

The International Court of Justice

Eberhard P. Deutsch

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Deutsch, Eberhard P. (1972) "The International Court of Justice," *Cornell International Law Journal*: Vol. 5: Iss. 1, Article 3.
Available at: <http://scholarship.law.cornell.edu/cilj/vol5/iss1/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The International Court of Justice

EBERHARD P. DEUTSCH*

That an international tribunal should have no cases to decide is largely attributable to its own fault. Yet the International Court of Justice was, for some months in 1970, for the first time in its history, in that unfortunate predicament. It is so again.

From the time of the decision in the Barcelona Traction case, the Court had not a case before it, until the time of the case of the Namibia mandate, and since the decision in that case, it is again without business. Very recently India is reported to have instituted a complaint against Pakistan.

During the interval, it is considering amendments to its rules, and is, in effect, sitting on its hands, while presumably contemplating the stars.

What is wrong? What changes will enable the court to function? What is holding back the nations of the world in bringing actions before the court? Can the court succeed in its function to "take effective . . . measures for the prevention and removal of threats to the peace . . . [through] adjustment[s] or settlement of international disputes . . . in conformity with the principles of justice and international law."¹

It is submitted that it can, if the powers that control the destinies of the United States and those of the Soviet Union want the Court to function as it was intended to function.

In the first place, the Court is a natural outgrowth of a series of efforts, begun in 1899 at The Hague, when representatives of the nations of the world met there to institute it. Then, in 1907 they met again in the same place and started the Permanent Court of Arbitration which was not a court at all, in the real sense of the word.

In 1920, the Committee of Jurists put their heads together, and began working out their problems, in an effort to find a solution. They came up with a plan, which overcame at least the first problem—up to that

*Of the New Orleans Bar.

1. U.N. CHARTER art. I, para. 1.

time insoluble—they found a way to elect judges and this created the fore-runner of the present court.

The United States never joined the League of Nations, and accordingly never joined the Permanent Court of International Justice; but it managed to have a judge on the bench throughout its roughly twenty-year history.

During that time, the Court managed to render some 62 decisions, 35 disputed and 27 advisory opinions—or say three decisions a year. This was a pitifully small docket to control, but it encouraged the world.

It really portended little. With the Second World War came a resurgence of the demand for an international court that would prevent conflict. The United States Senate refused to declare the nation's adherence to the Court except under an emasculating reservation.²

Then there was the Communist bloc. It refused to declare adherence to the Court's jurisdiction at all—while maintaining a two to four man judge minority on the Court.

During the nearly thirty-year period of its functions, it had decided some 40 cases, or an average of less than two a year. And, as stated, during the latter part of its existence, it has handled only one advisory opinion.

Surely there is something wrong—something missing in the structure of the Court, that keeps it from functioning. There are only some forty adherences to the Court's jurisdiction, and only two among these are really unreserved.

Will repeal of the Connally Amendment to the United States Reservation save the Court? Most assuredly not, since that Amendment affects nobody—not even the United States, really.

Is the trouble not something much more fundamental? Is it not really a distrust of judges who are still nationals of their own countries, appointed for limited terms, and bound to determine questions of their own jurisdiction as they see them—anxious to increase their own dockets?

The great powers simply will not submit their controversies to a court in which they do not have confidence. No one will assert that they would so submit to a court composed of judges who have agreed to give up their nationalities for life, but it will be a step in the right direction.

Nor will anyone agree that an honest vote on jurisdiction is assured by requiring the judges to decide questions of their own jurisdiction by

2. This reservation in pertinent part provides, "that this declaration shall not apply to . . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America. . . ." [1969-1970] I.C.J.Y.B. 80 (emphasis added).

a two-thirds vote. Or will they? Will not the two factors of giving up their citizenship for life, and requiring a two-thirds vote improve confidence in the tribunal?

In his annual report for 1955 to the General Assembly, Dag Hammarskjöld, its then Secretary-General, submitted that "it is surely in the interest of all Member States to restrict as much as possible the sphere where sheer strength is an argument and to extend as widely as possible the area ruled by considerations of law and justice. In an interdependent world, a greater degree of authority and effectiveness in international law will be a safeguard, not a threat, to the freedom and independence of national States."³

In the first place, then, the jurisdiction of the Court can be assured to take place only over matters believed to be strictly within the international arena. This assurance can be given by a proposal that the Court is not to overrule an objection to its own jurisdiction except by a vote of ten of its judges (two-thirds of its entire membership).

This should give ample assurance, but the number can be increased even to an unanimous vote, to give Russia assurance of a veto. And the statute can provide that "any doubt as to whether a matter is essentially within the domestic jurisdiction of a state shall be resolved by the Court in favor of such domestic jurisdiction."

The late, great Judge Sir Hersch Lauterpacht, in a recent edition of his book, edited by his son, on *The Development of International Law by the International Court*, said: "If government by men, and not by laws, is resented within the state by individuals, any appearance of it is likely to be viewed with even greater suspicion on the part of sovereign states in relation to judges of foreign nationality. The problem of judicial impartiality, however exaggerated it may be on occasions, is an ever-present problem in relation to international tribunals. . . ."⁴

As long ago as September 1927, a committee of judges of the Permanent Court of International Justice, in a report rendered with reference to the advisability of permitting appointment of judges *ad hoc* by litigants in cases submitted for advisory opinions, themselves conceded that "of all influences to which men are subject, none is more powerful, more persuasive or more subtle, than the tie of allegiance that binds" them "to the lands of their homes and kindred, and to the great sources of the honours and preferments for which they are so

3. Secretary-General, Annual Report, 10 U.N. GAOR, Supp. 1, at xiii, U.N. Doc. A/2911 (1955).

4. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 40 (1934).

ready to spend their fortunes and to risk their lives.”⁵

Judge Lauterpacht found, after an appropriate investigation, “that in no case have national (*ad hoc*) judges voted against their state,” a circumstance which “cannot be regarded as a mere coincidence.”⁶ More recent statistical data disclose that on twelve occasions from 1922 to 1960 a national (*ad hoc*) judge has formed a minority of one on the side of his own country.⁷

In the fifth century B.C., Thucydides is reported to have made the cynical suggestion that “it had always been a settled rule that the weaker should be constrained by the stronger . . .” but “you now avail yourselves of the appeal to justice; which no one ever brought forward when he had a chance of gaining anything by might. . . .”⁸

In an Essay Towards the Present and Future Peace of Europe, William Penn said, with reference to the suggestion “that sovereign princes and states will,” by the establishment of such a court, “become not sovereign,” that “if this be called a lessening of their power, it must be only because the great fish can no longer eat up the little ones.”⁹

Of course, sovereign nations remain extremely jealous of their sovereignties. They simply will not give up their right, as in the case of the United States and the Soviet Union, to hold the feet of the smaller nations to the fire; or as in the case of those smaller nations, to hold on to their single votes as against the single votes of the United States and the Soviet Union in the United Nations.

Very recently there was introduced in the United Nations, a request for a review of the role of the International Court of Justice to remove obstacles to its satisfactory functioning.¹⁰

This suggestion was referred, in September 1970 by the General Assembly to the Sixth (Legal) Committee, which worked assiduously on the matter during October and November; and on 11 December 1970, its report was placed before the General Assembly.

5. Publication, [1927] P.C.I.J., ser. E, No. 4, at 187.

6. H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 230-232 (1933).

7. [T]he dissenting vote of the judge *ad hoc* chosen by the State which loses the case, when it is a constant phenomenon, as has been the case thus far, constitutes an insurmountable obstacle to unanimity. . . .

Response of Switzerland to the Secretary-General's Questionnaire on the International Court of Justice, Report of the Secretary-General, Review of the Role of the International Court of Justice, 26 U.N. GAOR, at 63, U.N. Doc. A/8382 (1971).

8. THUCYDIDES, I *THE PELOPONESIAN WAR* 47 (H. Dale transl. 1893).

9. W. PENN, *An Essay Toward the Present and Future Peace of Europe* (1693), in *THE PEACE OF EUROPE: AND OTHER WRITINGS BY WILLIAM PENN* 15 (E. Rhys ed. 1963).

10. Request for a Review of the Role of the International Court of Justice, 25 U.N. GAOR, U.N. Doc. A/8042 (1970).

The report recommended adoption of a watered-down resolution, calling on member states and states parties to the ICJ "to submit to the Secretary General, by 1 July 1971, views and suggestions concerning the role of the Court on the basis of [a] questionnaire to be prepared by the Secretary-General," inviting "the Court to state its views, should it so desire," and requesting the Secretary-General "to prepare a comprehensive report in the light of the opinions expressed by the States and the Court. . . ."11

The recommendations of the Sixth Committee (which had been adopted in that Committee by consensus) was in turn adopted unanimously by the General Assembly on 15 December 1970.¹²

Efforts to get agreement on a better resolution, providing for the appointment of an *ad hoc* committee to study and report on the over-all question, were defeated through the intractable opposition of the Communist bloc. In the Sixth Committee, the Soviet Representative (Mr. Kolesnik) stated that "the USSR opposed any form of consideration of the role of the Court. . . ."13

He went on to say that it was "the USSR's basic position that the reason for the Court's present lack of activity was that it had handed down unjust decisions and not that its Statute was defective. It was for the Court to find a way out of its dilemma. [A]ny review of the Court's role and any attempt to undermine its Statute and the United Nations Charter were unacceptable; nor could it agree to States having the Court's compulsory jurisdiction in violation of their sovereign rights."¹⁴

In the General Assembly, the same Soviet representative, explaining that his "delegation did not wish to impede the unanimous adoption by the General Assembly of the draft report of the Sixth Committee", stated, in effect, that its failure to object to the resolution as adopted was not to be construed as an agreement with the resolution, asserting "that it is really not at all satisfied with the resolution which has been adopted. . . ."15

He submitted that his delegation does "not support the idea of a consideration of the question of the so-called role of the International Court in any form at all."¹⁶ "The Soviet delegation would state that

11. Sixth Committee (Legal), Report, 25 U.N. GAOR, at 28, U.N. Doc. A/8238 (1970).

12. G.A. Res. 2723, 26 U.N. GAOR.

13. Sixth Committee (Legal), Provisional Summary Record, 25 U.N. GAOR, at 6, A/C.6/ SR.1229 (1970).

14. *Id.*

15. Provisional Verbatim Record of the Nineteen Hundred and Thirty-First Meeting, U.N. GAOR, at 13, U.N. Doc. A/PV. 1931 (1970).

