

THE PLACE OF ISLAMIC LAW WITHIN THE FRAMEWORK  
OF THE SIERRA LEONE LEGAL SYSTEM\*

H. M. Joko Smart

I. INTRODUCTION

Sierra Leone has a pluralistic legal system embracing (i) general law; (ii) customary law; and (iii) Islamic law. This legal system shares a common heritage with those of many other former British dependencies in containing an admixture of laws either inherited from England or influenced by English law, indigenous laws and customs, and Islamic law tinged with the customs and traditions of the indigenous people. In this article, it is proposed to discuss the place of Islamic law within the framework of this legal system. For a better understanding of our discussion, it is useful to begin with an outline of the entire system.

A. General Law

The term "general law"<sup>1</sup> is used to describe the enactments of the Sierra Leone legislature and English law as adopted in Sierra Leone. English law is incorporated into the legal system by means of the automatic application of specific Acts of Parliament as Imperial Statutes, the re-enactment by the Sierra Leone legislature of certain Acts of Parliament, and the direct application of the common law, doctrines of equity, and statutes of general application in force in England on the 1st day of January 1880.

Authority for the application of some aspects of the general law is found in the Constitution, 1978 and in the Courts Act 1965. S.52 of the Constitution provides that:

Subject to the provisions of this Constitution  
Parliament shall be the supreme legislative  
authority for Sierra Leone.

S.156(1) further provides that:

In this Constitution unless a contrary intention  
appears..... "Law" includes (a) any instrument  
having the force of law made in exercise of a  
Power conferred by law....

The cumulative effect of both sections is that any law passed

by the Sierra Leone Parliament will answer to the description of "general law" except that which falls within the categories of customary law and Islamic law.

Apart from Imperial Statutes and those Statutes adopted by specific enactments, residual English law applies as a result of a reception statute.<sup>2</sup>

#### B. Customary Law

In Sierra Leone legislation, the phrase "customary law" appears to be used interchangeably with the terms "native law and custom" and "native customary law." "Native Customary Law" has never been defined by an Ordinance or Act, but s.2 of the Local Courts Act 1963 defines "Customary Law" as:

any rule, other than a rule of "general law" having the force of law in any chiefdom of the provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the Provinces, and includes any amendments of customary law made in accordance with the provisions of any enactment.

Furthermore, s.125(3) of the Constitution, 1978, defines "customary law" as "the rules of law which by custom are applicable to particular communities in Sierra Leone." The current statutory provisions in Sierra Leone for the recognition and application of customary law are to be found in the Constitution,<sup>3</sup> the Local Courts Act, 1963<sup>4</sup> and the Courts Act 1956.<sup>5</sup>

"Customary law" can be the law of the non-local Courts, by virtue of the Courts Act 1965, and is always the primary law of the Local Courts. The Native Courts Ordinance, s.5,6, stated that "native law" was applicable in Native Courts and combined courts. That ordinance was repealed by the Local Courts Act, 1963, which contains no clear and explicit provision for the application of customary law in Local Courts. But s.13(2) of the Local Courts Act, in giving jurisdiction to the Courts over persons within its territorial limits, provides that "where there is no provision of customary law the general law shall apply."

#### C. Islamic Law <sup>7</sup>

As a system of law, the Sharia does not apply in Sierra Leone in the same way as the general law and customary law; it may apply either as part of statute law or as part of customary law.

### 1. Islamic law as part of statute law

The only reference to Islamic law in the laws of Sierra Leone is the Mohammedan Marriage Act.<sup>8</sup> The Act deals specifically with three areas of Islamic law: marriage, divorce, and intestate succession. Starting with marriage, the Act states that a valid Mohammedan marriage contracted in Sierra Leone by Muslims domiciled in the country is to be regarded as valid for all civil purposes.<sup>9</sup> Such marriage, or a divorce therefrom, is registrable,<sup>10</sup> and proof according to Mohammedan law of the existence of the marriage or divorce is receivable in evidence by all Courts in the Colony.<sup>11</sup> Finally, the estate of a Muslim who dies intestate is distributed in accordance with Mohammedan law.<sup>12</sup>

### 2. Islamic law as part of customary law

Looking at the substance of the Mohammedan Marriage Act in relation to marriage and divorce, one significant point stands out clearly. It is that the Act does not give any court whatsoever power to inquire on its own accord whether or not the formalities of a Muslim marriage or divorce were complied with according to Islamic law; registration of the marriage or divorce by the appropriate Registrar is prima facie evidence of compliance with the norm of the sharia. Consequently, the door is left open for the introduction of customary law since, in many cases, a registered marriage or divorce usually complies more closely with the customary law of the parties than with Islamic law.

