım dede b. Abdullah, Mahmut b. Abdullah, *Muhzır*, Perviz b. Abdullah, *Muhzır*, and others.

The second document reads:

1/44/8 The case is as follows:

From the residents of Balkalağı, captain Perkin v. Mahter summoned Yağmur v. Danil to the court and [stated]:

"Previously, in the time of Selamat Giray Khan (may God's mercy and forgiveness be upon him), while unbeliever Basdik (?), from Balkalağı, was travelling with a cart loaded with several bulls, a number of bulls were stolen. Now, a *dhimmi* called Keroki has admitted that he found the aforementioned bulls on the road, and that he became a partner with Yağmur, and that they sold the bulls. I [Perkin] found 20 bulls in Keroki's possession and [another] 20 bulls in Yağmur's possession, and I seized those [bulls]. I [Perkin] received [illegible] *guruş* for the bulls which had been sold. I settled the claim with Yağmur and Keroki. I request that they should be questioned and that [their statement] should be recorded."

When Yağmur was questioned, he voluntarily acknowledged:

"It is correct that when Keroki found the bulls of the aforementioned captain Perkin, he established a partnership with me. We kept twenty bulls each and sold the rest".

It was recorded that the aforementioned Perkin and Yağmur settled the claim by means of a *sulh*.

[Written on] 5 *Muharram* 1021 [8 August 1612].

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34 Selamet Giray I, the son of Devlet Giray, was the Khan (the ruler of the Crimea) between 1608-10. Spüler, B. 'Kirim', *Encyclopedia of Islam*, 2. Edition. vol. 5.

Shuhud al-hal: Ömer b. Ali, Ali *çelebi* b. Kıytaş, Kasım dede b. Abdullah, Perviz b. Abdullah, *Muhzır*, and others.

In the first document, a *dhimmi* called Perkin brought a claim against another *dhimmi* named Yağmur. The plaintiff said that a number of bulls had dropped off of a cart and had been left behind. He added, "I found twenty bulls in Yağmur's possession". When the defendant was interrogated, he admitted that the plaintiff had found 20 bulls in his possession and stated that the bulls had been given to him by a *dhimmi* named Hoca. At this point, the entry comes to an end.

In the second document, the plaintiff changed his statement. He now claimed that the bulls had been stolen. As recorded in the *sicil*, Perkin, in the presence of Yağmur, stated that a number of bulls had been stolen, and that he had found 20 bulls in Yağmur's possession and another 20 in his partner's possession. He added that Keroki admitted that he had found the bulls on the road, and that he had become a partner with Yağmur, and that he had sold some of the bulls. Perkin declared that he had settled the claim by seizing 40 bulls from them and receiving a certain amount of money for the bulls that had been sold. The court noted that the matter had been resolved by means of a compromise (*sulh*).

It is to be noted that Keroki did not admit to stealing the bulls; rather, he said that he had found them on the road. Thus, he avoided the *hadd* punishment. If the bulls had been stolen, the case would have been classified as *sariqa*, since, according to our document, they were stolen while they were under the guardianship of a man named Basdik.

According to the documents, the bulls were lost or stolen at the time of Selamet Giray who was the Khan (the ruler of the Crimea) between 1608-10. The case was taken to the court in 1612, at least 2 years after the occasion. This means that the plaintiff waited for, at least, two years to find his bulls. It is very likely that it was a tip off about their whereabouts which helped him to reach his bulls. The statement of Yagmur in the first document that the plaintiff found the animals in his house suggests that he searched the farm. On the question of how he had the access to the farm, it is very likely that he went there with the executive authorities but definitely not alone. Presumably, having received the clue, he reported the case to the court and asked for help. The court sent two local *Muhzır*s along with him to investigate the matter and authorised them to make the search. The names of two *Muhzır*s -Mahmut b. Abdullah, Perviz b. Abdullah-, among *shuhud al-hal* verify this assumption. Their patronym 'b. Abdullah' suggests that they

were converts and presumably were *Muhzırs* for the community they had come from originally.

