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Marcin Michalski¹

LEGAL THEMES IN THE MAQĀMAS OF AL-ḤARĪRĪ (1054 – 1122)

ABSTRACT: The paper deals with legal themes used by al-Ḥarīrī (1054-1122) in his *Maqāmas*, which portray various social situations typical of the Arab world of the author's time. This genre, characterized by ornate form and jocular contents, is a good tool of criticism of social phenomena like Islamic law or its language. Al-Ḥarīrī bases some of his *Maqāmas* on the ambiguity of the language of law, by which he consciously shows that such ambiguity exists. He also presents some cases examined by judges, including a charge of plagiarism, which at that time was not considered a legal matter.

KEY WORDS: Law; Arabic; *Maqamas*; al-Hariri

1. Introduction

It is no wonder that in a literary work like the *Maqāmas* of al-Ḥarīrī, which is a collection of depictions of various social scenes, legal themes should occupy an important position.² Legal settings or legal matters appear in seven *maqāmas* where they serve as frames or pivots for the story. In this article some of these legal themes used by al-Ḥarīrī will be presented. It will be argued that they were employed by the author not only for comic purposes or in order to show his skills in inventing puns, puzzles and curious situations, as some historians of literature prefer to claim, but that al-Ḥarīrī was well aware of linguistic ambiguities and that in one *maqāma* he showed a possible legal problem which was left outside the scope of the interest of Islamic jurists of his time.

There are five *maqāmas* narrating a trial, before the qadi or the *wālī* (governor). The cases concern: charge of plagiarism (*M.* 23), charge of murder (*M.* 10), charge of child disobedience (*M.* 37), a wife's accusation of

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² For basic information about Islamic Law see Schacht 1964, Bielawski 1995, and Danecki 1998.

her husband not fulfilling his marital duty (M. 45) and a wife's accusation of her husband having unlawful intercourse with her (M. 40). There is also one *maqāma* where more than 100 fatwas are being issued (M. 32) and one *maqāma* relating a legal puzzle concerning succession law (M. 15).

2. Al-Ḥarīrī's life

Little is known of al-Ḥarīrī's life. He was born in 1054 in Basra. At this time the 'Abbāsid dynasty in Baghdad had lost their independence and was ruled or controlled by various foreign groups (Persian Buyids and Seldjuk Turks). The Arab rulers were at these times unable to oppose themselves to non-Arab, viz. Persian and Turkish, influences. Such prominent men of culture of this age as Nasir-i-Khosrou and Omar Khayyam both wrote in Persian.

It is in this time, marked by political and cultural changes and considered to be the onset of the decline (*inḥiṭāt*) of the Arabic language, that al-Ḥarīrī lived and worked. He followed the normal courses for every well educated man in the Arab world: he studied Arabic and law (*fiqh*) and the tradition of the Prophet Muḥammad (*ḥadīth*). He was appointed by the caliph administration as *ṣāḥib al-ḥabar*, which was equivalent to chief of intelligence and meant extensive travels throughout the Arab world. He died in 1122, leaving 50 *maqāmas*, several letters, a treaty on language purity and another on grammar.

2. Maqāma as a genre

It is accepted that the *maqāma* as a genre was created by al-Hamaḍānī (968-1008).³ It had its roots in earlier prose works but al-Hamaḍānī is considered the author of the first and perfect *maqāmas*. The construction of a *maqāma* follows a constant pattern: in a typical *maqāma* of al-Ḥarīrī, the narrator travels from town to town through the Arab world, where he comes accross a respectable man in a financially difficult situation. The respectability of this man demonstrates itself in his pious, sage and, above all, ornate words (which

³ Polish translation of his *maqāmas* is al-Hamaḍānī 1983. For more information on *maqāma* as a genre and bibliography see Katsumata 2002. For social and political background of the origination of *maqāma* see Monroe & Pettigrew 2003: 158-161.

he utters as a preacher, a street-preacher, a teacher, a lawyer, a lawyer's client etc.). In most cases, his excellent Arabic makes his listeners or interlocutors give him some money. After the needy man goes away, the charitable realize that they have been duped: the man was the notorious Abū Zayd as-Sarūǧī, assuming various characters but following one aim: to swindle money out of naive people and spend it on wordly pleasures. It is in Abū Zayd's various "incarnations" that the reader of the *Maqāmas* gets to know the panorama of the Arab society of his age.

