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Family law in Sierra Leone: a research report

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Family Law in Sierra Leone

A Research Report

Afrika-Studiecentrum - Leiden 1975

FAMILY LAW IN SIERRA LEONE

A Research Report

by

Barbara E. Harrell-Bond and Ulrica Rijnsdorp

with contributions from

Mr. J. Sanpha Koroma and Mr. L. C. Green

1974 AFRIKA - STUDIECENTRUM, LEIDEN, HOLLAND

P R E F A C E

Research projects supported by the Afrika-Studiecentrum are usually designed to focus on some specific development problem in an African country and are planned in co-operation with local government agencies or university departments. This particular study of family law was initiated by Professor J. F. Holleman and included in the programme of the Afrika-Studiecentrum.¹ Sierra Leone was selected because, unlike in many other African countries, no such research had ever been conducted there. Moreover, the size of Sierra Leone is such as to make it feasible to plan a project of wide enough scope to have practical significance. Furthermore, many Sierra Leoneans had expressed considerable concern about the legal situation and there was awareness in many quarters that some informed action was required.

Drs. G. W. Grootenhuis, the director of the Afrika-Studiecentrum, discussed the proposed research with staff of the University of Sierra Leone and the Law Officers Department when he visited Sierra Leone in 1968. The Attorney General, the Hon. J. E. Mahoney, supported the proposal and informed the Cabinet of the plan. The Institute of African Studies, Fourah Bay College, offered affiliation for the researchers. A brief preliminary investigation was conducted by a sociologist in the Bo area during 1969 and the research officially began in February 1971. The team of researchers included: Drs. U. Rijnsdorp, a Dutch lawyer with interests in African law, Mr. J. Sanpha Koroma, a Sierra Leonean trained in public administration, Drs. R. Niemeijer, a Dutch anthropologist, and the team leader, and Dr. Barbara E. Harrell-Bond an anthropologist with previous research experience in Sierra Leone.

¹ Financial support for this research was also contributed by the Netherlands Foundation for the Advancement of Tropical Research (WOTRO) The Hague, The Netherlands.

In addition to the work of the team, Dr. H. M. Joko-Smart, Senior Lecturer at Fourah Bay College, also conducted research in family law during the same period. Because of the overlap in the focus of these two investigations it was decided by the director of the Afrika-Studiecentrum that the overall aims of the research on this topic should be furthered through co-operation with Dr. Joko-Smart. We therefore arranged to make our data available to him as a possibly useful supplement to his own findings. He, in turn, made helpful additions to the series of questions which we used in interviews and in the panel discussions which were conducted in all district towns in the country. His work has now resulted in a Ph.D. thesis submitted to London University which we understand will soon be published. The availability of his work as a study of the substantive law of some of the indigenous groups in Sierra Leone influenced the structure of this report. We feel that the most useful contribution we can make is to draw attention to the relation between the law and those aspects of the social reality that may be submerged and difficult to establish without specialized study. From our findings we have attempted to indicate the areas where conflicts of law exist or where certain social problems are created or aggravated by the inadequacies of the law as it is now practised.

It is the policy of the Afrika-Studiecentrum to present governments with a report on the practical implications of research conducted. Further academic publications on this research will be forwarded at a later stage. While we do not consider it to be within our province to make suggestions for policy changes by the Sierra Leone government, nor to provide solutions, nevertheless, by focusing on what appear to be problems in the practice of family law, we often implicitly assume that certain legal reforms are desirable. Whenever possible, we attempt to provide evidence which suggests what could be the outcome of certain types of policy decisions which may be taken.

This report will be distributed among people with widely different backgrounds - not only lawyers, but politicians and many people who may have no legal training. Many of the readers will be familiar with aspects of local customary practices through their own personal experience. Others, having grown up in Freetown, may be less familiar with indigenous traditions. We have attempted to make the report comprehensible to all. Hence we have avoided legal terminology as much as possible and have often included some general sociological explanations for certain customary practices which are described.

One of the unintended consequences of a description of customary law practices may be to suggest that there exists a formal system which is inflexible and all-encompassing. It is a characteristic of those trained in jurisprudence to expect to find rules and regulations, or, at least, examples of case law which cover all eventualities. Indeed, the very process of investigation which attempts to elicit rules from informants' statements tends to impose a picture of customary law which is systematic, orderly and regular. At times respondents may be asked to explain the rules of customary law which would cover situations which in fact never occur in daily life. The assumptions and values about the nature of law which the researcher carries from his own personal experience and studies in another society may even determine the focus of the investigation and the results obtained. The emphasis of the methodology in this study has been on observation. We have attempted to put our own personal assumptions behind us and have tried to avoid putting words into the mouths of our informants. However, it is still possible that we have failed to emphasize adequately the essentially malleable and pliant nature of customary law in Sierra Leone.

The inferior legal position of women in the face of changing social and economic conditions has been stressed throughout the report. It should not be assumed, however, that Sierra

Leonean women view themselves as socially inferior or regard their legal position as helpless. Indeed, many of the dramatic innovations in customary law practices reported here are ample evidence of the resourcefulness of women to cope effectively with changes in their social and economic position.

The report is set out in the following way. In the first section we list certain assumptions which lay behind the research and explain how these assumptions guided the methodology we employed. We then mention the sources and kinds of data upon which our analyses were based. We feel that this information is essential for the reader to be able to assess the reliability of our findings. In section two we discuss marriage under customary law, beginning with a consideration of some of the problems which have resulted from attempts to equate the status of marriage under customary law with statutory marriage. We then examine the various kinds of customary marriage and present our findings regarding the new forms of conjugal unions which are evolving in Sierra Leone.

In the third section divorce is discussed. Those changing economic and social conditions which have led to radical alterations in the role of women are related to contemporary customary divorce practices. The variations in practice regarding women's rights to property are discussed in section four, and in section five the problems of the law relating to maintenance are presented. In section six the changing practices relating to customary rights over children and the matter of determining their inheritance rights are discussed. Although at present there is no customary or statutory law of adoption, in section seven we take up this question in relation to current practices in Sierra Leone. In section eight we list, although not exhaustively, a number of conflicts of laws which were observed, and in section nine we consider a variety of problems

relating to the administration of customary law. In the concluding section we discuss various approaches to the problem of customary law and the problems which arise from plural legal systems. We argue for a unified approach to family law in Sierra Leone and discuss the fundamental related question of tribal differences. Our findings are also considered in the light of the absence of provision for the administration of customary law in the Western Area, and many of the problems we observed as a result of this lack are discussed.

Land law is closely related to customary family law. Our research was not wide enough to include a comprehensive study of land tenure: therefore, we are pleased to be able to include, in Appendix A, Mr. L. C. Greene's report on his investigation of land law in Sierra Leone. This report was written about two years ago but has not been generally available until now. Finally, in Appendix B, we present the Government Paper No. 1 1969 in which the Tanzanian government's proposals for a uniform law of marriage were set out. Tanzania is a country which had a plural legal system. The Tanzanian government recently unified its family law. Because the problems they faced are very similar to problems we found in Sierra Leone we have included their discussion of these matters.

There is one terminological problem which must be mentioned here for the benefit of those non-Sierra Leoneans who read the report. Part of the marriage transaction under customary law involves the transfer of money from the groom's family to the relatives of the bride. In anthropological literature this payment is variously referred to as 'bridewealth', 'brideprice' or 'marriage payments'. However, the local English term for this payment in Sierra Leone (as well as in most parts of West Africa) is 'dowry' and its use dates a long way back into Colonial history. The dictionary defines 'dowry' as money, gifts, or

estate which a woman brings to her husband in marriage. Yet, since the use of the term to mean moneys which a groom pays to his bride's family has been fully accepted into local vernacular and is even used in the written law, we feel it is appropriate to use the term as it is understood in Sierra Leone.

Misunderstanding may also arise from the use of the terms, native and non-native. They are used in their legal sense and are discussed on page 65 of this report. Some other information may also be found useful. Two leones (Le.2.00) equal one pound sterling. Sierra Leoneans still often refer to their currency as 'pounds' and 'shillings'. Reference is made in the report to the Bundu society. This is a closed association for women. Girls must be initiated into the Bundu society before marriage. The Forty-day Ceremony which is mentioned is an important family gathering which is held forty days after a person has died. Often inheritance matters are settled during this meeting.

Those readers who are unfamiliar with Sierra Leone will wish to know that for administrative purposes the country is divided into the Western Area and three Provinces. These divisions are important for the consideration of family law. During colonial rule the British imposed English-based law in the Western Area while allowing for the administration of customary law in what was the Protectorate (now the Provinces). Today customary law is administered through Local Courts in Chiefdoms. There is no such provision for customary law in the Western Area.

It would be impossible to single out and thank all the persons who contributed to this research. Literally hundreds of people have given hours of their time towards its progress. We are especially grateful to His Excellency Dr. Siaka Stevens, the President of the Republic of Sierra Leone. Without his keen awareness of the problem of family law in

Sierra Leone and his enthusiastic and unqualified support of the research, our task would have been well nigh impossible. A number of ministries were involved, particularly the Ministry of Social Welfare and the Ministry of the Interior; the members of their staff deserve our special thanks. We owe gratitude to Mr. J. G. Edowa Hyde and other persons in the Institute of African Studies, the institution which provided local affiliation for the project.

Throughout the two years of research many people served for varying lengths of time as interpreters, typists and assistants. During one university vacation a number of Fourah Bay College students served as assistants. The progress of the project was very much a reflection of the sustained interest and hard work of all these people. Other persons who were employed to perform domestic services or to drive also helped with the research. In fact, there is such keen awareness at the local level of the problems of family law and the need for informed action that it was not difficult to enlist the co-operation of people in almost every walk of life. Throughout our stay in Sierra Leone we were continually conscious that this research was focused on an area of social behaviour which everyone agreed required attention. As a result, the report of this investigation may be viewed as an example of co-operative effort between Sierra Leoneans and team members from the Afrika-Studiecentrum.¹

In writing this report we have tried to represent

¹ Many persons outside Sierra Leone were also of assistance in a variety of ways. We want to acknowledge the help of Dr. Alan Milner, Trinity College, University of Oxford. He gave advice and practical assistance to us from the beginning of the research project. Professor J. F. Holleman and Professor John Beattie both provided guidance and support to the project from its inception. Professor Holleman must be especially thanked for his thoughtful suggestions for the writing of this report. We also appreciate the helpful comments of Mr. Garlan Hoskin of the American Universities Field Staff and Mr. M. Southwold of St. Antonys college. Dr. Sandra Burman, Centre of Socio-legal Studies, Wolfson College University of Oxford deserves special thanks for the long hours she spent reading and commenting on the report and assisting in the revisions. Appreciation is also due to Dr. G. Seidman, Centre of Applied Linguistics, University of Southampton, Miss Eva Percival, Somerville College, University of Oxford, and Miss Sally Carpenter, Oxford University Press for their work as editors.

the findings accurately but we do, of course, take personal responsibility for any errors or misinterpretations which may be found.

Barbara E. Harrell-Bond
Ulrica Rijnsdorp

AFRIKA-STUDIECENTRUM
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I. INTRODUCTION

1. Plural legal systems and social problems

Plural legal systems in Africa result in part from the imposition of a foreign legal system by the colonial government and in part from the ethnic heterogeneity of African countries. In Sierra Leone, as far as family law is concerned, there are three legal systems. Recognition is given to statutory (or general) law which is based upon English law, and to the customary law of the various ethnic groups indigenous to the country. Limited recognition is also given to Islamic marriage and inheritance law. Such plurality of legal systems gives rise to conflicts of law which result in many social and legal problems. However, these problems in post-colonial countries not only arise from the recognition of more than one system of law, but are intensified by social and economic change.

Ideally, law should reflect the values which are held by the great majority of persons in a society. As change takes place within a society it often happens that aspects of the law no longer reflect its values and practices nor do they serve its legal requirements. Of course, this is a very common phenomenon, since all societies are constantly changing in one aspect or another with the result that the law needs to be adapted in order to keep pace with, or guide, social developments. However, the rate of change in most post-colonial countries is particularly rapid as a result of dramatic economic and political changes and many aspects of the law as practised in the courts may be seen to have little or no relation to the social reality.

The attendant legal problems profoundly affect the lives of many people in the society. They give rise to considerable individual frustration and are often the underlying cause of serious social disruptions. Although this is seldom recognized, many of these problems affecting relationships

between individuals and between groups may significantly hinder the government's efforts to bring about general progress in the country. After all, the success of all development programmes ultimately depends on the willingness of people to work together towards shared national goals. Thus, one of the most profound challenges facing newly independent African countries is the task of creating a culturally sensitive body of law.

2. Assumptions and methods of this study

Our aim was to investigate whether the unification of family law in Sierra Leone would be possible at present. It was hypothesized that tribal differences in the practice of customary law in Sierra Leone were not so great as to present an insuperable obstacle to unification. It was further assumed that customary law is always adapting to changing social conditions and that the customary family law as practised in the larger towns had adapted to these urban conditions. It was also predicted that the pattern of family organization as observed in these larger towns and in Freetown, the capital, would, in the near future, be fairly typical all over Sierra Leone. Finally, it was assumed that customary law in a society undergoing radical economic and social change cannot be adequately understood solely through court cases and interviews with legal authorities; it must also be understood in relation to the characteristics of the social milieu in which disputes arise, and therefore very specific information on contemporary values and social practices is required. These considerations guided our decisions about the location of the research and the methods used to collect data.

3. Location of the research

Three urban areas were selected: Bo in the south, Makeni in the north, and Freetown, the capital. Both Bo and Makeni are tribally heterogeneous and in each the dominant tribe is one of the two largest tribal groups in Sierra Leone, the Mende and the Temne. All three locations are important trading centres. Both Bo and Makeni are the administrative headquarters for the Provinces in which they are located, and the branch offices of the various ministries are located in both towns. Bo and Makeni have Local Courts practising customary law, and the Magistrate's Court and the High Court sit regularly. Both have a number of primary and secondary schools.

Freetown, the capital, is the seat of the central government and all the tribal groups in Sierra Leone are represented in the population. Although there has never been any provision for the practice of customary law in the Western Area, it is the personal law of 81% of the people there. In the absence of official courts practising customary law, a great many unofficial courts have been established by tribal headmen and other local leaders. As these courts practise without official jurisdiction, they are also, for the most part, free from any supervision or influence from central government. As a result, the procedures of these courts are based upon customary traditional practices and provided data comparable with those collected in the Provinces.

4. Sources of data

The team of researchers collected the following kinds of data from each of the three areas, Bo, Makeni and Freetown.

(a) Customary law cases

Cases were collected from Local Courts and other courts practising customary law including Group Local Appeal Courts and the unofficial headman courts in Freetown and other parts of the Western Area. Cases being heard during the period of research were recorded in full, and translated into English. Follow-up interviews were conducted with persons involved in disputes in order to understand the kinds of situations which give rise to cases, to assess the reactions to the court's handling of a case and to investigate as far as possible the social consequences of particular decisions.

(b) Magistrates' Courts

Cases coming before the Magistrates' Courts were observed in order to ascertain how many disputes heard in these courts might have involved offences under customary law. Maintenance cases coming before the magistrates were also observed and follow-up interviews were conducted among the parties involved in many of these cases.

(c) Informal dispute settlements

We attempted to follow disputes from their inception through the various processes of settlement. Often disputes were heard in family meetings or in sessions before tribal headmen or chiefs, before going before a court. Many cases never reach the court and so it was necessary to observe them at neighbourhood level.

(d) Social Welfare

Many people take their family problems to family caseworkers in the Department of Social Welfare, preferring to avoid having their case heard in a court. These cases were observed during the research period, and

interviews were conducted with persons connected with the case. A statistical analysis was made of all the family cases handled by social workers over a three-year period. Caseworkers and other professional social workers were interviewed.

(e) Maintenance cases

Statistics were collected about those cases where the petitioner was suing for maintenance under the Married Woman's Maintenance Act (Cap. 100), the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c65) and the Bastardy Laws (Increase of Payments) Act, 1961. Interviews were conducted with women who had sued for maintenance and with the men who were responsible for paying it. The Social Welfare Department has many clients who are responsible for maintaining children but who cannot afford the amounts awarded in the courts. In response to this problem the social workers have organized an informal maintenance programme whereby they receive money from fathers and hand it over to their dependants. These cases were also studied.

(f) Government officials

Interviews were conducted with persons employed by the government in work which was in some way related to the administration of Local Courts and customary law. These included some Government Ministers, the Permanent Secretary of the Ministry of the Interior, the Provincial Secretaries, District Officers and other members of the staff of the Ministry of the Interior.

(g) Legal officials

Law officers, employees of the Ministry of Justice, judges, magistrates, lawyers, registrars, Local Court presidents, court clerks, and police were interviewed.

(h) Police Stations

Observations were conducted in all police stations for a period of one week. Our aim was to investigate what proportion of cases which come to the attention of the police are family cases and how the police deal with any cases which fall under customary law.

(i) Official records

Files and other official records pertaining to policy concerning the administration of Local Courts and customary law were consulted in the offices of the Ministry of the Interior, Provincial Headquarters, District Offices and the office of the Judicial Adviser.

(j) Panel discussions

Through the assistance of the Ministry of the Interior and the District Officers, panel discussions were conducted in each district headquarters town in Sierra Leone and with the persons formerly appointed as tribal headmen in the Western Area. Headmen were also interviewed in Bo and Makeni. The individuals serving on the panels in the district headquarters were selected by the District Officer on the basis of their knowledge of customary law. Care was also taken to ensure that each tribal group in the district was represented.

(k) Experts on customary law

Interviews were conducted with paramount chiefs, tribal headmen, and other persons regarded as experts on customary law. Because they play an important role in the practice of customary law, 'medicine owners' m̄ari men and herbalists who practise divining and provide medicines for oath-taking in courts were interviewed (See section 0).

(l) Questionnaires to Local Courts

Through the co-operation of the Ministry of the Interior, questionnaires were sent to each Local Court in the country. These questionnaires elicited some information on the numbers and types of cases handled by Local Courts as well as allowing for the expression of opinion on certain controversial matters. A total of 113 Courts from 91 chiefdoms returned completed forms.

(m) Ordinary Families in neighbourhoods: Observations and interviews were made in neighbourhoods in order to gain an insight into ordinary family life and to understand the causes of disputes.

(n) Kanteh: During the research period a kanteh (seclusion of chiefs) was being held in Makeni. Since part of the purpose of the kanteh is to familiarize the chief with customary law, cases are heard there. Many such cases were recorded for analysis.

(o) Mori men, 'medicine' owners, and herbalists: People who have the ability to divine, tell fortunes and influence behaviour through supernatural means play an exceedingly important role in the practice of customary law. We interviewed many such practitioners.

(p) Gratuities Committee and inheritance cases: Gratuities are awarded to the dependants of a deceased through the Administrator General and the District Officer. These cases were observed in order to discover how customary rules of inheritance were determined and how 'dependence on the deceased' was defined.

(q) Family gatherings: Such occasions as funerals, weddings, public society meetings, and Forty-day Ceremonies were attended in order to increase our understanding of the organization of the extended family, and to observe the settlement of inheritance matters within the family.

By adopting these wide-ranging methods of data collection we aimed to build up a dynamic picture of family life and the practice of customary family law in Sierra Leone, which would provide information not only on the rules of the law as stated by the conservative elders but also on the changes in social practices which had resulted in an adaptation of the rules.

II. MARRIAGE

1. The Registration of customary marriage

Since the nineteen fifties the government has been concerned with raising the status of customary marriage so as to equalize its position with marriage under statutory law. In its provision enabling chiefdoms to make orders and bye-laws (Cap. 61, Sec. 8 and 16), the Ministry of the Interior circulated a model bye-law for the registration of marriage and divorce. Although many chiefdoms in practice adopted this as a model bye-law, the first such bye-law actually to become law was published in The Gazette in 1960. Despite the provision, very few marriages under customary law are being voluntarily registered. Only about one-fifth of the chiefdoms in the country have legislated for such registration but many more are insisting on the registration of a marriage before a divorce is granted and are then charging fees for registering both marriages and divorces.

The model bye-law enables the Chiefdom Council to impose a fee for such registration. It prescribes that when a marriage or divorce is registered, a certificate in triplicate is filled in by the Registrar of Marriage and Divorce. The original and one copy are issued to the husband and the wife, the third is retained by the Registrar. Later, if a certified true copy is required, the Registrar is permitted to charge five shillings for that service.

Despite the clarity of these rules, there is considerable deviation in local practice. Many chiefdoms charge a fee for the marriage or divorce

certificate, and another fee for a receipt for the money paid for the registration of a marriage or a divorce. Moreover, many chiefdoms impose different fees for different categories of persons. For example, Badjia Chiefdom, Bo District (a chiefdom which has never published a bye-law providing for registration of marriage and divorce) charges Le.6.00 for the marriage of an unmarried girl, and Le.20.00 for the remarriage of a divorced woman. To obtain the actual certificate of marriage in this chiefdom it is necessary to pay a further Le.2.00. This chiefdom charges Le.30.00 for the registration of a divorce. If a couple wishes to divorce they must produce a certificate of their marriage (even if they were married long before the provision for registration of marriage was instituted). If they have not registered their marriage they must pay Le.6.00 for a marriage certificate before they can proceed with their divorce.

Another example: Soa Chiefdom, Kono District, published a bye-law 26 September 1963, providing for the registration of marriage and divorce. The official charges included Le.2.00 for the registration of marriage, Le.2.00 for the registration of a divorce, and five shillings for a certified copy. However, in reply to the questionnaire we sent to the courts, this chiefdom reported the following current charges: Le.2.00 for a receipt for the registration of the marriage of an unmarried girl; Le.10.00 for a receipt for the registration of a divorced woman's remarriage; and Le.10.00 for the certificates. This chiefdom also reported that Le.10.00 is charged for the registration of a divorce, although the partners are not required to register their previous marriage.

These examples are typical. Almost every chiefdom reporting through the questionnaire appeared to charge different rates. Although the model bye-law provides that each of the spouses should receive a copy of the certificate, in practice usually only one received a copy. Since most

chiefdoms charge more for the certificate (in some cases as much as Le.20.00), most people settle for what is referred to as a 'receipt marriage'. That is, they pay the amount prescribed, and a receipt for that amount is issued to the person paying. If this receipt is lost, the marriage must be reregistered and the fee paid again. Sometimes an even higher fee is demanded. If a husband holds the receipt and the wife seeks a divorce, many Local Courts demand that she pay the marriage registration fee again. The fact that the Registrar does not have easy access to records of receipts issued, is a result of the Audit Department's practice of annually calling in all receipt books. Of course, these recording problems could be avoided if marriages were properly entered in the register (called certificate book) as intended by the model bye-law. Moreover, when only a receipt is issued for the less expensive 'receipt marriage', none of the details of the marriage called for under the bye-law are requested or recorded. These details include the names and signatures of the relatives who have given their consent to the marriage, and the amount of the dowry presented to the wife's family. Thus, when the Registrar merely issues a 'receipt' for the registration of a marriage, he is failing in his duty to obtain proof of the marital status of the woman prior to the marriage because he is not requiring the consenting relatives to sign.

However, excessive costs and irregularities in registration practice are not the only reasons why many people neglect to register their marriages. As stated, the marriage certificate form calls for the recording of the amount of the dowry and people generally dislike to disclose such information. The reason the bye-law required this information was to avoid controversy over the amount of dowry recoverable at divorce (a topic which will be taken up again when we discuss divorce). However, to reveal the agreed amount of dowry at the outset of the marriage would be considered

inauspicious, as in traditional society this would constitute the first major step towards divorce proceedings or 'the assessment of dowry' under customary law. It therefore 'frightens the in-laws' and places unnecessary strains on family relationships during the establishment of the new household.

Another problem relating to the registration of marriages must also be mentioned. When married people bring their problems to family case-workers in the Department of Social Welfare for counselling, they are questioned about their marital status. The official policy of this department is to label cases according to the type of marriage. That is, persons married under statutory law are filed separately from persons married under customary law. Persons claiming to be married by customary law are asked if their marriage was registered. We discovered that unregistered marriages in the Provinces were usually filed in the Department of Social Welfare as 'affiliations', implying an illicit relationship. At present the official view of such unregistered marriages is of no concern to the parties involved. However, it may well be that in future a lawyer arguing a disputed inheritance case could use such evidence to try to prove the illegitimacy of an heir.

Thus we can see that, instead of raising the status of marriage under customary law, the bye-law for registering marriage and divorce has failed in this aim and has been primarily utilized by Chiefdom Councils as a means of raising revenue. Understandably, most people view registration as an unnecessary expense, since under customary law the agreement and participation of the families involved make a marriage legal. Moreover, as has been observed, the requirement to reveal the amount of dowry is regarded as an ill-omen for the new relationship. Until fees and practices of registration are standardized throughout the country and these attitudes

are taken into consideration, registration of customary marriages will, no doubt, continue to be neglected.