In the field of intestate succession few Muslims, even those who regard themselves as conservative, adhere to the strict rules of the Sharia. Left to themselves, they tend to apply Islamic law with the coating of their own customary law.

The reason for the admixture of customary law is that with the possible exception of the small Aku Muslim community in Freetown, Sierra Leone Muslims rarely apply or are knowledgeable about Islamic law (although do observe religious rituals), and in their day-to-day affairs they tend to be influenced by the customary laws of the tribes to which they belong.

## II. ISLAMIC LAW IN ACTION

Hitherto, we have been discussing the Sierra Leone legal system that constitutes the authority for the application of Islamic Law, highlighting the areas of Islamic law that fit into the legal system and pointing out the interaction of Islamic law with the general and customary law. Our next task is to examine Islamic law in action in the areas relevant to the national legal system: marriage, divorce, and succession.

### A. Marriage

As we have seen earlier, courts are enjoined by the Mohammedan Marriage Act to receive in evidence proofs, according to Muslim law,

of the existence of a Muslim marriage, but not necessarily to rule whether a marriage considered as such conforms with the tenets of the Sharia. I will therefore outline what Sierra Leone Muslims regard as the essentials of a Muslim marriage and show the extent to which these essentials comply with the strict requirements of a valid marriage under Islamic Law. Before doing so, however, it is necessary to discuss two preliminary questions: (1) who is a Muslim for the purposes of the Mohammedan Marriage Act? (2) which Muslim law is envisaged by that Act?

#### *1. Who is a Muslim?*

A Muslim is a person who professes the Muslim faith, which implies the acceptance of the Unity of God and the prophetic character of Mohammed.<sup>13</sup> There are many varieties of Muslims,<sup>14</sup> all of whom should be considered when reference is made to Mohammedans<sup>15</sup> in the Mohammedan Marriage Act. What is essential is the practice of the religion. Therefore, a child of Muslim parents who converts to Christianity cannot, during that period, contract a Muslim marriage, whereas a Christian who becomes a Muslim can validly enter into a Muslim marriage if at the time he professes the Muslim faith.

In addition to being a Muslim, the persons contracting the marriage must be domiciled in Sierra Leone. Consequently, a staunch Muslim missionary from another country, temporarily living in Sierra Leone, cannot enter into a valid Muslim marriage cognizable by the courts nor can he avail himself of the other provisions of the Mohammedan Marriage Act. Similarly, a Muslim who is a Sierra Leone citizen domiciled abroad but who is temporarily resident in Sierra Leone finds himself in the same disadvantageous position.

#### *2. Which Muslim law?*

The Mohammedan Marriage Act does not specify any particular school or sect of Islamic law. Since there are important points of difference between the laws of the various schools and sects, the question of which law is applicable permits a variety of answers. Compliance with the law of any school or sect is probably sufficient since there is no officially established school or sect in Sierra Leone. This resolves a possible question of conflict of law that may arise where Muslims of different sects or schools marry.

However, even though no school or sect is officially established, the vast majority of Sierra Leone Muslims regard themselves as belonging to the Maliki School of the Sunni sect. For this reason, in discussing Islamic law in Sierra Leone it will be appropriate to lay emphasis on Maliki law.<sup>16</sup>

#### *3. Essentials for a valid Mohammedan Marriage*

In strict Maliki law, marriage is a civil contract and its validity depends on the capacity of the parties, their consents, prohibited degrees of consanguinity, affinity, and fosterage, and proclamation. The presence of witnesses is not necessary. It is essential, however, that dower be paid to the bride, otherwise the marriage is irregular if it is not consummated. No religious ceremony must take place, no

priest (Imam) is required, and there need be no sacramental rites. Nevertheless, in Sierra Leone a religious ceremony is a social necessity, and usually occurs in a mosque before an Imam.

a. Capacity. The factors that determine capacity to contract a valid marriage according to Islamic law are soundness of mind, attainment of the age of puberty, number of other spouses, profession of the Muslim faith by the man, and observance of "idda"<sup>17</sup> by the woman. Among Sierra Leone Muslims there is no ascertainable rule with regard to the age of marriage. But it is settled practice that both parties should have reached puberty. For a girl, puberty is determined either by her first menstruation or when she has undergone clitoridectomy, usually at 15, which takes place upon initiation into the sande or bondo society.<sup>18</sup> A male must be circumcised but since this may occur at a very early age it does not mark the attainment of puberty. The ability of a man to maintain himself and his wife is always regarded as a prerequisite for marriage. Sierra Leone Muslims steadfastly adhere to this practice even though the parents or relatives of the bridegroom are wealthy and magnanimous enough to assume the economic responsibilities of the bridegroom.<sup>19</sup> In practice, therefore, men do not normally marry before 21, at which age they are considered to be able to pursue a trade or profession from which they can earn their living.