It has been sometimes claimed that the form of the *maqāma* surpasses its contents. Thus for instance, Świącicki calls al-Hamaḍānī's text "blabber" and "pointless rhymes" (1901: 233). Bielawski says that "in these works [scil. of al-Ḥarīrī] the contents give way to the form" (1971: 190). Similarly, Pellat states that al-Ḥarīrī's works "abounded in verbal acrobatics, to the detriment of the originality of the subject-matter and the interest of the adventures recounted" (1976: 149f). However, under the cover of what seems to be superfluous eloquence one finds interesting insights: social criticism, which has been remarked many times, and linguistic criticism, which the above mentioned scholars ignored. In the following, some legal themes as well as legal language and how it was used by al-Ḥarīrī not only for entertaining purposes but also for his linguistic observations will be discussed.

3. Judges

As it is the case in other *maqāmas* with respect to other aspects of life, in his "legal *maqāmas*" the author shows a jocular attitude towards law, lawyers and judges. His sometimes disrespectful treatment of such important functions as preacher or teacher does not spare venerable men of law. Al-Ḥarīrī amuses the reader with the outcome of situations in which the judge, moved by the eloquent depiction of the misery of the two parties, gives them money from his own pocket or public funds only to find afterwards that they had cheated him. On one hand we can see the judge portrayed as a naive dupe, who, being unable to solve the intricate problem, decides to satisfy both parties which leads to his own detriment. On the other hand, the judges are depicted as kind and sincere men of great understanding of Arabic language, able to appreciate others' education and wit, without looking at their poverty.

4. Plagiarism

In *Maqāma* 23, the narrator relates a legal action taken by an old man against a boy who had allegedly stolen his poem. The case begins with the formulaic blessing for the *wālī* and then the facts are presented. The man claims to have raised and educated the boy, who, having grown up, stole his poem. Here the Arabic terms for using others' words in one's poem are used: *idda'ayta* ('you unduly assumed'), *istallḥaqta* ('you annexed'), *intaḥalta* ('you took over'), *istaraqta* ('you stole'). Now, plagiarism, although much discussed among men of letters, was not a matter of legal actions. But al-Ḥarīrī put into the old plaintiff's mouth the following statement:

"For poets, literary theft is more outrageous than stealing silver or gold. And their jealousy for thoughts is like their jealousy for virgin daughters" (al-Ḥarīrī 1950: 168)⁴.

After the plaintiff recites his poem as well as the alleged plagiarism, which actually is an abbreviated original, the boy swears that he was not aware of the lines before he composed his own ones and argues that there occurred coincidence of thoughts (*tawārud al-ḥawāṭir*) because it happens that, as the Arabic idiom says, "a hoof may fall upon another hoof".

These terms are used in reference to coincidence of thoughts, which was much discussed by classical Arab critics and men of letters, who were not unanimous as to whether this was at all possible. With poets of old times who were dead, it was a difficult task to attribute the poem to one of them. However, there were even some modes of procedures of attributing poems to poets. Thus, one reads in the book of Abū Bakr al-Ṣūlī (d. 946):

"where two poets coincide over a thought or an expression or combine both, priority would be given to whichever of them is older; the one who was the first to pass away; and borrowing would be attributed to the younger, because this is most often the case. But if both belong to the same age, it would be attributed to the one with whose idiom it has a stronger affinity; should that be difficult, it would be conceded to both of them." (al-Ṣūlī 1937: 100f, quoted from and translated by Sanni 2001: 123).

In this *maqāma*, it seems that the *wālī* applies the above procedure, which must have been known to a person versed in literature like al-Ḥarīrī. Here, both poets are alive, so, it would follow from the procedure, neither

⁴ All translations from al-Ḥarīrī and the Qur'ān are mine unless stated otherwise.

of them is older. Thus the *wālī* decides to put them on trial as if in order to find out to whose idiom the poem “has a stronger affinity” and lets them make a poem in his presence, by making lines in turns. Both of them did it so well that the *wālī* believed in the *tawārud* and ordered the old man to give up his accusation (which he did only after he and the boy were given two gowns and a sum of money). As one can see, al-Ḥarīrī made the scene in court develop according to the procedure recommended by the Arab literary studies.