16. *Id.*

the adoption of this resolution in no way detracts from its fundamental position. The Court has fallen into a period of idleness, not because of any flaw in the Statute of the Court, but because it has compromised itself by erroneous decisions."¹⁷

On 15 and 30 September 1971, the Secretary-General issued his Report in the form of a 130-page "Review of the Role of the International Court of Justice" with a thirteen page addendum, consisting of excerpts from the replies he had received to a questionnaire he had issued pursuant to Resolution 2723 (XXV) of the General Assembly.¹⁸

Most of the material is of little value. For instance, Cuba responded that ". . . in the last instance, it is the Court which should adopt measures to enhance its effectiveness."¹⁹ The Soviet Union replied that ". . . the Soviet Union feels that there is not sufficient reason at present to believe that a review by the United Nations General Assembly of the role of the International Court of Justice could lead to an improvement in the functioning of the Court."²⁰

On the other hand, tiny Laos responded that the "Statute of the Court should be revised on the principle of compulsory adherence whereby all States Members of the United Nations would undertake *in advance* to comply with the decisions of the Court and to enforce them in the same way as decisions of their national courts."²¹

Remarkably, Poland has made much the same suggestion: "The practice of accepting the compulsory jurisdiction of the Court with reservations makes the acceptance only apparent. The experience indicates that the efforts aimed at enhancing the effectiveness of this judicial organ should be primarily directed at overcoming distrust and encouraging States to bring disputes before the Court, and this could be done by making improvements within the present framework of the Statute."²²

Senegal, in its reply, has indicated that giving the Court compulsory jurisdiction might tend to bring the organization to a premature end: "All the efforts made so far to impose the jurisdiction of the Court automatically have met with resistance from States which consider that their sovereignty would be impaired. It is probable that, if the Charter and the Statute were amended to that effect, a number of States would prefer

17. *Id.* at 14-15.

18. 26 U.N. GAOR, U.N. Doc. A/8382 and Add. 1.

19. Report of the Secretary-General, Review of the Role of the Court of International Justice, at 127, 26 U.N. GAOR, U.N. Doc. A/8382 (1971). See Czechoslovakia's reply to the same effect. *Id.* at 128.

20. *Id.* at 128. See also the response of the Ukrainian SSR. *Id.* at 127.

21. *Id.* at 120.

22. *Id.* at 66.

to leave the United Nations.”²³

It should be borne in mind that the Court has never yet decided a case which has saved the United Nations from getting into a Third World War, nor did it stop the Second. Nor has it stopped the situation in which the big fish have gobbled up the little ones. The technique has been different.

The United States, by and large, has acted like a mature, grown man. It has not used the Court at all, either to satisfy its own position or to destroy that of its enemies. But neither has the Soviet Union. Of course, it has not allowed disobedience by its satellites. When, in 1968, the Czechoslovakian republic threatened to get out of line, it simply moved in and took over. It will not give up its sovereignty nor take a chance on it.

In the summer of 1965, the American Bar Association adopted a resolution which stated that, “[t]he International Court of Justice, although now performing a useful function in resolving international differences, is not being utilized to its maximum capacity”; that “the private bar has long been committed to the principle of resolving all differences, public and private, by sound judicial processes”; and that “a re-examination of the Statute of the Court may well point to ways and means of making the Court an institutional structure having greater usefulness in meeting the requirements for world peace. . . .”²⁴

On these premises, the American Bar Association recommended “that the members of the United Nations be asked to consider a revision of the Statute of the International Court of Justice . . . to give the Court jurisdiction over all members of the United Nations . . . [and to give] consideration . . . (1) to the Court being composed of internationalized judges having tenure for life . . . and (2) to prohibiting the over-ruling of a plea to the jurisdiction on the ground that a controversy is domestic except by a vote of two-thirds of its entire membership. . . .”²⁵

When and if such a revision of the Statute of the International Court of Justice shall have been effected in accordance with the recommendation of the American Bar Association, a long firm stride will have been taken, in the words of the first Article of the Charter of the United Nations, toward “international peace and security”, through “prevention and removal of threats to the peace”, by bringing about “adjustment or settlement of international disputes”, in “conformity with the principles of justice and international law.”

23. Report of the Secretary-General, Review of the Role of the Court of International Justice, at 12, 26 U.N. GAOR, U.N. Doc. A/8382/Add. 1 (1971).

24. 90 A.B.A. REP. 330-31 (1965).

25. *Id.*

Marriage and Divorce Law in Sierra Leone: A Microcosm of African Legal Problems

CHARLES EDWARD DONEGAN*

I. LEGAL PLURALISM AND OTHER PROBLEMS

The single factor that appears to be of outstanding significance in Africa is that of legal pluralism, the coexistence of a number of legal systems within a given geographical area. In the countries of North Africa, Islamic law early replaced most of the indigenous customary law, but in recent centuries European (particularly French) law has intruded into many fields, and today we see the beginnings of national legal systems comprised of principles derived from the concepts of western and Islamic law. In South Africa, English law has penetrated into the Roman-Dutch system, while most of the African population lives according to various systems of customary law. On the other hand, in tropical Africa, everywhere the indigenous (customary) law exists alongside the non-indigenous law which was introduced and developed by the colonial power, at times coexisting together with Islamic law. The customary law, the non-indigenous western law as it has been fashioned in the colony, and Islamic law are segments of the law today. Some should be retained, some modified, still other segments completely altered to fit the new development of the emerging states.¹

*Assistant Professor of Law, State University of New York at Buffalo; B.S.C. Roosevelt University, 1954; M.S.I.R. Loyola University (Chicago), 1959; J.D. Howard, 1967; L.L.M. Columbia, 1970; Member, New York and District of Columbia Bars.

1. A. Schiller, *The Changes and Adjustments Which Should Be Brought to the Present Legal Systems of the Countries of Africa to Permit Them to Respond More Effectively to the New Requirements of the Development of the Countries*, in *LEGAL ASPECTS OF ECONOMIC DEVELOPMENT* 193-203 (1966).

Probably in no area of African law is the problem of legal pluralism more pronounced nor more clearly demonstrated than in the area of marriage and divorce. Like other African countries, one of the chief problems besetting Sierra Leone is the internal conflict of laws. We are all familiar with the external conflict of laws, but the English reader is less familiar with internal conflict of laws than his counterpart in the United States—where internal conflict of laws affects a wide area of legal matters. An internal conflict case occurs when a judge is required to choose between two or more systems of law which are not territorially distinct, *i.e.*, which apply concurrently and without a single territorial jurisdiction. Consequently, there is an overlap between one system of law and another, which cannot be removed merely by drawing a boundary on the ground. Conflicts of this nature have, of course, arisen in the legal system of British India when judges were required to decide whether one system of religious personal law or another (Hindu law or Mohammedan law) should apply to the exclusion of the general law or of each other. In Africa religious personal law presents less difficulty (except for Islamic law); and most of the conflicts that arise are between the English or general law and African customary law. African customary law was in origin a set of tribal laws, and a member of a tribe would take his tribal law around with him; the description of such tribal laws as “personal law” was therefore appropriate. Nowadays, however, the effect of the legislation and the practice of the courts is more and more to make customary law a territorial rather than a personal law.²

Internal conflict cases may involve *Choice of Courts*, *i.e.*, deciding whether the non-native courts or the native courts have jurisdiction over a particular case or type of case, and whether one court or another within the indicated system shall have jurisdiction in the instant case (in this regard territorial jurisdiction becomes especially relevant), or *Choice of Law*, *i.e.*, deciding which system of law to apply to the determination of a particular case.

The possible types of conflict involving choice of law in the African territories are English law versus indigenous law (African or Islamic), African law versus Islamic, and intertribal conflict of laws, in which the choice is between two kinds of African law.³ An increasingly common example of the latter type is the case in which a man and a woman who belong to different African tribes may contract a marriage, ostensibly in accordance with native law, but without any clear indication as to

2. A. ALLOTT, *ESSAYS IN AFRICAN LAW* 154-55 (1960).

3. *Id.* at 155-56.

which native law is applicable.⁴

Historically, the chief techniques utilized to bring about evolution of the law are legislation, restatement, judicial interpretation, and juristic opinions.⁵ Legislation is probably the best and quickest means to bring about uniformity in diverse legal rules. Recommendations for legislative changes follow later.

