THE FAMILY AS A CORPORATION IN GHANAIAN AND NIGERIAN LAW*

By Gordon Woodman

Senior Lecturer, Faculty of Law, University of Ghana
Visiting Associate Professor
New York University Law School (1973)

Introduction

This paper will examine the institution of the family in the customary law of Ghana and Nigeria, as developed in the case law. I shall emphasise the problems inherent in an attempt to express as aspect of social organization in legal norms, and to confer legal personality on the family. It is not suggested that the institution is exportable. However, thought and discussion about it may help its development in Ghana and Nigeria. Further, I believe that it has certain novel features which may illumine other systems when they are compared with it.

Customary law is one of the principal types of Ghanaian and Nigerian law classified by source, the others being common law and statute law. Customary law is the type most frequently applied in those areas of activity which will be discussed here. The exceptional cases where a different type applies, for example when a marriage is contracted under statute instead of customary law, will be ignored. For the present purpose customary law is defined as the norms which the courts apply under that name. Over the past century the courts have accumulated a large body of case law expressing these norms. They have developed a system of precedent similar to that of the English common law, whereby a previous decision is normally followed as an authority, although in certain, moderately well-defined circumstances a court is not bound to do this. Therefore from

---

*This paper was first presented at a seminar at N.Y. University Law School on 14 December 1973, and has been revised to take account of the criticisms made at that time. In revised form, it will appear in the author's forthcoming book of essays on customary law as administered in the superior courts.

this body of case-law we can extract the principles of customary law.[1] It does not follow from this that we can ignore everything but the law reports. This would not be justifiable even if our task were to predict the future decisions of the courts, because, firstly, the reasons for which courts depart from previous decisions are often to be found in other social facts, and, secondly, decisions on new questions can be predicted only by reference to other social facts. Moreover, in this paper I wish to discuss some of the wider problems of the relations between legal and social norms, which arise irrespective of whether the former are certainly established in the case-law.

The general manner in which customary law, in the above sense, results from social norms is clear. While the courts will follow a principle which has been declared in previous decisions, the initial decision on a matter is ostensibly an attempt to state a socially recognised norm. Thus if a question of customary law is one of first impression, the court will hear evidence as to what the custom is. A complicating factor is that the evidence may not be reliable, so that the court's initial finding may be wrong as a matter of fact. A decision having been given, however, it is likely to be followed in subsequent cases. Such errors have undoubtedly occurred, but it is difficult to document them. It seems unlikely that they have been particularly significant in this area of the law.[2]

---

[1]This view of customary law is argued more fully in: "Some Realism About Customary Law - The West African Experience" (1969) Wis. L. Rev. 128.

[2]The discussion will be of the customary law of Ghana and Nigeria. The implication is that national systems of customary law exist. One important proviso is that the available case law is not derived in equal quantities from all geographical areas. In particular, it contains few cases from the northern part of each country: the Upper and Northern Regions of Ghana, and the six northern states of Nigeria. However, the assumption of uniformity of customary law is firmly embedded in the case law, and relatively few local "variations" have been admitted. Moreover, some similarity between Ghana and Nigeria was assumed in the early colonial period, and the customary law which has developed in each is noticeably similar. This uniformity will not necessarily extend to the northern areas when their case

There are two other, more significant problems in the translation of social into legal norms. The first of these is the inevitable change which occurs when courts of the modern, state-operated type, start to enforce social norms. Assuming that the courts correctly identify these norms, their character is almost certain to be altered by the courts' modes of enforcement. Socially there are various grades of enforcement sanctions, ranging from mild disapproval to extreme physical force, and the decision whether to employ them is often discretionary. Thus a person who is apparently under a social duty, and who has motives for not performing it, may, in determining his action, take account of the possibility that no sanction will follow on disregard, or that the sanction may be so light that it is worth incurring it. Further, some sanctions are "supernatural", and so vary in efficacy with the degree of belief of those subject to the duties. When courts are requested to enforce social norms, they have to decide either to enforce them absolutely, with the full force of the state, or to disregard them. Perhaps there are other possibilities, but the courts in question have always considered that these are the only choices available, and this is the practical situation we have to consider. A refusal to enforce a norm will leave it to be enforced by such other social sanctions as are tolerated in a modern state, or by belief in the supernatural, both of which will often be declining in effectiveness. On the other hand, if a court decides to enforce a social norm, the result is usually that it becomes absolutely compulsory, at least in so far as parties are ready to go to court. It is likely that only a small minority of social norms receives legal enforcement. The social effects of such enforcement -- which are

---

[2](continued) law develops, and the Nigerian courts have recently emphasised the view that customary law may vary from one area to another. See especially: Taiwo v. Dosunmu (1965) 1 All N.L.R. 399; Erokwu v. Bosah (1966) 1 All N.L.R. 166. These cases became available after the writing of the article referred to in the previous note, and suggest a trend away from some of the practices documented there.

Subject to these wide qualifications it seems justifiable, in discussing the type of customary law defined, to speak of the law of Ghana and Nigeria.

clearly important, and need more investigation than they have had -- are, however, beyond the scope of this paper. My concern here is with the problem facing a court. Having ascertained the social facts, it has to decide whether a given social norm ought to be reinforced by a legal norm. This is essentially a policy decision.

The second, similar problem in the translation of social facts into norms arises because the creation of a court system produces possibilities of rights and duties which could not have existed previously. The court machinery itself poses new questions. For example, there has been much discussion of the question whether a head of family can be sued by the members for an account of family property. This question could not possibly have arisen before the existence of courts having the order for accounts in their repertoire of remedies. Accounting in other forms and before other forums is not the same process. Here the courts have to make the policy decision as to whether to create a new duty.

When either of these problems arises, and the court makes a policy choice, this is likely to produce social change. The process has not received much attention in the literature, although there have been important studies of the social changes produced by other forms of state involvement with traditional legal systems.[3] Indeed, it is not clear that the courts themselves have frequently recognised the significance of their role. Repeatedly the judges have spoken as if they had merely to "discover" and then "apply" social norms. The legislatures also have shown little awareness of the problems arising from their directions to the courts to apply customary law. There is some evidence that the courts' and legislatures' perception of the process may now be changing.[4] Perhaps anthropologists

---

[3] E.g., Busia, The Position of the Chief in the Modern Political System of Ashanti (1951).

[4] E.g., Ghana Courts Act, 1971 (Act 372), s. 49 (1), especially Rules 4-7; Fiaklu v. Adjiani (1972) 2 G.L.R. 209, at 212; Hausa v. Hausa (1972) 2 G.L.R. 469.

were partly responsible for the earlier lack of awareness. Their insistence that traditional societies had "law" may have persuaded the judges and legislators that nothing unusually creative was involved in the judicial application of that "law".