More serious is the lack of the official recognition of customary marriage in the Western Area because the bye-laws do not apply there - this, despite the fact that the vast majority of marriages contracted there are of the customary type. In fact, it should be noted that this is a growing problem because the number of marriages contracted under statutory law in Sierra Leone has actually been decreasing over the years despite the extension of the provision of the Civil Marriage Act to natives (The Civil Marriage (Amendment)(No. 2) Act, 1965). Banton (1957) found an average of 353 statutory marriages registered per annum between the years 1941 to 1952, compared to an average of 305 marriages between 1961 to 1968 (Harrell-Bond 1971) - a drop of 13.6 per cent. The evidence is clear: most marriages in Sierra Leone are contracted under customary law. The absence of an effective method of recognizing the legal status of these marriages leads to many problems, including problems of maintenance, legitimacy, bigamy and inheritance. These problems will be considered in more detail elsewhere in this report.

In 1966 efforts were made to resolve some of these problems. A bill on the subject of the registration of marriage and divorce was drafted. The circular attached to the bill indicated that it was intended to apply uniform registration of marriage and divorce by customary law 'to the whole country'. However, the bill was only circulated to Provincial Secretaries, and as there is no Provincial Secretary for the Western Area this circumvented the difficult problem of providing for the natives resident in the Western Area. This bill was never brought before Parliament and there has been no subsequent action to revive it.

2. Types of marriage under customary law

Underlying these problems of marriage registration is the question of defining a marriage by customary law. According to customary law, a valid marriage results in the transference of the rights to the domestic, sexual and procreative services of a woman from her family to her husband and his family, with the consent of the male members of both families concerned. A requirement for a valid marriage is that dowry is presented to the wife's family by the husband's family. These moneys are distributed among the relatives who assume the collective responsibility for encouraging the stability of the union. Should the marriage be dissolved, all these moneys must be returned to the husband. The man who receives the wife also assumes the responsibility for fulfilling certain economic obligations to the wife's family throughout the duration of the union. In case of a divorce, children born to the marriage will remain with the husband and his family. While the formalities and ceremonial aspects of these transactions may differ widely from place to place, the legal principles are the same. There are, however, several types of marriage, depending on the marital status of the woman.

(a) Marriage of an unmarried girl: This marriage is based upon an agreement between the two families involved and the presentation of dowry to the girl's family. The labour of the husband on the farm of the wife's family may sometimes be taken in lieu of marriage payments. Infant betrothal, a practice formerly more common, rarely occurs today except in cases where families wish their daughters to be married into a chief's or other prestigious family, or when two men seek to link their families through marriage owing to their long-standing friendship. Marriages which are referred to as 'family marriages' also occur. These arrangements are made within a family. Many ethnic groups in Sierra Leone permit, even

prefer, first-cousin marriages (i.e. a mother's son marrying her brother's daughter, when the mother and her brother have different mothers).

Marriages between persons more distantly related are also considered to be 'family marriages'. In these cases dowry is not usually given or, if it is, only a token amount is presented.

(b) Remarriage of a divorcee or of a woman wishing to divorce her husband:

The traditional arrangement is that the family, which has already repaid the dowry to secure the divorce of their daughter, will make new arrangements with a prospective husband. In practice, however, the marriage frequently is contracted through the usual arrangements between the families, the new husband repaying the dowry directly to the former husband.

(c) Remarriage of a widow: A widow may marry a member of her deceased husband's family, who will assume responsibility for the children she has already borne. This arrangement involves the consent of the widow and some token gifts to her family as a symbol of her remarriage. This practice is referred to as 'widow inheritance'. The children born to the second union belong to the new husband. Under traditional customary law a widow's refusal to agree to a marriage with a member of her husband's family would result in divorce proceedings, the deceased man's family claiming the recovery of the dowry. Although a cabinet directive (Directive on Customary Law, April 27, 1963), resulting from the deliberations of the Customary Law Advisory Panel, prohibited this practice of reclaiming dowry, we found that the practice still persisted.

(d) Friendship marriages: This type of marriage, although never preferred, has occurred as part of traditional practice for a very long time (Little 1967). Such a marriage occurs in cases where a man wanting to marry a girl is very poor or where, for some reason or another, it is difficult

for a marriage to be arranged for a girl. The family of the girl will not require that dowry be presented to them, but will expect the husband to assume certain obligations towards them. Usually these marriages are matrilocal, that is, the couple remain in the village of the girl's family.

(e) Pledge marriage: This type of marriage has also been practised for some time. In this case the father hands his daughter over to a creditor as a kind of security for a loan. He would not expect to receive dowry for this marriage from the creditor, although he would expect greater consideration with respect to the repayment of his loan. Such marriage arrangements contravene Cap. 60, Sec. 7 which prohibits the transfer of '...any persons as a pledge or security for a debt'. An offence against this act may be punished by '...a fine of not exceeding £1000 or imprisonment with or without hard labour, for a period not exceeding ten years, or both such fine and imprisonment' (Sec. 7, Para. 7, Cap. 60).¹

Our research findings show that today pledge marriages are not uncommon. Although Local Courts may be confronted with evidence of their existence, no action, so far as we could discover, has been taken against fathers who have contracted them, except that a Court President or Court Clerk would occasionally remonstrate with them for 'selling their daughters'.²

1 It is interesting to observe that the draft of 'The Provinces Act, 1965' eliminated Sec. 7 because it was believed to be outdated. However, since this bill was never passed by Parliament, Sec. 7 still stands as law.

2 In one case observed during the research, a man's family pledged his wife for a debt he owed. He had left home for the diamond area hoping to find funds to repay the debt. While he was away the creditor attempted to force the family to repay the debt. Under this pressure the family pledged the daughter-in-law to the creditor.

that when a stranger enters an area he must be introduced to the local authorities, so that his presence will be known to all. During the years of the diamond boom some chiefdoms in the diamond area passed a bye-law or orders prescribing a fee for a stranger permit in order to check the immigration of vast numbers of people into the chiefdom.

This stranger permit bye-law has been transformed into a kind of conjugal privilege licence. A man may introduce a woman with whom he is cohabiting to the local chiefdom authorities and pay a fee for her stranger permit. In the areas where this practice is recognized the stranger permit gives a man immunity from any adultery suit which might be brought against him by the woman's husband, although the husband may sue the wife's family for the return of dowry.

(d) 'Debtor-creditor marriage': Another type of union which is practised in some areas is the 'debtor-creditor marriage'. This type of conjugal union has grown out of the fact that a husband has the right to reclaim the dowry he presented to his wife's family if they divorce. It frequently happens that a woman wishes to divorce her husband but that her family is unable or unwilling to repay the dowry. They may suggest to their daughter that she must find this money herself. Such a woman may approach a wealthy man for a loan to secure her divorce, for which she may be required to pledge her services until the debt is paid. We encountered a number of these cases appearing before the Group Local Appeal Court in disputes over the repayment of the debt when the woman left before paying.

(e) Marriage with permission from the 'wrong side' of the family: Another problem frequently arises as a result of the dispersion of the extended family. As was observed above, marriage arrangements may only be completed with the agreement of the male members of the girl's family.

Even in those types of conjugal union which fall outside the formal definitions of marriage under customary law there is usually some deference to the requirement that a woman's relatives must be notified and their consent obtained. Although the mother of the girl will have some voice in the giving of family consent, it is the prerogative of the male members of the family on the father's side to grant consent to the marriage and it is to them that the dowry is to be presented.

Because of the geographical dispersion of the extended family and other economic and social changes which have weakened family solidarity, we found a large number of cases where the legality of a marriage was challenged because the paternal relatives had not been consulted. This can happen because a daughter has gone to live with her divorced mother who has remarried another man. The mother and her new husband may take it upon themselves to arrange a marriage for the daughter and illegally receive the dowry. In the case of a divorce or some other dispute which brings the union to public attention, the husband may find himself in the highly embarrassing position of being accused by the court of having married with permission from the wrong side of the family or of not knowing his own inlaws. We observed many cases where to all appearances the husband was completely ignorant of the fact that the male relatives with whom he had negotiated his marriage did not have the necessary authority.¹

4. Irregular conjugal unions and the registration of births

The provision for the registration of births has introduced a further complication into the problems of defining paternal rights under customary law. In Sierra Leone husbands may acknowledge as their legitimate children

¹ Sometimes in these cases the husband may be allowed to sue for the money he presented to the wrong relatives as 'love expenses' rather than as dowry. He may also attempt to sue for all the costs of maintaining the woman and for any contributions he has made to the family.

any offspring born to their wives, regardless of who is the biological father. In practice, in many parts of the country a husband may refuse to accept a child born to his wife when he knows he is not the father. However, according to customary law, when a married woman bears a child it should belong to either the husband's family, or, if they refuse to claim it, to its mother's family. We observed a number of cases in which the biological father of a child born to a woman married to another man took the initiative to register the birth, giving his own name as father. This is in direct contravention of the regulations under 'The Births and Deaths (Provinces) Registration Act' (Cap. 93) which specify that when the father of a child is not the legal husband, his name shall not be registered as the father of the child. Yet when such men do register the birth of a natural child it is generally accepted as prima facie proof of rights over the child, and birth certificates have been presented in court as proof of marriage to the mother concerned. The respect for the power of the bureaucratic arm of the national government tends to lead people to surrender their customary rights when confronted with a birth certificate.

5. Irregular unions and disputes over children

It is not surprising that these new kinds of conjugal union, which are not covered by the rules of a customary law, lead to many disputes concerning rights over children and questions of legitimacy. Other factors have also contributed to these disputes. The traditional family living in a subsistence economy laid great stress on a large number of children. The larger the family, the greater its economic potential. The subsistence agricultural economy was based upon co-operative labour and shared responsibilities among the members of the family. Each individual's security was bound up in the welfare of the whole group. The principles of customary law were designed to support this family system. The imposition of such sanctions as public opinion (the generous man was accorded prestige, the selfish person was subject to

shame) helped to maintain the pattern. Those who failed to conform were penalized through the use of supernatural sanctions such as 'swears' or witchcraft accusations.¹

Today the economy of Sierra Leone has been radically transformed and the effects of these changes on the institution of the family have been profound. For example, the importance and value of rights over children differ with the economic circumstances of individual families. The size of the group of potential heirs in the traditional family was not a matter for concern when all that was to be inherited were rights to land for farming (and formerly there was a more or less unlimited supply of land), responsibilities for dependants and, in some cases, the right to succeed to chieftaincy. Today it is increasingly possible for individuals to amass personal wealth which may include money in the bank, houses, vehicles, etc. It may well be in a man's interest to limit the number of his dependants in his lifetime and in the interest of his heirs to limit the number of persons having claims to his estate.² Men have the prerogative to name the children they wish to acknowledge as their legitimate heirs. Today disputes over legitimacy often arise, especially during an election of a paramount chief.

We should not wish to imply that children are no longer valued at all. The security of both men and women in their old age continues to be very much bound up with the position and economic success of their children.

1 'Swear' is a term which applies to both oaths and curses.

2 One example will serve as a vivid illustration of changing attitudes towards the arrival of children in a family. In one of our panel discussions one chief said, 'Children born to our daughters by lovers belong to the government. When we have no money to care for them, Social Welfare has to take them because they belong to Social Welfare.'

Formerly, in a subsistence economy, this security need not have involved much more than shelter and access to land which would produce sufficient food for physical survival. However, in today's economy, even shelter and food require access to cash. Moreover, expectations have moved beyond mere physical survival. The availability of manufactured goods has altered definitions of tolerable minimum requirements. Hence, people try to educate their children so that these will be better placed to support them when they are old.

These economic changes have also influenced the behaviour of women. In the traditional family system a woman was dependent on her husband and his family and, in her old age, upon her children and the goodwill of her husband's family, should her husband have died. Given the weakening of the traditional sense of family obligation, many women find it necessary to secure themselves individually. They seek to do this by taking advantage of the new economic opportunities, such as trading, which have become available to them, and by educating their children. To accomplish this, women have been motivated to break out of their traditional role within the family. Thus the conventional ideas of the role of the wife dependent on and under the authority of her husband and the family have been effectively eroded. It is understandable, in the light of all these profound social changes, that women estranged from their husbands should wish to continue to bear children as security against their old age. Of course, the men who father these children may complicate the situation by attempting to establish their own rights over the children.

6. Islamic marriage

The Muslim Community in Freetown succeeded in getting limited recognition for Islamic marriage in 1905 when, after a series of petitions and representations to the Colonial Government, the Mohammedan Marriage Act

(Cap. 96) was enacted. The Act allows Muslims to marry according to their religious law and provides for the registration of these marriages and divorces. In the course of this research a number of anomalies were observed in the administration of this Act.

1. The Mohammedan Marriage Act (Cap. 96) limits recognition of Mohammedan marriages to the 'Courts of the Colony' (Sec. 3), i.e. today's Western Area. Although Registrars for Islamic marriages have also been appointed in the Provinces, this law has never been amended.

2. The Act specifies that the Islamic marriage may only be recognized under the Act when it conforms to the requirements of Islamic law. In some cases the Registrars appointed to register Islamic marriages and divorces are not conversant with Islamic law and so are unable to verify the validity of a marriage.

3. Public Notice No. 17, 1964 sets the fee for registration of a Mohammedan marriage at Le.1.00. However, many Registrars depend on the fees they receive for their livelihood, and set fees at higher rates than those stipulated.

4. Registrars are required to send copies of the registration certificates to the Registrar-General. In practice, many fail to do this. As a result, problems may arise when a husband and wife require evidence that their marriage was registered.

5. There are further anomalies which obtain in Sierra Leone as well as in other African countries where polygamy was an established customary practice before the Islamic religion was adopted. Many practising Muslims continue to have more than the four wives allowed under Islamic law. They continue to regard these additional wives as their legal wives and their children as legitimate. Further, the accepted practice in Sierra Leone of

widow inheritance, which involves the mandatory repayment of dowry if the widow does not wish to marry within her deceased husband's family, is also in violation of Islamic law. Muslim leaders strongly condemn the continuation of these customary practices.

6. The Mohammedan Marriage Act states that the marriage may - not must - be registered. Thus, at any time a person may claim to have been married according to Islamic law, whether or not his marriage was registered. The definition of what constitutes a valid Islamic marriage, and who has authority to determine this validity, are not specified in the legislation.

III. DIVORCE

1. Divorce under customary law

Under customary law a husband may divorce his wife on a number of grounds, including failure to perform domestic duties, disobedience, desertion, refusal to cohabit, repeated adultery, witchcraft, and inability to get along with co-wives. A wife may divorce her husband on the grounds of his extreme cruelty, failure to maintain her, his having committed incest and, in some cases, his impotence.¹ The sufficiency of the various grounds for divorce may vary from place to place. For example, in many areas impotence may be regarded only as very shameful and, while justifying a wife's desertion of her husband, does not constitute grounds for divorce.

¹ It should be observed that the definition of what constitutes an incestuous relationship varies from place to place but is generally defined as a sexual relationship between persons who stand in certain kinship relations between which a marriage would be forbidden. For example, a Mende may marry a mother's brother's daughter (when the mother and the brother have different mothers) but it would be regarded as incestuous for him to have sexual relations with a father's brother's daughter. And, again, a Kono may, after marrying an elder daughter of a family, marry her younger sisters although other groups in Sierra Leone would regard marrying sisters as incestuous. However, in some cases, a man may marry the sister of his wife after his wife has died.

The process of divorce when the husband is the plaintiff involves the return of the wife to the male member of her family who is in authority, usually the head of the family. The husband must clearly indicate to her family his decision to divorce: he may have to bring witnesses from his own family and perhaps also pay a small witness fee to her relatives. He will be obliged to prove the grounds for his action before any discussion of the recovery of his dowry can proceed. Recoverable moneys under customary law could include all expenditures from betrothal to the point of divorce. These may include gifts to her family, contributions which the husband may have made to the Bundu society when his wife was initiated before the marriage, the actual sum of the dowry, and other contributions he has made to her family since marriage. Assessment of these amounts involves protracted discussion and dispute between the families involved. Understandably, the wife's family will be extremely hesitant to agree to any charges brought against the wife, since whatever sum the husband claims and which is then agreed upon will have to be found from among them. Hence, the wife's family will do everything in their power to reconcile the couple and to persuade the husband to withdraw his charges against the wife.

When a husband initiates divorce action, his chances of recovering his dowry are extremely small. As a result most men let marital troubles slide until the wife herself takes the initiative to break the relationship. She usually does this by running away or by taking a lover. Frequently, a husband will return a recalcitrant wife to her parents' home, complain about her behaviour and take no further action. As will be shown, estrangement involves few, if any, disadvantages for the husband although the wife who is separated from her husband suffers a number of handicaps.

When the wife is the plaintiff in the divorce, the husband's case for recovering his marriage payments is much stronger. It is her responsibility to convince her family of the justification for the divorce,

since the expenditures of the husband must, under customary law, be refunded by them. In all but the most serious cases (for example, extreme physical cruelty) her family will try to reconcile the couple. As observed, the institution of marriage under customary law is supported by the interests of a large number of people who stand to lose economically should the couple divorce.

Although the village chief and the elders might become involved in a prolonged dispute over divorce, in traditional village society a divorce is essentially a family matter. Part of the responsibility of the family will be to restrict the movements of the woman in order to ascertain whether or not she is pregnant with a child which would belong to her husband.

Today, however, divorce practices have radically altered. The changes have resulted in part from the centralization of courts and the formalization of procedures, which include the provision for the registration of divorces, and from the attempts to eliminate all local-level dispute settlement procedures.

2. Effect of separation on husband

It has been mentioned that a husband retains certain advantages despite a separation. An enumeration of some of these advantages will expose several features of the customary position of a husband and a wife and will allow us to consider those aspects of customary procedures which have persisted despite certain social and economic changes in the society. First of all, the right to sue his wife's family for the return of the dowry or, in short, to seek a divorce, is an option always open to the husband no matter how long he has been separated from his wife. The strength of his case is only increased by her prolonged failure to cohabit

and perform domestic duties, not to mention the increasing possibility of her committing further marital offences. It has become very common for a husband to sue his wife and/or her family for compensation for such offences as failure to perform domestic duties, or for 'detention' of his wife (i.e. the refusal by the wife, or the unwillingness of her parents to force her, to return to the marital home).

The husband continues to have sexual rights over his wife and so may take to court any man who has been involved in an adulterous relationship with her and claim compensation from him. If he can prove that her family was aware of her adulterous relationship, he can sue them for giving his wife to another man. Furthermore, in principle, a husband has control over all the economic gains of his wife. If a husband has loaned her money to trade, despite their separation, he can always sue for his initial investment and, in many cases, he also includes the 'interest' or what he believes she has earned in profits. He continues to have the right to claim any children born to his wife. And, during a separation, a husband may suspend his economic obligations to her family. If a wife has left without his consent, he is also relieved of any responsibility to maintain her.

3. Effect of separation on wife

While a separation rather than a divorce may be in the interests of the husband, it is definitely to the wife's advantage to seek a formal divorce. A separation leaves her in a highly ambiguous position. If she involves herself in a relationship with another man, she puts her family and the man in legal jeopardy vis-a-vis her husband. At the same time, under customary law, a woman is legally without capacity and thus must always be living under the care and protection of a man - either her father, her husband or some male relative. The manner in which many chiefdoms now enforce the rule that a woman must be living with a man was pointed out

previously, or if they have lost their certificate) before allowing the divorce case to proceed.

In 1959 Customary Law Advisory Panels were formed in each of the provinces under the Ministry of the Interior (formerly the Ministry of Internal Affairs and Development) and given the task of advising on questions regarding customary law which were referred to them by the government. One topic to which their attention was directed was divorce and the abuses which had been observed relating to the return of dowry. They found that the right of a husband to recover contributions he had made to the family during a marriage often resulted in exorbitant claims:

It is not uncommon to find N.A. courts awarding amounts up to £306 as dowry made up of breakages of kitchen utensils, lost trinkets, etc. solemnly assessed as items of dowry alongside the odd bottle of "Three Star Wine" given to a distant relative of the wife many years previously. In some chiefdoms manual labour on the father-in-law's farm, which at the time of performance was voluntary, and minor items of gifts, etc. are included which should not strictly be included as part of dowry. As against this, however, no consideration, even from the moral point of view, is given to the many years (at times up to thirty) of arduous and faithful domestic services rendered by the wife to the husband during cohabitation. Secondly, the wife is stripped of all ornamental property given to her by her husband and deprived of property which they may have acquired or worked for by their joint efforts (Report of the Customary Law Advisory Panel, April, 1963).

As a result of the deliberations of the panel, a directive was addressed to all Provincial Secretaries that they should instruct Local Courts through the District Office on the following matters: firstly, the amount of dowry recoverable at divorce should be limited to the amount paid at the time of the marriage; secondly, any expenses incurred by the husband in connection with the initiation of his wife into the Bundu society could be added to the lump sum and also recovered; thirdly, all other amounts which had been given as loans to other members of the wife's family during the marriage could be claimed as civil debts, but were not to be assessed as part of the dowry; fourthly, all articles or moneys advanced to the wife

by the husband for trading purposes could be recovered by suing for them as civil debts, but they could not be claimed as part of the dowry; and, finally, no other expenses incurred on behalf of the wife or of any of her relatives could be included in the dowry which was to be recovered.

Had this directive been strictly enforced by the courts and accepted in general practice outside the courts, some of the complications of divorce proceedings might have been simplified and the excesses of divorce disputes effectively reduced. However, we found very few courts abiding by the directive.

Although in most cases courts allow women to initiate law suits, yet in the case of divorce, they tend to take the traditional view that a woman is legally incompetent to act on her own behalf and so her case must be supported by the presence of a male relative who has the right to speak for her family. According to the Native Marriage and Divorce Bye-Law (Chieftom Council Act, Cap. 61), a divorce may not be granted until the case is heard in open court, with the decision following the representation of both spouses. The implication of this bye-law is that the assessment of refundable payments would also be concluded and the prescription for repayment as part of the final judgement. In practice however something quite different occurs.

Despite the regulation that both parties to the marriage should appear in court, we found that in most instances a woman will go to the office of the chieftom administration with one of her male relatives, stating her intention to divorce. She will be asked who is going to be responsible for the refund of the dowry. When she and her relatives have satisfactorily answered this question, the woman will be allowed to pay the local charges for a 'divorce permit' and will be given a receipt for this amount. This divorce permit is strictly illegal since no bye-law or directive has ever

prescribed such a procedure. The Court Clerk then addresses a letter to the husband informing him that his wife has, on the date of the letter, divorced him with the permission of her relatives. The husband is also informed in the letter that he no longer has the right to make any claim whatsoever against his wife. We observed that some of these letters include instructions to the husband that he is prohibited from any contact with his former wife. Finally, he is advised that he may sue her family for the recovery of his dowry if he should so desire.

Since most men do desire to recover their dowry expenditures, a husband must take the necessary steps to sue in court. It is common for men to wait for a long time, even several years, before taking legal action to recover their dowry. Even when such cases appear in the courts, the proceedings can be very protracted because of disagreements over the amount and the unwillingness or inability of the family to pay. Since most courts do not apply the rules included in the directive just cited, the cases involve disputes over the amounts a husband may have contributed to the wife's family throughout the years of the marriage. (Of course, in order to raise the necessary funds to repay these costs the wife's family may have to borrow money, and such debts often form the basis for further litigation when they cannot be repaid).

Thus we see, that while divorce under customary law should be limited to one legal action involving the members of the two families, in practice divorce involves at least two actions. The litigation may extend over a period of many years and meanwhile may fail to clarify the legal position of either the spouses or their relatives. The work of the court is increased and the court expenses may become exorbitant.

There are other features of the problems of divorce as it is currently practised. Today families tend to lose interest in or refuse to accept

responsibility for a daughter, or they may not even reside in the area where she lives. One case which we observed illustrates this problem. A man appeared in court suing his relatives for 'disassociating themselves from the family'. He complained that he had been sued by the husband of a woman in his family. Since he was the only relative available in the area, he had been forced to answer the summons. Later, he had attempted to collect some of the money he had had to pay from the other relatives but they had refused to acknowledge their responsibility for these costs.