Two important problems concerning African marriage are polygamous marriages and the scantiness of the African viewpoint on marriage. For example, should there be any allowances for polygamy in the planning of a new social system? It is one thing to tolerate the continuance of polygamy under customary law, as the majority of governments still do; it is quite another thing to include it in the design for a new, non-traditional order of society.⁶ There is a paucity of information as to what Africans themselves think and feel with regard to these matters. African public opinion has not yet had time to adjust itself to the pace and direction of modern changes. The masses of the people are still attached to their traditional institutions and unconvinced of the impossibility of preserving the substance of customary marriage apart from its traditional setting. Even though the decisive influence is more likely to be that of an educated and sophisticated minority, Africans of this class, to date, perhaps owing to their preoccupation with political questions, have devoted little consideration to the reshaping of their private law or the reintegration of their social system.⁷

Smooth administration of justice in most parts of Africa has been persistently difficult because the customary laws of its various peoples have been unwritten. This was a problem not only to the judges in determining the law, but also to advocates in advising their clients. Most important, unwritten customary law was the biggest stumbling block to reform since it was hardly possible to initiate sound reforms without a complete knowledge and understanding of it.⁸ Until very recently, those who administered justice in the native or customary courts relied on their own understanding of the customary law or the opinions of traditional experts; however the superior and subordinate courts staffed by professional judges or magistrates relied on the evidence of local experts setting out the applicable customary law, until such time as the customary law had been proved so frequently before the courts

4. A. PHILLIPS, *SURVEY OF AFRICAN MARRIAGE AND FAMILY LAW* 185 (1953).

5. A. Schiller, *supra* note 1, at 194-95.

6. A. Phillips, *supra* note 4, at xl.

7. *Id.* at xli.

8. Njonjo, *Foreward* to Cotran, *THE LAW OF MARRIAGE AND DIVORCE*, 1 RESTATEMENT OF AFRICAN LAW (1968).

that judicial notice might be taken of it. Legal textbooks were rare and the attempt to use anthropological writings, where they existed and where their use was permitted by the law, was not always successful, chiefly because these works were prepared for different purposes by persons who had no training in legal thought or language.⁹ Lack of certainty in the customary law was not, however, the only difficulty. The multiplicity of customary laws in force in the same country, the difficulty of harmonizing the institutions and principles of customary law with those of the imported and general law of western origin, and the desire to reform, and where possible unify, the local customary laws as part of a larger exercise in national development were all reasons why governments have found the ascertainment of customary law a vital task which cannot be delayed without damage to their ambitious programs of social and economic reform.¹⁰

With respect to the future direction of African law, given the plurality of legal systems in most of the territories of Africa—the co-existence of one or more indigenous legal systems (perhaps involving Islamic law) with a non-indigenous legal system accommodated to local circumstances—there are three major possibilities for the course of legal development. First, the pluralism of law may continue, either purposely adopted by the authorities or simply persisting in the absence of any change of policy. Second, a new state may select one of the component elements of a plural legal structure to the exclusion of the others. Third, there may occur a fusion of the elements of the plural legal system into a single national legal system, a process which would normally call for the directed evolution of the indigenous law, integrating it with the non-indigenous law into a modern legal structure.

Now that legal pluralism and other problems common to all Black African Countries have been discussed, we can focus on a single country that is a microcosm of such problems: Sierra Leone.

II. JUDICIAL AND LEGAL SYSTEMS IN SIERRA LEONE

Sierra Leone comprises: (a) an area consisting of Freetown and its immediate environs, formerly known as the "Colony"; and (b) an area formerly known as the "Protectorate."¹¹ The country became in-

9. *Id.* at vii.

10. *Id.*

11. Schiller, *Law, THE AFRICAN WORLD: A SURVEY OF SOCIAL RESEARCH* 176 (R. A. Lystod ed. 1965).

dependent on April 27, 1961, and the former Colony and Protectorate thereupon ceased to exist as such. However, the existing laws of the former Colony and Protectorate of Sierra Leone continue in force in Sierra Leone until repealed¹² and references in such laws to the "Colony" and "Protectorate" are to be taken as references to the areas in the former Colony and Protectorate respectively.¹³

The Courts consist of:

- A. Courts primarily administering the general law:
 - (a) the Privy Council;
 - (b) the Court of Appeal of Sierra Leone;
 - (c) the Supreme Court of Sierra Leone;
 - (d) the Magistrates' Court in the (former) Colony and Protectorate.
- B. Courts primarily administering African customary law:
 - (a) the Local Appeals Division of the Supreme Court;
 - (b) District Appeal Courts;
 - (c) Group Local Appeal Courts;
 - (d) Local Courts.¹⁴

A. COURTS ADMINISTERING GENERAL LAW

1. *The Privy Council*

The Judicial Committee of the Privy Council is the final court of appeal. Appeals may be taken from decisions of the Court of Appeal to Her Majesty in Council as a matter of right and with leave of the Court of Appeal.¹⁵

2. *The Court of Appeal*

Established by the Constitution,¹⁶ this body consists of a President and persons holding the offices of the Chief Justice and the Puisne (*i.e.*, Associate Judge), Judges of the Supreme Court, who are judges of the Court of Appeal *ex officio*, and such number, if any, of other judges as may be prescribed by Parliament. It has such jurisdiction and powers as may be conferred upon it by the Constitution or any other law.

12. S. L. CONST., 1961, No. 741, sched. 2, § 1, art. 4.

13. S. L. CONST., 1961, sched. 1, pt. V.

14. A. ALLOTT, *JUDICIAL AND LEGAL SYSTEMS IN AFRICA* 9-24 (2d. ed. 1970). H. M. Joko Smart, Lecturer in Law, University College of Sierra Leone at Fourah Bay, presents an excellent discussion of the judicial and legal system of Sierra Leone.

15. S. L. CONST., 1961, No. 741, sched. 2, § 1, art. 84, *as amended* by Courts Act, 1965 (No. 31 of 1965) §§ 70-73.

16. *Id.* § 79, *as amended* by Courts Act, 1965 (No. 31 of 1965) § 30.

3. *The Supreme Court*

Established by the Constitution,¹⁷ this body is a superior court of record and consists of the Chief Justice and such number of Puisne Judges as may be prescribed by Parliament.

The Supreme Court has such original jurisdiction as is conferred upon it by the Constitution¹⁸ or any other law. It has no jurisdiction in regard to any question arising exclusively between natives which relates to marriage or divorce by native customary law or any matrimonial claim founded on such a marriage.

The Supreme Court has appellate jurisdiction to hear and determine all appeals from the Magistrates' Courts. Appeals from the decision of the Supreme Court go to the Court of Appeals.¹⁹

The bodies of law administered by the Supreme Court are the general law, the customary law, and Islamic law.

General Law includes the Common Law, the doctrines of equity, and the statutes of general application in force in England on the first day of January 1880.²⁰

Customary law prevails insofar as it is not repugnant to natural justice, equity, and good conscience nor incompatible with any Ordinance applying in the Protectorate. Native customary law shall, except where the circumstances, nature, or justice of the case otherwise requires, be deemed applicable in all causes and matters where the parties thereto are natives, and also between natives and non-natives where substantial injustice would be done to any party by a strict adherence to the rules of any law other than native customary law—unless the parties agreed that the transaction should be regulated exclusively by English law.²¹

The only specific mention of Islamic law in the Ordinances of Sierra Leone is in the Mohammedan Marriage Ordinance, No. 20 of 1905. The relevant provision is section 3 which stipulates that “[p]roof according to Mohammedan Law of the existence, past or present, of a Mohammedan marriage or divorce shall be received in evidence by all Courts in the Colony and by any person having, by law or consent of parties, authority to hear and examine witnesses.”²²

17. *Id.* art. 75 (1), (4).

18. *Id.* art. 75 (1).

19. Courts Act, 1965, pts. II-IV (S.L.).

20. *Id.* § 74.

21. *Id.* § 76 (1) - (3).

22. Mohammedan Marriage Ordinance, Cap. 96 (S.L.).

4. Magistrates' Courts

Magistrates' Courts are courts of record. The three classes of magistrates' courts are: ordinary magistrates' courts, special magistrates' courts sitting in the Western Area, and juvenile courts.²³

At least one Magistrates' Court is established in each of Sierra Leone's judicial Districts.²⁴

Sitting as an ordinary court, a magistrates' court is composed of a single magistrate. As a special court for the administration of customary law, it consists of at least two special justices of the peace, one of whom must be the Chairman, together with two assessors selected by the Chairman from a list of experts in customary law drawn up by the Chief Justice.²⁵ A juvenile court normally comprises a single magistrate and two or more justices of the peace.²⁶

Magistrates' Courts have original jurisdiction only. Subject to the provisions the Courts Act of 1965, section 7 (1), every Magistrates' Court has jurisdiction to hear and determine all civil and criminal matters arising within the district or transferred to it by the Supreme Court.

Every such Court has jurisdiction to hear: (a) in the (former) Colony—any cause other than an action founded upon libel, slander, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage wherein the claim does not exceed 200 pounds in value; and (b) in the (former) Protectorate—any cause or matter other than libel, slander, etc., where such matter is between other than two natives.

No cause or matter which is within the Civil jurisdiction of Magistrates' Courts or of the Combined Courts established under the Native Courts Ordinance, and to which one of the parties is a non-native, shall be instituted in any other Court.²⁷

Appeals from the decisions of the Magistrates' Courts are heard and determined by the Supreme Court.²⁸ The Magistrates' Courts have no powers of review, revision, inspection, or supervision.

The Supreme Court has the power to transfer any civil cause before a Magistrates' Court either to the Supreme Court itself or to another Magistrates' Court. Any criminal proceedings before a Magistrates' Court can be transferred from that Court to any other Magistrates'

23. These are established under the Courts Act, 1965, the Courts Act Amendment Decree, 1967, and the Childrens and Young Persons Ordinance (Cap. 44 of the revised laws of Sierra Leone), respectively.

24. Courts Act, 1965, §§ 3-5 (S.L.).

25. Courts Act Amendment Decree 1967, § 1 (S.L.).

26. Laws of Sierra Leone, 1960, Cap. 44, § 4.

27. Courts Act, 1965, § 1 (S.L.).

28. *Id.* §§ 42-52.