My examination of the court registers indicates that the court dealt with the communities through their *Muhzırs*. Conversely, each community had *Muhzırs* of their own in the court. There must be several reasons for this: firstly, this might have made it easy catching the offenders as the local *Muhzırs* knew their community very well; secondly, arresting people does not produce a lot of reaction if the police was one of their own; thirdly, it might have been a way of keeping an eye on local trouble makers. This might have had some disadvantages as well. For example, although there is no evidence, this system might have produced corruption and led them to ignore certain criminal activities in return for bribe. It seems, however, advantages outweighed the disadvantages and they continued to keep local *Muhzırs*.

It is very likely that the defendant was brought to the court by these *Muhzırs*. The case suggests that the defendant was shocked and did not expect such offensive action and that he was not ready to tell the truth and to identify his partner. He gave just an honorific title without a name. It looks his purpose was to hide the real issue and to make a confusion by diverting the attention to some other issues.

The second document which was recorded five months later gives a clear picture about how the bulls ended up in the hands of the defendant and of his partner, and how the partnership was set up. The long time-period between these two records suggests that they were not able to settle the issue for some time. It is very likely that the defendant did not identify his partner for a while. After some time, he identified his accomplice. They might have had disputes and fights about the bulls. They might have not wanted to submit them over to their original owner for some reasons. They probably expected some payment for the animals as they kept and looked after them for two years.

The word 'seize' in the statement of the plaintiff suggests that he received them by force, perhaps with the help of the executive authorities. Once they have reached a compromise, probably with the help of the elders, or the leaders of the community, they came to the court to have it recorded so that they have evidence against any future disputes. The *qadi* did not solve the problem at first instance, as the defendant admitted to having the bulls. Rather he let them resolve the matter mutually.

This case is particularly important as it shows that partnerships were established in order to hide a crime. Alternatively, Keroki did not have a

farm big enough to keep that many bulls. So he gave half of them to his colleague or close friend Yagmur. Keroki must have had trust in Yagmur. He must have been shocked when the case was disclosed through Yagmur.

On the question of why they did not get rid of the animals by selling them, it is because if they had done so, the issue would have been out so soon and they did not want that. As we have seen in the cases above, theft mostly became known through third person, the purchaser. They must have known this. They were very clever in keeping them under their possession and not letting anyone know about it for two years.

Case 7:

22/?/10, The case is as follows:

From Akkerman (Belgorad-Dnestrovski), Otali b. Ak bora stated in the court in the presence of Burak b. El-Eman (?) and Ebussuud b. Cemal, who are residents in the village of al-Mardani, in the judicial district of Sheikh Ila:

"Three years prior to this document, while I was on a war campaign, [Burak b. El-Eman (?) and Ebussuud b. Cemal] forced their way into my house. They took away (*akhdh* and *qabd*) a desk (?), a *kibarali* (?) bridle, two red woollen clothes, two red satin outer garments, two yellow trousers, another two satin outer garments, two sable fur caps, one foot [illegible], satin [in an amount sufficient] for two garments [*don* (?)], *sildiyal* (?) for two garments, a silver amulet, a *kaş* (?) pillow, and a *surugh* (?), a silver *börcem* (?), a gilded reed *sasfik* (?), two silver bracelets, an ox-cart ten *kulaç*[35] [in length], twelve mattresses, a carpet, a woven carpet (*kilim*), a broadcloth [worth] forty-eight silver [coins], and six hundred *esedi*[36] *guruş* in cash. They should be questioned."

After interrogation, denial, and the evidence of the witnesses for the offence [*al-jurm* (?)], and legal oath [taken by the plaintiff], it was recorded upon request.

[The case was probably recorded during the last ten days of *Rabi' al-Akhir* 1088 [June 1677], since one of the entries on this sheet mentions this date. R. C.]

Shuhud al-hal: *Haci* İsa *efendi* from Kul Sadik, Ahmet şah Mirza *Haci* Bektağan (?), Abdurrahman *efendi*, preacher in Çorak kor, Abdurrahman *Molla* from the village of Kırbaç, Kurban Ali *Molla* from Milaz (?), Kurban

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35 *Kulaç* is a measure of length - 189.5 cm. Sertoğlu, *Osmanlı Tarihi*, p. 17.