In a discussion of the problem of divorce and refundable dowry the position of Islamic law should be considered. Islam has had a steadily increasing influence in Sierra Leone. Islamic law, as it is interpreted in Sierra Leone, discourages, if it does not prohibit, the practice of a husband claiming the refund of his dowry at divorce. In our discussions with chiefs, village elders, tribal headmen, imams and lay Muslims in those areas in which Islam is strong, we were often informed that 'no good Muslim will ever ask for his dowry to be repaid when his marriage ends in divorce'. We were then interested to discover what the reaction would be if the practice of dowry being refundable at divorce were officially eliminated. The questionnaire sent to the Local Courts included a question about this matter. Sixty-three per cent of the responses stated that the elimination of this practice would not be accepted by the population in their chiefdom and twenty-one per cent believed that it would be a good thing to eliminate the practice and that such a ruling would be acceptable.¹

1 A further 16 per cent of the questionnaires were either illegible or contained no answer to this particular question. Questionnaires were sent to all Local Courts and 113 courts returned their form. In all, 91, or 62 per cent of all chiefdoms in the country, were represented in the responses.

5. Conclusions

We lack sufficient information to assess the results either of continuing or eliminating the practice of refunding marriage payments on divorce. Neither the statements made by persons adhering to the strict tenets of the Muslim religion, nor the reactions of these court officials, provide sufficient information for this.

Within the traditional family organization the institution of dowry, far from reducing the status of women to that of 'chattels' to be bought and sold, as so many critics have regarded it, actually served as a mechanism to protect the position of a woman through the cementing of two families into a lifelong relationship of reciprocity and mutual interest. The family receiving the girl in marriage assumed a position of obligation to her family, by virtue of gaining rights over the children she would bear. Her family also continued to feel responsible for her well-being. It was in the interests of both families for the union to continue and be fruitful. Should the marriage dissolve the woman's family would face the heavy economic burden of having to return not only the dowry but other gifts the husband has presented. The girl's family would also lose status in the community for a divorce carries a stigma with it. Similarly, the family receiving a wife could only hope to maintain their prestigious position in the community by fulfilling their obligations to the girl and to her family. Public opinion, as well as the interests of the members of the families, served as a motive for individuals to perform according to community norms.

Today, for the most part, families no longer live as localized kin-groups. Relationships, by virtue of geographical separation, have become attenuated and public opinion no longer serves effectively to influence individual or family behaviour. Economic changes, particularly the

possibility of building up personal wealth, have resulted in a breakdown of co-operation characteristic of a subsistence society. Mutual interest has given way to a new emphasis on individualism. More specifically, in the past a man needed the material and other assistance of his family in order to obtain a wife; nowadays he can often manage on his own. To a lesser extent the same applies to women. Therefore, as we have seen, dowry can no longer be said to function in the ideal manner as formerly intended.

In the past a woman's family would be inclined to regard the dowry they received as a means of exerting pressure on the husband if he misbehaved; today men view dowry as a means of 'controlling' women, a way of keeping them within the household and under the authority of their husbands. However, as we have observed, the increase in economic opportunities which are open to women has already provided women who want to leave their husbands with the means to do so. However, the difficulties these women encounter when they find it necessary to free themselves from marital obligations lead them to choose one of several courses which do not dignify their status as women and are not generally conducive to marital stability.

Furthermore, focusing on dowry as a method of keeping women under the domination of husbands and preventing divorce greatly distorts the picture of present-day marital problems. We have noted that, given an unsatisfactory marriage, the interests of a husband are best served by adopting a mode of behaviour which will force a wife to provoke a divorce. Such behaviour often includes the failure to maintain wives and children. As a result women are forced to take steps to secure themselves. Moreover, we found many cases where a husband had, in effect, abandoned his wife by taking her to her family on some pretext and then failing to take her back. In most of these cases, the woman's family is financially unable to assume the

responsibility for her support. In such a crisis it is understandable that women take advantage of any opportunity to find economic security. Because the options open to them do not conform to customary ideas concerning respectable behaviour for women, many complain that 'our women are out of control'.

Today it appears that dowry is often viewed by a girl's family as a source of revenue and in some parts of the country amounts are increasing. Normally, the amount of dowry paid to a girl's family is a fairly modest sum. (Among its other functions, the giving of dowry is a symbolic statement of the establishment of a relationship between two families, not an act of selling a commodity.) Families are often hesitant to accept a large dowry, realizing the problems with which they will be confronted should the marriage fail. However, we encountered a number of instances where it appeared that the possibility of obtaining a large sum of money as dowry led fathers to take their daughters away from secondary school in order to arrange an immediate marriage. In one such case a sixteen-year-old girl, a ward of a family living in Freetown, was recalled from Britain where she was studying, to be married to a wealthy 'diamond man'. This man, having seen the girl's picture, offered her father a large sum of money for a dowry.

Today, in some parts of the country, particularly in the diamond areas, marriage payments may involve very large amounts of money. When a man is down on his luck, one obvious means of finding money is to attempt to recover the investment he has made in dowry. In such a case it is easy to see how a man might deliberately behave so as to encourage his wife to leave him, thus strengthening his chances of reclaiming his dowry.

Our findings indicate that not inconsiderable amounts of money are involved. According to the answers to the questionnaires returned by the

Local Courts, most marriage payment assessments fall between Le.70.00 and Le.200.00, but a large number ranged between Le.300.00 and Le.700.00, with such exceptionally high figures as, for example, Le.820.00, Le.1,090.00 and Le.2,395.00 appearing from time to time. Pledge marriages, as discussed earlier in this report, are also not uncommon. When these marriages end in divorce the enormity of the debt owed by the woman's father often makes settlement of the case nearly impossible.

IV PROPERTY RIGHTS OF WOMEN

1. The trend towards women's economic independence

Closely connected with the changes which have occurred in the organization of the family and the institution of marriage are the changing customs regarding the rights of married women over property. In the traditional village society the family is a co-operative unit. Ideally, everyone contributes to the family's economic development and everyone shares in the economic security the family attains. Although the husband could claim the surplus, he would be expected to use this in ways which would benefit the family's position in the community. Formerly, a woman was economically dependent upon her husband and his family. Today, with the growing opportunities for women to earn money through trading and other economic activities, they are highly motivated to provide for themselves independently. Everyone hopes to educate his children. As fathers are frequently unable to finance the educational costs of all their children, the responsibility for this expense may fall on the mother. In many cases, husbands fail to support their families adequately, either through neglect or poverty, and women are forced to earn money to support themselves and their children.

This is another area of family law which is in extreme flux. Our findings regarding traditional rules about women's rights over property

differed not only from area to area, but from one individual case to another. We cannot be certain that these differences reflect actual differences in traditional practices. After all, most descriptions of traditional customary law come from elderly men who strongly disapprove of the economic rights which women have assumed today.

Today the trend is towards the economic independence of women. However, their efforts towards achieving economic independence are contrary to the traditional conventions regarding women's roles and, as a result, many disputes arise. Rather than attempt to describe the customary law regarding women's rights over property, we shall list the kinds of disputes which arise over women's economic rights which were observed during the course of the research.

(a) The wife's rights over properties obtained through co-operative efforts with her husband: We found a number of cases in which women were suing their husbands for a share in the rice harvest which had come from lands which they had helped to cultivate. In many instances, the women won such cases. There were other similar cases. For example, a husband and wife built a house, both of them contributing towards the cost. When the house was let, the wife claimed a share of the rent. The trend in court decisions is to give women a right to a share of the proceeds of any such investment to which they had both contributed.

(b) Rights of a wife over personal property obtained solely through her own efforts: We found that women were using a number of methods to substantiate their rights over their own earnings. For example, a woman might build a house, register the plan and pay the rates on the house, so that no-one might challenge her right of ownership. Some women opened bank accounts in their own names. Many women were found to have invested their earnings in property attached to their own paternal family's estate rather

than that of their husbands. Although under customary as well as statutory law, it is illegal to buy or sell land in the Provinces, it is well known that in many towns house lots are being sold. We found many cases where women had bought such land, and were the registered owners.

Many women were launched into business through a loan from their husbands. In these cases it often happened that the husband sued his wife not only for the loan, but also for the profits which she had earned. Often the husband was only successful in claiming his initial investment from his wife. Nevertheless, the rules regarding the rights of women over the profits they earn when using a loan from their husbands are far from clear.

(c) Property rights of women at divorce: Under customary law a woman who is being divorced may be driven from the marital home and deprived of all possessions which have come to her during the marriage. However, we encountered many cases where wives sued their husbands for compensation for all the property they had acquired during the marriage. While the onus is on the woman to initiate such legal action and to prove that she contributed materially to the property she is claiming, those cases we observed were almost always decided in favour of the woman.

(d) Rights over a woman's property at her death: In principle, under customary law, a woman has no personal property other than her clothing, ornaments and cooking utensils. If she dies it is regarded as the husband's duty to show her property to her family. If there are no children, such property would most likely be handed over to her family.

Today it is usual that women who die leave much more in the way of personal property than clothing, ornaments and cooking utensils. A husband may attempt to conceal the amount of property his wife has left or to claim rights over it by asserting that he provided the initial

investment. The woman's family or her children may find themselves in the position of having to sue for their rights.

V. MAINTENANCE RESPONSIBILITIES OF HUSBANDS AND OF FATHERS OF CHILDREN BORN OUT OF WEDLOCK

1. Customary maintenance responsibilities

It has already been observed that the traditional household, in order to be economically viable, is dependent on the co-operation of all its members. Generally, it is regarded as the responsibility of men to provide shelter and food, but women provide much of the labour on the farm and also contribute by cultivating a garden. If the farm does not produce enough rice for the family's needs, it is the husband's duty to secure whatever extra is required. However, the day-to-day upkeep of the family depends heavily on the produce of the women's gardens to supplement the family's diet. Out of the surplus of the farm, a husband is responsible for supplying the minimal clothing needs of his family and for fulfilling his obligations to his own and his wives' relatives. Any extra proceeds might be used to secure another wife for his household, or to build up his prestige in the community through gifts or 'dashes'. In recent years, a man's wealth and position would also be indicated by his ability to afford a zinc roof for his house.

When a wife returns to her family for a visit or to give birth to a child, her husband will be expected to increase his contributions to them. If the wife's family provide for her and her children when the couple is estranged, the situation regarding the husband's maintenance responsibilities is more ambiguous. If she has run away on her own initiative, he can dismiss his obligation for her maintenance although her family may require him to help support the children. On the other hand, if he brought his wife to her family following a quarrel, once the couple is reconciled he may be obliged to pay for her upkeep for whatever period she

remained with them. All these arrangements are informal and the behaviour of the husband is very much dependent on the force of public opinion and the importance to him of continuing the marriage and his good relations with his in-laws.

Customary law does not provide rules for the maintenance responsibilities of a husband for his wife and their children, if his wife does not reside with him or with her parents. If a couple has divorced, the husband has no further obligations towards his wife. Under customary law children belong to the father, and men usually assume custody of all children old enough to leave their mothers; therefore the question of their maintenance after a divorce does not usually arise.

2. The management of maintenance disputes

Very few maintenance cases appear in the Local Courts. It is more common for court officials to refer all maintenance cases to the Department of Social Welfare or to the Magistrate's Court rather than attempting to settle them in the Local Court.

The Married Woman's Maintenance Act (Cap. 100) does not recognize a marriage by customary law. Consequently, although there is some question about the legality of the practice, it is common for women married by customary law who are seeking maintenance for their children to sue under the Bastardy Act (Bastardy Laws Amendment Act, 1972 35 & 36 Vict. C. 65 and Bastardy Laws [Increase of Payments] Act 196). Maintenance cases under these acts lie outside the jurisdiction of the Local Courts as these acts specify a Magistrate as competent to hear the case.

It is becoming increasingly common for women to go to social welfare workers for assistance in settling family disputes. This is especially the case in disputes over maintenance. There are some obvious reasons

for this trend. Social workers recognize women as legally competent. They do not question the right of a woman to live independently from her husband or her family. Moreover, they do not recognize the exclusive rights of a father over the children his wife bears. Finally, the Maintenance Acts under statutory law provide for regular support, and the family caseworkers attempt to impose this responsibility on men.

When a caseworker is faced with an irreconcilable marital dispute, he will try to convince the husband of his maintenance responsibilities. If the husband refuses to comply, the caseworker will instruct the wife on how she may take legal action in the Magistrate's Court. Of course, when these women sue under the Bastardy Act, they are only able to claim support for their children, not for themselves. This is in contrast to the Married Woman's Maintenance Act (Cap. 100), which provides for the support of the wife married under statutory law as well as for the children.

Under customary law, a husband has the right to the custody of the children his wife has borne. If she seeks maintenance for them, he may simply assume custody, since he may find it less expensive to support his children than to pay the amounts which may be awarded under the Act. Thus a woman who is separated from her husband may not only be deprived of maintenance, but of the custody of her children as well. (It should be observed, however, that this situation corresponds with a woman's position under customary law where it is expected that her family will maintain her.) On the other hand, if a woman has borne children outside marriage as a divorced woman, she has the possibility of claiming maintenance for them from the father under the Bastardy Act as well as retaining the right of custody. It would appear that, in the absence of a customary law which imposes maintenance responsibilities on husbands when their wives are living separately from them or any other relatives, the present application

of the Bastardy Act actually encourages the development of extra-marital forms of cohabitation producing children, which, under statutory law, are regarded as illegitimate.

Most men cannot afford to pay the amounts of money which are awardable under the Bastardy Act (a maximum of Le.3.00 per week per child). Recognizing this, Social Welfare has developed an informal scheme for maintenance payments. They fix a sum which the man will be able to pay, and caseworkers receive this money and hand it over, usually monthly, to the woman. Most men will agree to this arrangement, after being informed of the amounts the court could award, should the woman threaten to sue him in the Magistrate's Court.

In this vacuum Social Welfare is able to impose such measures on its clients even in contradiction to customary law, as people have great respect for the authority of government agencies, and are usually ignorant of their own rights. This is not, however, necessarily a criticism of the policies of Social Welfare. On the contrary, in the face of rapidly changing social conditions and weakening respect for family obligations, Social Welfare plays a vital role in alleviating human suffering. Indeed, its efficacy could be increased considerably by appropriate legislation to extend its powers.

VI. POSITION OF CHILDREN

1. Customary rules regarding rights over children

It has already been observed that the problems of defining marriage under customary law today lead to a number of complications in determining rights over children. It should be noted at the outset of this discussion that under customary law there is no concept which means exactly the same as the term 'legitimacy' under English law. Rights over the procreative

services of a woman are vested in her paternal family until they are transferred at marriage to her husband and his family. If a girl has a child before marriage, her family, not having transferred these rights to any man, would be in a position to claim damages from the man who has trespassed on their rights and to claim the child. Ideally, of course, in the traditional village society, all women past puberty should be married, thus avoiding such a situation.

Rights of succession and inheritance rest on the acknowledgement of paternity by the father. If a married woman has a child who was fathered by someone other than her husband, the husband may still acknowledge the child as his own, since he has rights over her procreative services. If it is known that the child's genitor was someone other than its mother's husband, it will be called by a term which, in the indigenous languages of Sierra Leone, means 'child of an illegal love relationship'. Children born of such illegal relationships present complicated problems under customary law. In some areas people say that a husband will recognize all the children his wife bears, regardless of the identity of the biological father. In other areas we were informed that a man would refuse to acknowledge such a child as his own. In many parts of the country the father who recognizes a child of his wife as his own, follows the custom of burying the child's navel string under a tree in his village. The child will be shown the tree and may claim the profits from the fruit of the tree. In disputes over paternity the existence of such a tree planted by the father may be offered as evidence. A child not recognized by its mother's husband will always stand in an ambiguous relationship to its mother's relatives or those of its biological father or of its mother's husband. Its chances of inheriting or succeeding to any position will rest largely on its personal conduct and arbitrary decisions made within the family. For example, it often happens that such a person is so obedient

and makes such a significant contribution to the upkeep of one of these family groups that he is fully accepted as a member with all the rights involved.

Under customary law, a woman never has the exclusive right to claim custody of the children she has born, since the woman herself is under the control of one family or another who has rights over her procreative services. Today, however, it is increasingly common for women to assume custody of the children they have borne through illegal relationships.

2. Cases of undisputed inheritance rights

The following cases cover those children whose rights of succession and inheritance are unlikely to be questioned under customary law.

- (a) A child born to parents who are legally married.
- (b) A child fathered by a married woman's lover but explicitly acknowledged by the legal husband as his own.

3. Cases of disputed inheritance rights

The following cases include children whose rights of succession and inheritance are not clearly defined under customary law.

- (a) An extra-marital child, not acknowledged by its mother's legal husband.

The mother of the child may seek to divorce her husband and marry the father of the child, in which case the child would be acknowledged by his natural father. However, if a divorce is impossible, the woman may be forced to seek refuge in the household of some relative. Her support and that of the child will

depend on the goodwill of her benefactors and her own ability to maintain herself. Today it is common for such women to sue for support under the Bastardy Act.

- (b) Children born to a union which has had the consent of the families but where dowry and other ceremonial prescriptions have not been completed.

The woman's family may coerce the child's father to fulfil his legal obligations or threaten to return their daughter to their household and assume rights over the child she has born.

- (c) A child born to a betrothed girl and fathered by the intended husband.

The girl's family have the right to fine such a man for having illegal sexual relations with their daughter and he may be coerced into an early marriage arrangement.

- (d) A child born to a betrothed girl and fathered by a man other than the man she is intended to marry.

The girl's family may claim rights over the child and continue the marriage arrangements with the intended husband, usually with a reduction in dowry. Either the intended husband or the girl's family will also seek compensation from the father of the child. It may also happen that the girl's family will try to break off marriage negotiations with the intended husband and arrange for the girl to marry the father of the child. In this case, the intended husband may claim any expenses he has already incurred and may even claim compensation for his loss from the girl's family, accusing them of giving their daughter to another man.

- (e) A child born to a married woman and fathered by her partner in a 'caretaker marriage'.

The husband may claim adultery damages from the 'caretaker'.

He may choose whether or not to claim his rights over the child.

- (f) A child born to a divorced woman and fathered by her partner in a 'debtor-creditor marriage'.

The woman's family may attempt to coerce the father into marrying the mother by paying a token dowry, or he may take this action on his own initiative in order to strengthen his own claim to the child. We observed that sometimes in these disputes over rights over a child the 'creditor' was named the legal father as 'interest on the loan'. But the mother of the child may contest his efforts to obtain such rights, wishing to retain custody of the child herself.

- (g) A child born to a widow who has been 'inherited' or married by a male relative of the deceased husband, and fathered by another man.

The new husband may claim adultery damages from the genitor of the child and he may choose whether or not to claim rights over the child.

- (h) A child born to an unmarried girl for whom no marriage has been arranged and fathered by an unmarried man who does not intend to marry the girl.

These cases appear very frequently nowadays because education interrupts the traditional pattern of marriage directly a girl reaches puberty. Often the natural fathers of such

children are students who feel that a marriage or parental responsibility will impede their studies. Such children may be claimed by the girl's parents, or the father may assume rights over the child and take it in to his own family without any payment or the girl herself may be left with the responsibility of caring for the child.

- (i) A child born to a married woman and fathered by her partner in a 'stranger-permit marriage'.

In those parts of the country where a 'stranger permit marriage' is recognized, the husband of the woman is not entitled to sue for adultery damages but may assert his rights over the child.

- (j) A child born to a married or divorced woman and fathered by a man who neither is nor has been the woman's husband but who registers the birth as that of his own child.

Because of the overwhelming authority with which people regard any agency of the Central Government, such a birth certificate will be accepted as evidence of rights over the child against all other customary claims.

- (k) A child whose mother is married by customary law, and who was fathered by her husband whose personal law is customary law but who is married by statutory law to another woman.

Since inheritance is governed by personal law and personal law is not affected by marriage, such children are the legal heirs and legitimate offspring of their father. However, the Christian Marriage (Amendment) (No. 2) Act 1965 makes a prior

customary marriage an impediment to a statutory marriage. On the other hand, there is no legislation which stipulates that a man may not contract a customary marriage after he has married under statutory law. The law defining bigamy (Cap. 95, Sec. 16 and 17) does not recognize a customary marriage. Since strictly customary law does not recognize a marriage where no dowry has been transferred, one could assume that only the children of the customary marriage would be recognized as legal heirs. However, in contradiction to this legal situation the tendency in Sierra Leone is to give priority to statutory marriages over customary marriages irrespective of their sequence.

- (1) A child whose mother is unmarried and who was fathered by a man already married under statutory law.

These children are illegitimate. If the father's personal law is general law, they can never be legitimized or regarded as his legal heirs, although they may inherit from him through explicit provisions in a will. There is no legislation to indicate what their position would be if the father's personal law was customary law and he later negotiated a customary marriage with the child's mother.

VII. ADOPTION

1. Customary law and adoption

Under customary law, rights over children are held by families, not only by the individual parents. Like all other decisions of importance, decisions affecting children are usually taken in consultation with the other members of the family.

It is a common practice for children to live for varying periods of time with relatives other than their parents. Many groups feel that it is desirable for a child to be reared by a relative who will provide strict discipline, as parents are likely to spoil him. The 'ward system', where the child is handed over to non-relatives for training, has been practised in Sierra Leone for a very long time. Formerly, it would have been impossible for a child to be left without relatives who could take care of him if his parents died. Today, however, it is not uncommon for the relatives of orphaned children to be unable or unwilling to assume responsibility for their care. Nevertheless, there has never been any formal provision for adoption, either under customary law or statutory law. The absence of any provision for legal adoption is a cause for concern among those couples who wish to provide a permanent home for such children.

The possibility of drafting suitable adoption legislation has been considered by the Judicial Department. During our research we attempted to discover whether there were any practices under customary law which correspond with adoption as it is understood in English law. We found a number of practices which involved at least partial transfer of rights over children. These can be grouped in four broad categories.

(a) A child may be handed over to a relative for varying periods of time. The financial support of such a child is usually provided by the family caring for him. Such a child is said to have been given to the relatives for training or 'minding'. The relative who actually rears the child for most of his childhood may be involved, together with the parents, in his or her marriage arrangements. If the child is a girl, some part of the marriage payments will be handed to the family which reared her, in recognition of their contribution to her development. The position of such

a child as regards inheritance and succession is not affected by this arrangement.

(b) There are exceptional cases where a child is handed over to a female relative who is barren. Such arrangements closely approximate to adoption since the family in loco parentis assumes the authority for arranging the child's marriage and, if the child is a girl, for receiving the dowry. In all the cases we observed the person receiving the child was a relative of the parents. Issues such as inheritance and succession rights did not arise because the child was a girl. According to our findings, complete assumption of parental rights over a child involves the right to assume the authority for arranging the child's marriage and, when the child is a girl, receiving the dowry.

(c) Infant betrothal, a practice which rarely occurs today, could involve the transfer of responsibility for rearing a child to the family of the prospective husband. Today it may happen that a very poor family places their child in the household of another family in the hope that one of the male members of the family will later choose her as a wife. Relationships with the parents as regards marriage arrangements, inheritance and succession are not affected by this practice.

(d) Since the early days of the Colony, the practice of placing children as 'wards' in the households of non-related families has been very common. The responsibility for maintenance varies with individual family arrangements. Formerly, it was quite common for the family in loco parentis to assume responsibility for the child's care and school education. In many cases these children became absorbed into their foster-family, sometimes even taking its name. Because of the gap in the social and educational background which often developed between the child and his own relatives, the question of their controlling his marriage arrangements or insisting

on their rights as parents usually did not arise. In many cases such children, when adults, turn their backs on their own relatives and fail to assume the responsibilities associated with family membership.

However, so far as we could determine, those parents who had handed over their child as a 'ward' never intended to lose their child to the new family. They expected to exercise their authority in marriage arrangements and anticipated that the child would return to the family as an adult and assume his rightful position in the family.

2. Problems which commonly arise

It can be seen that none of these customary arrangements constitutes adoption as it is understood in English law. Nevertheless, today many children have come under the care of the Children's Home or some other philanthropic agency because they have no close living relatives. People who foster or informally adopt such children have no legal protection from claims made by any relative who may establish a blood tie. After all, under customary law rights over children are controlled by the entire family, not only by the parents. The kinds of cases encountered in this research suggest the need for legislation which would define the rights of foster and adoptive parents.

For example, we learned of a number of cases where for one reason or another a child was placed with a non-Sierra Leonean couple. These foster-parents understood that the child had been given to them permanently and they fully expected to take the child with them to their home country. Such foster-parents would seek authority to remove the child from Sierra Leone through the Ministry of the Interior or through the courts. Often this authority was given, although the child's parents or relatives did not understand the implications of this action until it was too late. Our findings suggest that these parents never intended to relinquish their

rights over their child permanently; they believed that they had permitted the fostering of their child for a certain period only.