The legal concept of the family may be viewed as an attempt by the courts to express in law a social phenomenon known to and analysed by anthropologists. But, for the reasons just given, it would be unreasonable to expect an identity of the many particular legal and social norms. The anthropologist may therefore not accept an account of the legal concept as an accurate account of any particular social concept, nor will he necessarily recognise the terminology. The word "family" itself may convey a different meaning to him (if he considers it a meaningful term at all) from that which it carries in the courts. The divergence may be recognised and explained. It can hardly be denied. The lawyer is clearly not entitled to decide authoritatively which social norms as a matter of fact exist, nor the "proper" meaning of terms when used by anthropologists. But conversely, the anthropologist can hardly maintain, on the sole authority of his expertise, that the courts are "wrong" when legal norms diverge from social, or that they use words "improperly".

This study is concerned with the legal concept of the family. Necessarily it excludes considerable areas of social activity which would interest an anthropologist. But it is only by distinguishing the legal subject-matter that we can study the problems of legal method which arise. Moreover, even for the student of society as a whole, there is surely an important distinguishing characteristic in those norms which determine activity by the courts. After studying the law in close-up it is no doubt useful to stand back and see the place of legal controls in the whole picture of social activity,[5] but an examination of law separately is a useful exercise.

---

[5] Statements in the following sections about established principles of law can always, I believe, be supported by cases. However, it does not seem necessary to cite large numbers of cases in this paper.

Membership

The object here is to define the group which is called in law a "family" and to which is attached a legal persona. It follows from what has been said that this will not necessarily be a description of the socially-recognised institution commonly called the "family". To take an obvious divergence between the two, the case law has always assumed that the membership of a family consists exclusively of living individuals, whereas a description of the underlying social institution would need to take account of ideas concerning the continuing influence of the dead ancestors.

Subject to exceptions to be discussed, the family is a unilineal descent group. Further definition depends on the particular system of customary law in question.[6] For most ethnic groups the family is a patrilineage. For slightly more than half the population of Ghana, and a small proportion of that of Nigeria, the family is a matrilineage. Every descent group of the type recognised in any given ethnic group is a family, whether it be a maximal lineage or any of its segments. The legal definition is not necessarily an accurate renditon of any of the vernacular terms commonly translated as "family". For example, it seems that the patrilineal descendants of a Northern Ewe man would not be referred to immediately after his death as a dzotinu, the word translated as "family".[7] But they are within the definition, because they constitute the patrilineage descended from their deceased father. The courts have used the term "family" of this group.[8]

The legal definition has one clear deficiency. In practice a legal dispute over family membership usually requires a

---

[6]This is one of the instances where the case law does not apply a uniform customary law through Ghana and Nigeria.

[7]Kludze, "Problems of Intestate Succession in Ghana" (1972) 9 U.G.L.J. 89. I believe that abusua in Akan is used of every matrilineage.

[8]See e.g., Yawoga v. Yawoga (1958) 3 W.A.L.R. 309.

determination of the membership of the family of one or more given individuals. For example, the law of intestacy says that property passes to the family of the deceased. It is therefore necessary to determine who are the members of the family of the deceased. But the definition does not indicate the extent of the lineage which constitutes the family for this purpose. Suppose that, in the example given, the applicable law says that the family of the deceased is his patrilineage. Does this patrilineage comprise merely the patrilineal descendants of the deceased (where he was a male), or those of his father, or those of his paternal grandfather, or of a more remote patrilineal ancestor?

It is not possible to state in general terms the extent of the family to which a person, X, belongs. It is, however, possible to answer the question in respect of one particular relation, for example by stating who belongs to the family with a right to possession of X's property on his death intestate. It is quite possible that this particular family will not be identical with the family (or families) to which X belongs for other purposes. This the family which is entitled to possession of X's father's property on the father's death intestate may be a wider patrilineage, of which that entitled to X's property is a mere segment. And the family which is entitled to possession of X's paternal grandfather's property on his death intestate may be an even wider patrilineage.

When the general question is reduced in this way to specific instances, the case law suggests that problems do not often arise. The cases have been concerned only with determining the extent of families which inherit on intestacy and which benefit from express gifts by will. The latter problem is answered by reference to the intention of the testator. If this is unclear, it is presumed that, when he refers to his family, he means the family which would inherit on intestacy. The former problem can be subdivided. When the deceased intestate is a man, and the society is one where the family is a patrilineage, the family which inherits is the patrilineage descended from the deceased himself. Where the deceased is a woman, and the society is patrilineal, the somewhat scanty evidence suggests that usually the inheriting family consists of her father's patrilineal descendants, but that her own children have a life interest in the property. Where the deceased is a man and the society matrilineal, the family is the matrilineage descended from the mother of the deceased.

And where the deceased is a woman, and the society matrilineal, the weight of authority holds that the family which inherits on intestacy is that descended from the mother of the deceased, although there is also authority for holding that it is that descended from the deceased. In every case, if the group which would inherit is non-existent, the right is held by the group descended from the most recent ancestor or ancestress of the deceased with surviving matrilineal or patrilineal descendants, whichever is appropriate for that society.[9]

The difficulty in settling the law has perhaps arisen because this was one of those situations in which the social norms could not be adopted without change as legal norms. In the present state of our knowledge, one can only speculate on this. It may be that the segments of a lineage would normally in the past have reached a satisfactory modus vivendi with each other based on mutual respect and a complex set of assumptions concerning the authority of various persons in different decision-making processes. Thus property of an intestate would probably be enjoyed primarily by those most closely related to him, and this would be accepted as reasonable arrangement. However, those in enjoyment of the property would defer to, and receive the assistance of senior relatives, even if they were not very closely related. The courts have had to decide cases where this mutual agreement has broken down. If, say, the immediate family, i.e., the smallest lineage to which the deceased belonged, has attempted to sell the property, or is claiming the exclusive right to collect rents from it, and the wider lineage is challenging the claim in court, the case has to be decided in favour of one or the other. A decision in favour of the immediate family will make those social norms favouring the immediate family legal and therefore enforceable, while reducing the effect of those social norms which favoured the wider lineage.

---

[9] The case law for matrilineal inheritance is discussed in: "Two Problems of Matrilineal Succession" (1969) 1 R.G.L. 6. Atta v. Amissah, C.A. (Ghana) 4th May 1970, supports the conclusions of that article.

We may observe in passing a complication which is liable to ensue after the inheritance system just described has operated for some time. The family which inherits from an individual is so defined that for every member of a lineage the succeeding family is a different group from that for any other member, except that siblings are succeeded by the same family. If we consider developments in a wide lineage, then after a few generations there is liable to be a large number of family properties, the various owning families each having a different membership, although some will be branches of others. Some of these property-owning families will have grown to a considerable size. We may wonder whether an individual who belongs to each of a series of families will always be quite clear which particular group is entitled to deal with any particular property. Or will the result be so complex that it cannot be humanly operated? I would incline to the view that people will continue to remember the origins of inherited property, and to have a detailed, ready knowledge of their family relationships, so that the system will continue to work. If it does not, it is probable that it will be simplified by a tendency to assume, contrary to the strict rules, that particular properties belong to wider lineages than in fact inherited them, this assumption being generally acquiesced in by interested parties. The problem could also be avoided by the practice, common among some peoples, of partitioning inherited property among the members of the inheriting group.