As regards number, although a Muslim woman is allowed only one husband, the requirement that a Muslim man cannot have more than four wives at the same time is of rigid application only among the stricter Muslims in Sierra Leone, more particularly among the Aku Muslims in Freetown and among the native Muslims in the Western Area and in the Northern Province. In the Southern and Eastern Provinces the rule is more relaxed and many men who profess Islam may be found with more than four wives. The reason may be that, in the South and East, Islam is not as deep-seated as it is in the other parts of the country.

In respect of the profession of the Muslim religion as a requirement for marriage, the stricter Muslims in Sierra Leone are more inflexible than the tenets of their religion. A Muslim marriage is discouraged between a Muslim man and a Christian woman even though it is permissible under the Sharia. Small wonder, therefore, that the Mohammedan Marriage Act recognizes marriages as valid only if both partners profess the Muslim faith.

The extent to which "idda" is strictly observed in Sierra Leone is doubtful. One commentator<sup>20</sup> reports that the Susu, a devout Muslim tribe, observe "idda" for four months and six months, in the cases of death and divorce respectively. Nowadays, only the idda of death appears to be observed in Sierra Leone and even this is limited to the period of the funeral obsequies, which last for forty days. The idda of divorce is commonly ignored even by the stricter Muslims.

b. Consent. The requirement of consent prescribed by Islamic law is zealously respected by all Muslims in Sierra Leone. Since a woman does not usually marry during her minority, her consent is always

sought and obtained. This is now true even for a female minor who, in the olden days, was given in marriage without her consent. Apart from the consent of the intended bride and bridegroom, that of their respective families must also be given. For this reason, a family gathering consisting of representatives of the two families must be summoned at which the final negotiations are settled and the marriage consideration is paid.

c. Prohibited degrees. Most of the prohibited degrees of consanguinity and affinity entrenched in Islamic law are recognized by Sierra Leone Muslims in general. However, a Mende Muslim man can marry his mother's brother's daughter or a widow of his father other than his own mother--practices that are abhorred by the Temne and Susu Muslims. Also, among the Kono, a man is allowed to marry the sister of his wife during the subsistence of the first marriage. This departure from the Sharia is a manifestation of the strong influence of tribal custom.

d. Proclamation. The proclamation of a Muslim marriage is, in Sierra Leone, a very impressive affair.<sup>21</sup> On the morning of the wedding, the bridegroom and his party walk to the mosque singing Arabic songs. They are followed by the bride's party dressed in colorful attire (locally called ashobi). The bride and bridegroom sit in separate parts of the mosque. The custom of the Aku Muslims in the East end of Freetown is for the bride and the bridegroom to occupy separate mosques. The officiating Imam sits in the male mosque from which he communicates with the female mosque through a crier.

The Imam delivers a sermon to the couple in which he advises them of their marital responsibilities and their rights and obligations toward each other. Verses are read from the Quran after which the god-father of the bridegroom hands the wedding ring to the Imam, who returns it to him. The ring is finally taken to the bride by the Registrar of Marriage. As soon as it is delivered, the mosque drum (tabuli) is beaten--seven times for a man's first wedding and five times for a subsequent one, each stroke delivered at a precise interval.

When the ceremony is over, the husband meets the wife for a short while outside the mosque and they depart for their respective homes, each accompanied by relatives, friends, well-wishers, and dancers. Late in the evening of the wedding day, the husband and his party call at the houses of the wife's relatives, where the wedding feast will be in full swing, and give money to these relatives. Finally, the wife is escorted to the husband's house by her god-mother and her train.

Another aspect of the proclamation of a Muslim marriage in Sierra Leone is registration. Islamic law itself does not require marriages to be registered by certificate but the general law provides for such registration. For this purpose, every mosque keeps a register in the custody of a registrar appointed by the local Muslim community (jamaat). The Registrar issues the marriage certificate, which must contain the names of the spouses, their residences at the time of the marriage, age, marital status before marriage, and the names and occupations

of their fathers or matrimonial guardians. A certified copy of the certificate in English and Arabic must be sent to the Registrar-General of Sierra Leone within a week.

e. Dower. At the time of marriage, Islam requires a marriage settlement, i.e. dower (mahr), to be provided for the wife. The minimum laid down by Maliki law is 3 dirhams.<sup>22</sup> The object of the dower is to give the wife her separate property, out of which she can make charitable donations or gifts to her relations. The institution of the dower is a practical acknowledgment by the prospective husband of the independent proprietary position of his future wife and her right to maintain and acquire her own property.