It also happens that an unmarried mother will give her child to a family not necessarily related to her. Neither she nor the family may recognize any rights of the natural father. These cases arise quite frequently in towns where, as has been observed, young people enter into informal conjugal unions which may or may not have the authority of their families. Many of these couples intend to marry eventually under customary law. In other cases, the natural father assumes he has rights over the child because he has been supporting it. When such a father does provide financial support for his child, caseworkers in Social Welfare usually recognize his paternal rights. For example, in a dispute with the mother of a girl-friend who had died in childbirth, the caseworker insisted that the natural father's wishes and those of his family regarding the care and custody of the child be respected since he had supported his girl-friend during her pregnancy.

In one such case a man who had regularly supported his girl-friend and his child, found to his dismay that she had given the child to a non-Sierra Leonean couple. This couple had secured a passport for the baby and were intending to take the child out of the country. He complained to his girl-friend and she recovered the child from the foster-parents. Later, however, the foster-parents were able to persuade the girl to return the baby to their custody and they left the country immediately. In such cases parents, particularly natural fathers, are powerless. They are unsophisticated regarding their legal rights and economically unable to secure a lawyer even if they know their rights. When such cases come to the attention of Social Welfare, caseworkers are not empowered to take legal action on behalf of the parents. Of course the management of these cases contradicts the principles of customary law, which invest the rights

over children in families, not in individual parents, and most certainly not in women.

Misunderstandings often arise over the intentions of parents. For example, in one case a legal father handed his daughter over to a woman who reared it as her own child. Her investment included educating the child abroad from the age of 7. For many years the child had no contact with her natural family although the foster-mother had notified the father that his child was going to be educated outside Sierra Leone. When the girl was about 16 the father demanded that she be returned to him. He explained that he had given the child to the woman to be trained. The foster-mother argued that he had given her the child. She sought legal advice and was informed that she had no rights over the child. She then took her case to one of the unofficial headmen courts in Freetown where cases are tried according to customary law. The decision gave the father all rights over the child but added that he could only recall his daughter to Sierra Leone if he compensated the woman for all her expenses and paid the fare. The size of the amount assessed served effectively to discourage his efforts to gain custody of his daughter.

VIII. SOME CONFLICTS OF LAW AND RELATED PROBLEMS

1. Whether a customary marriage is an impediment to a statutory marriage

Today natives may marry under the provisions of both the Christian Marriage Act and the Civil Marriage Act but the Christian Marriage (Amendment) (No. 2) Act, 1965 specifies that a prior customary marriage is an impediment to marriage under its provisions. However, given the uneven response to the provision for registering a customary marriage, there is no effective method of ascertaining whether or not a person presenting himself for marriage under the Christian Marriage Act is already married to another person under customary law. Moreover, Sections

16 and 17 (Cap. 95) which deal with the offence of bigamy, state that a marriage by native law and custom shall not be deemed a marriage. The Civil Marriage (Cap. 97) (as amended by Act No. 49 of 1965) and the Mohammedan Marriage Act (Cap. 96) are both silent on the matter of whether or not a prior marriage under customary law should be regarded as an impediment under these provisions. Thus, while a person marrying under the Christian Marriage Act who is already married to another person under customary law would be committing an offence, it would not be an offence if he married under either of the two other acts. Thus far all these problems have been ignored.

2. Whether a statutory marriage is an impediment to subsequent customary marriages

None of the provisions for marriage under statutory law considers the problem of subsequent marriage under customary law. While the Muslim religion allows for polygamy, persons marrying under the Christian Marriage Act would be expected to remain monogamous. In practice, however, many native men are parties to marriages under the Christian Marriage Act and to others under customary law. Sometimes such marriages occur as a result of the death of a member of the family who has left a wife to be 'inherited'. She may be assigned to an already married man as his wife. Usually these 'inherited' wives could be better described as dependants than as wives. In other cases natives do take subsequent wives under customary law. However, a woman marrying under statutory law expects that she is entering a monogamous union. The law, as it stands, does not protect her from the possibility that her husband will marry other wives under customary law.

3. Whether a customary marriage can be converted into a statutory marriage

Many, perhaps most, natives who marry under statutory law have

observed the requirements of marriage under customary law, if only as an act of respect towards their families. The law does not specify whether a customary marriage may be converted into a statutory marriage. Related problems were observed to arise when couples divorced after having converted their customary marriage into a statutory marriage. For example, a couple married according to customary law and later converted their marriage into a statutory marriage under the Mohammedan Marriage Act. Still later they divorced according to Mohammedan law. The woman's family refused to acknowledge the legality of the divorce and would not countenance a subsequent marriage, claiming she was still a married woman.

4. Family consent when natives marry under statutory law

Both the Christian and Civil Marriage Acts require the consent of 'person or persons whose consent to such marriage is required by law' if the parties are below the age of 18. Nothing is said about the requirement of age or the matter of consent in the Mohammedan Marriage Act. Under customary law a marriage is not recognized as legal without the consent of the families of the parties. In practice today, there is a tendency for persons to form unions on the basis of their own choice, but it is still necessary for them to obtain at least the tacit approval of their families. Although statutory law allows people to proceed with marriage without the consent of their families if they are of age, some serious problems may arise when no familial consent has been given. A number of cases were encountered during this research where a family refused to assist a woman who had been deserted by her husband because they had never consented to the marriage and hence did not regard it as legal.

5. Minimal age for marriage and carnal knowledge

The Prevention of Cruelty to Children Act (Cap. 31) makes sexual relations with a girl under 14 years old, with or without her consent, a

crime to be tried before the High Court, with the possibility of a prison sentence being imposed. Under customary law it is common for a girl to be betrothed when she is below the age of 14. Although it is unusual, it does happen that girls below this age who are physically mature are handed over to their husbands as wives. If a man has sexual relations with a girl who is betrothed but not yet handed over to him, whatever her age, his action will be regarded as an offence. He will have to compensate the parents and will be forced to proceed immediately with marriage arrangements. If the girl has not been initiated into the Bundu society, hasty arrangements will be made for this procedure. If a man has sexual relations with a girl who is betrothed to another man, he may find himself in serious trouble with both this man and the girl's family. Marriage arrangements may be disrupted and the man who has had sexual relations with the girl may be forced to marry her. Under customary law, for a man to have sexual relations with a woman to whom he is not married is always an offence, regardless of the age of the woman or her having given consent, and must be remedied through the payment of compensation. Nevertheless, however serious these offences may be deemed, they may be remedied through negotiation and the paying of compensation. We know of a number of cases where a man was charged in the High Court for having sexual relations with a girl to whom he was betrothed, who was deemed to be under 14 years old. In these cases the defendants were unable to understand why their action was being treated as a serious and imprisonable offence.

The problem of girls having sexual relations while under the statutory age of consent is a growing one in Sierra Leone, and has implications in customary law as well. Traditionally, girls were not handed over in marriage until they had been initiated into the Bundu society. A girl was not initiated into the society until she had achieved puberty. Although records of age are not kept, people estimated that girls were usually about 16 or 17

before being initiated. Today there is a very general trend throughout the country for girls to be initiated at much younger ages than would previously have been approved. Once a girl has graduated from the society it is generally assumed among young people that she is mature enough to have sexual relations, and girls are beginning to exercise this freedom whether married or not.

Since government requires that permission (involving a fee for a permit for every initiate) must be obtained from the chieftom authorities before any initiation ceremony can proceed, it would seem possible to impose a minimum age limit for the girls proposed for initiation upon the head of a society who applies for the permit. Since custom demands that girls retain their virginity until they are initiated, such an age requirement would at least deter many girls from giving their consent to sexual intercourse before they had reached the official age of consent, and might perhaps reduce the number of such offences, together with the resulting undesirable social consequences.

6. Breach of promise to marry

The statutory law provides for damages for breach of promise to marry (Cap. 95, Sec. 29). Such a case falls under the jurisdiction of the High Court. However, the High Court does not have jurisdiction over cases concerning customary marriage (The Courts Act No. 31, 1965, Sec. 21). At the same time, Local Courts are specifically forbidden to hear cases of breach of promise to marry (Sec. 13). In practice, however, they may illegally hear such cases.

Customary law also punishes a man who fails to fulfil his promise to marry a woman to whom he has been betrothed. These cases usually arise when a couple have cohabited but the man has failed to complete the dowry payments. Until the payments are complete, the parents of the girl have

the right to reclaim her and any children she has borne. A case of breach of promise to marry may also arise under customary law when a family has arranged a marriage for their daughter with one man and then either they or the girl decide in favour of another suitor. While customary law does not make provision for the rejected man to sue for compensation for breach of promise, it does allow him to recover all moneys he may have given to her or her parents as 'love expenses'. As mentioned above although Local Courts do not have jurisdiction to try these cases, they do in practice frequently hear them.

7. Compellability as a witness in a case involving one's spouse

The Criminal Procedure Act, No. 32, 1965 (Sections 86 and 87) specifies that a person married otherwise than by a Civil or Mohammedan marriage shall be a competent and compellable witness either for the prosecution or the defence in a case where his or her spouse is charged with an offence. Section 91 defines a civil marriage as a marriage which is recognized by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others. Thus persons who are parties to a polygamous marriage may be compelled to give evidence for the defence or prosecution when a spouse has been charged with an offence. This statute does differentiate between persons married by customary and statutory law. However, the rule that a person may be compelled to give evidence against a spouse does not contradict customary practices. Under customary law there is no provision for excluding any person from being a compellable witness. Usually the witness is required to give his or her testimony after swearing on medicine.

8. Maintenance laws

The problems which women face in securing maintenance were discussed in Section II of this report. As observed there, the Married Woman's

Maintenance Act (Cap. 100) does not recognize customary marriage.

The Bastardy Act has been employed to force husbands to maintain children born of their customary marriage. Some lawyers question the legality of the application of this law to such cases but the matter has never been tested in court. The fact that women married under customary law have no other remedy for securing support for their children means that customary marriage gives inferior rights to statutory marriage. Furthermore, the Bastardy Act provides support only for children, not for their mothers. Thus wives married under customary law have no statutory means to secure support from their husbands. This problem has become more acute with the growing unwillingness of families to fulfil their traditional obligations towards their members who are in need.

9. Some changes in the concept of family property and personal property¹

In the traditional subsistence agricultural economy there were limited opportunities for the acquisition of personal property. Rules governing the devolution of estates concentrated on land and other family property. The general principle of devolution was that land and family property were vested in the extended family, but controlled by its recognized head. His was the responsibility for maintaining this family through his exercise of authority over the apportionment of the land to the various households.

The changing social and economic conditions in Sierra Leone have steadily increased opportunities for individuals to acquire personal property. Even before concepts from English law were introduced into Sierra Leone customary law recognized that a very limited category of property could be held by the individual rather than by the family.

1 Dr. H. M. Joko-Smart has investigated the problems of inheritance of property in Sierra Leone, and his findings are available for reference (1969; 1970). Mr. L. C. Greene has also conducted research into the problems of land tenure and has very kindly allowed his findings to be included in this report.

Not only has there been an increase in personal property to be devolved, but the very definition of what constitutes personal rights over property has expanded. Over the years there has been a shift of emphasis in the devolution of property. Today the trend is towards evolving per capita rules of inheritance and gradually limiting the role of the family head in his control over family property.

In many cases, property, even land, which would formerly have been regarded as family property controlled by the family head for the benefit of the members of the extended family is now included in the estate to be devolved according to the rules of distribution of personal property. The definition of personal property has broadened to include moveable and immoveable property. Today, for example, when a permanent building is erected on a piece of land, or when a farmer plants a permanent oil palm, coffee, or cocoa plantation, virtually permanent individual ownership is recognized. The concept of the inalienability of family land does, however, persist and gives rise to a number of disputes over land when an individual has claimed personal rights by virtue of his having built a permanent house or planted permanent crops.

A large proportion of inheritance disputes which arise today result from quarrels over rules regulating the devolution of personal property. In our opinion the confusion arises from the relative paucity of rules for the distribution of personal property in the traditional subsistence economy. Today people find that traditional rules of devolution no longer suit modern conditions and attempt to by-pass the practice of investing property in the head of the family. Family heads are often accused of using family property for personal gain - renting out family land, and taking the proceeds for themselves, and refusing legitimate requests for farming land from members of the family.

Other problems arise when a woman with several children is widowed. Her husband's property should, under customary law, be controlled by the head of the family who assumes responsibility for their welfare. She and her children are the responsibility of the family. We encountered many cases where the family head was accused of using such property in his own interests, ignoring the needs of the widow and her requests for money to pay school fees for her minor children. The widow who has no children and who rejects a levirate marriage will not benefit at all from her husband's estate.

As a result of such problems, there is a growing tendency to attempt to by-pass the rights of the family head and bequeath property directly to the children of the deceased. Reference to the English type of inheritance rules or the rules of Islamic law is used to justify this trend.

It is maintained that under customary law a woman may not inherit. Moreover, it is stated that the property a woman acquires from her husband during marriage is under the control of the husband. When a wife dies, if there are no children, according to customary practices her husband has the obligation to give her personal effects to her relatives. Formerly, a woman's personal property would amount to little more than clothing, pots and pans, and her personal ornaments. Today women are able to acquire considerable personal wealth. We found it common for the family of a deceased wife to claim the right over her property. If there are children, her family may allow the husband to keep such property in trust for them, but if her family suspects that he might use it for the benefit of his children by another wife, her relatives may assume responsibility themselves for keeping it in trust for the children. We also observed cases in which the wife's family sued the husband in court for a portion of his property, claiming that the deceased wife had materially contributed to its acquisition.

10. Familial rights over farming land¹

It has been argued in Africa that to continue the traditional land tenure system and to discourage individual land ownership will preserve the right of every person to a piece of land for subsistence farming purposes (Hailey 1949; Meek 1949). The argument runs that if the sale of land is permitted, the result will be the creation of a 'landless class' in the society. It is true that under the traditional land tenure system every family had a right to a portion of land for farming purposes. So long as there was sufficient arable land, this system was satisfactory. Today, however, in many parts of Sierra Leone there is a severe shortage of cultivable land. Moreover, there is a growing awareness of the profits which may be realized from the planting of permanent crops and from growing rice on certain types of land, such as swamp land. As a result, a person's absolute right to be allotted family land for farming is in practice curtailed. Contests over land (bush disputes) are becoming more frequent. The combination of the shortage of land and the attraction of wage-earning jobs in towns has led to a continuing and growing migration away from the farms.

Today, many people who originated in the Provinces but who are working in towns as unskilled labourers are beginning to recognize the possibilities of earning a more secure living through agriculture. Government policy, which encourages the development of the agricultural sector of the economy, has increased this awareness. However, in many cases when such persons decide to return to their home village to farm, they have a very difficult time obtaining land for themselves. To be successful, such persons would have to keep very close contact with their relatives during the years of their absence and should have continued to make financial

¹ A report on an investigation by Mr. L. C. Greene on the question of land registration appears as Appendix A.

contributions to them. They were also expected to bring a substantial sum of money as a 'shake hand' to the chief who has the final authority to allocate land. Those who have neglected these obligations have largely forfeited their claims to land.

There are a number of cases where highly educated Provincials have recognized that profits may be earned through modern, mechanized farming; because of their financial resources and prestige they have been able to detach villagers from the land and establish large farms. Moreover, although non-natives and foreigners are not allowed to buy land in the Provinces, many have been allocated land by a chief as 'strangers' and have been allowed to farm. Such leasing of land in the Provinces is provided for under the Provinces Land Act (Cap. 122), but our findings suggest that some of these individuals have been leased land at the expense of villagers who required it for subsistence farming. In short, the assumption that maintaining the present land system in Sierra Leone will avoid the development of a 'landless class' and retain the rights of everyone to subsistence farming is not borne out in reality because of the abuses which occur.

(a) Registration of land

Mr. Green has recommended a gradual programme of land registration for the Provinces. While in principle we support his recommendations, we would draw attention to one serious obstacle to successful registration. Because of migration, large numbers of people have established farms in various parts of the country away from their own home villages. These people are usually referred to as 'strangers'. It has long been a practice for 'strangers' to 'beg' land from the local traditional authority or landowner. 'Strangers' maintain their right to farm in the area by giving small annual payments to the local authority or family head from

whom the land was originally 'begged'. When a family has been resident in an area for many generations, it often happens that the practice of giving this annual sum is neglected or forgotten. It may even happen that the 'stranger' family becomes so well established that they become a 'ruling' family, providing successful candidates for the chieftancy. Today there are many cases where arguments arise over whether or not a family is a 'stranger', because people have forgotten which families were earliest resident in an area. We suggest that any programme of land registration would have to take this matter into serious consideration. It might be possible to set some arbitrary period of residence as the criterion for permanent rights over land. Otherwise, under the present situation, land registration could only contribute to the existing confusion.

11. The definition of a native and a non-native

As far as the personal law affecting inheritance is concerned, there are three systems of law in Sierra Leone. First, there is general or statutory law comprising English common law and equity and all the enactments in force in Sierra Leone which do not pertain to customary law or Mohammedan law. Secondly, there is the customary law of the various groups in the country and, finally, at least limited statutory provision for the recognition of marriage and inheritance under Mohammedan law. These three systems were intended to accommodate three distinct groups of people in Sierra Leone.

Customary law is to apply to those persons termed 'natives'. The Interpretation Act 1971 (No. 8 of 1971) defines a native as '...any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto), other than a race, tribe or community (a) which is of European or Asiatic or American origin; (b) whose

principal place of settlement is the Western Area'.

General or statutory law applies to 'non-natives', and 'non-native' is defined as any person other than a native. A third group of persons, governed by Islamic law, covers those who follow the Muslim religion. (In fact, the definition of this third group involves considerable confusion and will be discussed in more detail later in this report.) An individual's personal law is determined by his ethnic identity at birth and not by his place of birth or domicile. Thus, a native domiciled in the Western Area is subject to customary inheritance law and a non-native living in the Provinces is subject to general or statutory inheritance law. There are, however, a number of problems involved in determining which system of law should apply to an individual. Firstly, there is the problem of identifying a person's ethnic background. Tribes in Sierra Leone are not territorially defined. Many people tend to identify themselves with the predominant tribe in the area where they live regardless of their ethnic origin. Often individuals affiliate themselves with the tribe whose language they first learned to speak. A man may marry a woman from another tribe and live in her village; the children of this union may grow up considering themselves members of their mother's tribe for such reasons as the predominance of the tribe, the wealth and status of their mother's relatives, etc. Fortunately, many problems of conflict between the customary law of various groups are forestalled because, as has been discussed, customary family law is relatively uniform all over Sierra Leone (See Joko-Smart 1969).

It is more difficult to determine who has the right to consider his personal law to be the general or statutory law, or, in other words, what makes a person a 'non-native'. As Joko-Smart points out, '...according to the definition of a native, an issue of an intermarriage between a native

and a non-native is himself a native' (1969). There are probably very few individuals who can trace their ancestry back to the early settlers or Liberated Africans without encountering unions within their families which involved a native. Thus, it would be impossible to know how many people who regard themselves as non-natives are in fact offspring of unions between natives and non-natives. Furthermore, many natives have been absorbed into Creole families as wards and have assumed the family name of their benefactors. Today many persons who identify themselves as non-natives have grandparents whose first language was one of the indigenous languages of Sierra Leone. Assumption of the identity of a non-native appears to be associated with long residence and property interests in the Western Area, some consanguineous or affinal tie with established Creole families, affiliation with Christianity and Western education, and the practice of monogamous statutory marriage.¹ Thus the application of the terms 'native' and 'non-native' in determining personal law is considerably more arbitrary in practice than the legislation intended.

12. Wills

Everyone in Sierra Leone can make a will, although, as Joko-Smart (1969) points out, there are some special conditions which apply to wills made by natives. A native may only dispose in a will of property which, according to customary law, may be regarded as his personal property. He may never include family property in a will. However, as observed earlier, in practice the definition of personal property has been enlarged to include immoveable properties which formerly would have been considered family property.

¹ The Colonial Government was confronted with the inequity of this distinction between native and non-native in the application of laws, and colonial records show officials were tempted to apply some 'style of life' test as a basis for determining personal law in certain cases.

Property located in the Provinces belonging to a deceased native comes under the jurisdiction of the Local Courts. The practice of making a will is almost entirely foreign to customary law. Our observations suggest that in most cases where a will made by a person who was illiterate in English is presented to a Local Court, the will is assumed to be fraudulent. Any will presented to a Local Court will probably be recognized only when the testator has followed the customary rules of distributing property and had his will witnessed by chiefdom authorities. Moreover, even when wills are presented in inheritance cases, the usual practice is for the courts to confirm the head of the family as the executor. Some groups do place a great deal of importance on the death-bed wishes (in articulo mortis) of the deceased. However, in most parts of Sierra Leone we were informed that should the deceased's last wishes contradict customary rules of devolution, they will be ignored.

13. Wills and the location of personal property

A number of difficulties may arise in the devolution of an estate when a native owns property in both the Provinces and the Western Area. When a native dies intestate, all his property, whether located in the Provinces or the Western Area, must devolve according to customary law (Cap. 45, Sec. 43). However, when he dies testate it is not clear where jurisdiction lies. Joko-Smart (1969) has cited three cases where a native resident in the Western Area died leaving a will. The High Court (then the Supreme Court) granted probate. Joko-Smart does not explain what happened to the property they owned in the Provinces! Whether it was treated separately and devolved according to customary law, or whether, because of the existence of a will and the residence and status of the deceased (one case involved the property of Sir Milton Margai) the Supreme Court assumed without contest the jurisdiction over all the property. If

a native has the right to will property owned in the Western Area in contradiction to customary rules of devolution, all customary rules of inheritance could be set aside by will, thus jeopardizing the rights of relatives who would have benefited from the estate under customary law.

Differences in the application of the law on the basis of the location of the property concerned were observed in cases where all the property was located in the Provinces. The following case is typical. A husband had registered a house in his wife's name. When he died, his family claimed all his property in the customary manner. However, it was the opinion of one State Counsel that since the house was located in a Town Planning Area, its devolution came under statutory law and the wife had rights over it. Although the intention that his wife should own the house after his death could be inferred from the husband having registered the house in her name, statutory rules of inheritance should not, strictly, have been applied in this case.

14. Marriage between natives and the devolution of property in cases of intestacy

When two natives from different tribal backgrounds marry under customary law, in practice the wife's personal law alters to that of her husband. However, as Joko-Smart (1969) has also pointed out, such mixed marriages would not give rise to a conflict of laws anyway because of the great similarity of customary law regarding the position of the wife.

However, in contrast with many other African countries, in Sierra Leone marriage under statutory law does not alter the personal law of the spouses as regards inheritance. Therefore, when two natives marry under the statutes, their personal law as regards inheritance continues to be customary law (Cap. 95, Sec. 26). Many people are completely ignorant of

this fact. Often when both parties to a statutory marriage are natives they believe that they fall under statutory law as far as inheritance is concerned. Most of these couples are unaware that the wife may not inherit from her husband according to statutory law. Although the native husband could make a will, yet, as we have seen, if this will contradicts customary rules of inheritance, its validity may be challenged.

15. Marriage between natives and non-natives and the devolution of property in cases of intestacy

When a native marries a non-native under statutory law, upon his death the native's estate must devolve according to customary law. Under customary law the responsibility for the wife is passed on to some male member of the husband's family. The wife may not inherit money or property from her husband. If customary law were to be strictly applied, the husband's relatives would not be obliged to recognize the statutory marriage of their son and could thus avoid the responsibility for maintenance.

If a non-native wife dies intestate before her native husband's death, her own personal law, being statutory law, will recognize the marriage: her estate will pass over to her husband under the provisions of statutory law (Cap. 45). When he dies his estate, to which her property has now been added, will be inherited by his patrilineal relatives. Again, under a strict interpretation of customary law, their children would have no more claim to a share in the estate than would any other male member of the family.

When a non-native man married to a native woman under statutory law dies intestate, the wife will receive that proportion of his estate to which widows are entitled under statutory law (Cap. 45). If the native

wife has property and dies intestate before her husband, her estate should be administered under customary law. Again, according to a strict interpretation of customary law the marriage would not be recognized, if the family had not at the marriage received marriage payments from the husband or his family.

Generally, however, customary law is not strictly followed. We found a variety of compromise solutions worked out to solve the problems that arise in these cases. For example, there was a case in which a native man was married under statutory law to a non-native woman and also had other wives whom he had married under customary law. His property was located in the Provinces and he had money in the bank. The decision of the Administrator General was to treat the non-native wife as the 'principal' wife, thus giving her the largest share of the estate. It was decided that the money in the bank was under the jurisdiction of statutory law and so this portion of the estate was assigned to the non-native wife. The rest of the estate devolved according to customary rules. However, under customary law a wife, whether or not the first or 'principal' wife, does not inherit from her husband. Secondly, there was no basis for dividing the property according to two different legal systems, since all the property of a native which is not within the jurisdiction of a Local Court should be devolved according to customary law. In other cases involving such mixed marriages, the husband's property located in the Western Area was assigned to the non-native wife despite the legislation which prohibits such arrangements.