It is not easy to perceive why the problem of the extent of the family has arisen only in connection with succession. It could also have arisen when, for example, two or three persons acquired property during their lifetimes with the intention that it accrue to their family, this being another way in which a family may acquire property. Possibly the social situation here is that the two or three members, being still alive, have unchallengeable authority to determine the exercise of rights over the property, and that by the time they have all died it is clear that the rights are to be held by a particular, clearly defined group. Possibly these social norms have been so effective that they have not been challenged. Again, the problem could have arisen in relation to the rule of family exogamy, in cases turning on the validity of particular marriages, but no one has yet raised it in court.

Where the courts have had to make such determinations, they seem generally to have favoured the relatively small groups. This may represent a policy which will be discussed later.

The concept of paternity or maternity contained in the definition is not strictly biological. Legal parentage normally coincides with biological, but there are cases, normally of paternity, and reasonably well defined, where it does not. For example, if a child is conceived by a married woman outside wedlock, the woman's husband, rather than the genitor, is entitled to be regarded as the legal father among many peoples. Another example is where the mother is unmarried, and no one outside her family becomes the legal father by recognition of paternity; in that case the mother and her family are entitled to make a member of the family the legal father, despite the fact that he could not marry the mother, the family being exogamous.

Certain exceptions to the basic principle defining the family have arisen from particular social demands perceived by the courts. The definition does not itself state any complete legal relations, since it is merely the definition of a concept. A number of norms, to be discussed later, vest rights in individuals who satisfy the condition of being members of families. Consequently, to define membership of a family is in effect to confer rights. Instances have arisen where it was felt desirable to extend these rights to persons who did not come within the basic definition.

The most serious difficulties arise from the unilineal character of the social institution whose general characteristics the courts enforce as customary law: unilineal descent groups. They exclude by definition two classes of persons. Firstly, wives do not belong to their husbands' families. Secondly, every person is excluded from membership of the family of one of his parents. This latter problem is at its most acute when the family is a matrilineage, in which case sons and daughters are not members of their father's family. These exclusions have serious effects today with the growth of individual property because when a man dies the law of intestacy provides that his property vests in his family. A corresponding pair of problems could arise in a patrilineal family system on the death of a woman, in respect of her husband and children; this does not seem to present much

practical difficulty, however. One solution to these problems would have been to vary the definition of a family by including wives, sons and daughters as members of their husbands' and fathers' families. The courts have adamantly refused to do this, probably because they considered that it would have produced too great a divergence between legal and social norms.[11] The solution attempted instead has been to give these claimants rights as outsiders against the family. This will be discussed below.

In contrast, certain less fundamental problems have been dealt with by expanding the notion of a family. Thus if an individual renounces his original family and is adopted as a member by another entire family, he becomes in law a member of the new family. A formal ceremony of adoption is probably necessary. This may well be in accordance with social norms. Another case arises from the old institution, now legally abolished, of domestic slavery. A domestic often had no accessible family. The descendants of a domestic might also have too small a family for their protection and sustenance, for example if they were born to a female domestic in a society where the family was a matrilineage. When slavery was abolished by law domestics often did not leave the families which had owned them. It was then determined that, if they stayed with these families, they must be regarded as members. It is possible that socially the person born of a union between a domestic and a free person had already been regarded as a member of the family of his free parent. Perhaps the legal

---

[10] The reasons are not clear. One may be that women tend to be less wealthy than men, although this generalization is not universally true. Another may be the social practice and rule of law that husbands contribute towards the maintenance of their wives, and that the reverse is not the case, although here also there are important exceptions.

[11] A legislative enactment of this solution was once suggested: Ollennu (chairman), Report of the Inheritance Commission (Ghana, 1959). It has not been repeated by Ollennu, who on the bench has encouraged the development of the alternative solution discussed in a later section.

rule reflected a social norm in all instances, but this is less certain.

The most recent problems concern individuals who would according to the basic rule have no family membership. One instance is that where an individual's father belongs to a society where the family is a matrilineage, and the mother to a society where it is a patrilineage. (In the converse situation there seems to be no objection to the child belonging to both families.) It is regarded as objectionable for a person to lack the advantages of family membership, and it has been held that he may acquire membership by identifying himself with the family of either parent. Another instance arises where one parent is a foreigner and the child would not normally belong to the Ghanaian or Nigerian parent's family. Here again the danger of the individual having no family is avoided by ascribing him membership of the family of the Ghanaian or Nigerian parent. While these solutions may not directly embody social norms, they are related to the solutions to other cases of persons in danger of having no family -- as we have seen, the children of domestics by free persons belong exceptionally to the family of the one parent who has a family; and children whose biological paternity is unrecognised belong to the family of their mother, even where the family is otherwise a patrilineage.

A full discussion of this question requires an account of the legal consequences of family membership, which will be given below. One comment may, however, be appropriate here. The courts could have treated family membership much more flexibly than they have done, admitting or excluding persons according to policies for conferring or withholding benefits. The only immediate objection to this would have been the resultant dichotomy between the legal use of the word "family" and the norms of the social institution to which it purports to refer. This seems a relatively minor, theoretical objection. However, if legal membership had so differed from socially-recognised membership, there would have been a long-term danger in the probability that the benefits of family membership would not have been willingly and spontaneously conferred on all those persons whom the courts considered to be entitled to them, and on no others. It would then have been necessary for the courts to intervene to compel compliance with the legal definition of membership. We shall see later that the courts have been reluctant to intervene in families' internal

affairs. Given this reluctance, it would not have been practical to recognise as family members persons very different from those socially recognised. This may have been the reason why the problem of wives, sons and daughters was not tackled in this way. If, however, as will also be suggested, there has been a recent trend towards increased judicial supervision of family affairs, judicial legislation as to membership may become practicable.

Legal Relations Affecting the Family: A Summary

The family is a person in customary law, that is, it is the subject of legal relations such as the right-duty relation. It has been suggested that, according to the fiction theory of legal personality, this could be an end of the discussion: "An author who has written five volumes on the law of physical persons and then wishes to discuss legal persons, need not write another five volumes. . .but he need only write a single sentence stating: all I have said about human beings applies by way of analogy to the following entities, etc."[12] This makes the useful point that the types of legal relations of which corporate persons are subjects are in general the same as those of which individual persons are subjects. But as a general proposition it is erroneous. To apply the general law to a corporate person it is necessary, firstly, to describe the norms governing membership, as was done in the previous section; secondly, to describe the norms governing the internal relations of members with each other and to the corporation; and, thirdly, to describe the norms governing the peculiar problems of external relations which arise from giving a legal persona to a group of individuals. I wish to concentrate in later sections on problems in the second and third areas. The discussion will, however, be clearer if a very concise account of all these norms is first given.

The family being a legal person, and all individuals also being legal persons, there is a clear distinction between relations of the family and those of its members. The family

---

[12] Wolff, "On the Nature of Legal Persons" (1938) 54 L.Q.R. 494, at p. 506. Wolff himself does not fully accept this view.

is the subject of relations of which members are not subjects, or of which they are subjects as other parties. The most important of these in practice are property relations. A family may hold property (family property), which is distinct from any property held by members. This will be discussed first, before other relations are taken up. The more important family property at present is rights in land, although this may change with economic development.