Among many Sierra Leone Muslims dower and marriage consideration, i.e. payment made or services rendered by the bridegroom and his family to the family of the wife, are hardly distinguishable. The marriage consideration is usually regarded as taking the place of Islamic dower. But the stricter Muslims do insist that the dower is paid together with the marriage consideration and that payment is made at the time of the engagement (gage).<sup>23</sup>

Where money is paid, part of it is intended to equip the wife in preparation for her marital role. But the stricter Muslims draw a line between the two payments. Alhaji Gibril Gadri Saccoh, Imam of the Mandingo Muslim community in Freetown, reports<sup>24</sup> that whenever marriage consideration is paid the wife's parents always ask the husband's parents: "Is everything all right?" This question is answered in the affirmative only when the dower has accompanied the marriage consideration.

In the olden days dower, where separately paid, did not exceed 70 cents.<sup>25</sup> Today, there is no fixed amount. It is discretionary and varies with the financial circumstances of the prospective husband and his affection for his wife. It now usually takes the form of gold, oxen, houses, or money, ranging in value from Le.200/00 to Le.500/00 among the well-to-do Muslims (several hundred dollars).

f. Witnesses. According to Maliki Law, a marriage contracted without witnesses raises a shubba and is merely defective.<sup>26</sup> But the Quran prescribes that two male witnesses (or one male and two female witnesses) must always be present at a Muslim marriage. In this respect, Sierra Leone Muslims follow the Quran rather than Maliki law and require prescribed witnesses. In addition, there must also be a god-father and a god-mother, drawn from outside the two families. These continue to play a vital role during the life of the marriage for they act as marriage custodians to whom all disputes during the marriage between the spouses are referred before every divorce is pursued.

## B. Divorce <sup>27</sup>

Under Islamic law, a husband has the right to divorce his wife without assigning any reasons and without fault on her part. A wife,

on the other hand, can divorce her husband only in the following cases: with his consent (*khul*); and for his failure to maintain hers; cruelty; desertion; neglect; affliction with a serious and contagious disease; insanity; and impotence. Divorce can be effected by judicial process, mutual agreement, or *talaq*. The first two methods can be used by both husband and wife, but the last is the monopoly of the husband.

#### 1. Practice of Sierra Leone Muslims

As a rule, either spouse can divorce the other if the marriage has irretrievably broken down, and no reason need be given. Among the purists, however, the couple must adduce some reason acceptable to the Imam of the local community where the divorce is sought.

Among the Hausa community in Freetown, a husband may divorce his wife if she claims to be a virgin before marriage but is found not to be when the marriage is consummated, or if she commits adultery three times after having been warned on the first and second occasions. A wife, too, may divorce her husband for his inability or willful refusal to maintain her, for neglect, or if his mouth emits a pungent smell at night.<sup>28</sup> In the later case, however, the husband must first be warned.

The Aku Muslims insist upon one of the grounds recognized by Islamic law. Nevertheless, sterility of the wife and adultery by either spouse are also accepted as reasons for divorce among them.

In addition to the grounds permitted by Islamic law, a Mandingo Muslim wife may divorce her husband for persistent bad breath<sup>29</sup> and impotence, and either spouse can divorce the other for showing utter disrespect of the spouse's family, whether by deeds or omission. A husband cannot divorce a wife on the ground of her adultery, but such conduct brings severe punishment. In the olden days, both the adulterer and the wife were tortured to death. Nowadays, however, each is given 100 lashes and stripped naked, and the adulterer is banished from the local community. This happens extra-judicially.

Among the rest of the tribal Muslims, mainly in the Provinces, a husband can divorce a wife without assigning any reason, but if she is faultless, he must accompany her with money and return her to her parents. For a wife, unkindness by her husband is a sufficient reason for divorce. One act of adultery by the wife is, in general, insufficient to entitle the husband to divorce her without paying some amount of money to her parents. But if she persistently commits adultery after being warned and reported to her parents, she can be divorced without any payment to her parents. Among the Ahmadiyya, apart from those stipulated by Islamic law, accepted reasons for divorce, include: a husband who repeatedly drives away his wife with or without just cause; personal uncleanness by either party; disobedience of the husband by the wife; and the wife's willful and persistent refusal of sexual intercourse. Adultery by the wife is not sufficient but if she is manifestly immoral, as testified by four respectable residents of the locality, the husband must separate himself from her for four months after which, if she continues her conduct, she becomes liable to reasonable chastisement.