36 *Esedi* is a silver coin of Holland. Murphey, R. *Ottoman Warfare 1500-1700* (London: UCL Press limited 1999), p. 206.

gazi eylüş from Çürüksu (a district of Bakhchisaray), Sefer b. [illegible], Bayram Ali b. İslam, Aksaş b. Kurbakna (?) Karabaş *Muhzır*, Abdulbaki, *Atalik* (?) *Muhzır*, and others.

Here we see certain people committing a crime while the plaintiff was away on war campaign. It is very likely that they knew who the victim was. They probably reconnoitred the place contemplated for the commission of the crime. They were also aware of the fact that he is going to go to a war campaign. Once he was away, they took it as an opportunity to execute their plan and to make their way into his house. They must have stayed in the house for a while since they carried away quite a lot of items.

It is not clear from the way in which the case appears whether the crime is committed at night or in broad day light. However, the following statement "the evidence of the witnesses for the offence [*al-jurm* (?)]" suggests that it was committed in daytime, as there were eye-witnesses for the offence. It is likely that it was these witnesses who informed the plaintiff of the crime and identified the criminals. On the question of why they did not intervene in the crime, it is perhaps because the criminals were equipped with lethal instruments and it was dangerous for them to do anything to stop the burglars, or there might have been other reasons.

When the plaintiff returned from the war campaign, to his horror he discovered that his house had been burgled and everything had been scattered. Upon receiving the information about the suspects, he reported the case to the *qadi* who had them summoned to the court by the police force/*Muhzırs*, -Aksaş and Abdulbaki. The defendants refuted the accusation. However, the testimony of the witnesses corroborated the statement of the plaintiff. As in the cases above, the plaintiff was asked to swear a legal oath to the effect that he had not terminated his ownership of the aforementioned items by any transaction, and he did so. Although the outcome of the case is not recorded, it is likely that the defendants were ordered to return the stolen objects to the plaintiff. Since the case was brought as a civil matter, and the terminology of *sariqa* was avoided, it is unlikely that the defendants received *hadd* punishment. They might have received *ta'zir* penalty, perhaps certain strokes or imprisonment as their way of theft was very serious and damaging.

The presence of several persons from religious class among *shuhud al-hal* suggests that the plaintiff was from high ranking soldiers, due to the fact that normally not that many people come to the court to witness a case.

The case was within Muslim community. The reason behind the crime was not disclosed, and it was not business of the court. It simply made an

official record of the fact. It is unlikely that it was the result of economic circumstances, as religious endowments (*waqfs*) within the Muslim community provided help for the needy and the poor. It is possible that they might have suffered social injustice, and this might have been a way of escaping it and a soldier was a good prey for them. It is also likely that being a soldier, the plaintiff made them suffer injustice and losses. So, they stole his belongings to teach him a lesson and to have him compensated for their losses.

CONCLUSION

The primary aim of this article has been to find out whether the *qadi* followed the legal doctrines in his decisions. Analysis of the documents indicates that he did so. This study has also revealed that almost all of *sariqa* disputes are formulated in order to protect the parties from possible *hadd* punishments. Firstly, jurists made an effort in all judicial discussions to mitigate the harshness of *hadd* punishments if it all possible. Secondly, political authorities might have not wanted to implement *hadd* penalties. There may also lie a social factor which the people did not want to see their counterparts with chopped hands; rather they wanted to recover their stolen items.

The concept of justice is viewed by the *qadi* as the application of the legal doctrines. In the view of people, justice was not the corporal punishment but it was the restitution of property. It was them who suffered the loss, it can only be compensated by restitution. However, the formalities and the procedures sometimes prevented justice.

Our examination of the documents has also shown that most of the disputes involved *dhimmis*. This might indicate that there was a social problem within the non-Muslim community. Economic circumstances might have been the reason behind this problem. This work has also underlined that the court dealt with the communities through their own *Muhzırs* (police).

Lastly, *dhimmis* took refuge in the court and did not hesitate to bring their counterparts to the court to face justice. In the court, they were fairly treated as required by the law.