A family usually acquires property[13] in one of two ways. One is through the law of intestacy, which says that on a person's death intestate his property passes to his family. The second is through the rule that a family acquires property if one or more of its members do acts necessary to acquire property, using family resources such as family funds, or with the intention that that property accrue to their family rather than to themselves. Other modes of acquisition are less frequent. Property may be granted by will to a family (a process which seems to have been commoner among the Yoruba than anywhere else), or by gift inter vivos. And certain evidenciary presumptions may assist the family to acquire property, for example the presumption that if a member acquires property which is about to be lost to the family by execution of a judgment, his intention is to recover it on behalf of the family.

Once a family has acquired property, it has to be administered.[14] Property interests are composed largely of rights

---

[13] This subject has been more fully discussed for Ghanaian law in "The Acquisition of Family Land in Ghana" (1963) J.A.L. 136. For Nigeria there are discussions in the principal texts, particularly: Lloyd, Yoruba Land Law (1962); Derrett (ed.), Studies in the Laws of Succession in Nigeria (1965); Coker, Family Property Among the Yorubas (2nd ed. 1966), pp. 75-94.

[14] See for more details: Ollennu, Principles of Customary Land Law in Ghana (1962), Chap. 11; Bentsi-Enchill, Ghana Land Law (1963), Chaps. 2 and 3; Coker, op. cit., Parts II and III.

which can be enjoyed only by individuals, and cannot with convenience be enjoyed simultaneously and equally by all the members of a family. The law therefore provides for the orderly exercise of these rights (including that of alienation[15]) in accordance with certain policies. Generally the rights are exercised according to decisions of the head of family, who consults the principal members of the family. The head and principal members are called the management committee by Professor Bentsi-Enchill[16]; this is a useful title, which will be used here. The principal members are the heads of the branches, or the largest segments into which the family can be divided, together with any other members who have attained this status by general recognition of all the members. If the family is so small that it cannot be divided into segments which are themselves families, the principal members are all the members with full legal capacity. The head is elected by the principal members from among themselves, and may be removed from office by them for misconduct. In cases of disagreement within the management committee concerning proposed acts the head has a power of veto.

The family also has relations arising from the law of marriage. There is authority for the view that a valid marriage requires the consent of the families of the husband and wife, and that a valid divorce requires their participation.[17] Such evidence as there is suggests that the courts will regard the marriage payment as a payment by the family of the husband to the family of the wife. However, this area has not been much developed in the case law, and the current trend may be towards the recognition of legal relations in marriage only between the husband and wife and any children they may have, and against the recognition of either's family as a party to their legal relations.

---

[15] See "The Alienation of Family Land in Ghana" (1964) 1 U.G. L.J. 23; Bentsi-Enchill, op.cit., pp. 44-59; Lloyd, op. cit., passim; Coker, op. cit., pp. 94-130; Kasunmu and James, Alienation of Family Property in Southern Nigeria (1966).

[16] Bentsi-Enchill, op. cit., p. 16.

[17] See, e.g., Yaotey v. Quaye (1961) 2 G.L.R. 573.

A family may have rights to the custody of its infant members and to recover damages for the seduction of an unmarried female member. These are by no means established. It is possible that the courts will eventually prefer parents over families as the persons to hold rights in respect of individuals under disability. The example of Anglo-American law may be influential.

A family may have rights in an office. Thus chiefs are normally chosen from one particular family in the community, sometimes called the "royal family", which is described colloquially as the "owner" of the office. The process of selecting an occupant of the office includes the proposal of a candidate by the family, the nomination being determined according to norms similar to those for the management of family property. However, if the office carries authority over persons who are not members of the family, the approval of other groups is necessary to a valid appointment.

A family may be the subject of many other legal relations of which individuals are more commonly the subjects. For example, there have been cases in which families sued for defamation, and in which they have sued and been sued for trespass. Assuming that there is no necessary doctrinal objection to attributing a wide variety of acts and states of mind to corporations, there is room for a great deal of development here.

I shall now discuss at greater length those aspects of the law which give particular difficulty and on which there has been sufficient case law to provide some certainty about the general trends of development.

The Ordering of Internal Affairs

I have mentioned the need for rules to prescribe the modes whereby individuals enjoy rights which are vested in a family, but which cannot be enjoyed simultaneously by all members. I stated also the general rule that the head of family, in consultation with the rest of the management committee, determined in each case what should be done. In principle, this one rule, with specifications of the constitution and mode of decision-making of the management committee, could be sufficient to dispose of the question. In practice,

the courts have not found it possible to leave matters there. They have been faced with cases where it was argued that management committees were behaving unreasonably, and they have not always refused to intervene. Thus the general problem has been, how far should the courts allow families to act as self-governing bodies, or, to put the same question differently, how detailed a set of legal rules is needed here? The question has arisen in several contexts.

Some questions have concerned the rights of the individual family member in respect of the income from family property. The courts have asserted a general principle that each member is entitled to benefit from, and particularly to be maintained from, the family property. It is possible to develop from this proposition an enforceable right to an ascertainable portion of the income from family property. The Nigerian courts have done this, stating that the benefit of family property must be shared in fixed proportions among the members, and enforcing this division. The head of family has a discretion in some cases to choose between two formulae for sharing, but beyond this it is a matter for the courts.[18] The Ghanaian courts, on the other hand, have generally maintained that it is for the head of family to decide what each member should receive. Only in respect of the Anlo Ewe is there an exception. There it has been held that, when a man dies intestate and his family inherits his property, each of his children is entitled to an equal share of the benefits.[19]

The autonomy of the family has also been called in question when members have claimed the capital of family property. The possibility of partitioning family property, so that the portions become the individual property of the members, has long been accepted for the patrilineage. The situation in which the question usually arises is that, a man having acquired property and died intestate, it has passed to his descendants, and they wish to partition it among themselves, or to sell it and divide the proceeds. The Nigerian cases have held that any dissatisfied member may apply to the court for partition, which will be ordered if the court is satisfied that this is

---

[18] Dawodu v. Danmole (1962) 1 All N.L.R. 702, (1962) 1 W.L.R. 1053.

[19] Tamakloe v. Attipoe (1951) D.C.(Land) '48-'51, 378.

desirable in the circumstances. If partition is not practicable the court can order a sale and division of the proceeds. The Ghanaian courts have been much slower to accept these possibilities. It was only recently that they clearly disapproved earlier suggestions that matrilineal family property was "indivisible."[20] However, having embarked on this course, they have recently gone nearly as far as the Nigerian courts. The view now is that a court will order a partition of family property on the application of a member if he establishes that there are good grounds, such as a split in the family going beyond mere dissatisfaction, that a partition would be advantageous to the whole family, and that the property is capable of being partitioned.[21] If a member can effectively threaten to obtain a partition, he may be able effectively to demand a proportion of the income. However, it seems clear that generally the Ghanaian courts will not directly enforce the latter claim. Moreover, although the Nigerian courts are willing to do this, they also insist that the member cannot deal with his rights in family property by granting them to outsiders, either outright or as security for debts.