By placing the dispute in court, al-Ḥarīrī seems to ask whether it is possible, from the point of view of the Islamic law, to treat plagiarism as theft. Indeed, one of the terms for plagiarism is simply *sariqa* ‘theft’. As is commonly known, according to Islamic law theft should be severely punished.⁵ One of al-Ḥarīrī’s contemporaries, ‘Alī Ibn Aflah (d. 1141), rejected the existence of *tawārud* and argued that “Any poet found guilty of it should be seriously reprimanded and his membership of the poetical salon withdrawn” (Sanni 2001: 127). However, his view was rather isolated. Although the opinion varied from criticism to acceptance, plagiarism was not a matter of courts but of literary criticism.

However, Sanni relates one case (which he, however, finds “to good to be true”) where the question of attribution of a literary work had to be settled in a rather official way: when two pre-Islamic poets, Ṭarafa and Imru’ l-Qays, were quarrelling over the authorship of a famous line, “each of them brought records of events from his respective clan on account of which it was established that both had composed the poem containing the similar lines on the same day” (Sanni 2001: 129). It is also related that Ṭarafa had to swear that “he was not aware of the exemplar of Imru’ l-Qays” (Sanni 2001: 129).

Classical Arab historians of literatures tried to explain such phenomena by saying that similarity of impressions caused similarity of expressions. But of course, the nature of transmitting the poems, which initially was exclusively oral, could not have been without influence on occurrence of similar or even identic passages in two different works.

⁵ It is noteworthy that this argument seems to be based on *qiyās*, i.e. reasoning by analogy (words are precious things, consequently their appropriation should be treated like theft), which is one of the sources of Islamic law.

5. Succession

Maqāma 15 relates a puzzle concerning the law of succession. The puzzle consists in the following problem:

A man died and left his brother, a Muslim, freeman and pious, born of the same parents.

The deceased had a wife, who had a brother, a respectable person, with no fault. She took her part and her brother took the remaining part, while the brother of the deceased got nothing (al-Ḥarīrī 1950: 110).

Assuming that not mentioning any ascendants or descendants means that there were not any, one should say that the succession was divided wrongly, since according to the Qur'ān:

“if a man or a women leaves a succession and has no ascendants or descendants [*yūriṭu kalālatan*], but has a brother or sister, then each of them shall obtain one sixth part” (Qur'ān 4, 12).

But even if one assumes that the deceased had children, it is still not clear why his wife's brother should have anything of the inheritance while his brother should be omitted. The solution is given in the further lines of the *maqāma* (al-Ḥarīrī 1950: 112f):

The deceased, whose brother was omitted by law in favour of his wife's brother, Married his son to his mother-in-law [scil. the mother-in-law of the deceased] (...).

Then this son died, but his wife [the mother-in-law of the deceased] had child with him.

This child is the grandson of the deceased (...) and the true brother of the wife of the deceased.

And a grandson is closer to his grandfather [the deceased] and has more right to inherit than the brother [of the deceased].

Therefore when that one died, his wife was given one eighth part of the inheritance,

And his grandson, who actually is her brother from her mother, took what was left.

The full-brother was thus excluded from the inheritance (...).

It turns out that the man was granted the inheritance by virtue of being a grandson of the deceased, and not by virtue of being his wife's brother. The deeper sense of this riddle lies in the word 'brother,' which makes the solution difficult: Arabic has two words for brother: *aḥ* and *šaqīq*. The latter means a brother born of the same parents (full-brother), while the former may mean a brother sharing only the mother or only the father (half-brother), but more often than not is also used as the general term, including full-brother as well. This may lead to misunderstanding as in the case of this puzzle, where one is told about the wife's brother (*aḥ*) and what instantly comes to one's mind is not half-brother (although this is the precise dictionary definition of *aḥ*, known by most Arabs), but full-brother (which is the everyday use).

6. Marital obligation

Al-Ḥarīrī wrote two *maqāmas* concerning legal actions taken by women against their spouses. Both concern sexual problems but in none of them is there to find a direct reference to sex or human body. It is only by interpreting metaphors and allusions and equally allusive responses of the interlocutors that the reader arrives at the wife's true concern.