## 2. Procedure

Since the High Court of Sierra Leone has no jurisdiction to dissolve a Muslim marriage and there are not Qadi Courts, divorce by judicial process is virtually unknown. Nevertheless, the tribal Muslims in the Provinces do, from time to time, resort to the local courts, but what is dissolved by these courts is a customary marriage that resembles a Muslim marriage.

In the Western Area, it is common for a Muslim who seeks divorce to go to the executive committee of the Local Muslim Community (jamaat). These ad hoc tribunals have no judicial capacity at law, but their decrees are respected by those who seek them and by the local community.

Divorce by talaq or by mutual agreement without arbitral intervention hardly ever occurs, notwithstanding the opinion of one Imam<sup>30</sup> that an immediate divorce can be obtained if one spouse pronounces that he or she is no longer married to the other spouse, in a mosque in the presence of his or her parents, the Imam, and the Muslim elders who witnessed the wedding.

The usual procedure by which divorce is obtained seems to be as follows. In case of a dispute the spouses first resort to the god-parents of the marriage; if the dispute is not resolved, the god-parents summon representatives of the families of the spouses, who try to effect a reconciliation. Failing that, one or both go to the local Imam or headman and indicate the intention to divorce. The Imam or headman makes a final effort to salvage the marriage, failing which he summons an ad hoc tribunal consisting of the executive committee of the local Muslim community (jamaat). If, after hearing evidence from both sides, the tribunal is satisfied that one spouse has given sufficient reasons for a divorce, it pronounces a decree and communicates it to the Registrar who registers it. The marriage is legally dissolved once the decree is pronounced, but registration is necessary as evidence of the dissolution. Divorce, once effected, is irrevocable, and in the event of a later reconciliation the parties must re-marry in order to restore the relationship of husband and wife. A strict Muslim never contracts a second marriage with a spouse whom he or she has already divorced but the more liberal native Muslims in the Southern and Eastern Provinces may do so.

## C. Succession

### 1. Testate Succession

Neither the Mohammedan Marriage Act nor any other enactment provides for the application of Islamic law to wills made by Muslims. However, a good many Muslims in Sierra Leone mistakenly believe that they can make wills governed by Islamic law and thereby throw overboard the provisions of the general law. This belief may have originated in a meeting between the Muslim leaders in Freetown and the Attorney-General of the Colony of Sierra Leone, at the Foulah Mosque in Freetown, on March 10, 1904, a meeting that heralded the passage of the Mohammedan Marriage Act. At that meeting, the Muslim leaders expressed their desire that Islamic law govern wills, and the Attorney-

General agreed in principle. But as can be seen from the Mohammedan Marriage Act, the hopes of the Muslims were not realized.

Prior to 1972, the courts tended to regard a will as valid under the general law if it had been made by a Muslim and complied with the form required by the general law--in which case the applicable law was the general law and not Islamic law.<sup>31</sup> But in 1972, a judicial opinion upset this well established practice. In *In re Turay*<sup>32</sup> the deceased, a Muslim, left a will, four sons and a daughter, and property consisting of a house and a piece of land in Freetown. The value of the house far exceeded that of the piece of land. The testator devised the house to the daughter and the piece of land to the four sons. Two of the sons challenged the will on many grounds, one being that it contravened the rules of testate succession under Islamic law. Tejan, J., himself a Muslim, upheld the contention of the plaintiffs:

This devise is in contravention of verse 11 of chapter 4 of the Koran since the devise to the defendant is more than one-third of the property and moreover the defendant is a person entitled to share in the inheritance. It seems to me that the gift to the defendant fails.

It is submitted that this decision, though attractive to Muslims, is erroneous in law. Tejan, J., argued that Islamic law "is a customary law applicable to those who profess the Muslim faith".<sup>33</sup> Clearly, the Learned Judge did not use the term "customary law" in the sense that it is used in s.2 of the Local Courts Act 1963, because he stated earlier in his judgement that he did not regard Muslim law as a "native law." He therefore sought to introduce a fourth branch of law into the Sierra Leone legal system. This is judicial creativity with a vengeance and tantamount to a usurpation of the function of the legislature. Even if the Learned Judge had regarded Muslim law as customary law, which would not seem to be the case by virtue of s.125(3) of the Constitution, 1978, his stance would still be erroneous, for customary law prevails only when "it is not incompatible, either directly or indirectly, with any enactment applying to the Provinces." The United Kingdom Wills Act 1837 is of general application throughout Sierra Leone. Therefore any customary law that is incompatible with it cannot stand. It must be borne in mind that the essential characteristics of a valid will under Islamic law differ in many respects from those under the general law. For example, according to the Maliki School, writing, signature and attestation are not necessary for a valid will whereas under the general law the absence of any of these elements invalidates a will. There is thus a conflict between the two systems. In the absence of specific legislation to the contrary, this conflict must be resolved in favor of the general law.