Court for hearing and determination.²⁹

Magistrates administer the same law as does the Supreme Court, *i.e.*, the general, customary, and Islamic law.

B. COURTS ADMINISTERING AFRICAN CUSTOMARY LAW

1. *The Local Appeals Division of the Supreme Court*

The Local Appeals Division of the Supreme Court was established by the Local Courts Act, 1963.³⁰

The Court consists of a judge of the Supreme Court sitting with two assessors selected by him from a list of experts in customary law drawn up by the Judicial Adviser. The assessors operate in a purely advisory capacity and the decision of the Court is vested exclusively in the judge.³¹

The Court hears appeals from decisions of the District Appeal Court.³² It has no original jurisdiction.

Appeal from the Local Division of the Supreme Court lies the Court of Appeal.

The Court administers the general Law,³³ customary Law,³⁴ and Islamic Law.³⁵

2. *District Appeal Courts*

The District Appeal Courts were established by the Local Courts Act, 1963³⁶ and are found in every district of the province.

The Court is composed of the police magistrate of the district who sits with two assessors selected by him from a list of experts in customary law drawn up by the District Officers. The services of the assessors are dispensed with where the Court is not likely to deal with any question of customary law.³⁷ The Court's decision is vested exclusively in the Magistrate.³⁸

The Court determines appeals from the decisions of both Local Courts and the Group Local Courts.³⁹ The Court has no original jurisdiction.

29. *Id.* § 10.

30. Local Courts Act, 1963, § 31 (S.L.).

31. *Id.* § 31 (1).

32. *Id.*

33. Courts Act, 1965, § 74 (S.L.).

34. *Id.* §§ 76 (1) - (3).

35. Mohammedan Marriage Ordinance, Cap. 96 (S.L.).

36. Local Courts Act, 1963, § 29 (1) (S.L.).

37. *Id.*

38. *Id.* § 29 (2).

39. *Id.* §§ 29, 30.

Appeal from the District Appeal Court lies with the Local Division of the Supreme Court. If a case is governed by the general law, the conditions of appeal are the same as those governing appeals from magistrates' courts. However, where the case is governed by customary law and the proceedings are civil, an appeal lies as a matter of right from questions of both law and fact. In a criminal case, an appeal lies without leave on any ground of appeal which involves solely a question of law.⁴⁰

The Court administers the general law,⁴¹ customary law,⁴² and Islamic law.⁴³

3. *Group Local Appeal Court*

A Group Local Appeal Court is a joint Court for two or more Chiefdoms in the Provinces. Originally, it was established as a Group Native Appeal Court under the Native Court Ordinance.⁴⁴ The Court has been renamed Group Local Appeal Court.⁴⁵ The Native Courts Ordinance has been repealed and superceded by the Local Courts Act, 1963. However, all Local Courts and Group Local Appeal Courts in existence immediately before the latter Act were not affected by the repeal except as was expressly provided in the Act.⁴⁶

The Court is composed of a Paramount Chief or his deputy and one or more representatives of each chiefdom of the group.⁴⁷ The government minister responsible for legal and judicial matters has the power to appoint a President and one or more Vice-Presidents of the Court.⁴⁸ Presently, the trend is to exclude Paramount Chiefs from both the Presidency and Vice-Presidency.⁴⁹

The Court has the same original jurisdiction and powers generally exercised by the former Native Courts according to native law and custom.⁵⁰ The Court has the power to hear and determine appeals from decisions of Local Courts.⁵¹

40. *Id.* § 31 (1).

41. Courts Act, 1965, § 74 (S.L.).

42. Local Courts Act, 1963, § 2 (S.L.).

43. Mohammedan Marriage Ordinance, Cap. 96 (S.L.).

44. Native Courts Ordinance, Cap. 8, § 14 (S.L.).

45. Local Courts Act, 1963, § 3 (S.L.).

46. *Id.* § 50 (1)(a).

47. Native Courts Ordinance, § 15 (S.L.).

48. Local Courts Act, 1963, § 4 (S.L.), as amended by Local Courts Amendment Act, 1966, § 1 (S.L.).

49. Smart, *The Local Court System in Sierra Leone*, 22 SIERRA LEONE STUDIES 43 (undated).

50. See Native Courts Ordinance, § 17 (S.L.).

51. Local Courts Act, 1963, § 30 (S.L.).

Appeal from a Group Local Appeal Court lies with the District Court.⁵²

The Judicial Adviser or a District Officer has access to Group Local Appeal Courts and all books, records, and other documents in their custody. They may of their own motion review any decision of such Courts, whether civil or criminal, where a prima facie case of miscarriage of justice is disclosed or an obvious error is to be corrected.⁵³ However, the power of review is not exercised where an appeal is pending.⁵⁴ Furthermore, notice of intention to review is given to the Court and the parties concerned.⁵⁵

At the conclusion of each session of a Group Local Appeal Court, the Registrar forwards to the Judicial Adviser and the District Officer a complete list of all appeals decided or commenced before the Court during that session.⁵⁶

The Court administers the general law,⁵⁷ customary law,⁵⁸ and Islamic law.⁵⁹

4. Local Courts

Native Courts were established under the Native Courts Ordinance.⁶⁰ A Native Court is now redesignated Local Court.⁶¹ Combined Courts which seemed to have been included within the description of Native Courts have now fallen into desuetude.

Local Courts consist of Local Courts presently existing according to native law and custom and also such other Local Courts as may be established.⁶² Tribunals such as Headman's and subchiefs' courts have been erroneously thought to be Local Courts.⁶³ Judicial power was taken away from these Courts long ago.⁶⁴ Today, the only recognized Local Courts are the Courts of the Paramount Chiefs sitting with two or more tribal authorities.

52. *Id.* § 30 (2).

53. *Id.* § 36.

54. *Id.* § 37.

55. *Id.* § 38.

56. *Id.* § 35 (2).

57. *Id.* § 2.

58. *Id.*

59. Mohammedan Marriage Ordinance, Cap. 96 (S.L.).

60. *Id.* Cap. 8, § 7.

61. Local Courts Act, 1963, § 3 (S.L.). Note that the Local Courts Act, 1963, § 50 (1) (S.L.) applies to Group Local Appeal Courts as well as to Local Courts.

62. Native Courts Ordinance, Cap. 8, § 7, as amended by Local Courts Act, 1963, § 3 (S.L.).

63. Daniels, *Sierra Leone*, in JUDICIAL AND LEGAL SYSTEMS IN AFRICA 18 (1962).

64. Smart, *supra* note 49, at 35-36.

A Local Court has original jurisdiction to: (a) administer decedents' estates governed by customary law; (b) hear and determine all civil cases governed by customary law other than cases between Paramount Chiefs or tribal authorities involving title to land and all civil cases governed by general law involving relatively small amounts of money; and (c) hear and determine all criminal cases where the maximum punishment does not exceed a fine of two hundred leones or imprisonment for a period of one year or both.⁶⁵ Local Courts have no appellate jurisdiction.

Appeal from a Local Court lies to the Group Local Appeal Court or directly to the District Appeal Court.⁶⁶

Both the Judicial Adviser and a District Appeal Court have the power, on their own motion or on the application of a Local Court or any party to the proceedings for reasonable cause, to transfer a case initiated before a Local Court. The case can be transferred to a different Local Court, a magistrates' court, or the District Appeal Court. The transferred case then proceeds *de novo*.⁶⁷

The Clerk of each Local Court, within seven days after the end of each month, forwards to the Judicial Adviser and the District Officer a complete list of all cases decided or commenced in the Local Court during the month.⁶⁸

The bodies of law administered by the Local Courts are the general law, customary law, and Islamic law.

General law applies where there is no provision for customary law. General law includes the common law, equity, and all enactments in force in Sierra Leone except insofar as they are concerned with customary law.⁶⁹

Customary law is the primary law of the Court.⁷⁰ Customary law means any rule, other than a rule of general law, having the force of law in any chieftom of the Provinces which is applicable in any case and conforms with natural justice and equity and is not incompatible with any enactment applying to the Provinces.⁷¹ The Local Court also administers Islamic Law.⁷²

65. Local Courts Act, 1963, § 13 (S.L.), as amended by Local Courts Amendment Act, 1965, § 5 (S.L.).

66. *Id.* §§ 29 (3), 30(1).

67. *Id.* § 14 (2).

68. *Id.* § 35(1).

69. *Id.* § 2.

70. *Id.* § 13 (2).

71. *Id.* § 2.

72. Mohammedan Marriage Ordinance, Cap. 96 (S.L.).

III. RECOMMENDATIONS FOR CHANGES TO EFFECT AN INTEGRATED AND IMPROVED JUDICIAL AND LEGAL SYSTEM IN SIERRA LEONE

The customary courts should become a part of an integrated judicial system in the Protectorate.⁷³ These courts are no longer referred to as Native Courts. The term "native" had aroused negative feelings because it is reminiscent of the old title "native affairs." The word was thought to have a derogatory sense when used generically. The present term "local" court had been suggested earlier but discarded as being as colorless as the term "native." The term "Customary Courts" is preferable and should raise the status of courts applying customary law (which will become the common law). This has already occurred in other countries. They apply customary law as the fundamental law whereas the other set of courts primarily administer English law.

