LEGAL UNIFORMITY IN PLURALISTIC SOCIETIES*

Daniel Haile**

1. INTRODUCTION

a. *Pluralism and Legal Uniformity: Concept of Pluralism*

"Pluralism is a condition in which members of a common society are internally distinguished by fundamental differences in their institutional practice. Where present, such differences are not distributed at random, they normally cluster and by their clusters they simultaneously identify institutionally distinct aggregates or groups and establish deep social divisions between them. The prevalence of such systematic disassociation between the members of institutionally distinct collectivities within a single society constitutes pluralism."[1] In other words, the phenomenon can be viewed as involving differentiation at three levels. First at the base there are the units of cleavage however they may be defined (racial, tribal, ethnic as the case may be); then associated with the cleavages there are cultural pluralism, or diversity in basic patterns of behaviour, and social pluralism or separation in social organization.[2]

Except for Lesotho and Swaziland which are formally monoethnic,[3] all African countries within their national boundaries contain a variety of ethnic, religious and linguistic groups. A major colonial legacy in this regard, as A. Allot points out, is the artificial aggregation and segregation of indigenous systems. "The laws of peoples without a common culture or way of life were thrown together as in the case of lacustrine kingdoms and the Nilotic chiefless societies in Uganda; while people of similar laws were artificially divided by territorial frontiers as in the case of the Massai distributed between Kenya and Tanganyika, and the Mossi between the then Gold Coast and Haute Volta. Whatever territory acquired was thus a ragbag of indigenous legal systems having no more real connection with each other than the languages these people spoke"[4]. Moreover, European political partition and administration in Africa abruptly arrested the growth of the indigenous systems. "The traditions and institutions of the indigenous systems in varying degrees were suppressed. European type institutions were established and European law together with European tradition became paramount . Where for reasons of necessity and expediency, the continued existence of tribal courts and tribunals was officially sanctioned by Europeans, those tribal courts were reinstituted under colonial statutory authority and allowed to administer the prevailing tribal

---

* Adapted for the Journal of Development Research from the LL. M. Legal Essay submitted to the Harvard Law School, April, 1974.

** Ato Daniel Haile is a lecturer in the Faculty of Law of the Addis Ababa University.

laws and customs only so long as the same were not repugnant to natural justice, equity, and good conscience."[5]

The artificial aggregation of different ethnic groups and imposition of new sets of norms intensified the already existing social pluralism. For in addition to the already existing cleavages, colonialism, in particular French colonialism, with its policy of assimilation, added a new stratification based on the acceptance of the new values. We thus have not only a conglomeration of ethnic and religious groups but peoples living with the traditions of millenia of indigenous civilization and others who have adopted ways of "modern" living. These different value systems are reflected in the various cultures and patterns of behaviour and the "side by side presence of one or more indigenous legal systems (with or without intrusion of problems of the Islamic law) and of non-indigenous legal systems accommodated to local circumstances"[6].

In this paper we shall be considering a set of very important patterns of behaviour--marriage and divorce--taking the plural societies of Africa as our perspective. We shall critically analyze the validity of the idea of standardizing or having uniform laws in these two areas. "The question of what shall and shall not be regulated uniformly for all members of the nation irrespective of group membership is, of course, exactly the question of how far pluralism will continue to exist."

In an era of nation-states every feature of society which divides group from group is viewed as a potential source of weakness and thus even though the plural legal system still exists in most of the emerging nations of sub-Saharan Africa the trend is clearly in the direction of integration and unification. A certain amount of integration of customary law takes place by national evolution. With increased urbanization and contact between peoples of different tribal groups, changes in customary practice occur, and this may be reflected in the customary law of the various groups.[7] But this self-generating approach is considered as being too slow for the taste of most African countries and this dissatisfaction was expressed in 1963 when the African conference on the role of customary law resolved the necessity for positive action.[8]

b. *Uniformity*

Up to this stage we have been talking of uniformity and the movement towards unification as though it was a single notion or process. However,at this point "we would suggest that a distinction be made between organic and structured unity. The former would indicate a notion closer in its meaning to 'uniformity' or 'identity'.[9]" It can either consist of unification of the various customary laws or the unification of the customary and received law. Various erminologies have been used to describe the methods[10] but we shall use the terms used by Professor A. Allot. Professor Allot has postulated three degrees

in the unification of the laws of a particular country. First, there is harmonisation, which is defined as "the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law". The next stage is integration defined as "the making of a new legal system by combining the separate legal systems into a self consistent whole. The legal systems thus combined may still retain a life of their own as sources of rules, but they cease to be self-sufficient autonomous systems."