## 2. Intestate Succession

As we have already seen, the authority for applying the Islamic law of succession to the distribution of the real and personal proper-

ty of a Muslim who dies intestate is s.9 of the Mohammedan Marriage Act. That section lists, in order, those responsible for administering the estate: (a) the eldest son of the intestate, if of full age according to Islamic law; (b) the eldest brother, if of full age according to Islamic law; or (c) the Administrator General.

According to Islamic law, distribution occurs only when the estate consists entirely of personalty, or of realty that has been converted to personalty by sale, or where the administrator of the estate is the Administrator-General. But if the entire estate consists of realty and the administrator is the eldest son or eldest brother, and a dispute is not anticipated, it is common for the Muslim elders--"big men"--to step in and make an arrangement whereby the property is kept in the family and enjoyed by all.

In In re Banufe (decd),<sup>34</sup> the validity of such an arrangement was challenged. In that case, Ibrahim Banufe, a Muslim, died intestate in Freetown, survived by three wives and nine children, and left real property in Freetown. One of the houses that formed the estate was allocated to a son, Muctarr, who later died, survived by his mother, maternal grand-mother, maternal uncle, and five consanguine sisters. On the son's death, a family meeting was held in which the elders of the tribe to which the deceased belonged decided that the mother should occupy the son's house as a tenant at will until her death, and thereafter the property should go to the sisters absolutely, since the elders said it belonged to them. After the death of the mother, the sisters of Muctarr sought to claim possession and absolute ownership of this property and the claim was resisted by the maternal grand-mother and maternal uncle of Muctarr, who claimed as next-of-kin of Muctarr's mother. The learned trial acting Chief Justice held that though, as a rule, the Islamic law of intestate secession should have applied, in equity the existence of a valid family arrangement following the death of Muctarr displaced Islamic law.

On the point of law, it is submitted that the decision is correct. Equity favors family arrangements entered into fairly and reasonably for the benefit of all those who have any sort of claim to the property in question.<sup>35</sup> But such an arrangement may be challenged by a party on the ground that, at the purported settlement, he did not acknowledge the title of others to the property he claims, in exchange for their acknowledgment of his title to property claimed by other members of the family.<sup>36</sup> A party may also challenge the arrangement on the ground that he was misled as to his legal rights in respect of the property, and for the kind of mistake, misrepresentation, or undue influence that normally renders a contract voidable.<sup>37</sup>

On the facts of the instant case, however, it is submitted that equity would not favor purported family arrangement. Throughout the meeting that followed Muctarr's death the elders of his sect assumed that his sisters, but not his mother, had a legal right to his property.<sup>38</sup> The meeting was not intended to be a family gathering at which all claims to the property were to be acknowledged and a compromise concluded in order to retain the property in the family. Clearly,

the elders intended to distribute the property according to Islamic law but, on moral grounds, allow the mother of the deceased to occupy the premises rent free for the rest of her life. No doubt she agreed to this, but perhaps, had she not been misled as to the law by the elders, she would have taken a different position. On the other hand, it could be argued that since she was legally entitled to only one-sixth of the property, an arrangement that allowed her to occupy the premises rent free for the rest of her life was fair and reasonable.

Whatever view is taken of the instant case, before a family arrangement can be concluded that displaces the Islamic law of succession, it is necessary that the parties concerned must be aware of their legal rights and that there be give and take in respect of those rights.<sup>39</sup> Presumably, the elders in Banufe's case intended to apply the Islamic law of intestate succession in accordance with their custom. It is submitted that this is wrong under the present law, which does not admit custom but Islamic law simpliciter. But the application of Islamic law with tribal custom is a desirable gloss and must be welcomed, since it not only suits local conditions but also moves toward the unification of the pluralistic legal system of Sierra Leone.

### III. THE FUTURE OF ISLAMIC LAW

Politically, educationally, and socially, Muslim influence in Sierra Leone is growing. Important positions in Government and the public service are occupied by Muslims; more Muslim festivals are now observed as public holidays in addition to the traditional two--Id-El-Fitr and Id-El-Kabir; many Muslim schools have now been established throughout the country. Nevertheless, the place of Islamic law within the framework of the legal system has remained substantially static since the passing of the Mohammedan Marriage Act. The reason is partially the strong influence of traditional customs and partially the ignorance, among most Muslims, of the rules of the Sharia; even though Islamic education is gaining ground, it is still limited to Arabic and to Islamic ritual and does not include jurisprudence.