The first legislation concerning native courts was passed in 1896. The hinterland had been declared a Protectorate by the Proclamation of 1896. A Commission of Inquiry appointed in 1898 reported that the only practical form of government was administration through the Chiefs. Legislation was enacted between 1901 and 1905 as the foundation of a system of native administration. Chieftdom Courts were recognized, but no provision was made for the supervision of their proceedings. This only amounted to leaving jurisdiction where native law and custom had placed it.⁷⁴

About the same time, Combined Courts also administering native law and custom were established for minor cases between non-natives and natives. Due to local conditions and history, the Chieftdom Courts became entrenched as a more systematic tribunal with an effective, although primitive, procedure. There was little contact with the outside world. There was no interference with Chieftdom affairs other than to prevent abuses. These factors contributed to the fixation of native law and custom.

Part of a general reorganization of the system of native administration, the Native Courts Ordinance No. 40 of 1932 provided for three classes of native courts: Courts of native chiefs, referred to as Native Courts, which include Chieftdom Courts and subordinate courts, Native Appeal Courts, and Combined Courts.

73. L. BROOKE, REPORT ON THE NATIVE COURT SYSTEM IN SIERRA LEONE 57 (1953).

74. *Id.*

In general, the Chiefdom Courts conduct their proceedings with dignity, have the confidence of the public, and are useful beyond merely performing their judicial duties. However, there is an increasing demand that their procedure be improved. The administration of justice is centered in the Chiefdom. Therefore, it is desirable to retain the authoritative and representative character of these courts when introducing some of the legal mechanisms of a more institutionalized system. Eventually the judiciary must be separated from the executive. In time public duties will prevent the Chief from giving much of his time to judicial duties. At present, too much depends on the Chief, and his duties must be distributed. However, the close association between tribal authority and court can only be relaxed gradually and with understanding.

There has been a great advance in establishing the position of District Councils, and their influence over tribal authorities can perhaps be extended to take charge of the administrative function of the courts. Aside from the matter of expense, the Chiefdom Courts must remain as the local courts of lower jurisdiction. They will become the petty sessional courts. Their present powers are generally thought to be excessive. Additionally, there is a need for a graduated system of courts, as is the usual African practice. Under such an arrangement, a higher grade district court is also known as a customary court but is more strongly constituted in that it can also act as a Native Court of Appeal from the Chiefdom Courts. The district courts have largely taken the place of the present Combined Courts. Only one of the Combined Courts now sits regularly—its jurisdiction gives it no scope, its bench is not specialized, and its utility is restricted by its cumbersome procedure.

The aim of Sierra Leone and other Black African nations must be the fusion of the dual organization of Customary and English Courts and law into an integrated system. The Native Court will, most likely, be the important factor in the fusion of the two sets of courts and will act in the nature of a filtering process. Customary law has shown few signs of development from within and the tendency will be to supplement the residuum of native law and custom by legislation. Rather than by empowering the native courts to enforce the provisions of the Sierra Leone Ordinances, legislation should occur as tribal authority, bylaws or rules made by District Councils. This will bridge the gap between the two systems and make the departure from essentially traditional, social sanctions to the imposition of an institutionalized level of law.⁷⁵

The Courts are unwieldy and need to become more specialized. The

75. *Id.* at 58.

use of assessors could be helpful both for their educative effect and as a safeguard for the independent development of native law. The Court's effectiveness is hampered by the lack of personnel. The general advancement has brought an increase in literacy and thus in initiative and impatience with the lack of improvement in a system which must continue to try the bulk of the criminal and civil cases in the former Protectorate. At present it is usual to rely on the District Officer. Some suitable person, such as a government pensioner, retired businessman, or hopefully a qualified lawyer, should assume the magisterial duties of the District Officer.

Although the time for a complete separation of executive and judiciary may not have arrived, the goal must be to bring together the parallel systems of court and law. However, the useful features of the traditional system must be preserved until they become outmoded. Another concern should be to guard against changing too abruptly an organized system which has taken centuries to develop. Consequently, much depends on the composition of local courts. Therefore, members and officers of these courts should be trained. A new section in the Ordinance can be added to relieve anxiety as to the exercise of powers and to protect members and officers acting in good faith.⁷⁶

With respect to jurisdiction, the general principle of all persons being subject to native tribunals must be controlled by the law to be applied and by the competency of the court involved. The liberal exercise of the power of transfer guarantees that only cases that are properly cognisable by local courts should go before them. On application by a party, an inquiry by the Supreme Court or Magistrates' Court as to whether a person is subject to the jurisdiction of those courts would operate as a stay of proceeding pending the determination of such issue. There are few such applications. Conversely, a native should have the same power. Both the criminal and civil jurisdiction of Local Courts, which are the local and static courts and will become petty sessional, are too high. Local Courts should be graded because grading is an incentive to improvement and the highest grade district court, which would tour, might take the cases beyond the local courts' competence. Magistrates' Courts would be fully occupied in the commercial centers. The Supreme Court's original jurisdiction would be limited in practice to cases beyond the competence of the higher grade district native court and the Magistrates' Court and in land causes to cases transferred by the District Officer to the Supreme Court. On principle, cases should be taken by the lowest

76. *Id.*

court having jurisdiction.

The law to be administered in the local courts must continue to be native law and custom, bylaws made by tribal authorities, and rules made by District Councils, whose power in this area should be extended. Provisions of local Ordinances should be enforced by district courts and any Chieftom Courts which are capable of doing so. Jurisdiction should be conferred only for competence and not for convenience. Courts should have copies of all legislation that they are empowered to administer.

The practice and procedure of administering oaths in the form of self-imprecation charged with punishing power are primitive but will continue to be effective as long as the belief remains in the power of the "swear." Administrative officers have introduced a simplified English procedure and the practice is in a transitional stage. The Local Courts require simple rules of procedure and evidence. Records of Local Court cases are inadequate. The appointment of the Local Courts advisor should improve this situation.

Everywhere the enforcement of judgments and orders has encountered difficulties. To remedy this situation, new ancillary powers should be included in the Ordinance and provisions should be made in the rules of court for execution against property. Parties should appear in person in court proceedings. If a party is unavoidably absent, a relative or other non-attorney representative should be allowed to appear for him. The lack of such provision is causing too many adjournments. Legal practitioners should continue to be excluded from the audience.

Control of Local Courts with respect to their Constitution and composition must remain with the administrative staff until the District Councils can perform such executive functions. The appointment of members should be made by the Provincial Officer. Such appointments should be made on the advice of the District Officer after consulting the District Council. By the same token, the revisionary power over Local Courts decisions, both original and appellate, should be retained and limited to cases where there is grave miscarriage of justice or clerical errors on the record. Such power should be exercised by the Provincial Officer (if he has not sat as President of the native court) and perhaps the Local Courts Adviser. Since transfers are of such importance in a dual system of courts and law, a separate section has been included in a new Local Courts Ordinance which provides for the free exercise of such power and prescribes the effect of an order or transfer. Appointment of a Local Courts Adviser with advisory duties would be very beneficial.

At present the provision for appeals in the Ordinance is limited to: (a) an automatic appeal to the District Officer in a case involving a sentence over fourteen days; and (b) a Group Local Appeal Court

which serves as an appeal court for a small group of Chiefdoms who agree to such arrangements. The latter failed in the one case where it was established and so far gives little promise of success. The Local Court of Appeal is considered the point of integration in a dual court system. It should consist of a more highly qualified bench and be presided over by the District Officer or other suitable person. A further appeal, restricted by a ceiling of penalty or value of subject matter, would be to the Supreme Court or Court of Appeal.⁷⁷

IV. MARRIAGE AND DIVORCE LAWS OF SIERRA LEONE— EXISTING LAW AND RECOMMENDATIONS FOR CHANGE

A. AN OVERVIEW

The study of African family law provides one of the best introductions to the problematic nature of African legal systems. Most of the difficulties of legal interpretation and application in Africa result from the mixing of colonial and indigenous laws, but there are few areas where these difficulties are so magnified as in those laws relating to marriage and divorce.⁷⁸

Sierra Leone, like other English speaking African states, owes part of its system of law to English common and statutory law and consequently suffers the inevitable conflicts that result from the application of such law to a citizen widely separated from his English counterpart in customs, language, traditions, and temperament.⁷⁹

Sierra Leone is similar to Ghana and Gambia in that it has an operative ordinance for the marriage and divorce of Mohammedans; this is why polygamy in certain instances is not a ground for divorce. The laws of Sierra Leone with respect to monogamy and polygamy are very comprehensive.⁸⁰

The principal ordinance of Sierra Leone (Cap. 97) is nearly identical to the Kenya ordinance. Sierra Leone is also similar to Kenya in that

77. *Id.* at 59.

78. Stibich, *Family Law in Some English Speaking African States*, 2 AFRICAN LAW STUDIES 49 (1969).

79. *Id.*

80. Sierra Leone has its own Causes Laws and is *not* under English law as is Ghana, Gambia, Liberia, Nigeria, and Zambia.

Laws of Sierra Leone *as amended*.

Christian Marriage Ordinance, Cap. 95, *as amended* by Act No. 48 of 1965.

Mohammedan Marriage Ordinance, Cap. 96.

Civil Marriage Ordinance, Cap. 97, *as amended* by No. 49 of 1965.

Foreign Marriage Ordinance, Cap. 98.

Marriage of British Subjects Ordinance, Cap. 99.

Married Woman's Maintenance Ordinance, Cap. 100.

Matrimonial Causes Ordinance, Cap. 102, *as amended* by Act. No. 16 of 1961.

Evidence (Marital Intercourse) Ordinance, Cap. 103.

there is no written law with respect to marriage between indigenous people. Nor in either country is there a provision for registration of customary marriages.

Some of the chief indigenous tribes in Sierra Leone are the Timne, Susu, Loko, Limba, Yalunka, Koranko, Keno, Mendi, Cola, and Kisi.