It is often said that every family member has a duty to assist his family, especially when a failure by the family to fulfill its obligations to outsiders is liable to lead to the loss of family property. Neither the Ghanaian nor the Nigerian courts have translated this general proposition into a definite legal duty.

Another question of the degree of judicial control of family affairs may be involved in the problem already noticed of the extent of an inheriting family. It was suggested that perhaps an earlier set of social norms gave rights of control to a wide lineage, while providing that this wide lineage ought normally to permit the benefits of the property to accrue to the narrower lineage, the "immediate family" of the deceased. It was suggested that the courts were moving to the conclusion that the more substantial rights vested without qualification in the immediate family. If the speculation as to the earlier state of affairs was correct, the courts have in effect intervened in family affairs again by determining that they will in

---

[20] Foriwaah v. Fordwuo, C.A. 6th Aug. 1969 (1970) C.C. 5.

[21] Adabla v. Kisseh (1972) 1 G.L.R. 43.

all cases enforce the social rights of the immediate family alone.

The problem of the extent of judicial involvement has arisen also in respect of the process for determining the individuals who are to hold particular offices.[22] Each family, whether immediate or extended, normally has a head, although this may be unnecessary for a very small group with no property. On an intestacy the family of the deceased appoints a "successor" to the deceased. The successor assumes certain of the duties and rights of the deceased individual, and exercises over his property (which has now become family property) the powers of a head of family -- indeed, for the purposes of this property he may be considered a head of family.[23] The Nigerian cases have suggested that the assumption of the offices of head and successor is largely automatic, being governed by principles of seniority. The Ghanaian cases, concerned mostly with matrilineal families, illustrate a conflict of policies. Earlier cases suggested that the offices were elective in the sense that the principal members could choose whomever they wished. During the past two decades there have been a number of holdings to the effect that the electors may not "pass over" a candidate except for good reason, and that if they do the courts will annul the election or even declare that the rejected candidate has a right to be appointed. The implication is that there are social norms determining seniority among candidates and the grounds on which the most senior may be rejected, and that the courts will enforce these norms. When the question of removing an office-holder for misconduct arises, the Ghanaian courts have held that a certain procedure must be followed, and certain legally-defined grounds for removal must be established. The courts have suggested that they are prepared to accept family councils' decisions on questions of fact, as they do those of inferior tribunals, and subject to the same

---

[22] See generally: Coker, op. cit., pp. 169-70; Ollennu, The Law of Testate and Intestate Succession in Ghana (1966), Chap. 14.

[23] It is possible that what is to be said of these offices applies also to such positions as that of a royal family's candidate for the chieftaincy or other public office, although this has not been determined.

limitations. Beyond this, they assert the primacy of legal norms, enforced by themselves, over the family's discretion.

On the other hand, the courts have not intervened in respect of the head's handling of family funds. Attempts in Ghana by family members to sue for accounts of family funds have been rejected. In Nigeria the law is not fully settled. The most recent reported decision, while not committing the court, lays some stress on the objection to court orders for accounts.[24] The objection is not that a family member cannot sue the head -- he clearly can -- but that the head has a discretion in his use of family funds, so that he cannot be required to pay any particular sum to anyone. The principle has been assailed by writers, who are concerned at the failure of the courts to enforce social norms requiring the head to use the funds "reasonably", and to consult and inform the principal members about his acts as head.[25] But the courts have decided that in this area families must arrange their own affairs, and that the courts will not even intervene to secure information for the members. The latter can have judicial assistance only if they decide, on approved grounds, to remove the head from office. The one established exception to this concerns the Anlo. We have seen that there, in certain circumstances, a member is entitled to a precise share of the benefits of family property. It has been held that, because his interest is fixed, he may enforce it by suing the head for an account.[26]

Another problem involving the particular rights of a family member concerns the situation where one or more members have acquired property for their family. For example, a wealthy member may build a house for his family. Is such property subject to the normal principles, under which it is, for example, saleable by decision of the management committee, or does the acquirer have special legal rights in it? The courts seem

---

[24] Taiwo v. Dosunmu (1965) 1 All N.L.R. 399.

[25] See especially: Bentsi-Enchill, op. cit., pp. 95-108; Asante, "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana - A Comparative Study" (1965) 14 I.C.L.Q. 1144, at pp. 1164-73.

[26] Tamakloe v. Attipoe, above note 19.

willing to confer special rights on him. They have said that he holds a "life interest", but have not yet succeeded in finding a satisfactory formulation which will protect the acquirer's interest while maintaining the family nature of the property.[27] While the details are not yet clear, there seems to have been a decision to intervene, and not to leave this matter to the discretion of the head and principal members.

Other examples of the problem of determining the proper extent of judicial involvement in the internal affairs of families are more conveniently discussed in the next section, on the external relations of the family. Those already given should be sufficient to illustrate the problem. There are reasons which might incline one to the conclusion that once the law has conferred corporate personality on the family, it should concern itself as little as possible with its internal workings. The standard arguments for democracy and self-government of small communities are generally applicable to the family unit. Moreover, it is impossible for courts to supervise the detailed day-to-day domestic relations within a family. On the other hand, it is inevitable that the courts will be faced periodically with hard cases: cases where the decision-making process within a family is alleged to have produced grossly unjust results. For example, a needy member of a wealthy family may have been totally neglected, or a management committee may have arbitrarily passed over a candidate for headship. In such a case a court will find it difficult to refrain from substituting its own decision for the family's.

The trend of development has been towards increased intervention. One might postulate a hypothesis that courts will, in the absence of opposition, generally tend to extend their scope of intervention in the affairs of people and institutions. If this is not encouraged by a system of judicial renumeration from court fees, as during much of English history, it will be provoked by the regular, nagging presentation of hard cases. In some areas there will be an opposing

---

[27] One case is discussed and criticised in "The Acquisition of Family Land in Ghana", above note 13, at pp. 142-44.

principle, such as the constitutional principles of federalism or separation of powers. In the field of family law there is likely to be no such opposition. Moreover, any attempt at judicial creativity, at leadership of society by the courts, tends to produce more judicial activity on related questions. Thus we have seen that the courts have made a few, very limited modifications in family membership, one of which was the addition of domestics and their descendants. This development could be without effect unless the courts are prepared to intervene and ensure that former domestics are accorded the privileges of membership. If the courts refuse to enforce a member's social right to benefit from family property it will be possible for families to exclude former domestics from these benefits. Insofar as the courts do intervene to ensure consultation of principal members on alienation of family property (to be discussed in the next section), and appointment of heads by seniority, they have been able to uphold the rights of former domestics. Thus they have invalidated family decisions reached without consulting domestics where the legal status of those domestics was that of principal members with a right to be consulted.[28]

Eventually judicial intervention could lead to the destruction of the corporate personality of the family. Thus the courts may enforce the right of the individual member to benefit from family property. Creditors of a family member can then argue that his assets include his interest in family property, as they have attempted to do in both Ghana and Nigeria. The creditor's argument will be strengthened if, as is possible, the member has used his family's wealth to improve his own credit-worthiness. A creditor's enforcement against a member of his individual obligations could then affect family property. This would mean that the distinction between property of a family and property of a member, hitherto rigidly maintained, would be weakened. Family property would come to resemble property held by the members as co-owners. Thus co-ownership would replace ownership by the corporate person of the family. The survival of a corporation seems to be precarious if the members have more than relatively minor legal rights against it. Customary rights of "assistance" or

---

[28] Bassil v. Honger (1954) 14 W.A.C.A. 569; Ambradu v. Mansah (No. 2) (1947) D.C. (Land) '38-'47, 346.