Thus far no such cases have been contested in a court of law, although the possibility of a successful contest is evident. Mixed marriages between natives and non-natives are increasingly common and it is predictable that problems of inheritance in these cases will only increase.

16. Islamic marriage and inheritance

The Mohammedan Marriage Act (Cap. 96) recognizes for all civil purposes those marriages which are valid according to the rules of Islamic law. Provisions are made for the registration of such marriages but, as noted before, the law only indicates that the marriage may, not must, be registered. The Mohammedan Marriage Act also specifies the manner of distribution of an estate when the deceased, being a Muslim, has died intestate (Cap. 96, Sec. 9).

However, the Administration of Estates Act (Cap. 45) states that upon the death intestate of a native, his properties shall devolve according to customary law. In Sierra Leone there are both natives and non-natives who adhere to the Muslim faith. Thus, the question of whether or not Mohammedan inheritance law may be applied when a native dies intestate is unclear. Joko-Smart (1969) states that only the estate of non-natives who at the time of their deaths profess the Muslim faith may be distributed according to Islamic law. Thus it is an open question whether Islamic inheritance law may be applied when a native dies intestate. In practice, the estate of intestate natives resident in the Western Area are distributed according to Islamic law with the approval of the beneficiaries. The Administrator General takes advice from a person he regards as an authority in Islamic law. Even if all the beneficiaries of an intestate native Muslim's estate agree to the application of Islamic law, there are still further problems. Section 9 (Cap. 96) specifies that the rules of distribution under Islamic law cover personal and real property. Since the Concessions Act (Cap. 121, Sec. 5) specifies that land in the Provinces may not be alienated, it would appear that there is a conflict in the law and that Section 9 of the Mohammedan Marriage Act must be interpreted as covering only a native's personal moveable property. When the Mohammedan Marriage Act was first

passed in 1905, it was in response to efforts by Muslim leaders who were living in the Western Area and who were seeking equal recognition for Islamic marriage compared with Christian marriage. Presumably their real property was located in the Western Area.

There is a further difficulty. The Mohammedan Marriage Act allows for the distribution of an intestate relative's estate under Islamic law. However, the Administration of Estates Act (Cap. 45) only distinguishes between natives and non-natives for the purpose of administering an estate (whether or not of natives who have died intestate) under either customary or statutory law. Moreover, the Interpretation Act, 1971 (No. 8 of 1971) maintains the definitions of a native and a non-native, without reference to the Muslim religion. Thus, the question of whose estate and what part of an estate may be legally administered under Islamic law is left uncertain. The implications of this problem obviously have a profound effect upon customary law. The vast majority of natives in the Provinces regard themselves as Muslims. The rules of distribution under Islamic law fundamentally contradict the rules of devolution under customary law.

Supposing Alhaji X approaches the District Officer with the demand that his deceased Muslim brother's estate be distributed according to Islamic law as provided under Section 9 (Cap. 96). At the same time, another brother, a Paramount Chief in the district, places a counter-demand before the District Officer that the property shall be distributed according to the local customary law. The law as it stands will not resolve such a matter. At present, due to the relative lack of information regarding the law, such problems are usually avoided in cases involving natives living in the Provinces. In a recent inheritance dispute argued before the High Court, it was decided that Islamic law was to be applied (*Salimatu Conteh and others v. N'Dambah Sillah and others*, Civil

Case No. 36 of 1971) although the status of the deceased as a native was never considered.¹

17. The distribution of gratuities²

The formation of the Gratuities Committee under the office of the Administrator and Registrar General is based on the Pensions Act (Cap. 173, Sec. 16 and the Pensions Amendment Act, No. 2, 1970). The committee has the responsibilities for distributing the gratuities to the dependants of a deceased person who worked either in government service or for a private company having a pension or gratuity scheme. While such private companies are not required by law to employ the services of the Gratuities Committee to apportion funds, in practice most of them find it less troublesome and expensive to do so.

Prior to 1959 the gratuities of natives were distributed according to customary inheritance law. That is, the District Officer was required to take local advice about the rightful beneficiaries of the deceased's estate. In 1959 an Establishment Memorandum entitled Award of Gratuities to Relatives and Dependants of Deceased African Officers and Employees, specified that the gratuities of natives should no longer be treated as part of the estate of the deceased, devolving according to customary law; they should be distributed to anyone who suffered 'loss in material comforts by the death of the wage earner and is deserving of some proportion of the gratuities' (Establishment Secretary Circular, No. MP 1505/11, September 22, 1959). As a result of this circular, the Gratuities Committee has been relieved of the responsibility of investigating the cases in

1 I am indebted to Albert Metzger for his discussion of this case.

2 The information in this section is derived from a report made by Mr. James Koroma on his observations of the working of the Gratuities Committee.

terms of customary law inheritance rules, and may treat the cases of natives and non-natives alike.

The Gratuities Committee consists of the Registrar General and one representative of the Department of Social Welfare. A number of problems were observed by Mr. Koroma which suggest the need for attention.

(a) The first responsibility of the Committee is to establish just who are the rightful beneficiaries of the gratuity funds. If the deceased originates from the Provinces, the District Officer will be asked to name those persons who were material dependants of the deceased at the time of his death. District Officers are often unable to devote the necessary time to make thorough investigations which would lessen the possibility of fraudulent claims. However, Sections 4, 5 and 6 of Cap. 174 actually set out the requirements that the Accountant General keep a record of the dates of the birth of the employee, his wife or wives and children, if any. The law also refers to the necessity to record any 'adopted' children for whom the employee is responsible. Since there is no law of adoption, it can be assumed that this provision was intended to include any children or other persons who were dependants of the employee. If this law were amended to include the requirement that the names of all these dependants be included, and if these records were required to be kept in the office of the employee, many of the problems of eliminating fraudulent claims would be minimized.

(b) The Gratuities Committee meets only in Freetown, which frequently necessitates long travel and burdensome expenses for persons claiming gratuity benefits.

(c) Claimants are not informed before their meeting with the Committee what questions will be asked of them or what documents they will be required to present (such as birth or marriage certificates). The

requirement for a birth or marriage certificate can introduce a serious obstacle for the expediting of a case. Many births and most customary marriages are not registered. Satisfactory proof requires witnesses and involves protracted delays. Such delays could be shortened or avoided if a standard letter of information were sent to all parties in advance of their appearance at the Committee meeting.

(d) The Committee meets fortnightly and so any case which must be adjourned for one reason or another will involve considerable expense and inconvenience to the claimants. At the present time personnel shortages render more frequent meetings impossible.

(e) Persons who claim the right to benefit from the gratuities of the deceased suffer from other disadvantages. The law provides for the parties to be represented by counsel if they choose. This is not generally known and the provision is rarely utilized. The Committee is directly under the President and his Cabinet and so an appeal against a Gratuities Committee decision may only be made to the Cabinet. Hence, once a recommendation has been made, there is no possibility for new facts to be brought before the Committee unless an appeal is made to the Cabinet.

IX. ADMINISTRATION OF LOCAL COURTS

1. The court system

During the course of the research in family law our attention was drawn to certain problems which arise out of the present organization and administration of the courts. It will be recalled that English-based law was imposed in the Colony in 1857 (Joko-Smart 1970). With the declaration of the Protectorate, English-based law was administered there through a system of courts also based on the English model, although in civil matters native law and custom was allowed to be administered by

native courts. Today a dual system of courts operates in the country. The Local Courts Act, 1963 (No. 20 of 1963) linked the Local Courts, (formerly native courts) through an appellate system to the English-type courts. It also extended the jurisdiction of the Local Courts so as to allow them to administer statutory or general law within certain limits. No provision was made for customary law to be administered in the Western Area (including the Bonthe Urban District) despite the fact that the vast majority of the population there is of indigenous origin. The administration of the Local Courts is under the Ministry of the Interior while the Ministry of Justice administers the English-type courts.

2. Court Presidents

Court Presidents who preside over the Local Courts are selected by the Ministry of the Interior and these appointments are confirmed by the President of the Sierra Leone Republic. Efforts are made to select persons who are knowledgeable in customary law. However, despite the care taken in reaching an objective decision about a particular appointment, it is probable that some political considerations influence the initial selection of candidates. Moreover, once appointed, a successful candidate will be under considerable local political pressure. These pressures are expressed in various ways.

The Court President's position is made difficult owing to his fear of complaints about decisions. It was observed that very frequently evidence is fabricated against a particular Court President by dissatisfied litigants. A petition of complaint presented by a few persons reaching the Ministry of Interior can result in the immediate suspension of a Court President until an investigation has been concluded. The Court President finding himself in this situation loses considerable prestige, income, and possibly even his position.

It also happens that Court Presidents are sued in the High Court as a result of decisions taken in the exercise of their judicial duties. Both the Courts Act (Cap. 7, Sec. 39) and the Local Courts Act 1963 (Sec. 10 (1) (a)) specify immunity from such suits so long as the person in question '...in good faith believed himself to have jurisdiction to do or order the act complained of...'. One such case (Edwards vs. Macavoray and nine others, ALR.S.L.469) was dismissed by the High Court on this ground. Today, however, in practice it appears that proof of good faith in the exercise of judicial duties must be determined in the High Court. Thus, since there is no provision for the administrative authorities to hear such cases, the law does not actually protect Local Court Presidents from legal action. It often happens that such a case is brought to the High Court before the Ministry of the Interior is even aware of any local problem. Often such action is based on very questionable grounds, but because the plaintiff has the financial resources to hire a lawyer he does not hesitate to try his luck by suing the Court President in the High Court. Usually the Court President involved is suspended from his duties for the duration of such a hearing. Even if the case is dismissed, the fact of such litigation diminishes respect for the authority of the Court President and the Local Court.

3. Jurisdictional problems

Since the jurisdiction of Local Courts has been extended to include certain issues under statutory law, court personnel are often confused over the rules of jurisdiction. For example, most Local Courts do not hear petty theft cases because they do not understand the implications of the Local Courts (Amendment) Act, 1965, which extended the criminal jurisdiction of the Local Courts. We observed that very often such minor cases as the theft of one chicken are sent to the Magistrate's Court, thus increasing the burdens on this court. On the other hand, many cases over

which the Local Courts have no jurisdiction are heard under different titles. For example, Local Courts are not allowed to hear cases connected with witchcraft accusations, as these, according to statutory law, constitute cases of defamation of character which lie outside Local Court jurisdiction. However, these cases are heard in Local Courts as 'Bad Action' cases. Similarly, the Local Courts are prohibited from hearing such cases as 'Breach of Promise'. Under customary law most of these cases are brought by male plaintiffs and are heard as claims for 'love expenses'. Of course, there is an argument for allowing the Local Court to retain jurisdiction over these cases, since they constitute offences under customary law, and the Local Courts are perhaps better able to apply appropriate penalties. All these problems could be reduced if simplified instructions, including a list of cases which a Local Court may hear, were distributed to all Local Courts.

4. Review and appeal

If a person is dissatisfied with the decision of a Local Court, he may appeal to the Group Local Appeal Court or he may appeal directly to the District Appeal Court. There is a fixed time limit for such an appeal. It is also possible to ask the Judicial Adviser or the District Officer to review any case decided in a Local Court or the Group Local Appeal Court. There is no time limit to this right of review. Because of the irregular sittings of the Group Local Appeal Courts and the inordinate delays which occur in the hearing of appeal cases in the District Appeal Court, persons often find it is to their advantage to appeal against a decision, simply because it will at any rate delay the execution of a decision. Similarly, requesting an official review of the Judicial Adviser or the District Officer may also delay the execution of a court decision, since the judgement may be altered no matter how much time has elapsed

since the court's decision. Moreover, because it is possible to employ counsel in the District Appeal Court, those persons who are able to afford a lawyer do not hesitate to appeal after losing a case. Our findings confirm the general view that a case defended by counsel stands a stronger chance of achieving a favourable decision. Therefore, in the absence of free legal aid, the person having the financial resources to employ a lawyer has the greater advantage.

5. Supervision of Local Courts

The task of supervising and inspecting the practices of Local Courts is assigned to the office of the Judicial Adviser. However, it is the District Officer's responsibility to supervise the making of chiefdom bye-laws by the Chiefdom Councillors, which will be administered by the Local Court. In our view many of the problems in the practices of Local Courts stem from this division of responsibility between these officers. We also suggest that the drafting of bye-laws should be done under the supervision of persons having legal training.

Both the Judicial Adviser and the District Officer are hampered in the performance of their responsibilities by the lack of personnel. Certainly the Judicial Adviser's supervisory role would be greatly assisted by extending the personnel of this office to include a trained inspectorate to examine regularly the functioning of the Local Courts.

6. Financing the Local Courts

Certain irregularities in Local Court practice stem from the present system of financing. Court Presidents and Clerks are paid out of the Chiefdom Treasury, which is supported partly through a government grant and partly through the proceeds from the courts. Sometimes court panel members, who are selected from the list of Chiefdom Councillors, are paid for their services directly out of fines imposed for contempt of court

during a court sitting. Such financial arrangements encourage the court to prolong cases, to divide them into separate issues to be heard at different sittings of the court, and to interrupt court proceedings to impose a fine for contempt of court for some minor breach of court etiquette which could as well be ignored.

7. The Group Local Appeal Court

There has been considerable discussion about the future of the Group Local Appeal Court among members of the government. We observed the working of this court and also attempted to assess local attitudes towards its usefulness. Our findings support the views of Mr. S. M. K. Kutubu, Judicial Adviser, who in his report to the Government recommended the court's continuation. The following reasons for favouring its continuation were given by local leaders.

(a) Land cases, or bush disputes, are heard in the traditional manner in the Group Local Appeal Court by a panel of persons who are knowledgeable in customary land law. The panel always visits the disputed site, since litigants will never be satisfied otherwise. People complain that when a land dispute is heard by a Magistrate in the District Court of Appeal, such visits are never made.

(b) The Group Local Appeal Court sits in the chiefdom. Cases which are appealed from the Local Court may be heard where witnesses and parties to the dispute are close at hand. If, on the other hand, a case is appealed to the District Court of Appeal, litigants and their witnesses face expensive travel. Moreover, the calendar of these courts is always very full, with the result that cases are often adjourned and settlement is delayed.

(c) Lawyers are not allowed to appear in the Group Local Appeal Court. Cases are decided according to customary law and the procedures followed in this court emphasize the reconciliation of the disputants as well as the deciding of the case. In the District Court of Appeal if one party has employed a lawyer, the person who is unable to afford one is at a great disadvantage.

However, the Group Local Appeal Courts are crippled by lack of funds which would enable them to sit regularly. Only one Registrar serves an entire district. His duties include organizing all aspects of the court for each chiefdom in the district and serving as the Clerk of the Court when it is in session. It is impossible for one person to manage all these tasks efficiently. Often the Group Local Appeal Court is unable to sit simply because the Registrar is unavailable.

Other problems interfere with the efficient working of the Group Local Appeal Court. Both the Judicial Adviser and the District Officer have the power to review a case which has been decided in a Local Court. As a result, it often happens that cases are misplaced in one or other of these offices and the Registrar is unable to trace missing records. Local Courts are often remiss in their duty of supplying a typewritten report of the case when an appeal is made. All of these bureaucratic problems involve long delays in the completion of a case. It is suggested that these problems could be alleviated by centralizing in the Judicial Adviser's office the supervision and review of cases and by enlarging the staff of this office to include a trained inspectorate.

8. Lawyers in the Local Courts

Since the jurisdiction of the Local Courts has been extended to allow them to administer statutory law, discussion has arisen over the question of whether or not lawyers should be allowed to appear in these courts. Before making such a change a number of facts should be considered.

- (a) Introducing lawyers into courts administering customary law would hasten the deterioration of customary procedures which emphasize reconciliation and arbitration.
- (b) Many people are unable to afford a lawyer; thus those able to do so would have an advantage in a case.
- (c) Lawyers are not usually familiar with, nor trained in customary law.

It is noteworthy that today in many European countries the trend is to establish lower-level courts where counsel is not permitted to appear. Such courts allow disputes to be settled speedily and with a minimum of social disruption and expense. It would be unfortunate if an African country were to discourage such institutions, especially when they are already a recognized part of the judicial order. Rather, it would appear wiser to extend the provision for lower-level institutions for dealing with customary civil cases and to limit the possibility of appealing these cases to courts where lawyers are allowed to appear.

9. Cases involving customary law which appear in higher courts

Since the possibility for appealing cases decided in the Local Courts has been extended, it has become much more common for the higher courts to be faced with cases involving customary law. The question of lawyers appearing on behalf of clients in these cases has been discussed above. Our observations indicated that not only were lawyers untrained in customary law, but the Bench itself is not trained to hear these cases. During the research a large proportion of the Magistrates and Judges assigned to the Provinces were either non-natives or non-Sierra Leoneans and so lacked even a personal experience of traditional customary procedures to guide them.

A number of cases were observed where the Magistrate did not recog-

nize that a case involved customary law and tried it under statutory law. For example, a divorce case was appealed from the Local Court where the amount of dowry assessed was disputed. The Magistrate tried this case as a civil debt. The Local Courts Act 1963 provides that cases involving customary law may be heard with the assistance of assessors. In many cases observed, however, assessors were not allowed to sit on the Bench, nor was their advice sought by the presiding Magistrate or Judge before a decision was taken.

There is some ambiguity in the law regarding the role of the assessors in hearing customary cases. The Local Courts Act 1963, Section 29 (2) for the District Appeal Court and Section 31 (1) for the Local Appeal Division of the High Court makes provision for assessors to sit on the Bench to advise the Magistrate or Judge; but he is not bound by their advice. However, the Courts Act 1965, Section 75 which also makes provision for assessors, makes the decision of the majority binding upon the court (except when their decision is inconsistent with a previous decision of this court on the same issue, either in its appellate or original jurisdiction). Today, in practice, the Local Appeals Division of the High Court applies the rule of Section 75 of the Courts Act 1965, although this law did not repeal or amend Section 31 of the Local Courts Act 1963. It should also be observed that these rules for customary law cases heard in the higher courts apply only to the Provinces.

10. Centralization of courts administering customary law

The importance of the Local Courts as sources of chieftom revenue has effectively eliminated other agencies for dispute settlement which are seen by the Local Courts as competitors for revenue. This has had a profound influence on traditional social life. It is a fundamental principle of traditional social organization that any dispute which arises must be settled through the intervention of an intermediary. In the past

minor quarrels which erupted within a household were first heard by the head of the family who, by virtue of the localized nature of kinship grouping, was usually close at hand. More serious disputes would be taken to the village elders and the chief. The emphasis of these proceedings would not be so much on assigning blame as on settling the dispute and reconciling the parties in order that they might continue to live peacefully in the face-to-face relations of the village society. When a case was beyond the power of these elders to settle, it could be heard in the Paramount Chief's compound. Even the smallest dispute which arose within a household was treated with due seriousness, since co-operation and harmonious relations within the family and the village were vital for the group's survival. The authority structure of traditional society was utilized to support and enforce this arbitration process. Parties to a dispute would pay small fees to the persons hearing the dispute, but often the act of presenting a token payment to an intermediary served to bind the parties to behave peacefully until the dispute was heard and could be settled. In this way many conflicts were settled quickly, thus avoiding a prolonged court case.

Today, all this has been radically altered. The Paramount Chief may no longer hear cases which arise within his chiefdom. The dispute settlement machinery has been centralized in the Local Court. The Local Courts Act, 1963, Section 40 specifically prohibits anyone outside the court exercising judicial powers; unauthorized persons who hear cases may be heavily fined. Although a mediator might still hear a case without receiving any fee, it is unthinkable that anyone would ask him to do so without giving him at least a token fee, or 'shake-hand' - no-one would respect an arbitration process which did not involve some monetary consideration.

The fact that local-level dispute settlement machinery has now been effectively eroded has further implications. Disputes which are not settled quickly tend to escalate. Moreover, since all cases in traditional society, no matter how trivial, require an intermediary to settle them, the tendency now is for even very minor disputes to make their way to the Local Court. Cases involving close relatives or intimate problems, which could be settled within the confines of the village without embarrassment, may cause shame and humiliation when heard in the Local Court away from home surroundings. For example, cases were observed where brothers were suing one another. A wife may quarrel with a co-wife and take her to court; cases of wives suing their husbands for failure to cohabit have also found their way to the Local Court. Other minor cases are being heard in the Local Court which could have been adequately handled by a village elder. For example, two co-workers got involved in a quarrel because one had thrown a shirt to the other who failed to catch it - this was interpreted by the latter as an insult. In the absence of effective local-level arbitration machinery, this case escalated into a serious fight. It was heard in the Local Court and later appealed to the District Court of Appeal. Court Presidents are often heard to reprimand parties for bringing disgrace on their families, forgetting that such cases are only being brought to them because the Local Courts jealously guard their prerogative to hear all disputes.

Under customary law a woman is considered as legally incompetent. She must always be under the protection of a man - her father, her husband or another male member of her family. If she is involved in a dispute she must go to the man who is responsible for her and it is he who must represent her in the case before the elders or the chief. Nowadays, Local Courts do not observe the rule that women may not sue in court. While this trend towards the independence of women is not one which it would be desirable to reverse, the result has been for women to make use of the Local

Court for trivial cases which could have been more properly settled by family elders before escalating into serious disputes involving large fines, damages, and undesirable publicity. Encouraging rather than discouraging the traditional low-level dispute settlement institutions could alleviate many of these problems. When a satisfactory settlement is not possible, the Local Court would still be available as a further avenue of adjudication.

11. Local Court's tendency to impose decisions rather than seek reconciliation or settlement between parties

In the village community, as has been suggested earlier, it is necessary for persons involved in a dispute to settle their differences in order that they may live together in an economy which depends on co-operative action. Although a person may, as a plaintiff, bring a case before the elders before a dispute is settled, he may find himself having to apologize for his own wrongdoing which has contributed to the altercation. The defendant who has committed some action which has precipitated the quarrel will doubtless be reprimanded for his behaviour, but the plaintiff may even find himself in the position of having to compensate the defendant for some previous wrongdoing. In other words, the traditional mode of dispute settlement allows all the issues which led to the dispute to be brought into the open, and the elders seek to right all the wrongs and restore good relations between the parties.

Probably the most profound change in customary law practices which has resulted from the influence of the English procedures has been that of finding guilt and handing down decisions accordingly. For example, today a plaintiff may sue a person for 'abuse'. Even if the evidence plainly shows that the plaintiff has committed some offence against the defendant which provoked the abuse, the Local Court will decide the case on the charge of abuse and ignore the circumstances which, in traditional

procedure would receive more attention. (Indeed, people often resort to loud public abuse in some public place as a method of bringing some other customary offence to the attention of the local community.) This approach fails to achieve reconciliation between parties. Certainly, the defendant will not be satisfied nor will the community consider that justice has been done. The result is that Local Courts contribute little to harmonious community relations. Our findings also suggest that the combined effect of the centralization of dispute-settlement machinery and the emphasis on imposed decisions in Local Courts, has increased the tendency for people to rely on supernatural methods ('swears' and 'medicines') of manipulating the courts and witnesses in order to achieve their aims.

12. The use of swears and medicines in the practice of customary law

The use of swears and medicines as supernatural sanctions on social behaviour is central to the practice of customary law. Over the years both the Colonial and the independent governments have been ambivalent about the continuation of these practices. At the same time the government has also been keenly aware that it is impossible to legislate them out of existence. There have been some attempts to limit certain excesses which were deemed 'repugnant to natural justice', and in all chiefdoms in the Provinces some regulations have been introduced. However, often these regulations are simply means of collecting revenue from the practice by imposing licensing fees on those who wish to use the medicines. The progressive centralization of the customary dispute-settling machinery from informal settings in the village to the Local Court (together with the overriding emphasis on determining the guilty party in a dispute, rather than on reconciling the disputants) have, according to our findings, increased the importance of these practices in the settling of disputes. Given the necessity for cases to be heard away from the locality of the disputants, the possibility of fabricating evidence is increased. (It is rather more difficult to lie about events

if evidence is being given in the community where everyone knows one another intimately). As one informant put it, 'The rich man has his lawyer, the poor man has only his medicine.' Before discussing the uses of these supernatural sanctions in the settling of disputes, we will briefly describe the practices in the Sierra Leone context.