In *Maqāma* 40 the wife sues her husband for unnatural way of fulfilling his marital duty ("he enters the house through the rear gate"). Interesting as this story is from the point of view of history of morals and society, it is of lesser interest as far as legal language is concerned. More attention in this respect deserves *Maqāma* 45 where the problem lies in the unfulfilment of the marital obligation, or, more strictly speaking, fulfilling it only once. Here, the wife requires either the divorce or the proper treatment from her husband. What is of special interest here is not the theme itself, but the way it is presented. The very intimate problem is not addressed by its true name. The wife presents her case using only euphemisms – if one may thus term what some will consider sacrilege since the euphemisms are taken from the religious terminology: the sexual intercourse is alluded to as the pilgrimage to the Holy House in Mecca.⁶

⁶ In order to forestall any accusation of me being the only one to see indecencies in this text (with such sanctitudes as the hajj involved, an error would be grave) I hasten to make two observations: first, that the reading of the pilgrimage as sexual intercourse is indicated by the Egyptian editor (*taknī bi-ḍālika 'ani l-ḡimā'i*, p. 377, fn. 17) and second one, more convincing, that such reading is confirmed by the text itself (the husband replies: *miltu 'an ḥarīi* 'I turned away from my land' (p. 379; see below for the meaning of 'land'), and by the fact that every other reading makes little if any sense.

One translation of the charge presented by the wife is:

I complain about the injustice of my husband
who did not make the pilgrimage to the Kaaba but once.
I wish that he, after he had carried out his pious deed,
and relieved his backbone by throwing his stone,⁷

Had (...) connected the Great Pilgrimage with the Little one (al-Ḥarīrī 1950: 377f).

Of course, one could take these lines as the accusation against a man who did fulfil his religious duty, went to Mecca, but did it only once. But why should his wife sue him for that? It makes more sense to interpret it metaphorically. Yet perhaps one can even do without recourse to metaphors since it will suffice to translate the original text in a different way. By virtue of polysemy, the same Arabic text may assume a shape with no religious connotations:

I complain about the injustice of my husband
who did not *aim at the house* but once.
I wish that he, after he had carried out his pious deed,
and relieved his *back by throwing off his heat*,
Had (...) connected this *one travel* with [another] *visit*.

Other metaphorical euphemisms are used by the defendant, the husband, who argues that the reason for his sexual abstinence is the poverty which would make raising children impossible. His words are:

I turned away from my land not because I dislike it,
But because I fear for the seed (p. 379).

In this case the metaphor is taken directly from the Qur'ān, which says:

nīsā'ukum ḥarṭun lakum fa-tū ḥarṭakum annà šī'tum

Your wives are your arable land. So come to your land as you like (Qur'ān 2, 223)

In this place it can be noted that the author probably makes conscious use of his etymological knowledge. Numerous technical words and legal terms have their roots in everyday language. With time they became specific and their meaning got narrowed. Thus e.g. the verb *ḥaḡḡa* which meant 'to go in direction of, to aim for' was narrowed to mean 'to aim for Mecca' i.e.

⁷ The stone (*ḡamra*) is a pebble used by Muslim pilgrims for symbolic stoning of the devil during the pilgrimage.

‘to make the Holy pilgrimage.’ Similarly, *‘umra* originally meant ‘heading for inhabited place’ but changed its meaning to ‘Little Pilgrimage.’ Such examples are quite abundant. Some more frequent can be adduced:

qur’ān ‘recitation, reading’ > ‘Holy Qur’ān’

ḥadīṭ ‘speaking, tale’ > ‘tradition of the Prophet’

sunna ‘way’ > ‘sunna, body of *ḥadīṭ*’

fiqh ‘knowledge’ > ‘jurisprudence’

‘idda ‘number’ > ‘period of waiting during which a woman may not remarry after being widowed or divorced’ (Wehr 1974: 595)

mut‘a ‘pleasure’ > ‘temporary marriage contracted for a specified time for the purpose of sexual pleasure’ (Wehr 1974: 890)

zakāt ‘purity’ > ‘alms, alms tax’ (for purification of worldly things)

ḥağr ‘barring, closing’ > ‘revocation or limitation of someone’s legal competence’