In the field of marriage, the vast majority of Muslims do comply with some, but not all, of the requirements of a valid marriage as laid down by the Sharia. Judicial notice is commonly taken of these obstacles to the development of Islamic law, and the general law courts are always accommodating in accepting a Muslim marriage or divorce that is represented to them as valid. Diligent research reveals only one instance when the validity of such a marriage was questioned before the Sierra Leone courts but, on the production of the registrar's certificate, the High Court ruled that the marriage was valid.<sup>40</sup> So far as divorce is concerned, the registrar's certificate has always been taken as conclusive even though relevant statutes says that registration shall be regarded as a prima facie evidence of compliance with the rules of the Sharia.

Even in the area of intestate succession, although the courts follow the Act and abide by Islamic law, they give liberal interpreta-

tions to certain concepts and take cognizance of customary law where to do so is not offensive to the provisions of the Act. For example, s.9(1) of the Act merely states that the estate of a deceased Muslim shall be distributed in accordance with Islamic law. Under that law, one of the persons entitled to a share as Quranic heir is the wife. If there is more than one wife, all share equally in the quota allocated to that class. In In re Lamin Mohammed (decd),<sup>41</sup> the two claimants to the estate of the deceased, a Muslim, were his two wives, one married by Islamic law and the other under customary law. The former contended that the latter was not a wife for the purpose of participating in the estate of the deceased. The High Court rejected the argument and held that both wives were equally entitled to the estate.<sup>42</sup>

Devout Muslims may justifiably deprecate the practice of misrepresenting marriages and divorces as Muslim when they do not conform with the Sharia, and may argue that the Islamic law of marriage and divorce must be strictly observed, but such a step would be both complicated and retrograde. First, the majority of Muslims are tribal people and illiterate in Islamic law. Except for the ritual ordinances of their religion, they conduct their daily lives in accordance with customary law. It would therefore be impractical to compel them to comply with a jurisprudence that is quite alien to them and their courts.

For those Muslims who contend that the Islamic law of testate succession ought to apply, a case may be made that, in some respects, that law resembles customary law in recognizing oral or nuncupative wills and emphasizing that property be enjoyed by members of the deceased's family rather than by strangers. But such an argument gives additional roots to Islamic law, further entrenching it within the legal system--something that will retard the eventual fusion of customary law and the general law, which must surely be the ultimate goal. If individual Muslims so desire, they are always free to follow the dictates of Islamic law in their personal lives or even in family matters if the family consents.<sup>43</sup>

The only appropriate and desirable reform would be to extend the jurisdiction of the High Court to hear matrimonial causes in accordance with the relevant principles of the Sharia. This will meet the needs of the stricter or better educated Muslims. At present, the High Court has jurisdiction to hear matrimonial causes only in Christian and civil marriages and divorces and there are no Qudi courts in Sierra Leone. The only avenues open to the stricter or better educated Muslims are ad hoc arbitral tribunals or customary law courts, but to appear before the latter is considered infra dignitatem.

## NOTES

- \* Most of the material contained in this article was collected between 1968 and 1972 when I conducted research into Sierra Leone Family Law for my Ph.D. thesis for the University of London. However, the facts and the law contained herein have been updated up to April 1979.
- <sup>1</sup> This term is first used in the Local Courts Act, 1963, s.2 of which provides: "'general law' includes the common law, equity and enactments in force in Sierra Leone, except insofar as they are concerned with customary law." S.4 of the Sierra Leone Constitution, 1971, defines "general law" as meaning "the common law, equity and all enactments in force in Sierra Leone."
- <sup>2</sup> The present reception Statute is the Courts Act, 1965 (see s.74).
- <sup>3</sup> See s.156(1).
- <sup>4</sup> See s.13(2).
- <sup>5</sup> See s.76.
- <sup>6</sup> Cap. 8 of the revised Laws of Sierra Leone 1960.
- <sup>7</sup> For Islamic Law in Sierra Leone generally see J.N.D. Anderson, Islamic Law in Africa (H.M.S.O., London, 1954).
- <sup>8</sup> Cap. 96 of the revised Laws of Sierra Leone, 1960, passed in 1905.
- <sup>9</sup> Ibid. s.2.
- <sup>10</sup> Ibid. s.5.
- <sup>11</sup> Ibid. s.3.
- <sup>12</sup> Ibid. s.9(1).
- <sup>13</sup> See Amir Ali, Mohammedan Law, Calcutta, 1912, Vol. II (5th ed.)22.
- <sup>14</sup> The two major groupings are Sunnites and Shiites. The Sunnites are divided into four schools namely, Hanafi, Hanbali, Maliki and Shafri.
- <sup>15</sup> See the Indian case of Jiwan Khan V. Habib (1933) 14 Lahore 518, in which it was held that the term covers all Sunnites as well as Shiites.
- <sup>16</sup> On Maliki law generally see T. P. Hughes, A Dictionary of Islam, London, 1894; Al-Haj Fazlul Karim, Al Hadis, Book II, Calcutta, 1939; A.A.A. Fyzee: Outlines of Mohammedan Law, (3rd ed.) O.U.P. 1964.
- <sup>17</sup> This is the period during which a woman whose marriage has been dissolved by death or divorce is prohibited from re-marrying.