A medicine is a collection of items believed to have supernatural power to kill the guilty, and which may also be used for other purposes. Certain individuals are known as 'owners of medicine'. Some individuals have inherited their medicine and the knowledge of its use from someone and others have been apprenticed to a 'medicine owner', obtaining the right to use his medicine after his death. Still others have 'found' their medicine through some supernatural means, usually through a dream.

A medicine may be used for 'swearing' people, that is, an individual may offer or be required to take an oath on a medicine. If he lies, the medicine is capable of 'catching him' or causing death. No-one can easily refuse to take an oath when requested to do so, since such a refusal is tantamount to a confession of guilt. Medicines may also be used in other ways not directly connected with legal proceedings. They may be used to 'catch' one's enemies. They may also be instrumental in protecting an individual, whether or not his endeavours are regarded as legitimate according to the values of the society.

Medicines have different powers and some are regarded as more effective than others. As a result, the use of one medicine may neutralize or cancel the effect of a less powerful one. For example, a guilty person may know he is going to be required to swear his innocence on a certain medicine. If he is unwilling to confess, he may secretly arrange to enlist the help of a 'medicine owner' with a stronger medicine to protect him against the results of his lying. Again, if a person fears he stands the risk of losing his case in court, he may seek out a 'medicine owner' and

pay him to work to prevent the case from ever being concluded in the court. In such a case, the medicine owner will probably give the individual some amulet to carry on his person into the court. If it is suspected that someone has attempted to 'tie the court' in this way, he may be stripped and searched for any occult item as evidence of contempt of court. Courts regard this as a serious matter and will fine the individual.

(a) Oath-taking or swearing in the Local Court: Courts require parties to swear (or take an oath) on the court medicine. As far as we could determine, court medicine consists of occult items which have been confiscated from medicine owners who have been found guilty of misusing their occult powers. Since only the 'medicine owner' knows the rules for using and sustaining the power of his medicine, and since medicines require constant attention and 'feeding', many people discount the effectiveness of court medicine. As a result, persons involved in a case may prefer to bring to court a 'medicine owner' in whose powers they have confidence.

In many parts of the country, oaths in court are taken on substances which must be ingested. In 1971, as a result of complaints that poison was deliberately being added to these substances, a Cabinet Directive was circulated which prohibited the taking of oaths on any substance which was to be eaten or drunk (CP (71) 10, 3.8.71).

Part of the chieftom regulations pertaining to the use of medicines require that any individual wishing to use a medicine in court must have the permission of the Paramount Chief and this will require a payment. If the medicine is known to be extremely powerful, the District Officer's permission may also be required.

The rules regulating the use of medicines include that swearing ceremonies must be public events. Swearing must never be done within a house and ideally should be done outside the court building or at some other

public place in the open. After a permit has been secured and the permission of the Paramount Chief granted, the Town Crier must announce that the swearing will take place. In some parts of the country such announcements must be made for three days prior to the swearing for witchcraft or for theft. This publicity ensures that all those who may be affected by the swear will be informed and that guilty persons have an opportunity to confess.

When a 'medicine owner' is called to preside over a swear he is first required to take an oath on his own medicine. He makes a statement to this effect:

If I have connived with the plaintiff to bring a harmful medicine rather than the actual swear medicine with the intention of wilfully killing the defendant, let my own medicine destroy my own life. If my medicine bearer has interfered with this medicine in order to do harm to the defendant without any just cause, let the medicine paralyze him and in the end let him die.

The Chieftom Council should send a representative to ensure that the proceedings are conducted properly and that nothing is included in the content of the swear which was not mentioned in the permit.

(b) Results of medicines: Swears on medicine may be directed in a number of ways. It sometimes happens today that a person will state that only he will be affected by the medicine if he should lie, although most people still fear that a swear may affect other members of the family of the individual who has lied. Guilt is usually regarded as collective, since the actions of one member of the family may involve all. Some swears are regarded as likely to kill anyone, related or not, who is in the vicinity of the guilty person. When a swear is taken on such medicine, the individual who has been sworn may be driven out of his home village; yet nobody may refuse to be sworn on any medicine chosen by the accuser and officially allowed.

Medicines do not necessarily work quickly. People may have to wait for years to see the results. Since deaths and illnesses are everyday occurrences, these may be ascribed to some such medicine thus providing confirmation of its effectiveness. Medicines may continue to act upon relatives even after the death of the persons sworn. As a result, people are highly motivated to co-operate as families to fulfil whatever obligation is outstanding, so that the threat of the swear may be removed from them. Once a medicine has been directed towards a person, it must be ceremonially 'pulled' or revoked to render it harmless. This procedure, too, requires that the 'medicine owner' appear and local regulations also impose a fee for a permit for the performance of this ceremony.

'Medicine owners' are sometimes associated with only one occult power. Others also practise as what is locally called a 'm̄ri man'. These m̄ri men may have other skills such as divining and fortune-telling. They also provide talismans or amulets to protect and assist people in a wide variety of problems. Some practitioners also regard themselves as herbalists, since they have some knowledge of therapeutic herbs. These practitioners have different combinations of skills and expertise and, as a result, it is impossible to classify them according to their functions. (They may also be referred to as 'muslim men' and those who handle 'bad medicine' are referred to as 'juju men'.)

The psychological importance of their role cannot be overestimated. Many people are loth to take any decision of moment without first consulting such a practitioner for advice. Many practitioners, by listening to everyday problems, provide their clients with useful opportunities for catharsis. They may also encourage a sense of security in their clients, through providing them with amulets or talismans as protection against harm or for assistance in achieving ambitions. At the same time, most practitioners are also willing to direct their occult powers to harming their

clients' enemies.

(c) 'Medicine owners' in the Western Area: These practices are by no means limited to the Provinces in Sierra Leone. Some practitioners, regarded as the most powerful, reside in Freetown. While the City Council does not recognize occult powers directly, and there are no specific regulations for their practice, it does, however, issue licences to 'herbalists'. While we did find some of the herbalist licence-holders restricting their practice to dispensing therapeutic herbs, most also engaged in a wide variety of occult work. Because of the expense of a licence and the absence of governmental interest or supervision, most practitioners in Freetown do not actually hold a valid licence. Again, as in the Provinces, these individuals perform a wide variety of social functions and people from every level of society employ their services.

(d) Costs of medicine: The use of medicines involves considerable expense. A single permit issued by the Chiefdom Council may cost between Le.0.50 and Le.10.00. Gaining the permission of the Paramount Chief will involve some extra payment. The medicine owner's charge from a few shillings to as much as Le.100. In addition to these costs, the expense of food and transport for him and his assistants must be paid. If an especially renowned practitioner from another chiefdom is required, permission must be obtained from that Paramount Chief and the District Officer, and so all these costs are increased.

13. The use of swears and medicines in cases heard in Local Courts

(a) Protection of the court: In many Local Courts a swear is made to open the court's first session of the new year. The senior chiefdom policeman calls for order in the court and then swears. The following is a typical swear:

Anybody who may have an aggrieved mind against the Court President, the court members and the Clerk for no good reason, let this swearing medicine kill him. If someone is not satisfied with a court decision, he has a right to appeal against such a decision, but if he takes any of the court members or the Clerk to a juju man or a muslim man to destroy their lives, let this medicine destroy his life too.

(b) Oath taking: The Local Courts (Procedure) Rules, 1964 require that only witnesses take an oath. This rule reflects the practice in customary law that the decision in a case should rest primarily on the testimony of the witness. Moreover, this legislation gives the witness the right to take his oath on whatever he declares as binding upon him and he is protected from being forced to take an oath which is contrary to his religious beliefs (The Constitution of Sierra Leone, No. 6, 1971 Section 10 (4)).

(c) Enforcements of court decisions: When a person fails to follow a court order, 'medicines' may be employed to force him to do so. A plaintiff having difficulty in collecting a debt which the court has awarded him may appeal to the court for assistance. The court issues a judgement debtor's summons and the debtor will be required to appear to explain why he has not paid and to reveal his economic resources. The court will determine a date for the debt to be paid. If the debtor fails to pay, he may then be imprisoned for a maximum of fourteen days. The creditor is obliged to provide him with food during his confinement (Rules 62 - 71, Local Courts (Procedure) Rules 1964). Should the debtor still fail to pay his debt, the creditor pays a fee for a permit to bring a 'medicine owner' to swear the debtor. In such cases the court is likely to allow him to use the most powerful medicine available.

(d) Absence of conclusive evidence: It often happens that there is insufficient evidence to decide a case or that the testimonies of the witnesses are in conflict. In the higher courts such cases would simply

be dismissed, but in the Local Courts the solution is quite different. The party who is convinced he is right and who can afford to bring a 'medicine owner' to the court will swear himself. When he has followed this procedure, the court will decide the case in his favour. In a dispute over the assessment of recoverable marriage payments in a divorce case the husband may be required to swear on medicine that the amount he has claimed is accurate.

(e) Dissatisfaction with the court decision: An individual who is not satisfied with the decision handed down by the Local Court may appeal to a higher court. However, should he still fail to achieve satisfaction he may pay for a permit to swear himself ('If I am not in the right in this case, may this medicine catch me'). This procedure is frequently followed in disputes over land boundaries.

(f) Swears to establish guilt or innocence: In some cases where there is only one witness to an action, swears will be employed to establish the trustworthiness of the testimony. For example, in an adultery trial the defendant may deny his guilt. The woman will be required to swear on medicine that he is the guilty party and it is assumed that if she is willing to do this, the accused must be guilty despite his protests. Similarly, swears may be employed to establish paternity where it is in doubt. Again, a person accused of having practised witchcraft may wish to clear his name by swearing to his innocence on medicine in court.¹

(g) The use of swears and medicines outside the court with its permission:
It is possible to obtain a permit to call a 'medicine owner' to swear in

¹ The person making a witchcraft accusation should be tried by the High Court for slander (Cap. 8, sec. 7 and Local Courts Act No. 20 of 1963, sec. 13). However, although acting beyond their jurisdiction, these cases are often heard by Local Courts as 'Bad Action' cases.

such cases where the identity of the culprit is unknown. For example, if something has been stolen or if some malicious damage to property has been committed, the injured party may swear that unless his property is restored, the unknown guilty person will die. It is also possible for a husband to obtain a permit for medicine upon which he may require his wives to swear that they have not been involved in any adulterous relationships. It is even possible to swear when property is simply mislaid or lost in order that the person who finds it will hand it over.

14. The use of medicine and the problem of witchcraft accusations

Very early in the history of Sierra Leone the colonial government legislated against witchcraft practices, and today, if a person accuses another of practising witchcraft, he may be sued in the High Court for defamation of character (Courts Act, Sec. 18, 1965). However, because witchcraft beliefs still exist, the legislation has not been successful in eliminating the problem of cases involving these accusations. In Sierra Leone, as in many parts of the world, witchcraft continues to be regarded as the explanation very commonly for sickness, death, or other misfortunes. In the absence of any institutionalized remedy such beliefs can result in considerable social dislocation and even violence. Recognizing this, many traditional rulers in Sierra Leone consent to hear these cases despite the fact that they have no jurisdiction to do so.

Traditionally, a person accused of witchcraft could be forced to submit to an ordeal which would be fatal to the guilty. Today, cases which are heard outside the Local Courts, under the authority of a traditional ruler or an elder, are handled differently. The person making the accusation is required to bring a 'medicine owner' on whose medicine both he and the accused will swear. A time limit, usually six months, is set, in which time the medicine is instructed to catch the guilty person. If the accused remains in good health until this time has passed,

he is regarded as innocent and may even claim compensation from his accuser. As noted above, Local Courts also allow persons accused of witchcraft to bring medicine to the court and to swear their innocence in public in order to maintain their good reputation in the community. These practices are an infringement of the law but the frequency and seriousness of witchcraft accusations suggest that the government would be best advised to provide some avenue of expression and resolution.

The role of the mari man, medicine owner, and herbalist in encouraging the persistence of witchcraft beliefs should be noted. When some misfortune befalls an individual or his family, the first response is usually to visit such a practitioner for an explanation. It was observed that many people were informed they were suffering from the effects of witchcraft. While the practitioner will not usually mention any specific individual, he will suggest that his client should look within his own family circle for some person who is jealous or envious of him, or who shows some evidence of antagonism towards him. Such advice increases suspicion and mistrust among people and perpetuates the tendency to explain trouble in terms of malice. Perhaps the practitioner who has named an individual as responsible for a misfortune should be included in a suit for compensation, should some medicine prove the innocence of the individual accused of witchcraft!

X. CONCLUSIONS

1. Possible approaches to the problems of a plural legal system

(a) Codification: There are a number of possible solutions to the problems which arise as a result of a plural legal system. Sierra Leoneans who are concerned with these problems often mention codification as the best approach. Codification is the enactment of accepted customary practices by legislation. Such enactment necessarily implies the prior

knowledge and recording of customary law as it is practised today. It also involves certain assumptions about the adequacy of the various sources of information on the content of customary law. Most important, most persons who advocate a programme of codification of customary law accept the notion that each of the ethnic or tribal groups in Sierra Leone has a separate and distinct customary legal system. We shall return to this problem shortly.

While we have no evidence that codification of customary law was the intention of the Colonial government, it is very interesting to observe that in Sierra Leone the provision for chiefdoms to make orders and bye-laws (Cap. 61, Sec. 8 and 16) could have been utilized as the mechanism for the recording and codifying of local customary laws. However, most orders and bye-laws which have been made by chiefdom councils have dealt with such matters as the licensing of trade, sanitation rules, the registration of births, deaths and marriages, health regulations and other matters involving urban administration. Many have been concerned with prescribing fees for permits or licences which will bring additional revenue into the local chiefdom treasury.

Although the provision for local-level legislation has not been utilized for the codifying of customary law until now, it is possible to envisage that this form of legislation might be used to carry out a gradual programme for codifying family law. However, such an approach requires adequate safeguards. Moreover, it should be observed that one of the results of recording and codifying customary law is to introduce a certain rigidity into its practice, thereby reducing its adaptability in the face of changing social circumstances. All law, whether written or not, is constantly developing or adapting to changing social conditions, but the written law is often more conservative than is social practice.

Therefore, when contemplating the recording and codification of customary law, it is imperative that the content of that law be drawn from sources which reflect contemporary practice and values. This is why this research has stressed the importance of the social context of the cases which arise and the implications for social relations of particular policies which government might adopt.

(b) Restatement: Restatement is a particular approach to unwritten legal systems, which for Africa has largely been developed by Professor A. Allott and his colleagues of the University of London. He explains the aims of the restatement approach:

This process involves the re-arrangement, in an approved and simplified form, of statement of the existing laws. The restatement is designed to be authoritative, in the sense that it has been prepared by persons or bodies whose reputation and methods guarantee the authenticity of the restatements which they produce; but the restatement is not a code, and to legislate the restatements would entirely alter their nature and value (Allott 1968).

The restatement approach may serve a useful function in some societies at certain periods in their history. We do not feel, however, that it would at this time resolve the problems of family law in Sierra Leone.

For one thing, the restatement approach tends to assume that each tribal or ethnic group has a separate and distinct legal system. Our findings suggest that for Sierra Leone this is not true, even though it is widely believed to be so. Secondly, Allott emphasizes that the restatements are intended to serve only as guides to the interpretation of customary law by the courts which administer it. However, as our research has shown, at the present time most lawyers and Judges serving in the higher courts in Sierra Leone do not make use of assessors as consultants on the content of customary law, even though most of them do not have knowledge of customary law from their own personal experience. However,

if such a publication as a restatement were available, the tendency would be for them to rely on it, not as a guide, but as a final authority, when confronted with a case involving customary law.

As far as the Local Court are concerned, we also feel the value of the restatement approach is questionable. Most Court Presidents are not literate in English and would have to rely on the reading ability of the Court Clerk. If the restatement has been presented to the Court President only as a guide, it would not be surprising if he ignored it since he would regard himself as an expert on customary law and not in need of any guidance.

(c) Unification of family law: An assumption underlying this research has been that the most positive approach to the problems of family law in Sierra Leone is the unification or integration of the law. Underlying this assumption is the belief that a country's best interests are served when national identity transcends ethnic identification. Unification of the law necessarily demands that attention be paid to the differences in the practices of the various groups, in that whatever legislation is enacted, it must be broad enough to contain these differences.

2. Obstacles to the unification or integration of family law in Sierra Leone

To those who are responsible for official policy regarding family law three obstacles to the unification of family law in Sierra Leone will immediately present themselves.

(a) The coexistence of polygamy and monogamy: Four African countries which have seriously considered the unification or integration of their family law are Ghana, Uganda, Kenya, and Tanzania:

The various solutions proposed share a certain amount of common ground: all envisage the provision of one unified system of registration of marriage, whatever its form, and all, whilst not outlawing polygamy, recognize that encouragement should be given to monogamy (Phillips and Morris 1971, p. 41).

Tanzania has unified some aspects of its marriage law (see Appendix B). All marriages, whether monogamous or polygamous, have equal status under the law. Moreover, the Tanzanian government has legislated some special provisions regarding polygamy. If a man wants to marry a second wife he can do so only after consulting his first wife and obtaining her consent. In Government Paper No. 1 of 1969 (Tanzania - Mainland) (see Appendix B) the logic behind this provision is spelled out in some detail. It is pointed out that before the new legislation a Christian who wanted to marry a second wife could not do so unless he had divorced his former wife, 'even if that wife wishes to continue to live with her husband after his second marriage'. Moreover, if such a Christian married a second wife while he was still legally married to his first wife, the second wife and her children were not recognized by the law. This meant that the woman would have insurmountable problems in bringing up her children on her own.

The Government has no intention of allowing this situation to continue, hence the Government proposes that a husband should be allowed to marry more than one wife if his first wife agrees and that both wives, together with their children would be legally recognized, even if the first marriage was solemnized in a church or a Registrar's Office. However the husband and his wife must voluntarily and freely agree to convert a monogamous marriage to a polygamous marriage. Where once such agreement has been freely and voluntarily entered into, the parties will not be allowed to retract from it and thus treat the law with levity. Such an agreement would be required to be registered in the court and proper evidence would be required to be adduced in order to ensure that both parties have voluntarily agreed to such an agreement (Government Paper No. 1 of 1969 Tanzania-Mainland7).

At first sight such a legislative provision might appear radical and objectionable to the many Sierra Leoneans who practise monogamy.

The Tanzanian government has stressed the problems which arise when Christians wish to take a second wife. The question for Sierra Leone is, 'How would the provision that a man must have his wife's consent fit into the traditional value system under customary law in Sierra Leone?'

It is customary in Sierra Leone for a husband to consult his first wife when he decides to take another. It may even happen that his wife will advise him on a suitable choice; but, no matter how the second wife is selected, the first wife must be informed. Although customary law does not permit women to deny their husbands the right to marry another wife, the result in many cases is that the wife who objects to a co-wife takes this opportunity to divorce her husband. Thus, in effect, under customary law a wife has the right to refuse to be a party to a polygamous marriage, although at present this option may be expressed only by her seeking a divorce. Given the absence of adequate maintenance provisions for women divorced under customary law, it is undesirable to allow this situation to continue. Certainly, legislation which insists on the consent of a woman before her husband takes another wife should be coupled with adequate legislative provision for her maintenance should she decide to divorce her husband rather than give this consent. In our opinion, such legislation would tend to raise the status of women married under customary law.

Providing for one uniform marriage law would not need to interfere with individuals' obedience to the tenets of their religious beliefs, whether or not these included a provision for polygamy. Legislative provision for the practice of polygamy which includes the necessity of the wife's consent regardless of religious affiliation, would prevent the considerable hardship now experienced by many women whose husbands decide to have more than one wife.

(b) Tribal differences in customary law: It is unnecessary to trace Sierra Leone's political history to show how tribalism has been utilized in political struggles. Government is strongly aware of the disruptive influences resulting from an emphasis on these divisions and would welcome any policy which would help to equalize the status of all peoples who for one reason or another have identified themselves with particular tribes.

It has been a basic assumption of this research that the unification of family law in Sierra Leone was the most positive approach to the existing plural legal system. It was hypothesized that the tribal differences in customary law were not so great as to present an insurmountable impediment to such unification. While there are differences in family organization from area to area, from our findings we conclude that these differences do not markedly influence the practice of customary law in the Local Courts. As has been noted, most areas of Sierra Leone are ethnically heterogeneous. Even though it is the general policy of the government to appoint as Court Presidents persons who represent the dominant tribal group in an area, it even sometimes happens that a Court President comes from a minority tribe. We found almost no evidence of dissatisfaction with Local Court decisions arising from the feeling that the court was not considering the difference in the customary law of the parties involved in a case. People accepted that the customary law of the predominant tribal group was the rightful law to be administered in the area. Such acceptance lends confirmation to our conclusion that the time is ripe for unification of family law.¹ Most important, the differences which we found between groups can best be described as ceremonial differences

¹ Moreover, today, in the Western Area the so-called 'tribal headman courts' are almost all presided over by Temne headmen. Despite this, Provincial people of every tribal background take their disputes to these courts.

rather than legal differences. The basic principles of customary family law practised throughout Sierra Leone today are remarkably similar. Differences in the stress placed upon certain rules do exist. For example, the costs of compensation in adultery cases vary widely from the south to the north, but the rules applied in such cases are the same. Attitudes towards women's rights over personal property do differ widely, but the overall trend throughout the country is towards recognizing the economic independence of women. Unification of the law regarding women's property may produce resistance in some quarters, but a law which is sensitive to the dominant trend will reduce many problems which currently arise and also will serve to raise the status of women in accord with international standards of human rights.

There are other tribal or ethnic differences but these rarely affect the practices of the Local Courts. For instance, different groups have different 'incest rules' - that is, there are differing rules about whom one may marry. For example, the Kono tribe allows a man to marry sisters of his first wife providing he has married the eldest sister first. Such a practice would be prohibited in other groups. (However, in other groups, if a wife dies, the husband may then marry one of her sisters without incurring criticism) The authority of the family over the choice of spouses serves to discourage people from marrying those who stand in prohibited degrees of relationship. When such rules are broken the problem is usually handled by the family with the ceremonial assistance of one of the secret societies which has jurisdiction over such matters. We rarely found evidence of such 'incest' cases coming before the Local Courts, except in the Western Area where the traditional institutions have been so effectively eroded as to leave people without any other recourse than the tribal headmen's courts which, in fact, have no jurisdiction. The one case we witnessed there was finally settled 'out of court' by the families of the parties involved.

There are many differences between areas which have little or nothing to do with tribal distinctions. These include differences in the use of medicines and swears in court cases and differences in costs imposed by Local Courts. The enforcement of a standard tariff for court charges would prevent Local Courts from charging excessive rates.

The concept of tribe has been a subject of considerable investigation and theoretical discussion among anthropologists and others for some time. All attempts by scholars to define tribe by such criteria as language, common culture, or physical characteristics have thus far failed. The idea that different tribal groups also have a distinct and separate body of customary law also cannot be supported by our findings in Sierra Leone. Why, then, does the notion of tribal differences continue to persist in Sierra Leone as well as in other African countries?

Bohannan has shown that part of the responsibility for the situation in Africa today must be placed on colonial governments as well as on early travellers who were 'under the illusion that African societies tended to be mutually exclusive, when in fact many of them ran together and inter-mixed' (1966 p. 121). Anthropologists have also contributed to the belief in tribal exclusiveness through their emphasis on the study of 'cultures'. While they might have recognized the high degree of inter-digitation which existed between the so-called tribal groups, it did not deter them from their belief in distinct boundaries between ethnic groups. Bohannan refers to the countless efforts to create 'tribal maps' of Africa in an effort to get Africa 'straightened out' or 'classified'. He refers to the phenomenon of discrimination between neighbouring groups through the use of pejorative terms by their neighbours, and cites the classic case in the Northern Territories of Ghana:

...where some of the so-called tribal names that were meticulously recorded by early administrators and students turn out to be no more than derisive terms for culture traits that have come from one direction or the other, while

the peoples of the area refer to themselves by names that take their references from local places and who, in fact, have scarcely any organized groups larger than the ordinary homesite or compound (1966 p. 122).

Colson (1968) also maintains that 'Tribalism in Africa today does not represent the continued acceptance of ancient loyalties or the thrust forward into the present or outmoded social forms'. Rather, she asserts:

At least in Africa, tribes and tribalism as we know them today are recent creations reflecting the influences of the Colonial era when largescale political and economic organization set the scene for mobilization of ethnic groups based upon linguistic and cultural similarities which formerly had been irrelevant in effecting alliances (1968).