"sharing" could hardly be minor. Ghana has generally resisted the argument by maintaining that the member has no enforceable right to a specific proportion of family property. Nigeria has accepted that he has, but has so far held that the right is not cognisable by outsiders.

The Conduct of External Affairs

When legal personality is conferred on an individual there is little theoretical difficulty in applying to him rules the conditions for which are human acts and states of mind. The acts and states of mind of the individual are usually attributed without question to the legal persona with which he has been endowed. Indeed, we often do not distinguish between the individual and his legal persona.[29] When legal personality is conferred on a group of individuals, it is necessary to provide a formulation of the circumstances in which acts and states of mind of individuals will be attributed to the corporation.

In providing such a formulation in respect of the family certain conflicts of interest require resolution. We may distinguish between acts which result in the acquisition of rights, and those which result in the disposition of rights, or between acquisitive and dispositive acts. Certainly, many transactions, such as the acquisition of land for a money payment, require acts of both types. Strictly the different parts of such a transaction could be taken separately, and it might sometimes be found that part of the transaction was attributable to the family, and part not. However, in practice attention is focussed on the more prominent aspect of the transaction. Thus land is regarded as a more significant type of property than any other, so that the purchase of land can be regarded as essentially acquisitive, and its sale as essentially dispositive.

The conflict of interests involved in acquisitive acts is a conflict between the member who does the acts, and the family. The interest of each is in the ready attribution of acts of acquisition to himself or itself. In terms of social interests, this is a conflict between the maintenance of the

---

[29] The theory of legal personality adopted here is that argued by Kocourek, Jural Relations (1927), Chap. XVII.

family as a social institution, which is presumably fostered by its holding of property, and the encouragement of individual effort, fostered by individual rewards. I believe it is possible to trace a steady trend from support of the former to the latter. Originally there was a strong presumption in favour of the family, with a prohibition on individual holding of certain types of property. Today there are probably no prohibitions, and the person to whom the act of acquisition is attributed is determined by reference to the intention of the actor, with at most a very weak presumption in favour of the family. The family is an automatic beneficiary only if the acquisition involves the use of property which is clearly still vested in the family, with no significant contribution by the actor. The decisions probably reflect the changes in social valuation of the interests. The policy choices are fairly clear.

In the case of dispositive acts, a different problem arises. The question might be viewed as a problem of internal affairs, because it concerns the exercise of the right of alienation vested in the family. However, since it also raises another conflict of interest, it is discussed separately here. It is in the interest of outsiders who have dealings with the family that it should be as easy as possible for someone to act on behalf of the family. For example, a would-be purchaser of family property would prefer the law to allow a bargain and conveyance by one member to constitute an effective disposition of family property. On the other hand it is in the interest of members of the family that no disposition should occur until consultation and deliberation have ensured that the members generally agree to it, and unless it is in reality to the benefit of the family. Several types of dispositive acts have been discussed in the case law.

The clearest type is the express grant of family property. The first stage of legal development here was a dispute over an extreme position: some were prepared to assert that such alienations were impossible. This view was defeated, and replaced for a while by the view that they were possible only when essential to defray family debts. This in turn has been rejected in favour of the view that they are valid provided that the requisite individuals consent. It might perhaps have been determined at this stage that the head's acts would be attributable to the family. This, however, would have increased his authority within the family

beyond an acceptable level. The courts adopted the view that, whoever performed the act, it was to be attributable to the family only if the head and the principal members consented. A large and not fully self-consistent body of case law suggests that all principal members should be given an opportunity to express their opinions; but that those who avoidably fail to do so may be disregarded, as may possibly an insignificant minority who oppose alienation. There is still some uncertainty, but it is not extensive. A further doubt centres on the situation where the head of family consents to the alienation, but it does not have all the other requisite consents. Some authorities take the view that such an alienation is voidable, and others that it is void. A voidable alienation is more likely to become fully effective if the family does not take prompt steps to recover the property. The long-term trend is clearly towards increasing recognition of the interest of the outsider.

Related to the power to alienate is the power to litigate. Here the authorities started with the rule that the head of family alone represented the family in court, but it was found necessary to introduce exceptions. Giving the head this function exclusively would again have produced an undesired balance of power within the family. Moreover, since acts done in litigation can have the effect of an alienation of family property, such a rule would have been inconsistent with the emerging rules on overt alienations. The courts therefore developed rules that if the head refused unjustifiably to litigate, a principal member could do so, and, failing that, even a member who was not a principal member. For the normal case, where the head litigates, there have been some suggestions that his acts are not attributable to the family unless they are done severally with the consent of the principal members. If this view were followed, the interest of the outsider would be significantly subordinated, because he would have at every stage in litigation to investigate whether consent had been given.

One development is of interest in respect of both alienation and litigation. The leading Ghanaian case on litigation states that a junior (non-principal) member is entitled to litigate on behalf of the family to preserve family property "where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a

whole."[30] While this dictum was strictly concerned with locus standi, the implication is that an alienation would not be valid, even if consented to by all the members of the management committee, if it were "to the detriment of the family as a whole". This, if followed, would represent a swing towards preference for the interest of the family as against that of the outsider.

Thus far I have discussed acts of acquisition and disposition. The state of mind of the acquiring person is not usually important in acquisition, but is relevant, and in some instances more prominent than acts, in the disposition of property. This applies particularly to the doctrines of acquiescence, waiver and forfeiture for misconduct. There has been little discussion of whose state of mind may be attributed to a family. Such authority as there is suggests that only if all the members of the management committee know something can the family be said to know it.[31] While this may appear consistent with the principles of dispositive acts, it could, because of evidentiary difficulties, also be strongly favourable to the interest of the family.

Also relevant is the earlier discussion of the extent of the lineage which holds rights. I have suggested that the trend has been towards vesting all rights in a relatively small lineage. This applies to rights of alienation. It also tends to favour the outsider, given the other rules, because the members of the management committee of a small family are likely to be more accessible than those of a wide family. Thus it is easier to obtain the requisite consents to an alienation.