A 1916 anthropological study of the indigenous people of Sierra Leone reported:

Compared with the Nigerian tribes, the marriage customs of Sierra Leone appear to be extremely simple. Only one form of marriage—by purchase—is known; and though the wife may leave the husband, when she has borne many children, on payment of one kola, her position corresponds in reality to that of the bond wife (*amoia*) of the Edo-speaking peoples; for her children belong to her husband's clan and remain his property if she leaves him.⁸¹

Cross-cousin marriage and other special forms seem to be unknown to the Timne—most first cousins are not eligible wives, though a mother's brother's daughter might be chosen. Widows are a form of property. A man can marry his father's brother's wife. A man can marry his mother's brother's wife or his mother's father's wife (but not his own grandmother).

When a woman leaves or is driven out by her husband, and she goes to a new husband, the latter pays a bride-price to the former; otherwise circumstances determine whether the parents repay the first husband or not. However, the wife must leave behind what she earned in the husband's house.

If a wife leaves her husband, the bride price is repaid unless she has children. If she goes directly to another husband, the latter is liable for a fine for adultery.

Divorce under indigenous law can be justified for the following reasons: idleness, theft, slandering the husband, or doing witchcraft in the house. However, a husband cannot claim refund of the bride price. If the woman goes to another husband, the children are his. In some places the wife can take the children if her husband divorces her.⁸²

B. MINIMUM AGE

Under the present civil, Christian, Mohammadan, or indigenous law, there is no statutory minimum age for marriage.⁸³ Also, child marriages are permissible under Islamic and indigenous law.⁸⁴ The reason for fix-

81. J. THOMAS, AN ANTHROPOLOGICAL REPORT ON SIERRA LEONE, PART I, LAW AND CUSTOM OF THE TIMNE AND OTHER TRIBES 91 (1916).

82. *Id.* at 92-100.

83. Laws of Sierra Leone, Caps. 95-97.

84. J. FENTON, OUTLINE OF NATIVE LAW IN SIERRA LEONE 23 (1948).

ing minimum ages is to allow time for more education; a man should be old enough to support a wife, and a woman should have enough experience to manage a household. Persons should have the maturity of judgment to choose a life long partner.

Therefore, it is recommended that there should be a statutory minimum age for marriage, applying to all communities, of 18 for males and 16 for females.

Courts should be given discretion to allow persons to marry below the minimum age in extraordinary circumstances. This would be to enable children to be legitimate and relieve families from shame and humiliation. An objection is that it might seem to be condoning sexual intercourse between young people. A marriage where either party is below the minimum age is not likely to have the necessary ingredients for stability and may not be in the best interests of the State, the parties, or the unborn child. Whereas it is desirable to give a court such power where pregnancy is involved, it should not be a matter of course and never given where either party is less than 14 years of age.⁸⁵

C. PROHIBITED DEGREES OF AFFINITY

Under the Christian Marriage and Civil Marriage laws, marriage may not be celebrated between persons who are related within the prohibited degrees of consanguinity or affinity according to the law of England.⁸⁶

Prohibited degrees of consanguinity and affinity are much wider than in continental Europe. A direct relationship through the female line is a bar to marriage; for example, a man may not marry his mother's sister or his mother's sister's daughter. Nor may he marry his whole or half sister.

Probably among the Lemnes, as well as among tribes where there is Mohammanan influence, marriage between members of the same clan was formerly prohibited. As clans grow larger, the rule of exogamy falls into disuse.

Under existing indigenous law, a man may take his deceased father's wives, except of course, his own mother. But, where there is Mohammanan influence, the deceased's wives now often fall to his brother.⁸⁷

It is recommended that any marriage that would not be within the prohibited degrees in England be considered as lawful. Also a deceased's

85. KENYA, REPORT OF THE COMMISSION ON THE LAW OF MARRIAGE AND DIVORCE 16-19 (1968) [hereinafter cited as KENYA REPORT].

86. Christian Marriage Ordinance, Cap. 95, § 7 (S.L.). See also Civil Marriage Ordinance, Cap. 97, § 7 (S.L.).

87. KENYA REPORT, *supra* note 85, at 23.

wives should not be compelled to live with his son or brothers.

The present situation is not satisfactory. To begin with, it seems that parties' capacity to marry may depend on the form of marriage chosen. Also, prohibiting marriages where there is a remote blood relationship may cause uncertainty as to the validity of marriages. The relationship may not be known to the parties and may not be discovered until long after the marriage. It is of the greatest importance that there be certainty as to marital status. There should be a single uniform rule applying to members of all communities prescribing the degrees of relationship within which marriage is prohibited by law. Such a rule should only specify those relationships prohibited by all communities and should be more tolerant than the rules of any particular community. Although some people will regard such a rule as being too liberal, the consciences of individuals and the social pressures within communities will generally insure compliance with religious and traditional rules. Therefore, there will be no need for legal sanctions. This proposal would lead to certainty in the law as well as flexibility in regard to religious and customary rules.

It is recommended that a statute, applying to persons of all races, tribes, and religions, prohibit marriages between a person and his grandparent, parent, child or grandchild, great aunt or great uncle, aunt or uncle, niece or nephew, great niece or great nephew as the case may be.

Also, no person should be allowed to marry the grandparent or parent, child or grandchild of his or her spouse or former spouse. No person should be allowed to marry the former spouse of his or her grandparent or parent, child or grandchild.

No one should be allowed to marry a person whom he or she had adopted or by whom he or she was adopted.

Relationship of the half blood should be treated the same as full blood, and it should be immaterial whether a person was born legitimate or illegitimate.

Any ceremony purporting to be a marriage involving parties within the prohibited degrees should be a nullity. Children of such a void union should be deemed legitimate. It should be an offence to participate knowingly in such a ceremony.⁸⁸

D. MONOGAMY AND POLYGAMY

Although the English law conception of marriage is, according to

88. *Id.* at 19-20.

the famous dictum of Sir J. P. Wilde in *Hyde v. Hyde*, the voluntary union for life of one man and one woman to the exclusion of all others, British Colonial Courts were enjoined to recognize polygamy, which is the usual form of customary marriage in practically all the former African colonies. Such recognition entails all the legal consequences of ordinary English law marriages and is therefore not restricted only to matters of status and succession, as it is in English Courts sitting in England over cases involving polygamy. Indeed, for most purposes, a customary law marriage has legal validity with one celebrated under a Colonial Marriage Ordinance. It follows, therefore, that it is a punishable offence—though the point is not always obvious from some of the Colonial Marriage Ordinances—for anyone who, being previously married under customary law, goes through a ceremony of marriage prescribed by the Ordinance, and vice versa.⁸⁹

Such is also the law in Sierra Leone.

Marriages under the Christian and Civil laws must be monogamous.⁹⁰ On the other hand, polygamy is permitted under indigenous and Moham-medan law.

Opponents of polygamy state that older wives are sometimes neglected while the husband lavishes his attention on the younger wives.

The main argument made for monogamy, aside from religious teaching, is that only in the union of one man and one woman is it possible to find mutual love and trust essential to a stable and happy home. Some also believe that the father will prefer children of one wife to those of another, which will result in jealousy and discord among the children.

Persons favoring polygamy state that it will hold down prostitution. They also think a man is particularly entitled to a second wife if his first marriage has been without issue.

Many people, some favoring and others opposing polygamy, believe the practice will eventually die out under the pressure of social and economic change.

It is recommended that the law recognize the monogamous and polygamous types of marriage. However, once a person enters into a monogamous form of marriage under Christian or Civil law, he should not be able to enter into a polygamous marriage later.

Polygamy should in no case be prohibited by law. The effect of such a law would probably cause considerable social disruption without being

89. Elias, *Indigenous Law and its Sphere of Operation*, BRITISH COLONIAL LAW 110 (1962).

90. See Christian Marriage Ordinance, Cap. 95, § 7 (3) (S.L.) and Civil Marriage Ordinance, Cap. 97, § 15 (b) (S.L.).

really effective. In addition, it would probably result in an increasing number of unions that are not lawful marriages and therefore an increase in the number of illegitimate children.

On the other hand, all marriages should not be made potentially polygamous. This would be a backward step and offensive to a large segment of the population.

Where a man has two or more wives there should be complete equality of legal status and legal rights between such wives.

It is generally accepted under Mohammedan and indigenous law that a man should not take a second wife unless he has the means to support both wives adequately.⁹¹

E. CONSENT TO MARRIAGE

Under existing indigenous law, the general principle is that marriage is only marriage when it is with the consent of the woman's parents or guardians and is contracted in prescribed ways.⁹²

The consent, freely given, of both parties should be essential to the validity of every marriage. At present it is essential to every Christian and Civil marriage and to every Moslem marriage where the parties have attained the age of puberty.⁹³

On the other hand, under indigenous law the young girl may be betrothed by her parents without her consent, although it has become more usual to ask for it. The girl may be betrothed at ten years of age or earlier but usually is not handed over in marriage until she is fourteen or fifteen.⁹⁴

Any present religious or customary law which allows parents to force a child into marriage is wrong and should be abrogated.

It is recommended that the consent of both parties freely given be essential to the validity of a marriage, whether among non-natives or natives. A ceremony purporting to be a marriage should be a nullity if the consent of both parties is not freely given. However, any children by such union should by statute be legitimate.

91. KENYA REPORT, *supra* note 85, at 21-28.

92. J. FENTON, *supra* note 84, at 23.

93. KENYA REPORT, *supra* note 85, at 28.

94. J. FENTON, *supra* note 84, at 23.

The present law requiring parental consent where a party is under 21 years of age should be continued. A person of 18 may be old enough to enter into ordinary contracts. However, marriage is a kind of contract which may affect the whole course of a person's life and one which requires maturity of judgment more than intelligence.