This process is conditioned by the history and grammar of Arabic. Classical Arabic had no holy or technical language like Latin or Greek in Europe, since it itself is the holy and technical language. Consequently, it could not receive technical terms from other sources just like European languages drew from Latin or Greek. Secondly, although Arabic morphology allows semantic nuances to be reflected by form modification (today ‘reading’ is not *qur’ān* but *qirā’a*, ‘speaking’ is not *ḥadīṭ* but *taḥadduṭ* or *muḥādāṭa*), such modification was used rather infrequently to differentiate technical meanings from non-technical. An example may be:

ḥul’ ‘divorce at the instance of the wife, who must pay a compensation’ (Wehr 1974: 256), while *ḥal’* means ‘taking off, expropriation’.

7. Fatwas

Polysemy is also the pivot of *Maqāma* 32, the protagonist of which is asked 104 questions concerning jurisprudence (*fiqh*). These questions are solicitations of issuing *fatwas*. A *fatwa* is a legal opinion delivered by an Islamic authority called *muftī*, which can be an individual or an institution. Since Islamic law (*ṣarī’a*) regulates other domains of life than e.g. European systems, the subject of a *fatwa* can concern things that from the Western point of view could be considered a matter of theology or manners. A *fatwa* consists usually of two parts: the question asked by a *mustaftī* ‘asking for *fatwa*’ and the answer given by a *muftī*. Today a *mustaftī* can send a question

to a newspaper or television, since many newspapers and television channels have special space dedicated to it.

In *Maqāma* 32, Abū Zayd, the chief character, who claims to be versed in *fiqh*, is confronted by an eloquent young man who claims to have gathered from different *faqīhs* (jurists) all over the world 100 fatwas. A kind of competition takes place and the young man asks Abū Zayd questions concerning various domains of *fiqh* including ablution, prayer, imams, fasting, alms, pilgrimage, trade, ritual sacrifice, interpersonal relations, legal competence, legitimation as ruler, legitimation as witness, apostasy, murder, theft and marriage. Now, each of these question is answered in a way contrary to the common sense and, indeed, to an average *faqīh*'s expectations. Here is the first instance, concerning ablution, with the Arabic original:

Q: What do you say if someone has made his ablution and then touched the back of his shoe?

Q: *mā taqūlu fi-man tawaḍḍa'a tumma lamasa zahra na'lih?*

A: His ablution was made void by his action.

A: *intaḡaḡa wuḍū'uhū bi fi'lih* (p. 251).

Touching the back of one's shoe does not make one ritually impure, in other words does not make the ablution void. The solution is that the word *na'l* has more than one meaning. One suggests itself, but second, less frequent or archaic, must be looked for. In fact, the appropriate explanation for the word *na'l* is not found in the vocabulary of contemporary Arabs nor in today's dictionaries of Arabic (e.g. Wehr or *al-Munğid*). But it can be found in Fayrūzābādī's *al-Muḡīṭ* from 14th century: it means 'wife'. However, one can not state that due to its remoteness, the remote meaning is less justified. Other examples are:

Purity:

Q: Is it permitted that a *dāris* [student/menstruating woman] carry Qur'āns?

A: No, not even if they were enveloped (p. 253).

Fast:

Q: Can a man break his fast when the *ṭābiḡ* [cook/fever] insists?

A: Of course, but it must not be the chef (p. 255).

Alms:

Q: Do those who have *awzār* [sins/arms] deserve a part of alms?

A: Yes, if they are warriors (p. 256).

Food:

Q: What do you say on *maytat al-kāfir* [the corps of an infidel/fish swimming near the surface of the sea]?

A: It is permitted [to eat it] both to those who are in travel and those who are not (p. 258).

Q: Is it forbidden for a *ḍimmī*⁸ to perform *qatl al-‘ağūz* [kill the old woman/mix wine]?

A: One must not forbid him to do that (p. 259) .

Customs:

Q: What do you say on *ṣabr al-baliya* [suffering misfortune/tethering a she-camel to the grave⁹]?

A: It is a very grave sin (p. 260).

Legal competence:

Q: May the judge *yaḍriba ‘alā yad* [hit upon the hand of/declare legally incompetent] an orphan?

A: Yes (...) (p. 261).

Crimes:

Q: What should be done to the *muḥtafi* [stay-at-home/grave plunderer], according to law?