The main long-term trend seems to have been favourable to the interest of the outsider, but some recent minor developments have favoured the interest of the family. It is tempting to express these conflicting interests in wider terms. The interest of the outsider, in so far as it is concerned with ease of alienation and security of purchasers' titles, appears to be part of a social interest in economic efficiency and

---

30 Kwan v. Nyieni (1959) G.L.R. 67.

31 See e.g., Ohimen v. Adjei (1957) 2 W.A.L.R. 275.

development. The interest of the family, in so far as it is concerned with the maintenance of long-standing social relations, appears to be part of a social interest in tradition. However, the economic-development-versus-traditional-life-style characterisation is perhaps too crude. A case could be made for the view that the values of co-operation and emotional security maintained by the family are conducive to economic development. Empirical investigation of this possibility, if feasible, would be desirable.

One other aspect of the external relations of the family needs mention. I have discussed acts and states of mind related to acquisition and disposition of family property. This meant that acquisition by succession on death did not need discussion. It does not in most respects raise special problems of external relations. Where, however, the deceased leaves obligations as well as, or instead of rights, a problem does arise. Obligations to ordinary creditors need mention here; obligations to spouses and children will be discussed in the next section. Where a deceased leaves debts it seems that social norms used to, and possibly still do require that the family pay them all, normally through the successor whom it has appointed. The courts treat this as a legal duty, but apparently only to the extent of the assets left by the deceased.[32] Consistency seems to support this conclusion, because during a member's lifetime his family is not legally liable for his debts, which can therefore be enforced only to the extent of his individually-owned property. This seems to be another instance of the strict distinction between the _personae_ of the family and the member. It results, however, in the curious situation that debts which have become family debts are enforceable against only some of the family's property.

---

[32] The question is discussed in Ollennu, _The Law of Testate and Succession in Ghana_ (1966), pp. 211-17.

Family Relations Arising From Marital and Parental Relations

The customary law of marriage and infants is strangely undeveloped in the cases. The general, tentative statements made earlier on the role of the family in these respects are nearly all that can be said at present. There is considerable potentiality for interesting development here. For example, one would like to know whether the role of the family in the contracting of a marriage will result in its having rights and obligations towards either of the parties or to children of the marriage, and if so which members will represent the family for their enforcement.

The only problems which have much case law are those which arise on the death of the individual male member who is a husband or a father. Men have duties of maintenance in respect of their wives and children. Hence their death can threaten hardship and give rise to claims intended to prevent it.

The position of the widow was initially governed by the social principle that the marriage was not terminated by the death of the husband. His successor therefore succeeded to his duties, including the duty of maintenance, and to his rights. This seems to suggest that the husband's family, as well as the husband individually, was a party to the original marriage.[33] However, the obligation of the successor was rendered less effective by the relative ease of divorce, by which a husband or his successor and their family could terminate it. Perhaps the successor's decision to take advantage of this possibility would depend on the various social pressures on him in each particular case. Rattray, writing of the Ashanti, seems to have regarded this duty of maintenance as not "legal", even in the sense in which he as an anthropologist used the term.[34] The question has not arisen in the courts until fairly recently. They have indicated that they are willing to impose a legal obligation of maintenance on the successor to the extent of the estate of the deceased. The

---

[33] This does not seem to apply on the other side, all obligations normally terminating after the funeral of the wife. Sororate is rare. The marriage payment may be returnable by the wife's family if the wife dies young and childless.

[34] Rattray, Ashanti Law and Constitution(1929), pp.28, 29, 31.

details of this obligation have not yet been worked out.

In most cases there is no serious problem concerning the children of a deceased male. When the family is a patrilineage they belong to it, and if they are infants they therefore have a right of maintenance as members which the courts are often prepared to enforce. If they are all infants they do not have the capacity to administer the property. In that case the next wider patrilineage with competent members supplies someone to adminster the property, but not as a head of family, and subject to a liability to account in court.[35] The problem is where the family is a matrilineage, a problem which has come before the courts in Ghana only. Probably the earlier practice would have been for the children, if they were residing with their father's family at the time of his death, to move soon afterwards to their own family. If, however, they wished to stay, and behaved reasonably, it would have been thought wrong to turn them out. Their remaining in residence would have meant in effect that they were maintained. In 1963, in a judgment since regarded as decisive of the law, the Supreme Court held that the children had a legally enforceable right to be maintained out of their deceased father's estate.[36]

These developments have a clearer appearance of judicial legislation than most others which have been mentioned. In so far as there were social obligations of maintenance there seems no ground for supposing them to have been restricted to the extent of the estate of the deceased. It is more likely that they were regarded as having been family obligations even during the lifetime of the deceased, which he had discharged on the family's behalf, and which his successor had assumed, also on the family's behalf, on his death. The courts have probably been influenced by the modern conception of the situation in the common-law world. This is that a man's widow and children, being his closest relatives, should individually inherit substantial shares of his estate on his intestacy.

---

[35] Tamakloe v. Attipoe, above note 19.

[36] Manu v. Kuma (1963) 1 G.L.R. 464.

This could not be directly applied, because it was totally alien to the social institution and to the existing customary law. By the time the problem arose in court it was already established that the estate paseed to the family. It was also clear that the family did not regard the widows, or, if a matrilineage, the children, as members. For the courts to try to insist that they were members would not have been practicable. Further, it had for long been clear that the family's obligations to these persons were indefinite and fragile. Had the courts asserted an unlimited family obligation of maintenance, they would have been aiming at a considerable change in the social practice, and this would have been perceived as legislation. In fact the courts did invent a new norm, but it was one designed to strike a compromise between existing practice and an ideal.

Since the consequences have yet to be worked out, it is not clear what proportion of the average estate will be consumed by these obligations. A recent case concerning children asserts that the successor is bound to use the estate towards the maintenance and education of the children down to the last pesewa.[37] If this argument is continued, families may often find that their right of inheritance make s them little more than trustees.

Ad Hoc Variations

There have been instances where the usual rules so far discussed have been varied by express stipulation. These have been few hitherto, but are of great potential, since they indicate the possibility of adapting the established, familiar institution of family property to new needs. The instances fall into two patterns. One has occurred in Nigeria and one in Ghana, but there is no clear explanation for the geographical division.

In Nigeria a number of persons have made wills disposing of property to families. Sometimes the beneficiary was the family which would have inherited on intestacy, and sometimes a wider lineage. They have then added conditions to the gift varying some of the rules which would otherwise have applied.

---

[37] Rhule v. Rhule (1973) 1 G.L.R. 41.

For example, in one case a testator left a house to be held in trust for his patrilineal descendants, as family property, providing that it should "remain as my family house with the incidents of native law and custom thereto attaching." He also added a prohibition on alienation for a period, and a proviso that any child who insisted on partition should forfeit his interest.[38] Thus the property was to be family property according to the usual rules, except that it was not to be alienable or divisible.