- 18 This is a secret society in which a girl is taught the arts of womanhood. The Mende call it sande while the Temne name it bondo.
- 19 This seldom happens since a man is expected to defray his own marriage expenses to show that he is able to maintain another person.
- 20 See M. Aubert, "Laws and Customs of the Susu," S.L.S. (O.S.) No. 20, Dec. 1936, 67 at pp. 70-71.
- 21 For a description of a marriage celebration among a Freetown community, see O. Bassir, "Marriage rites among the Aki (Yoruba) of Freetown," Africa, Vol. 24, 1954, p. 251.
- 22 According to the M.T. Houtema et al., Encyclopaedia of Islam, Leiden-London, 1913-1937, Vol. I, p. 978, a dirham is a silver coin 2.97 grammes in weight. Three dirhams have been valued at 2 shillings sterling. see S. Vesey-Fitzgerald, Mohammedan Law, An Abridgement, O.U.P., London, 1931, p. 63.
- 23 The word "gage," a corruption of the English word "engagement," is Krio, the lingua franca of Sierra Leone.
- 24 Personal communication.
- 25 100 cents = one leone (abbreviated "Le"). Sierra Leone changed its currency from the pound and penny sterling to the leone and cent in August 1965. Prior to November 1978 a leone was equivalent to fifty pence sterling. The relationship between the leone and the pound was severed in November 1978 resulting in a five per cent depreciation of the leone against the pound.
- 26 A defective marriage in Islamic law is not identical to a void or voidable marriage in the general law because different legal consequences follow. In Maliki law, some defective marriages raise a shubha, i.e. a semblance of validity, while others do not.
- 27 For a comprehensive analysis of divorce in Islamic law, see Hughes, op.cit., 87-90; Karim, op.cit., 139-169.
- 28 Personal communication from the late Alhaji Buhari who was Imam of Hausa Mosque, Freetown, for over 30 years, and confirmed by other Elders of the Hausa community in Freetown.
- 29 Personal communication from Alhaji Gibril Succoh, Imam of Mandingo Mosque, Freetown, and confirmed by other Elders of the Mandingo community in Freetown.
- 30 Personal communication from Alpha Ibrahim Koroma, Imam of the Ngiyeiya Road Mosque, Bo.
- 31 See, e.g., In re Allie (decd) 1950-56 ALR SL. 338, in which the Supreme Court applied English law to determine the validity of a will made by a Muslim.

- 32 1972-73 ALR SL. 177.
- 33 Ibid., p. 188.
- 34 1968-69 ALR SL. 268.
- 35 See J.D.M. Derrett, "Family Arrangements in Developing Countries," Family Law in Asia and Africa (ed. J.N.D. Anderson) London, 1968, pp. 156-181.
- 36 Derrett, op. cit., p. 164.
- 37 See Halsbury's Laws of England, (3rd ed.) Vol. 17, pp. 215-230.
- 38 See p. 271 of the report of the case for extracts of the evidence of two of the witnesses for the plaintiffs.
- 39 An appeal was lodged against the decision in Banufe's case, one of the grounds being that the learned trial acting Chief Justice misdirected himself as to the facts on which he established that there was a valid family arrangement capable of displacing Islamic law. Without considering this ground, the Court of Appeal allowed the appeal and set aside the decision of the Lower Court on the basis that, upon the death of Ibrahim Banufe, his property vested in the Administrator and Registrar-General and that the purported family arrangement was a nullity because Letters of Administration had not been taken before the arrangement was made. After taking out Letters of Administration the Administrator and Registrar-General distributed the estate strictly in accordance with Islamic law of the Maliki school. The decision of the appeal is unreported.
- 40 In re Lamin Mohamed Maxwell (decd), C.C. 472/74, 1974 M. No. 32 (unreported), decided on 11 July 1977.
- 41 Ibid.
- 42 Thompson-Davies, J., found that a customary law marriage was act established in the case of the alleged customary law wife. Nevertheless, he applied the presumption of marriage in respect of this wife from the evidence adduced.
- 43 J.N.D. Anderson, op. cit., p. 299.