The notion of tribe does, however, have very important political implications. As Colson has shown, 'contemporary African tribes are either new forms of political organization created for administrative purposes ... or they represent the emergence of self-conscious nationalistic movements ...'(1968). She points out how independence has often given a new momentum to the process of mobilization, and the idiom of tribal affiliation has been utilized by political leaders to create solidarity. Unfortunately, the concept of tribe 'carried the connotation that the new political struggles were anachronistic throwbacks to earlier political forms and alliances'. However, Colson asserts, contemporary African groups are not survivals from the pre-colonial political world, although they may seek to acquire legitimacy through some 'myth of ancient unity' (Emphasis added).

Sierra Leone's political history since the first movements towards independence has been marred by political rivalry which has been expressed in terms of tribal factions. Since independence, the government has sought to encourage national unity and to discourage tribalism. We suggest that a policy which encourages national unity through the unification of family law would be one major step towards achieving the

goals which the government has set for itself. An ideology of unity in the sphere of social life could assist in undermining those disruptive influences which promote divisions, whether of ethnic, tribal or class origin. Most important, it would eliminate one of the major areas of discrimination which occurs in family law - the division of the population into the very arbitrary and ambiguous classification of 'native' and 'non-native'. At the same time, unification of family law would not jeopardize any of the rights and privileges of persons whose personal law is now statutory law.

(c) Attitudes towards customary law: The major residual feature of the colonial era, the division of the population into groups labelled 'native' and 'non-native', leads us to consider the most serious obstacle, as we see it, to the unification of family law in Sierra Leone: present-day attitudes towards customary law.

Although no concerted effort has so far been made by the Sierra Leone government either before or after independence to determine the content of customary law, it should not be concluded that there was, or is, an absence of policy on these matters. The government's policy might best be described as laissez faire, particularly during the colonial period. The necessity for making provision for the practice of customary law, at least in the Protectorate (now the Provinces) was, and continues to be, acknowledged. However, from our reading of government correspondence about these matters and from interviews with administrators, judges, and lawyers, we found a very common and explicit assumption that given time and education, the organization of the traditional family will evolve towards a more Westernized form. It is believed that the customs and practices which give rise to cases not provided for under the statutory or 'English style' law will gradually disappear. The official policy in Sierra Leone, as we have come to understand it, has been very similar to that which Cotran describes for Uganda. As he puts it, 'not only was there

a lack of interest in customary law but I think it is right to say that government policy was actively concerned in discouraging any attempt at recording customary law in any official manner. The official view amongst both the judiciary and the administration seemed to be that one should leave customary law alone and allow it to wither away' (1966).

Although the British, as part of their policy of indirect rule, permitted chiefs to retain civil authority at the local level, official interest in customary law was limited to those issues which produced administrative problems. The fact that the Native Courts (now Local Courts) have still never been fully integrated into the official judicial system and have remained an administrative responsibility of the Ministry of the Interior is an expression of official regard for indigenous customary practices. Yet it is ironical that statutory law is called 'general' law when, as far as family law is concerned, it constitutes the personal law of but a minute proportion of the population.

That such an official view prevails among the educated Sierra Leonean elite is not surprising.¹ After all, all of them were born and educated

¹ There are exceptions to these general statements. Over the years there have been a number of Sierra Leoneans who have not held the views outlined in this section. These include civil servants who were posted in the Provinces and as a result of their work were brought into direct contact with customary practices, and also certain lawyers who were appreciative of the traditional family system. It is fitting that some persons, because of their significant efforts to improve the situation as they found it, be singled out for mention: Mr. Morris Jones, who was the first Sierra Leonean Judicial Adviser under the Colonial Government, wrote a detailed handbook for Native Courts and attempted to regularize procedures in a manner sympathetic to traditional practices; Mr. A. J. Massally, who, as a Police Magistrate in Kenema, constructed a questionnaire for circulation throughout the country to collect information on customary law; and Mr. S. T. Navo, at one time a Judicial Adviser, who, in addition to his regular duties, attended international conferences on African law and made representations to the government in an effort to evoke some concern for the need to unify the law of Sierra Leone. More recently, Dr. H. M. Joko-Smart has attempted to contribute to efforts to bring order into the practice of customary law by conducting extensive research into the substantive law of the various groups in the country. Mr. S. M. F. Kutubu, until recently Judicial Adviser, has also made efforts to convince the government of the importance of retaining courts practising customary law and extending this provision to Provincials living in the Western Area and Bonthe Town.

during the period of Colonial rule. Furthermore, all Sierra Leonean lawyers have been trained abroad in English jurisprudence, as there is no law school in the country. Only a handful have even been exposed to a curriculum which acknowledged the value of legal systems other than those of Western origin. Lawyers have been schooled in an atmosphere in which the superiority of Western Christian concepts of the family was eulogized and where, if they were considered at all, the dominant attitude towards traditional African family practices was one of contempt.

Certain factors led most educated elites in Sierra Leone to consider everything promoting the Western family system as progressive and any policy which supported the continuation of the traditional system as retrograde. These factors included the climate of opinion of the Colonial period, the emphasis of missionary teachings, and the Westernized character of education. The educational system until recently (that is, until the establishment of a Department of Sociology at Fourah Bay College and a new stress on African studies in the curricula of secondary schools) completely lacked any studies of the differing family systems which have developed in different socio-economic settings. It would be presumptuous to predict what form of the family will emerge in the distant future in Sierra Leone. However, for several decades to come it is unlikely that customary family practices will alter so radically as to eliminate the need for customary law, whatever might be thought the most desirable direction of social evolution. Moreover, our findings suggest that the development of family law will not be aided by continual neglect of the problem of finding suitable and enforceable norms of conduct during this stage of rapid transition.

3. Customary law in the Western Area

There has never been provision for the administration of customary

law in the Western Area (including Bonthe Urban District) despite the fact that at least 81 per cent of the population of the Western Area is of indigenous origin. Despite the absence of any legislation which would have given them jurisdiction to try customary law cases, Tribal Headmen have assumed this role throughout the years since the Colony was founded. In fact, administering customary law has always been assumed as the Tribal Headmen's most important responsibility. Although a number of official inquiries have been conducted and policy recommendations made, the problem has remained. In 1967 the National Reformation Council abolished the institution of the Tribal Headman and recommended that the jurisdiction of the Magistrates' Courts be extended to include customary law. The programme of the National Reformation Council was never implemented. Nevertheless, the former government-appointed Tribal Headmen, have, for the most part, ceased to fulfil their various functions. Since the advent of the civilian government a number of people have assumed the right to call themselves Tribal Headmen or claim to have been so designated by their local Member of Parliament. During the course of this research we discovered more than thirty people who were unofficially serving as Tribal Headmen.¹ All of them understood that their role included responsibility for hearing disputes and administering customary law. Most of them held regular court sessions.

During the course of our research the Ministry of the Interior was actively engaged in attempting to decide on a policy regarding the institution of the Tribal Headmen. The hope was often expressed that the findings of this research would provide useful information on which government could base policy decisions on this question. Of course, a policy regarding the institution of the Tribal Headmen must take into account not only customary family law but also political and administra-

¹ In addition to these unofficial or self-appointed headmen, government has appointed a Headman for the Fula, Bassa and the Kru tribes.

tive considerations. Our research concentrated on the social and legal problems which arise as a result of the absence of provision for the administration of customary law in the Western Area. We restrict this part of the report to considering these particular problems. As far as the content of customary law is concerned, the data upon which this report is based were collected in the Western Area as well as in other parts of the country. Therefore, our findings on the law and the social problems which were found to exist, apply equally to all parts of the country, including the Western Area. Regarding the need for provision for customary law in the Bonthe Urban District (administratively part of the Western Area) the problems cited are even more acute, since the personal law of almost the entire population of Bonthe Urban District is customary law.

The National Reformation Council believed that the Department of Social Welfare could cope with the problems of family dispute settlement in the Western Area without the assistance of the Tribal Headmen and their courts. Under present circumstances we do not believe this to be the case. There is a critical shortage of caseworkers to deal with family disputes. Moreover, social workers are not usually familiar with customary law and many do not understand the traditional family system. Most important there is no law to enforce the decisions of the social worker. The unofficial headmen's courts deal with cases in terms of traditional values and attempt to enforce traditional familial obligations when arbitrating a dispute. Even if there were enough social workers to deal with the family problems which arise in the Western Area, there are insufficient social services available to replace the system of extended family obligations. However, without the strength of traditional institutions such as the court which administers and enforces customary law, people are prepared to ignore familial obligations whenever possible.

The number of cases which are voluntarily brought to unofficial headmen's courts in the Western Area reveals the serious need for the administration of customary law. In one of the most active of these unofficial courts a total of 500 cases was heard in one year. Not all of these cases involved customary family law. In fact, many were for debt, assault, abuse and other similar offences. These latter cases could have been heard in the Magistrate's Court under statutory law. However, for a number of reasons many people have more confidence in the procedures of arbitration which are used in the headman's court than in those followed in the Magistrate's Court. For example, Krio or their own native language is spoken, the headmen's authority is regarded as similar to that of the Chief, and there is less formality. This preference is demonstrated by the fact that while a case may be heard in the Magistrate's Court at a cost of a few shillings, a man may spend as much as Le.30.00 in the process of having his case heard in the headman's court. The financial practices of some of these courts are irregular. The usual procedure is for the court to ask the plaintiff (who has already paid a summons fee which must be matched by the defendant) how much he is willing to sacrifice should he lose the case; the defendant is required to match the amount the plaintiff names. These moneys are held by the court until the case is decided, the person winning the case taking the entire amount, excluding the summons fees. In addition, these courts may impose fines and other routine court costs such as fees for sending a messenger to collect a witness. Many cases are unduly prolonged, either because the plaintiff, the defendant or the witnesses do not appear at the appointed time, or because the headman's calendar is too full. In fact, our findings reveal that the majority of cases are never concluded. In many cases the parties lose patience with the court and decide to let the matter drop. As far as we could ascertain, the court policy is to retain the moneys which have been put up by the plaintiff and the defendant at the outset of the case,

or to return them only under coercion. We found that many of the litigants who were involved in cases earned monthly salaries of Le.30 and even less. It is common for such people to have to borrow money to cover their costs and when they cannot repay the loan they find themselves embroiled in further court proceedings and more debts. It would be easy to devote considerable space to a discussion of the irregular financial practices of these unofficial courts. However, the comparatively high cost of having a case heard in these unofficial courts is well known. People are also aware of the possibility of losing money through court irregularities. Nevertheless, this knowledge does not deter people from repeatedly bringing their disputes to the headmen's courts for arbitration. We suggest that this behaviour only serves to strengthen the argument that these courts are attempting to serve a very serious social need which has been neglected.

The tribal headmen have always had some difficulty in imposing their authority. Since they have never had formal jurisdiction to hear cases, there was no official way for them to enforce decisions. The unofficial headmen's courts which now administer customary law in the Western Area have even greater difficulties. Many go to great lengths to promote an image of authority which will encourage people to submit to their jurisdiction. Court sessions are opened with lengthy speeches on the importance of the service that is being provided and the support which it is claimed that government has given. Loyalty to the government is affirmed through both speeches and the presence of active party supporters. (Our research was also offered as evidence that the government regarded these courts as important institutions) While most courts follow very traditional court procedures, some attempt to promote an image of authority through the use of printed summons forms and receipts. In one of these courts the Local Courts Act was referred to as the authority for the court's jurisdiction. Individual policemen co-operate with the local

headmen, and some even appear in court in uniform. Outlying police stations have provided temporary lock-up facilities to detain people who have failed to abide by the decisions of these courts. However, such actions are fraught with danger, since someone in the court may be aware of the illegality of such practices and may report the headmen to the Minister of the Interior.

It frequently happens that a person who has been summoned to court will openly defy the headman and his panel, and sometimes fights break out in the middle of a court session. Nevertheless, despite such problems, respect for what is presumed to constitute traditional authority, for customary law and for the procedures which are followed by these courts, continues to motivate people to bring their cases and to attend court when summoned.

We suggest the use of these courts, dramatically illustrates their usefulness in the urban area. All that was stressed earlier in Section IX (10) of this report, where we discussed the problems following the centralization of the Local Courts, can be applied with even more emphasis to the city. Social problems at the neighbourhood level in the city are exacerbated by the absence of the authority structure of the family. One of the most useful functions of the present unofficial courts is to be found in their attempts to inculcate traditional values of morality and decent behaviour. The procedure of these courts usually includes a long speech by the presiding headman which is a recitation of acceptable norms of behaviour and of the dangers of giving way to the many temptations with which a person is confronted in the city. Several of the reports to government on the problem of tribal headmen have referred to the Westernized character of city life, and expressed the view that people should be encouraged to accept this and to leave their 'tribal ways' behind them when they take up residence in the city. Such a view

reveals a serious lack of appreciation of the character of the social life of the vast majority of city dwellers in Sierra Leone. Moreover, even if the direction of social development could conceivably be said to be moving in the direction which these officials have described as 'Western', the present-day social problems of the majority of the population deserve serious and immediate attention. However, the almost total absence of traditional institutions in the city makes the task of moral leadership in the traditional community almost impossible.

Our general conclusion is that the problems of family law in the Western Area would best be resolved by the unification of family law throughout the country. The court machinery devised to administer this unified law should include provision for local-level dispute settlement following procedures with which people are familiar. Costs should be minimal. Providing a uniform marriage law and equal legislative protection for everyone would significantly reduce the kind of social problems which give rise to cases now heard in unofficial courts and the Department of Social Welfare. Official recognition of marriage by customary law in the Western Area would assist those traditional leaders who are attempting to lift the moral quality of social life in Freetown.

A less desirable approach, already considered by Mr. S. M. F. Kutubu in his report to government on this problem, would be to extend the machinery of the Local Courts to the Western Area. However, as he notes, a number of complicated problems would immediately arise over jurisdiction, in addition to the many other problems which now exist in the provinces under the present system.

A third approach which might alleviate some problems, on at least a short term basis, would be to pass legislation to provide for the establishment of conciliation courts formed on a multi-tribal basis. Cases heard by such courts could be decided by a panel. Some members

of the panel should be people recognized in the community as authorities on customary law and respected as traditional leaders. The panel could also include one or more social worker whose professional training would assist them in arbitrating cases. A lawyer should also serve on the panel in order to advise on the statutory rights of individuals. Such conciliation courts could supplement the present unofficial headmen courts. It is suggested that no-one should be bound by their jurisdiction unless he voluntarily submitted himself to it, but once he had done so he would be bound by their decisions.

Over the last several years government has become aware of the steady increase in the crime rate in Sierra Leone. It is our view that one of the reasons for this increase in crime is the absence of institutions which provide individuals with opportunity to obtain legal remedies for offences. In such a situation it is only natural for individuals to seek redress through self-help. For example, adultery is a very serious crime under customary law. Failure to secure redress is very humiliating for a husband. We witnessed more than one case where the husband resorted to physical violence against his wife's lover because he felt he had no other means of remedying the situation. Western-educated government officials may find it difficult to comprehend such attitudes and behaviour. But eighty-one per cent of the population of the Western Area continue to follow traditional patterns of family life. We would urge that immediate attention be given to this large majority.

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A P P E N D I X A

LAND LAW IN SIERRA LEONE

Mr. L. C. Green

I. Historical background

In order to be able to assess the magnitude of our land problems, it will be essential to give a brief historical background to the present system.

Land tenure in the Western Area is based on the freehold system. This system evolved as a matter of policy, as the then British Government in the administration of the Western Area, which had been acquired by Treaty with the Chiefs, introduced the English legal system. Thus in Freetown in the early 19th century the Crown tried to settle all grants of land to the settlers to provide them with a secure title. An Act was passed providing that all lands in use or occupation which might be cultivated before the 1st January 1810 should become the freehold property of the cultivator and his heirs, irrespective of any other claims. A Registration Ordinance was passed in 1857 to provide Registration of Title.

In the rural areas of the Western Area, as there was an abundance of land, there was no problem about the allocation of land. Consequently most of the lands were unregistered and even today there are still some unregistered lands. Since that time a number of laws have been introduced to establish the system of freehold, culminating in the Crown Lands Ordinance of 1960. The following Acts are relevant:-

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|------------------------------------|----------------|
| (a) The Public Lands Act | 1898 Cap 116 |
| (b) The Crown Land Conservancy Act | 1903 Cap 118 |
| (c) The Unoccupied Lands Act | 1911 Cap 117 |

- | | |
|-----------------------------|--------------------|
| (d) The Crown Lands Act | 1960 Cap 134 |
| (e) The Land Protection Act | 1962 No 61 of 1962 |

In the Provinces the treaties made with the Paramount Chiefs when the British Government proclaimed jurisdiction over the territory in 1896 gave it no general rights over land. For these reasons whenever government required land for whatever purposes, lease agreements had to be negotiated with the appropriate chiefdom council. They preserved the customary rights of land holding and Acts No 16 of 1905 and No 16 of 1907 were passed vesting all lands in the chiefs and chiefdom council which hold such land for and on behalf of the families concerned. The 1927 Provinces Land Act is the one and only legislature up to date on land in the Provinces. No further legislation has ever been introduced, if one excludes the Town and Country Planning Act which was intended to be applied in the Provinces as well, but had to be dropped when it met with vehement opposition from the chiefs. The 1927 Provinces Land Act crystallizes all the Provinces Lands Acts up to date and includes the following:-

Nos. 16 of 1927, 34 of 1928, 32 of 1933, 1 of 1935,
Rules No 18 of 1930 and 24 of 1933.

II. The findings of research in land law

Since 1945 when this explosive legislation of the Town and Country Planning Act was introduced, no attempt was made to introduce further land legislation in the Provinces. However with the introduction of responsible government in 1957 it was thought that the time was ripe to review the position in the Provinces, and in 1959 the government secured the services of Dr. E. H. Jacoby, an F.A.O. Land Tenure expert, to study the problem and make recommendations.

In 1960 Dr. E. H. Jacoby was invited to this country to make a preliminary study of the problems. In his report he stated that

in his opinion, "the time has not yet arrived for a unified and homogeneous tenure system in Sierra Leone, since the institutional framework has to be cautiously adjusted to the needs of individual regions. The unrestricted freehold system of the Colony does not exercise much attraction in the Protectorate. There, public opinion gives specific attention to the shortcomings of the freehold system which in an increasing scale, facilitates loss of properties to economically superior foreigners. In general the Tribal population in the Protectorate seems to consider custom as satisfactory, and as their best protection against economically superior forces. They are very conscious of their economic weakness and of their lack of bargaining capacity. They are particularly afraid of concentration of land ownership and many interviewed persons expressed the fear that foreigners, diamond miners and even people of the colony might buy agricultural land and establish large estate at the expense of the tribal population. This fear is a reality and has to be taken into serious consideration since it expresses a realistic valuation of the risks of individualisation and of the protection which custom still provides".

Through I do not disagree entirely with the view expressed by Dr. Jacoby, I think circumstances have changed since he made this comment 10 years ago. There has never been any problem of negotiating leases for plantation projects in the provinces. To cite a few examples - the S.I.P.M.B. plantation schemes and the present World Bank

Oil Palm project. It has now been realized that one can still give up one's land for development projects as long as the title remains vested in the family:

In 1961 the government obtained the services of a land tenure expert who studied the problems in detail. The expert, Mr. Hussain M.A. of Pakistan, was appointed by the Food and Agricultural Organisation,

- (1) to deal with general aspect of land tenure, and specifically with aspects associated with the emergence of the concept of property in the Protectorate.
- (2) to determine the area where individual rights have matured.
- (3) to advise the government with respect to land survey activities, problems of adjudication land consolidation and land registration.
- (4) to assist in the modification of existing legislation and administration in the field of land tenure.

Mr. Hussain, who arrived in the country on 29th November, 1961, studied the problems and finally left on 15th March, 1964. His report, which was submitted on 12th August, 1964, included the following recommendations:-

Customary land law should be developed and built up into a systematic body in stages. The first stage should be the collection of information on all aspects from Paramount Chiefs, Chiefdom Councillors, Section Chiefs and individuals on a tribal basis. The second stage should be the preparation of a text book on the material collected in stage one. A third and final stage should be the codification of customary law, though it is suggested that this stage should be deferred

as long as possible.

Some rules of customary law, he stated, needed clarification and modification. He therefore suggested that government directives, legislation and rules by District Council under Section 40 of the District Council Act Cap. 79, may be used in effecting the changes. The following are examples of customary law which require modification:-

- (a) The principle that land holding rights of original cultivators can never be extinguished;
- (b) The practice of families claiming land in their surrounding neighbourhood in excess of their foreseeable needs for several generations.
- (c) In regard to economic tree crops, the planter's rights are subordinate to those of the land holder's with the result that he has no security of tenure.

A system of registration of land should be introduced and spread out in two phases. The first phase should include the determination of presumptive boundaries of large blocks of land and family reserves. This should be done by a preliminary public enquiry conducted by special communities of the Chiefdom Councils. The boundaries should then be surveyed and mapped; after that the rights and a more detailed public enquiry should be conducted by the same committee. Disputed claims should be settled by an Adjudication Committee appointed by the District Officer, or with his approval. Such rights and interests as are proved should be entered in Chiefdom registers which may be given some such name as "General Register of Existing Rights" and which should show only broad categories of rights, that is, ownership, usufruct, or occupation. The maps should be revised in accordance with the entries in the Register. In the course of these proceedings, an

attempt should be made by the Tribal Authorities to resume jurisdiction over surplus family lands.

The second phase should be the determination of existing individual rights within the large blocks. The phase will involve more detailed surveys and registration of rights. In implementing this phase, legislation on the Registration of land in the Provinces should be introduced. The Act should make a distinction between the two phases - the registration of existing rights and the registration of titles - and empower the Government to give effect to either phase at the most opportune time. Registration of land in the Provinces should be made compulsory.

Finally, he recommended the establishment of a number of Committees and courts for land administration and adjudication. A high level inter-Ministerial organ should be formed to coordinate all matters on land. An adviser should be appointed who will exercise supervisory jurisdiction over the departments concerned with land tenure and land use. Inter departmental land Committees should also be set up under the chairmanship of District Officers. Land officers should be appointed to serve in the districts. Finally, special land courts should be set up where necessary.

III. Problems resulting from present land law

Following my attendance at the Land Administration course in Cambridge, I have come to the conclusion that government must give priority to our land problems before they become more complex, and insurmountable. As it is, the most effective way for promoting economic development is to make the greatest use of our land resources. This is the surest way of creating the necessary surpluses from the export of cash crops to earn the foreign exchange required to promote

industrial development. There is no shortage of cultivable land in this country. All that is required is providing security of tenure for land owners, in short, uniting ownership with possession, and inviting capital so as to increase the productivity of the land.

The present situation is such that nobody knows who owns what parcel of land. It is equally true of the Western Area and worse in the provinces. I agree we have a deeds registry for the Western Area, but it is very unsatisfactory and it would be surprising to note that considerable portion of the rural areas have never been brought into the deeds registry. There is always the question whether such lands are crown lands or private lands. These lands are relics of land grants made to settlers in the early 19th century which for one reason or the other such as opposition to the payment of 'quit rents' levied by government were never registered. Such lands passed on to the settlers' descendants without any form of title.

It may be worthwhile at this stage to point out some of the defects of registration of deeds. Registration of deeds consists of putting on record copies of all land transactions as they stand, without investigation. It is optional and not necessary for passing the legal estate. The registrar is under no obligation to ensure consistency with previous deeds. It is only evidence that the dealing has taken place and is no proof of the legality of the transaction. The title cannot be guaranteed and the registrar has no curative power, and the register is indexed not to the land but between the parties to the deed.

As the system of land tenure in the provinces is based on customary law, no form of registration has ever been introduced with the exception of leases which, in accordance with the Provinces Land Act, have to be registered. One reason for this situation is the

feeling that customary land law should be preserved to prevent dispossessing the peasants of their land. On this account one may assess the advantages and disadvantages of customary land law in the light of modern developments. The advantages of the system are that it is non-statutory and flexible and can adapt itself to social and economic changes and has not completely impeded economic development. (For examples several tree crops including coffee, cacao and piassava have been developed in customary land in response to a market demand.) It does not inhibit cash crop production for export. Absentee land lordism is rare. Everyone is entitled as of right, by belonging to a family, to land however small the acreage and, in theory, there is no landless class. It has also provided a climate for collective action and a social outlook towards labour. It has not proved static though it usually lags behind and does not change radically enough to meet changing conditions.

The disadvantages have usually been highlighted as a drag on economic development, the foremost of which is the lack of security of tenure. Customary system does not ensure security of tenure. Absence of registered titles makes it impossible to know who owns what and severely militates against the attraction of capital which is so essential to achieve higher productivity. Ordinarily, agricultural enterprises do not attract capital so easily because of their very nature being subject to the vagaries of weather, soil conditions, availability of markets and fluctuations in price. This is much more so when security of tenure is inhibited by a practice which does not vest the land in any individual.