Where parental consent is unreasonably withheld or where it is impracticable to obtain (for example, where the parents' presence are unknown) the court should have discretion to give such consent.

Lack of consent (other than consent of the parties themselves) should not invalidate a marriage. However, the court should have power to annul such a marriage on the application of an interested person if one party to the marriage is under 21 years of age.⁹⁵

F. DOWRY

Under present indigenous law, after the betrothal presents are given, the first part of the "head money" or marriage price ("dowry") is presented. The marriage is valid as soon as the first of this money is accepted. The marriage price is often paid partly in kind, especially cattle and country cloths. If, after the first part of the head money is paid, the woman dies, the husband is expected to complete payment before burial.

The bride or marriage price is divided as follows: father, one-half; mother's eldest brother or his representative, one-quarter; and bride's brother by the same mother, one quarter.

Where a man's wife dies soon after marriage, and especially if the marriage is not yet consummated, he may claim another woman from her family. They then give him a near female relative. In return he makes a small payment of perhaps one pound.⁹⁶

The payment of dowry or marriage price should not be abolished because it is believed to be a factor making for stability in marriage.⁹⁷ However, it should merely be a matter of arrangement between the two families and not a legal requirement.

Although in many indigenous laws the payment of dowry is regarded as a legal essential, the custom is losing much of its legal significance and is becoming, like the European dowry, a social custom.

It is recommended that the legal validity of marriage should not

95. KENYA REPORT, *supra* note 85, at 28-31.

96. J. FENTON, *supra* note 84, at 24-25.

97. KENYA REPORT, *supra* note 85, at 32-33. It is thought to act as a deterrent to misconduct by the wife since there must be repayment in event of divorce.

depend on dowry having been paid or promised. Furthermore, the law should not regulate the amount of the marriage price but should leave it to agreement between the families concerned.

In addition, no action should lie for the return of dowry after and in consequence of the death of a wife. Neither should the validity of a divorce depend on the return of any dowry to the husband or his family.

G. PRELIMINARIES TO MARRIAGE

Under indigenous law, witnesses should be present when preliminary presents are given and accepted as evidence for the betrothal.⁹⁸ Three months public notice must be given under the Civil Marriage Ordinance and three weeks notice under the Christian Marriage Ordinance.⁹⁹

Secret marriages should not be allowed, and the giving of public notice is most desirable. This is so mainly that steps may be taken to prevent the ceremony taking place where there is any lawful impediment to marriage.

It is recommended that the parties to an intended marriage be required to give at least 21 days notice before the marriage date, that such notice be given to a registrar, minister of religion, or the local Chief or sub-chief and that it be the duty of such registrar or Chief to make the intention of marriage known locally and, so far as practicable, when the parents of the parties reside elsewhere, in the places where they ordinarily reside.¹⁰⁰

H. CELEBRATION OF MARRIAGE

Christian marriage may be used by natives if they wish, but not without publication of bans.¹⁰¹ Natives cannot contract a civil marriage before a registrar. Native authorities still feel that it should be known to all concerned that the parties intend to marry.¹⁰²

Non-natives cannot contract marriage with native women except under Ordinance, for example under Cap. 95 (Christian Marriage). They do sometimes go through the form of a native marriage. However, they cannot sue for refund of the marriage money if they are deserted by the

98. J. FENTON, *supra* note 84, at 24.

99. Civil Marriage Ordinance, Cap. 97, § 6 (S.L.) and Christian Marriage Ordinance, Cap. 95, § 5 (S.L.).

100. KENYA REPORT, *supra* note 85, at 36-39.

101. Christian Marriage Ordinance, Cap. 95, § 3 (S.L.).

102. Civil Marriage Ordinance, Cap. 97, § 4 (S.L.).

women.¹⁰³

A simple and uniform ceremony as a prerequisite to a valid marriage is not practicable at this time. Many people in rural areas would not realize for years that their customary marriages were not valid. In addition, Moslems and traditionalists would resent the fact that their marriage ceremonies were not valid.

It is therefore recommended that marriages in the future, as at present, be capable of being contracted by (1) civil form, (2) religious ceremony, (3) Moslem form or (4) rites recognized by indigenous law.¹⁰⁴

I. REGISTRATION

Under indigenous law, some chiefs might favor registration of native marriages by a Chiefdom clerk, with a statement agreed on by the parties as to the value of the first part of the marriage price, when it was paid, and in whose presence.¹⁰⁵

At present there are three systems of registration, one each for Christian,¹⁰⁶ Civil,¹⁰⁷ and Mohammedan¹⁰⁸ marriages. There is no valid reason for such separation. The registration of marriage is a civil instead of a religious matter.

All marriages should be registered, and they should be registered under a single system. Therefore, it is recommended that there be a single system of registration applying to all persons, regardless of race, religion, or community. However, the validity of a marriage should not depend on registration. Furthermore, the new law should permit the registration of existing, unregistered marriages and the registration of such marriages should be encouraged but not made compulsory.¹⁰⁹

J. BREACH OF PROMISE

Under indigenous law, the proposed marriage may be broken off. The girl may dislike and refuse the marriage, or the parents may give her to a richer suitor who comes on the scene after the betrothal. The native court may award the rejected suitor damages. In either event, he is en-

103. J. FENTON, *supra* note 84, at 30.

104. KENYA REPORT, *supra* note 85, at 39-40.

105. J. FENTON, *supra* note 84, at 24.

106. Christian Marriage Ordinance, Cap. 95, § 11 (S.L.).

107. Civil Marriage Ordinance, Cap. 97, § 16 (S.L.).

108. Mohammedan Marriage Ordinance, Cap. 96, § 5 (S.L.).

109. KENYA REPORT, *supra* note 85, at 46-48.

titled to a return of his contributions.¹¹⁰

Under the Christian Marriage Ordinance, a person aggrieved may sue to recover damages in any court for breach of promise or for seduction.¹¹¹

It is recommended that the action for breach of promise be abolished because damages are too conjectural and because the action for breach of promise exposes a person to false accusations.

K. SEDUCTION AND ADULTERY

Under indigenous law, if a virgin is seduced by one who is not the prospective husband, her parents can sue him for "spoiling the marriage," *i.e.*, spoiling her prospects and theirs, and would obtain substantial damages (virgin money). In addition, the court may order the seducer to pay damages to the man to whom she is betrothed. Or the man to whom she is betrothed may call upon her family to pay compensation or may demand repayment of whatever has been paid of the marriage price.

If the woman is married, the husband sues the seducer for "woman damage" which may vary from 10s to 30s, according to the offender's behavior and repentance. The usual procedure is that, if the woman takes an oath that she had intercourse with A, A is required to pay, whether he admits or denies the seduction. A woman cannot be obliged to take an oath without her family's consent, and she may refuse to take an oath if she is pregnant. On rare occasions, A takes an oath denying guilt, on the husband's "medicine," and pays nothing.¹¹²

Under the Matrimonial Causes Ordinance¹¹³ a husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with petitioner's wife. The court may direct in what manner the damages recovered on such petition are to be paid or applied and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

It is recommended that a wife should have a right of action for damages against a woman with whom her husband has committed adultery.

110. J. FENTON, *supra* note 84, at 24.

111. Christian Marriage Ordinance, Cap. 95, § 29 (S.L.).

112. J. FENTON, *supra* note 84, at 26. The presumption is that if a person takes an oath on another's "medicine" and commits perjury, such "medicine" will cause the perjurer to suffer some grave misfortune. "Medicine" is a supernatural power that a person has to protect himself from his enemies.

113. Matrimonial Causes Ordinance, Cap. 102, § 20 (1), (3) (S.L.).

There is no logical reason for the distinction in the existing law allowing only the husband such a cause of action. The present law discriminates against the wife in this respect.¹¹⁴

L. SEPARATION

There is little information about separation under indigenous law. Under indigenous law, the distinction between separation and divorce is not clearly defined. The customs of most tribes permit the remarriage of the wife if the dowry is repaid, and this may be regarded as the factor which distinguishes divorce from separation.

The law with respect to separation should be the same for everyone. It is recommended in relation to all marriages that: (1) the parties to a marriage be at liberty to separate by agreement, making their own arrangements as regards the disposal of property, maintenance, and the custody of children, subject to a provision giving the court power to vary or set aside any such arrangement where the circumstances have changed in any material respect; (2) there be a single form of separation by decree of the court.¹¹⁵

M. NULLITY

Under the existing statutory law, provision for nullity and divorce only apply to monogamous marriage. Furthermore, the Matrimonial Causes Ordinance does not clearly distinguish between void and voidable ceremonies.

The Ordinance specifically states that:

In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—

- (a) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
- (b) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (c) that the respondent was at the time of the marriage pregnant by some person other than the petitioner,¹¹⁶

provided that in (b) and (c) above the court shall not grant a decree unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged, instituted the proceedings within a year of the date of the marriage, and that marital intercourse has not taken

114. KENYA REPORT, *supra* note 85, at 64.

115. *Id.* at 84-85.

116. Matrimonial Causes Ordinance, Cap. 102, § 3(1)-(3) (S.L.).

place since the petitioner discovered the existence of the grounds for a decree.

Any child born pursuant to (b) above shall be deemed a legitimate child of the parties notwithstanding the fact that the marriage is void.

Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.¹¹⁷

The following additional grounds for nullity are recommended: (1) where either party was permanently impotent or incapable of consummating the marriage at the time of the marriage and (2) where a party has married without the consent of his or her guardian and the court is satisfied that there is good reason for setting the marriage aside and the proceedings are instituted while the party is below the age of 21 years.¹¹⁸

N. DIVORCE

Christian and Civil marriages can only be dissolved by judicial decree of a court which may be granted on the petition of either party.¹¹⁹ Under indigenous law, a man can divorce his wife by declaring before witnesses that he does not wish to keep her and by sending her back to her family. If he does so, he has no claim to the return of the marriage price. Mohammedans follow the same procedure, requiring two witnesses to the declaration.

A native woman can divorce her husband by declaring before witnesses that she is leaving him, by refusing to cohabit with him, or by deserting him. Her family is then obligated to repay the marriage price or be sued for such in court.

Repeated infidelity is not a ground for divorce by the wife against her husband. On the other hand, it may be a good ground for the husband against his wife.

In a Christian marriage, if no marriage price had been paid and the wife afterwards is deserted, she cannot sue her husband for maintenance.¹²⁰

A husband should no longer be able to divorce his wife by declaring before witnesses that he does not wish to keep her and sending her back to her family.

117. *Id.*

118. KENYA REPORT, *supra* note 85, at 87-91.

119. Matrimonial Causes Ordinance, Cap. 102, § 3-5 (S.L.).

120. J. FENTON, *supra* note 84, at 26-27.

A legal divorce should be by order of the court. A marriage between natives could be terminated by a native court.

It is recommended that the grounds for divorce be the same for husband and wife. This is consistent with the modern trend towards providing greater social, economic, and legal equality between the sexes.

It is recommended that there be no divorce except by the decree of a court of competent jurisdiction. Furthermore, it is recommended that cruelty (mental and physical) and incurable mental illness, certified by a psychiatrist and at least one other physician, constitute additional grounds for divorce. In addition, every petition for divorce should be required to contain: (1) a statement of the principal allegations sought to be proved, (2) the terms of any agreement regarding maintenance, or, where no agreement has been reached, the petitioner's proposals and (3) the terms of any agreement regarding the custody and access to the infant children, if any, of the marriage, or where no agreement has been reached, the petitioner's proposals.

At present there is no registration or recording of divorces under indigenous law. It is recommended that all divorces be required to be registered and that there be a single system of registration applying to all persons, regardless of race, religion, or community.¹²¹

O. MAINTENANCE

When a woman leaves or is driven out by her husband and goes to a new husband, the latter usually pays the bride-price to the former, otherwise circumstances determine whether the parents repay the first husband or not. The first husband seems to have no claim when he has turned his wife out of the house; but his wife must leave behind what she earned in the husband's home. When the wife takes the initiative, the husband seems to have a right to the money, but is sometimes too proud to stand upon his rights, and will sometimes abandon them if the woman has been a hard worker. As to the woman's property, there seems to be a good deal of uncertainty; some informants hold that a runaway can take what her parents give her and her husband's presents; others that she can claim what she has earned (probably by trading in her husband's house); others that her husband's ill-treatment gives her a right to her property if she has been a hard worker, provided that she has no children; others again that she will get nothing if she has no child but may get something as an act of grace if she has a child, provided she had not given her husband reason to send her away.¹²²

121. KENYA REPORT, *supra* note 85, at 91-103.

122. *Id.* at 93-94.

Where there is a monogamous marriage, a deserting husband may be ordered to pay maintenance to his wife under the Married Women's Maintenance Ordinance.¹²³

Where a decree for restitution of conjugal rights is passed under the Matrimonial Causes Ordinance and is not complied with, the Court may order the husband to make "such periodical payments as may be just to the wife."¹²⁴

It is recommended that the Court have the power to order a man to pay maintenance to his wife or former wife: (1) if he has deserted her; or (2) during any matrimonial proceedings; or (3) on or following the grant of a decree of separation; or (4) on or following the grant of a decree of divorce.

Furthermore, the Court should be given the power to order a woman to pay maintenance to her husband or former husband where she has the means to do so and where he lacks means and is incapacitated by mental or physical ill-health.

The amount of any maintenance awarded should be based on the means and needs of the parties. The Court should also take into account the degree of responsibility for the breakdown of the marriage. The present Married Women's Maintenance Ordinance provides for a maximum weekly maintenance of four pounds.¹²⁵

It is recommended that the amount of maintenance be left entirely in the discretion of the Court, without any guiding formula. The statutory maximum of four pounds should be eliminated.

A Court should also be given the discretionary power to order that any assets acquired during the marriage by the joint efforts of the husband and wife be divided between them on divorce. The Court should take into consideration the customs of the community to which the parties belong, the contributions each made to acquiring the assets, the liabilities contracted by either in such joint interest, and the needs of the children of the marriage and, subject to the foregoing, should lean towards equality. Finally, the right to maintenance of a divorced person should automatically cease if he or she remarries, except where the parties have agreed otherwise.¹²⁶

Except where there has been separation by agreement or court order, a wife should be under a legal duty to obtain relief from the court in the form of a court order for maintenance if her husband unreasonably

123. Married Woman's Maintenance Ordinance, Cap. 100, § 2 (S.L.).

124. Matrimonial Causes Ordinance, Cap. 102, § 18 (S.L.).

125. Married Woman's Maintenance Ordinance, Cap. 100, § 2 (S.L.).

126. KENYA REPORT, *supra* note 85, at 106-113.

refuses or neglects to provide for her. This is the present law in regard to monogamous marriages. Also, under Moslem law, a wife generally has a right to maintenance. Under most indigenous laws a wife has the right to be maintained by her husband only as long as she lives with him. The standard of maintenance should depend on the husband's means and style of life.

It is recommended that the law expressly state that except where there has been separation by agreement or by order of a court, a husband has a legal duty to maintain his wife or wives according to his means and station in life. Furthermore, where a husband unreasonably refuses or neglects to provide for his wife, the Court should have power, on her application, to grant her an order for maintenance.

P. CUSTODY OF CHILDREN

In any proceeding for divorce or nullity of marriage or judicial separation, the Court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the Court.¹²⁷

The Court, in its discretion, on any decree of divorce or nullity of marriage, may order the husband to secure for the benefit of the children such gross or annual sum of money as it deems reasonable. For that purpose the Court may order a proper deed or instrument to be executed by all necessary parties. Such arrangement ceases when the child reaches 21 years of age.¹²⁸

The father is generally entitled to custody of the children under indigenous law. It does not seem that anyone should have an absolute right to the custody of infant children of a marriage if the parents separate or divorce.

Under indigenous law, if one parent is dead, the children of a marriage remain with the other parent. If the wife is the survivor, she will be required to live with the deceased's family or to leave the children there. If both parents are dead, the children remain with the father's family. If the mother has been divorced or has separated from her husband, the children remain with the father.

127. Matrimonial Causes Ordinance, Cap. 102, § 24 (1) (S.L.).

128. *Id.* § 24 (3).

It has been held under Lemne and Kono law that where the wife has gone to live with another man that children born of this second union still belong to the first husband until the marriage money has been repaid. The law should be that children of the second union belong to the wife and second husband.

A surviving wife should no longer be required by law to live with the deceased's family or to leave the children there. Neither should the law favor the father's family over the mother's family where both parents are dead. Nor if the mother is divorced or separated from her husband should the law automatically entitle the father to their custody. The guiding principle regarding child custody should be the best interest of the children.

Children too young (under seven) to leave the mother when the marriage is dissolved remain with her until they are old enough to go with the father, at which time they go to him if he claims them. He should be able to show that he has supported them while they were with the mother; or she should offer to pay the reasonable cost of the upbringing to the date when the claim is made.¹²⁹

The fittest person should have custody of the children, whether it be the mother or the father.

Under the law children should belong to both parents and there should be no preference in awarding custody based on sex.

It is recommended that, following a separation or divorce decree, the custody of the infant children of the marriage should be decided by the Court, with the paramount consideration being the good of the children. The Court should consider the wishes of the parents and children and local custom. It should also take into consideration the advice of any available officers trained in child welfare. Furthermore, there should be a presumption that children below the age of seven years should be in the custody of their mothers. However, such presumption should be rebuttable on the facts of any particular case.

The Court should be given the power at any time to vary or set aside:

- (1) any order relating to the custody of the children whose parents are separated or divorced; and
- (2) any agreement relating to the custody of children made between the parents on or following their voluntary separation.

It is also recommended that the Court be given power, when making an order for the custody of a child or at any later time, to order that any parent denied custody or any members of such parent's family be allowed access to the child at such times and with such frequency as seems reasonable to the Court.

129. J. FENTON, *supra* note 84, at 29-30.

In addition, the Court should have the power in all separation or divorce cases to order the father to pay the cost of maintenance of his children. This should be irrespective of any order that may be made as to their custody. The Court should also have the discretionary power to order the mother to pay or contribute towards the maintenance of her children if she has the means to do so. Custody orders should relate only to children under 18 years of age.

The Court should be given power on the application of any interested party to issue an order prohibiting the taking of a child outside the jurisdiction.¹³⁰

V. CONCLUSION

The present dual judicial system and pluralistic legal systems of many Black African countries are impediments to their progress. Integrated judicial and legal systems must quickly evolve if they are to take their rightful places in the family of nations as strong united nations free from racial, religious, or tribal interests. In the writer's opinion such changes are imperative if meaningful political, economic, and social progress is to be made.

Legislation is probably the best way to bring about change of the magnitude required. It is hoped that the recommendations and suggestions for change outlined in this paper can at least serve as a guideline or point of departure for constructive change in Sierra Leone and other Black African nations. It is perhaps unnecessary to state that any contemplated changes in the law should fully take into consideration political, economic, and social institutions existing in the respective countries.

130. KENYA REPORT, *supra* note 85, at 114-119.