A: He should be sanctioned, so that he be prevented from it (p. 263).

From the fact that the word *zawḡa* ‘wife’ has the synonym *na‘l*, which in turn has the homonym *na‘l* meaning ‘shoe’, arises ambiguity. Not always is it possible to be sure that what one sees and thinks is what is really meant. This may have negative impact on everyday life but such an uncertainty is particularly dangerous in language of law.

Of course, every Muslim knows that, for instance, a non-Muslim is allowed to make wine. These fatwas are not very innovative. They do not give any new insight into Islamic law. But they do provide insight into its language. One could say that al-Ḥarīrī did not aim to show any possible ambiguity in language, that what he put in his *maqāma* was simply a literary entertainment, play on words. But in the same way as jokes must have foundations in serious life in order to be more than just amusing, the contents of *maqāmas* can not be totally abstracted from reality in order for generations of readers to want to read them. Indeed, ambiguities of this kind do occur in everyday legal practice. Everyone who at least superficially

⁸ A free non-Muslim.

⁹ A pagan custom, prohibited by Islam.

came into contact with problems of Islamic law must have come across such difficulties: the much discussed problem of what really jihad (*ḡihād*) is may be the first example. Another one is the Qur'ānic commandment to cut the hand of a thief:

wa s-sāriqu wa s-sāriqatu fa qṭa'ū aydiya-humā ḡazā'an bi-mā kasabā
 'as for the man and woman who have stolen – cut their hands as punishment for what both of them have gained' (5, 38).

The verb *qṭa'a* does not necessarily need to mean 'cut off', it may also have the meaning: 'to stop' or 'to prevent'. Compare for instance the above fatwa about the grave-plunderer which should be subjected to *qṭa'*, i.e. to prevention or sanction. It is also used in another line in the Qur'ān (12, 31), where the women who have heard about al-'Azīz's wife planning to seduce Yūsuf were given knives and when they saw Yūsuf, they were so impressed by his externals that they *qṭa'na aydiya-hunna*, which rather did not mean 'cut their hands off' but 'cut' or 'injured their hands'.

Another very important problem concerns the interpretation of the Qur'ānic regulation on punishing disobedient wives. The crucial verb *ḍrubū* (4, 34) is translated as "(And last) beat them (lightly)" by Yusuf Ali (1987), as "scourge them" by Pickthall (2000), and as "beat them" by Shakir (1999). One of the Qur'ān translations into Polish (via English) renders it by:

poddawajcie je karze

'subject them to punishment' (*Święty Koran* 1996: 202).

8. Conclusions

It seems justified to see in al-Ḥarīrī's works a conscious treatment of Islamic law as an important theme in his *Maqāmas*. Islamic law, which according to Bielawski is "a sort of summary of Islamic thought, the most typical manifestation of Muslim way of life" (1995: 100) was chosen by al-Ḥarīrī to be the basis for several of his *Maqāmas*. In them, he tacitly but convincingly pointed to the ambiguity of the language of Islamic law and to polysemy of its vocabulary. On the pretext of entertaining, he presented a situation which could not have taken place in the then world but is something normal in our courts and thus, in promoting plagiarism to the rank of a legal matter, al-Ḥarīrī anticipated the modern idea of settling such disputes with recourse to the law. It seems that by how he used legal themes in his works, he showed a good deal of critical sense with respect to the legal system and the society in which he lived.

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Motywy prawne w *makamach* al-Ḥarīriego (1054-1122)

Wśród przedstawionych w *Makamach* al-Ḥarīriego różnych sytuacji społecznych typowych dla świata arabskiego z czasów życia autora nie mogło zabraknąć zdarzeń związanych z prawem. *Makama*, jako gatunek popisowy w formie i rozrywkowy w treści, doskonale nadawała się jako narzędzie do krytycznych obserwacji dotyczących prawa i języka prawa muzułmańskiego. Al-Ḥarīrī opiera swe *makamy* na wieloznaczności języka prawa dla celów artystycznych, lecz jednocześnie świadomie pokazuje, że taka wieloznaczność istnieje. W swych utworach umieszcza też rozprawy prowadzone przez sędziów, m.in. sprawę o plagiat – spór, który w jego świecie nie stanowił przedmiotu zainteresowania prawa.