The absence of demarcated boundaries and registered titles leads to a number of land disputes. It also encourages a feeling of

exclusiveness and leads to many inter chiefdom disputes which drag on for years. For example the Bo - Baoma Chiefdom dispute has been going on for the last 65 years and was apparently settled this year, but there is no guarantee it will not flare up again. It also to a certain extent encourages cultivation for subsistence farming. It does not create much incentive for large scale cultivation. It also creates difficulties for further development. It also inhibits certain groups of people, that is, potential farmers, from being in the main stream of economic development which is symbolized by giving more initiative to individual participants, a rising level of inspirations and market-oriented production.

In consequence it can be said that the customary system has its advantages, but the disadvantages which impede economic development should be removed. What is required is a variety of tenure forms and this may only mean extensions and adjustments of these forms, which must not however be left to the slow processes of adjustment by customary forms.

IV. Recommendations

One method of tackling this problem is to introduce a system of Title Registration to cover the whole country, both the Western Area and the Provinces. The system of land tenure, whether it is based on freehold as in the Western Area or customary law as in the Provinces is immaterial for purposes of registration.

First of all, the main characteristics of a Titles Register are as follows:-

- (a) Authoritative examination or adjudicating of existing rights whether freehold land, or land held under the customary basis.
- (b) Simultaneous delimitation of boundaries upon an accurate map. Each land parcel is allocated a unique number which forms the basis of the register and map reference system. Whenever the boundary is altered the plot number is cancelled and a new unique number or numbers allocated.
- (c) A page is opened in respect of each land parcel.
- (d) All land dealings after first registration are transacted by the use of simple statutory forms. For example: sale, lease, mortgage, transfer etc.

The Register is the only legal authority

- (e) The Registered proprietor is issued with a Land Certificate containing facsimile of register and plan.

As I see it, Sierra Leone is now ripe for some form of registration of titles to be introduced, if not for the whole country but for certain parts. The circumstances which make registration of title desirable may be outlined as follows:-

- (a) The spread of cash cropping: Cash Cropping involves the investment of labour and capital and possibly a waiting period of several years before the crops begin to yield. On such grounds there must be security of tenure to ensure that the individual can benefit from his own investment.
- (b) Development of a market in Land: Mobility of land resources is considered essential so that an enterprising individual can acquire the land he needs without let or hindrance. The emergence of a land market will be accompanied by fraud,

uncertainty and litigation unless dealings are regulated through registration. We have abundant evidence of double-dealing in land in several parts of the country, particularly in Bo, which is mainly due to the absence of registered titles.

- (c) Greater complexity in land rights: Land rights become more complex as custom gives way to contract and this complexity is inevitable if land resources are to be fully utilized. We don't have to wait 10 - 20 years when land rights will have become more complex, and the solution becomes more intricate.
- (d) The need to control the distribution of interests in land: Government has to control the alienation of land to non-indigenous and other racial groups and to regulate the aggregation of land rights by individuals, or to restrain sub-division or to examine the qualifications of persons acquiring interests in land. This can only be effected through registration.
- (e) Land disputes: Land disputes are time consuming as well as a waste of capital. They also deter a land holder from investing much needed capital or labour in any land subject to dispute. They militate against cooperative enterprises and community development projects. Through registration the main sources of dispute are removed.
- (f) For the expansion of agricultural credit: Whether for medium or long term loans, the pledging of land itself rather than merely the crops is necessary and this preferably requires documentary evidence of title.

- (g) Where compulsory acquisition of land is necessary for public purposes:

"If public confidence is to be maintained, any acquisition of land should cover only acquisition of registered interests in land" (East Africa Rural Commission Report, 1953/55)

- (h) For the introduction of land-use planning: Reliable statistical data of all kinds is essential and lack of it constitutes a circumstance making registration desirable.

There are obvious advantages in introducing a system of registration of title:

- (a) Dealings in land are rendered secure, expeditious and cheap:

- (b) Expansion of credit is greatly facilitated:

The registered proprietor may borrow money quickly, easily and cheaply on the security of his title.

- (c) Litigation over land is greatly reduced.

- (d) Absentee interests are fully prohibited.

- (e) Registration of title can serve as a vehicle of land law.

The Transition from customary to statutory tenure can be effected through the introduction of registration. New land law can be introduced as part of a Registration Act so that the new nations grow up together and the titles register thereby becomes the matrix in which land tenure is subsequently shaped. There are many other advantages which I need not mention here.

However if any system of registration is to be introduced it is essential that there should be a reasonable measure of support, and it is

not opposed by any substantial proportion of the land owners. In this context it would therefore be necessary to consider the arguments usually raised by protagonists of the customary system in the provinces against any modification of the present system.

It has always been argued that if the system of land tenure is changed, citizens in the Western Area would quickly buy out interests in land in the provinces and so lead to dispossession of the peasant farmers thereby creating a land-less class. Registration of title does not lead to any alienation of land whatsoever, but is a process designed for giving a secure title to land owners whether the land is held on a freehold or customary basis.

It simply implies the conversion of the de facto user into the de jure owner.

The establishment of indefeasible title to property in land is essential if private capital is to be introduced in agricultural or similar projects which make use of the land. The land owner on the other hand has four requirements in respect of his land:-

- (a) Security, i.e. he wants it to be realized that he is the owner of his land beyond all doubt.
- (b) he wants to know how he may use his land or if its use is restricted in any particular way
- (c) he wants to know how he may deal with the land in transfer, exchange, lease, pledge, mortgage etc.
- (d) he wants to know what will happen to the land when he dies - Inheritance laws etc.

Registration of title facilitates all these requirements. Thus the contention that any modification of the present customary system will

lead to dispossession of the land owner cannot outweigh the advantages of registration of title. Adequate safeguards can be incorporated in the proposed Land Registration Act to protect the land owners from unscrupulous speculators. To meet this contingency local land Boards can be set up for each district in the Provinces with powers to control all dealings in land.

The Board will protect the landowners who try to dispose of their land indiscriminately without due regard to their own future and that of their family. Their function would be to list each dealing in land on the criterion of social advantage. Before a landowner can dispose of his land, he would have to get permission from the Minister to ensure that disposition of his land is for example to realize capital to invest in his land and not otherwise, in which case permission would not be given to dispose of his land. The composition of the land Board may include the District Officer, Elders and Chieftom Councillors versed in customary law, the Paramount Chief of the appropriate chieftom. Membership of the board may be limited to 5 or 6. The Minister of Lands would give his approval for all such transactions and in this direction he would be advised by the Local land Boards.

Registration of Title does not necessarily mean vesting the title in the individual. Title registration may still be effected even though the land is vested in the family. It would only mean that in the land certificate the names of the Head family and say another member of the family would appear and there would be a clause in the encumbrances section of the register that the land cannot be alienated without the consent of the family. In areas where individual ownership has emerged like Bo, Kenema and Makeni, the land would be vested in such individuals.

In this light, and if government decides to introduce registration of title, wide publicity would have to be given to the matter to explain

the system in order to allay the fears and misgivings of landowners.

Title Registration is a social service and a sort of long term investment. Its benefits are not immediately apparent and it is not a luxury, but a necessity for economic development. It has been introduced in a number of developing countries. In Asian countries with considerable populations all land is registered. Boundaries are clearly defined and each land owner has documentary evidence to support his claim to the land. In Africa Registration of title has been introduced in Kenya, Malawi, Sudan, Uganda and is to be introduced in Zambia. In West Africa Registration of Title was recently introduced in Lagos and it is proposed to extend it to other parts of the country. In Ghana a Land Commission is presently reviewing the system for the purpose of introducing registration of title.

Finally there is the administrative aspect which involves the distribution of functions of government on land matters. At present responsibility for lands is divided up between the Ministry of Lands, Mines and Labour under which there the Division of Lands and Survey and the Ministry of the Interior. The Registrar General who is responsible for the registration of instruments is under the jurisdiction of the Chief Justice. There is need for closer coordination between operating ministries and departments so that they can work in unison. The ultimate objective would be to have a chief Land Registrar with legal qualifications or a Commissioner of land with responsibility for registration of land in the whole country.

I would recommend that a committee be set up to look into the question of instituting a system of registration of title to cover the whole country.

The Committee should include the following:-

Permanent Secretary, Ministry of Lands, Mines and Labour

Permanent Secretary, Ministry of the Interior

Permanent Secretary, Ministry of Agriculture and Natural Resources

Chief Agriculturist

Director of Surveys and Lands

Chief Conservator of Forests

Registrar General

Law Officer

The Committee would have to consider among other things:-

- (a) the feasibility of introducing Title Registration
- (b) what parts of the country can benefit most by the immediate registration of title
- (c) Coordination of functions of departments and ministries with responsibility for lands;
- (d) request for technical assistance for implementing a system of registration, if necessary.

SUMMARY AND RECOMMENDATIONS

1. Land tenure in the Western Area is based on freehold unlike the Provinces where it is based on customary law.
2. Not all land is registered in the Western Area particularly the rural areas.
3. The concept of land holding in the Western Area being based on freehold, several Acts have been passed culminating in the Crown Lands Act 1960.
4. In the Provinces the main Act is the Provinces Land Act 1927 incorporating a series of earlier and subsequent Acts and vests the land "in the Chieftom Councils who hold such land for and on behalf of the native communities concerned".
5. In 1959 Dr. E. H. Jacoby, a Food and Agricultural Organisation Land Tenure adviser, made a preliminary study and recommended that it was not possible at this stage to have a unified and homogeneous tenure system. What was required was to create the conditions necessary for accelerating the advances which are taking place within the customary system.
6. In 1961 Mr. Hussain was invited to make a detailed study of the problem and make recommendations. Among other things he recommended the introduction of a system of registration to take place in stages:-
 - (a) Recording of broad categories of existing rights - sections, towns, villages, communal reserves, family holdings i.e. adjudication.
 - (b) Survey, demarcation and registration of existing individual rights.
7. Most effective way for promoting economic development is to make the greatest use of land resources, by increasing agricultural productivity and so earn foreign exchange to import the necessary capital for industry. No shortage of cultivable land. All that is required is providing incentives for land owners by security of tenure i.e. uniting capital to create the surpluses for take-off into industry.
8. The present position is that nobody knows who owns what parcel of land. In the Freetown Area the system of registration by deed deals partly with problem, but in the Rural Areas the situation is unsatisfactory as there is a considerable amount of unregistered land.
9. In the Provinces there is no system of registration of land excepting leases which in accordance with Cap 122 should be registered within 3 months from the date of execution.
10. Some of the defects of Registration of Deeds include:-
 - (a) Deeds registry is a compilation of all land transactions as they stand without investigation.
 - (b) It is optional and not necessary for passing the legal estate.
 - (c) Registration is under no obligation to ensure its consistency with previous deeds.

- (d) Deeds are only evidence that the dealing has taken place, and are no proof of the legality of the transaction.
- (e) The title cannot be guaranteed and the registrar has no curative powers.
- (f) The register is indexed not to the land parcels but between the parties to the deed.

11. Advantages and disadvantages of customary land tenure include:-

- (a) It is non-statutory and flexible and can adapt itself to social and economic changes and has not completely impeded economic development. For example the emergence of a demand for exportable cash crops in past war period has led individual land owners to devote their resources to extending their holdings. Coffee, cacao and piassava have been developed in customary land.
- (b) Absentee land-lordism is rare. Land being vested in the family, every member as of right is entitled to parcel of land however small the acreage may be.
- (c) The system has checked landlessness as land may not be alienated outside the family group.
- (d) It has not proved static though it usually lags behind and does not change radically enough to meet changing conditions.

The disadvantages include:-

- (a) Lack of security of tenure is a drag on economic development.
- (b) Absence of registered titles makes it impossible to know who owns what and severely militates against the attraction of capital which is so essential to achieve higher productivity.
- (c) Absence of demarcated and clearly defined boundaries and registered titles leads to a high incidence of land disputes e.g. Bo - Baoma chiefdom dispute lasted for 65 years.
- (d) Encourages to a certain extent cultivation for subsistence farming. It does not create much incentive for large scale cultivation. It also create difficulties in generating agricultural surpluses and providing infrastructure for further development. It also inhibits certain groups of people, that is, potential farmers to be in the main stream of economic development which is symbolized by giving more initiative to individual participants, a rising level of inspirations and market oriented production.

12. Changes in the system cannot be left to the slow processes of adjustment by customary forms. A sound basis of amending the system without outright destruction of the customary system is by introducing Registration of Title.

13. The benefits of Registration of Title include:-

- (a) Dealings in land are rendered secure, expeditious and cheap.
- (b) Expansion of credit is greatly facilitated.
- (c) Litigation over land is reduced to a minimum.
- (d) Absentee interests are fully protected.
- (e) Registration of Title can serve as a vehicle of land law.

14. Registration of Title to be effective must be supported by at least 50% of the landowners. Wide publicity should be given to the scheme to allay the fears of the public and to emphasize that registration of title does not lead to alienation of land, but is a process designed to give land owners a secure title, whether the system is based on freehold, leasehold or customary law. It simply implies conversion of de facto user into de jure owner.
15. Local Land Boards can be constituted for each district in the Provinces to vet all dealings in land which amount to disposition with final authority for its disposal being vested in the Minister with responsibility for lands. Land Boards to include the District Officer, Paramount Chief and local chiefdom councillors vested in customary law.
16. Distribution of functions between departments and ministries on land matters should be reviewed.
17. Committee comprising of the following should be set up:-
 - Permanent Secretary, Ministry of Lands, Mines and Labour
 - Permanent Secretary, Ministry of the Interior
 - Permanent Secretary, Ministry of Agriculture and Natural Resources
 - Director of Survey and Lands
 - Chief Conservator of Forests
 - Chief Agriculturist
 - Registrar General
 - Law Officer

A P P E N D I X BGOVERNMENT PAPER NO. 1 OF 1969

(TANZANIA - MAINLAND)

GOVERNMENT'S PROPOSALS OF UNIFORM LAW OF MARRIAGE

In Tanganyika every community is governed by its own personal law of marriage. There are at the moment different kinds of laws governing marriage such as customary laws, under which customary law marriages are contracted, Islamic law marriages, Hindu marriages, Christian marriages and civil marriages (solemnized in the Registrar's office). In customary law marriages the parents agree on the amount of bride price to be paid and once such bride price is paid, then the marriage is solemnized in accordance with the customary law in question. The laws relating to customary law marriages, divorce, maintenance and custody of children, when the spouses divorce or when one spouse dies, are known. Even if a person belongs to the same tribe as the ones married under customary laws but he is a Muslim, he too pays the bride price but he has to call a Sheikh to officiate at such a marriage ceremony, which is performed in accordance with the Islamic law rites. This ceremony is different from the marriage ceremony performed under customary law. If a man is a Christian though he belongs to the same tribe as the couple married under customary law, the marriage is performed in a licensed church and by a licensed priest or minister. Again the marriage ceremony is different from the one under customary law or Islamic law. Moreover, if the man is a Hindu, though he is a Tanzanian citizen, his marriage is governed by the Hindu laws, which are different from other marriage laws. Besides the above mentioned different kinds of marriages there are some youths who do not want to marry under their customary laws if they belong to different tribes or if they belong to different religious groups, hence they marry in a registry office.

2. One of TANU's beliefs is that every individual should be respected and that every individual should be free to profess his beliefs in any religion, and associate with any persons as long as he does not contravene the provisions of any law.

3. The existing laws do not recognize all the marriages contracted under different laws as equal. If there are any disputes in respect of the customary law marriages, the primary court is the court which has jurisdiction to determine such disputes. All questions relating to marriages where the parties concerned are African Muslims are also decided by the primary courts. On the other hand where the parties concerned are Asiatic Muslims the court having jurisdiction is the High Court. The High Court also has jurisdiction if all parties are Hindus. Where a marriage has been solemnized in church or by a Registrar of Marriages, the High Court has jurisdiction.

4. Most of the existing marriage laws do not allow a woman to decide anything in respect of her marriage. In marriages contracted in accordance with the customary law rites, the girl's consent to the choice of the husband is not necessary as long as her father or guardian gives his consent to the marriage. The wife cannot divorce her husband even if he has broken all the marriage vows. On the other hand, a husband may divorce his wife at will and this causes hardship to the wife and her children, since she has no legal remedy. For instance, Maganga marries Sele in accordance with the customary law marriage rites. Later on Maganga changes his religion and becomes a Christian, and he is called Yohane. He then persuades Sele to change her religion but she refuses to do so. Later, Yohane wants to marry Eva, according to the Christian rites. Before Yohane can marry Eva, he is obliged to divorce Sele, even though he had lived with Sele as his wife for more than ten years, and once he marries Eva, from that time onwards Eva will be his legal wife. If Yohane marries Eva before divorcing Sele, he will be committing bigamy.

5. It is obvious that this situation should not be allowed to continue, because TANU believes that all human beings are equal and that every individual has a right to dignity and respect. The Government is therefore anxious to enact legislation to provide for the uniformity of laws relating to marriages and divorce. However, it is not the intention of the Government to force every person to marry in accordance with a single procedure laid down in the law in total disregard of their religious laws. A Muslim should be able to continue to marry in accordance with the Islamic law rites; a Christian in church; a Hindu according to Hindu marriage rites and others under customary law rites. In the interest of our national beliefs and aspirations it is essential that all these marriages should be treated equally.

6. In the first place it is proposed to provide that marriage must be a voluntary union. Both the parties should have the freedom to consent to the marriage or to withhold their consent, without any coercion. There will of course be certain conditions which must be complied with. For instance, each party must have attained the age prescribed by law. This will prohibit child marriages.

7. Hence the Government recommends that a man should be allowed to marry when he attains the age of 18 years and a girl when she attains the age of 15 years. In this connection it should be noted that the U.N. has recommended 15 years as the minimum marriage age for girls so as to protect their health, and the health of their children. One of the effects of prescribing the minimum marriage age would be to prevent the parents from removing their young daughters from schools, because they cannot be married until they reach the prescribed minimum age. Moreover, the girls would be old enough to know how to take care of their children and look after their homes properly. On the other hand a boy of 18 years is allowed to vote, to become a member of TANU and can also enter into any contract.

Most of the boys who attain the age of 18 years would be those who have completed their primary school education or if they did not go to school, they have already acquired the necessary skill or knowledge to enable them to help themselves.

8. Since the law will prescribe the minimum age for marriage to apply to all the communities, it will put a stop to child marriages. It would also be necessary for the parties concerned, together with their witnesses to ensure that those who want to marry have attained the minimum age prescribed by the law.

9. The proposed law would also prescribe the prohibited degrees of affinity or consanguinity in respect of every kind of marriage, for example a brother cannot marry his sister. At the moment there are different classes or groups of people included in the list of persons in the prohibited degrees because different tribes have different categories of such people. It is therefore necessary to bring uniformity in this sphere.

10. Further, the Government recommends that if a man wants to change the nature of his marriage, for instance if a Christian wants to marry a second wife, he can only do so after consulting his first wife and obtaining her consent. However, at the moment, a man who has married in church and in accordance with the Christian rites (under the Marriage Ordinance), is not allowed to marry another wife, unless he divorces his former wife, even if that wife wishes to continue to live with her husband after his second marriage. If the husband marries a second wife while he is still legally married to his first wife, then the second wife and her children would not be recognized by the law. This means that the woman would have insurmountable problems of bringing up her children alone. The Government has no intention of allowing this situation to continue. Hence the Government proposes that a husband should be allowed to marry more than one wife if his first wife agrees and that both wives, together with their children

would be legally recognized, even if the first marriage was solemnized in a church or a Registrar's Office. However the husband and his wife must voluntarily and freely agree to convert a monogamous marriage to a polygamous marriage. Where once such agreement has been freely and voluntarily entered into, the parties will not be allowed to retract from it and thus treat the law with levity. Such an agreement would be required to be registered in the court and proper evidence would be required to be adduced in order to ensure that both parties have voluntarily agreed to such an agreement.

11. Such agreements would not contravene the religious doctrines in respect of marriages as some people may doubtless think. If a Christian, whose marriage was solemnized in a church loves another woman and wants to marry her then he has already broken his religious laws. Some Christians marry second wives but because they are Christians and have already married in church, therefore their second marriages are not valid under their religious law.

12. As it is not the basic law of Tanganyika, but certain religious laws, which prohibit polygamy, the Government proposes that when the parties freely agree to convert the nature of their marriage, the law of the country should not prohibit the man from marrying another woman. Such prohibition of law would be unrealistic, as it will not deter the man from marrying the other woman but will force him to divorce the first wife. The Government proposes that in such a case the man should not be forced into a position whereby he has either to divorce his first wife, or cohabit with the other woman with the inevitable result that their union would be a union not recognized by the law and the offspring of such a union would be illegitimate. Every human being has a right to dignity and he cannot be deprived of this right merely because his parents could not get lawfully married. While everyone must have the freedom to profess the faith of his choice, he cannot in doing so be allowed to inflict indignity upon another

person. For this reason the law will permit conversion of a monogamous marriage into a polygamous marriage, provided, of course, the wife has voluntarily and freely agreed to such conversion.

13. It is also proposed that the law should provide for the protection of the woman who lives with a man for a long time without being legally married to him. At the moment a man may live with a woman for many years and even have children, yet the day he is tired of living with her he may drive her out of his house or leave her. Such a woman cannot sue the man for maintenance and her children are illegitimate children. The Government proposes, therefore, that in order to remove this injustice, if a man cohabits with a woman for period of more than two years then he would be presumed to have married that woman, and if they have children such children would be deemed to be legitimate children of such spouses, as long as the man at the time he started co-habiting with such a woman was legally capable of being married.

14. The payment of bride price (dowry) in respect of customary law marriages, is another problem facing many young men today. Many young men are not able to marry because they do not have enough money or live-stock to pay the bride price demanded by the girl's family. As a result of that the young couples elope and then live together as husband and wife even if they are not properly married. The Government does not intend to abolish the payment of bride price but it proposes that a procedure should be worked out, whereby the bride price may be paid in instalments and there should also be a further provision authorizing those who are entitled to receive bride price to sue for such bride price, even after the solemnization of the marriage. Again, the non-payment of bride price should not make the marriage void.

15. The Government also proposes that the parties to an intended marriage be required to give at least 21 days notice of their intention before the date fixed for the marriage. Such notice should be given to the Registrar or Assistant Registrar or a priest or minister licensed as a registrar. The notice is necessary in order to enable other people to know of the intended marriage so that if they know of any impediments to such a marriage they may give notice of their objections to the Registrar, priest or minister, who would then refer the objection to the court of competent jurisdiction for the objection to be heard and decided upon. Where there are no legal objections, then the Registrar, priest or minister may fix the date of the marriage. If it is a civil marriage then the notice would be sent to the Area Commissioner; if it is a Christian marriage, the notice would be sent to the church, to the priest or minister licensed to solemnize such marriages; if it is a Muslim marriage, the notice would be sent to the Sheikh, who is authorized by the Minister to solemnize marriages. Where a marriage is performed in accordance with the customary law rites, the notice would be sent to the person authorized by the Minister to register such marriages. Every marriage should be attested by two witnesses.

16. The Government proposes that the provisions of the new law should recognize as valid any marriage solemnized and registered in Tanzanian Embassies, High Commissions or Consulate Offices in foreign lands where at least one of the parties is a Tanzanian citizen, and in the form recognized by the law where each party has the capacity to marry the other according to the law of his or her domicile, and provided that each party expresses his or her free consent to the marriage.

17. There are at the moment different registers for different kinds of marriages. The Government feels that it is not necessary to have different registers. All the marriages contracted in Tanganyika should be registered in one register, so that there would be a single system of registration

applying to all persons, regardless of the race, religion or community, to which such people belong. If such a register is kept then it would be easy for any person to find out where any marriage was solemnized. Since the introduction of a single register may have administrative problems, it is proposed that the Minister be given power to declare after an inquiry the areas in which the registration of marriages would be compulsory. The law should also permit but not compulsorily require, the registration of the existing marriages and the registration of marriages contracted abroad in Tanzanian Embassies, High Commissions and Consulate Offices, where either party is a Tanzanian citizen.

18. Moreover, in order to remove the injustices inflicted upon a wife, the Government proposes that in any kind of marriage neither the husband nor the wife would not be allowed to inflict corporal punishment on his spouse. If either party has a complaint he or she may go to the appropriate authority.

19. The Government proposes that the new law should provide expressly that it is the duty of either spouse to take care of each other. It is the duty of a husband to maintain his wife or wives but where the husband is impecunious and the wife is capable of maintaining him, then she will be under a duty to maintain her husband. Moreover, the proposed law should provide expressly that either spouse may own his or her own separate property which he or she owned before marriage or acquires after marriage.