In Ghana the variation has been in the rules governing membership, rather than in those of administration. In several cases property has been acquired by or given to groups which would not normally have constituted a family. It was nevertheless provided that the group should hold the property as if it were a family, thus constituting it a family for this particular purpose, and importing the norms governing the administration of family property for the administration of this property. In one case, for example, land was given by a man who had children by three wives to all his children, who would not necessarily have belonged to the same family. The court held: "The law relating to a gift by a father to his children as I understand it operates to constitute the children into a 'family' for the purpose of holding and enjoying the said property, if it is land. ... irrespective of their several other family affiliations."[39]

We see here a development analogous to that of the old English strict settlement. The general public has a fairly accurate idea, one may assume, of the norms relating to family property, just as the English land-holding class understood the common-law freehold estates. There are thus advantages in arranging for land to be held as family property: both settlor and beneficiaries understand what to expect, and generally regard the institution as operating fairly. But the established institution may not be precisely the arrangement a settlor wishes to adopt. He may wish, for example, to ensure that the property cannot be partitioned, or he may wish the membership to be a different group from that which it would otherwise be, just as an English settlor wished the fee tail which he granted to his descendants to be unbarrable.

---

[38] Balogun v. Balogun (1935) 2 W.A.C.A. 290.

[39] Mensah v. Lartey (1963) 2 G.L.R. 92, at pp. 95-96.

Therefore, while retaining the advantages of using a known institution, the settlor makes specific variations tailored to his needs. The Ghanaian or Nigerian grantor adds a condition or specially defines the family membership; the English settlor adopted various devices to make the entail unbarrable.

Unlike the English example, the Ghanaian and Nigerian examples so far encountered have not been opposed to any policy consideration which induced the courts to invalidate or modify them. Such instances could arise, if for example attempts were made to deprive the family permanently of all powers of alienation. However, subject to the need for judicial intervention in such cases, there are considerable possibilities for the future. In particular the legal institution of family property could be exploited by those who wish to make settlements of their property, and by those who wish to join together in co-operative enterprises.

Theories of Corporate Personality

In conclusion some of the theories of corporate personality will be briefly discussed in the light of the experience of the legal personality of the Ghanaian and Nigerian family.[40] The theories have attempted to explain "the nature" of legal persons, i.e. of the subjects of legal relations. Much of the divergence of opinion may have arisen because a problem so expressed is regarded by different writers as posing different questions. However, even if some of the questions are not important, and some are purely verbal, the theories may contain useful insights.

The number of theories is almost as great as the number of writers who have discussed the problem, and they are many. For the present purpose a very brief reference to a few will suffice. Most fall into three very broad categories.

---

[40] It does not seem useful to give my personal selection of citations for theories which have been so often discussed. I have used as a guide to the sources Dias, Bibliography of Jurisprudence (2nd ed. 1970).

Firstly, the organism, or realist theory says that legal persons are real persons, each having an existence and a will of its own, which in the case of corporations are distinct from those of the human beings who form it. Gierke in particular developed this view, arguing that German law merely recognised the groups which in German society had corporate personality. Secondly, the fiction theory contends in opposition to the organism theory that only human beings (individuals) are really persons, and that when such bodies as companies and states are called legal persons the law is engaging in a fiction. Related to this is the concession theory, which says that legal personality is conceded by the law-making authority or the state, and asserts that this concession is a discretionary matter. Also related to the fiction theory is the collective, or bracket theory, which says that a corporate legal person is nothing but a collection of individuals, who for convenience are referred to in the aggregate, in a "bracket". This theory denies that there is even a fictitious person, but shows with the fiction theory the view that the law can be considered as an abstract structure without regard to its social courses. A third set of theories says that the dispute between the first two is of no importance, or meaningless, or purely semantic.

The adherents of the third view should at least persuade us to take care in the framing of the question we are to discuss. If the "nature" of a thing means anything, it presumably refers to one or more of its essential characteristics. Once one has defined the subject matter of the investigation, by saying that legal persons are the subjects of legal rights and duties, one has exhausted their essential characteristics. It is most unlikely that we shall find any other characteristic shared by, say, the customary-law family, the registered company, the corporation sole and the state. Thus there is no further "nature" to define. To ask instead whether corporations are "real" or "fictitious" persons is to invite purely semantic dispute. If law may be conceived of as systems of rules, which seems at least a tenable conception for the present purpose, it follows that legal concepts are not facts. Whether a concept is then said to be real or fictitious has no significance.

But there would appear to be one substantial problem in the dispute between the organism and the fiction theories, although it is often not stated expressly. This is whether

particular instances of legal personality in given legal systems correspond to anything in extra-legal social thought or organisation. The law cannot include all the rights, duties and other relations of a system of social norms: this has been argued above in respect of customary law. But it is still possible that the subjects of social and legal relations may be the same. In the case of individuals this correspondence exists. Society generally regards each individual as being the subject of social norms, and the law generally regards him as a person. In the case of corporations this is not always so clear. The organism theory takes the view that only social personality can give rise to legal personality, and that it ought always to do so. Advocates of the fiction theory emphasise all possible instances of a lack of correspondence between the two, and particularly those where legal personality has no corresponding social equivalent.

Taking the dispute in this limited sense, the customary-law family might almost have been invented to illustrate the organism theory. It was regarded socially as an entity from earliest times. It is conceivable that it was so regarded before society recognised individual human beings as persons, although this possibility need not now be discussed. As we have seen, it is so important socially that the courts ensure that every individual belongs to, or has the opportunity to belong to a family. The legal corporation of the family clearly corresponds to a "real" social entity.

It is generally intended by the courts that the rules of customary law be nearly as possible the same as the corresponding social norms. In so far as the courts accurately perceive social organisation, and there is no deliberate variation between legal and social norms, a legal institution such as the family can be said loosely to be a "real" person. It happens that in this area there appears to have been a relatively small divergence between the legal and social institutions, notwithstanding my earlier emphasis on the few cases of such divergence.

It may not always remain the case that the law confers corporate legal personality on exactly those groups who socially are "persons". The ad hoc family could become an important instance of divergence. Here a group which is not socially recognised as having a personality is consciously constituted a legal person. A point is scored for the fiction

theory every time a private transaction (as here) or a statute (as with public corporations in Ghana, Nigeria and Britain) confers legal personality on a group which is not a person for any other purpose. This legal act may later influence society to regard the group as a person, but at the initial stage it cannot be contended that the law is reflecting society's view. Modern legislative leadership of social development supports the fiction view; the application of a customary law already formulated by social action supports the organism view.

Conclusion

I have attempted to describe briefly the customary-law "family," with emphasis on the areas of difficulty which are of special significance for its analysis as a corporation. I suggested at the outset that the institution was unlikely to be exportable. It is obviously very different from the legal persons of modern Anglo-American law. Family property might perhaps have some similarity to the developing institution in some marriage laws of community, or household property, and if this "community" were to be enlarged to include children of a marriage the possible points of comparison would increase. Otherwise, possibilities of detailed comparison do not appear promising. However, the family provides another example for the general discussions of legal personality, and of certain questions concerning social control through law. Perhaps the main value of a study of the family, therefore (beyond its importance to lawyers and litigants in Ghana and Nigeria), is that this is an institution on which a sizeable volume of information is available, and which, because it is so unlike other institutions in other legal systems, adds to our general legal experience.