Finally, there is unification, which is "the creation of a new uniform legal system entirely replacing the preexisting legal systems, which no longer exist, either as self-sufficient systems, or as bodies of rules incorporated in the larger whole although the unified law may well draw its rules from any of the component legal systems which it has replaced."[11]

Structural unification on the other hand does not imply uniformity. "Parallelism in its pure form meant distinct judicial systems with no connection link at any level of the judicial hierarchy and at its most formal level can be accomplished merely by having a uniform court system which superimposes an extraneous uniform procedure and machinery of enforcement but leaves the substantive law of the different ethnic or other legal units basically unaltered".[12]

Even though as late as 1953 Kenya and Sierra Leone had pure parallel legal structures, generally no basic legislation substantially re-organizing the judicial structure was introduced in any country until 1960.[13] Since then most African countries have integrated their courts at least by integrating the chain of appeal.[14]

Although united together and having repercussions on each other, the integration of courts and the integration of laws may be viewed as two separate problems, for originally the question of why different bodies of law are applied to different classes does not arise until at least the courts are integrated by creating a chain of appeal.[15] As most African countries have achieved this level of integration of their courts we shall not be concerned with integration of courts as such except to the extent that integration of courts brings up questions of procedure, practice, and evidence, i.e. the question of whether the rules which heretofore prevailed in the ordinary courts should be extended to the tribunals newly integrated into the national legal system.[16] In short our focus of attention will be organic rather than structural unity.

c. *Arguments for Uniform Laws. General*

The idea of legal development which is the underpinning of the movement towards uniform laws rests on the simple assumption that some legal systems are better than others with respect to a particular dimension that can be called

modernity or advancement or progressiveness. Legal missionaries must have, in the back of their minds, the notion that modern legal systems are better suited to economic social and political development than non-modern ones.[17] We shall hereunder briefly state the arguments in order to give us a framework for our analysis in the next section.[18]

The economic arguments against the plural legal system are directed against the nature of customary law and the family institutions which it supports. As Seidman states, "Development demands transformation away from the plural economy and society. ...By definition, customary law cannot lead to development because it arises and supports a subsistence economy".[19] We shall not be concerned with the wider implications of this view but we shall examine it within the context of the present African family structure and its implications for modernization and economic development—to be more specific, the problems presented by the extended family, polygamous marriage and customary patterns of relationship between spouses and between family members.[20]

The generally stated political reason is that uniform laws assist the process of nation-building and the creation of national consciousness. "The capacity to define and integrate social relationships is necessary for developing political systems characterized by pluralism. they must be able to increasingly organize and integrate into the national system individuals whose roles in the diverse social subsystems may hinder continuing development and uniform laws, by redefining some of the social relationships in favour of national goals, helps the process of nation-building.[21]

When applied to the African scene this general argument has been restated basically in terms of the centrifugal tendencies of tribalism. It has been argued that laws that are national in scope are essential in African countries due to the fact that their boundaries did not follow tribal lines. A number of tribes, sometimes hostile to one another, are found within the same boundary and customary laws based on tribal or geographical groupings would hinder the effort towards national consciousness.[22]

In addition to nation-building we shall also consider the process of democratization or movement towards equality which in this context is especially conceived with improving the status of women.

The legal reasons for having uniform laws are varied and range from the idea of having uniform laws simply as a symbol of development to the simplification of the task of the lawyer.[23] We shall consider the rationale put forward to support each point: symbolism, certainty, conflict of laws and problems of traditional judicial process, and attempt to critically analyze their premises and their implications.

2. CRITIQUE OF ECONOMIC REASONS

The desire to modernize as soon as possible has been given as a major justification for the legal reforms that are being undertaken by African countries. The desire for modernization when projected to the marriage area has been an attempt to use the laws to promote the nuclear family structure which is thought to be an essential ingredient of an industrialized society.[24] The essentiality of nuclear family structure seems to be one of loose association with the stereotype picture of an entrepreneur as an "innovating and primarily as a strong individual whose leadership, willingness to assume, to break through patterns of finance, production and distribution have been emphasized to such an extent as to make him look like a rebel against society."[25] Nuclear family as the social arrangement that least fettered this individualism was automatically viewed as the most conducive social structure.

However, this stereotype characterization gives only half of the picture. For in addition to the creativity first mentioned, another component involving the ability to engineer agreement among all interested parties, such as the inventor of the process, the partners, the capitalist, the suppliers of parts and services,[26] the distributors, etc. or the cooperative factor, is totally missing.

The attacks on customary law and the family structure and the relationships which it supports are basically a result of this undue emphasis on the creativity aspect of enterprise and the almost total exclusion of the cooperative aspect. As regards the extended family, for example, it was noted that "it tends to discourage individual enterprise and initiative as the burden of the family obligation rises with the degree of an individual's success. A big man in the family is expected to be generous in helping others with school fees, doctor's bills, brideprice, financing weddings and funerals and hospitality to all relatives. Consciously or unconsciously, the knowledge that a greater income will mean correspondingly greater burdens must inhibit the effort an individual puts forth."[27]

This of course is nothing but merely an application of the "conception commonly expressed in western writings of a generation or more ago, that an individual will function efficiently in economic endeavours only if he is working in a private enterprise to further his individual interests, an idea which has been proven false by history for the entrepreneur may act to advance himself, his family, his community, his country, some other social group, or the business organizations to which he is attached.[28]

Other drawbacks of the extended family systems such as its tendency to prevent the accumulation of capital and the proliferation of small enterprises[29] are double-edged. True it may have these drawbacks but on the other hand small contributions from many family members may be pooled to finance the education of a bright child and the family's assets can serve as security for small

loans given to individual members and help the family to pool its credit to borrow money.[30]

After an analysis of the economic implications of the African extended family system, Kamarck concluded that "on balance the extended family system in Africa so far has probably inhibited economic development more than it has helped".[31] Kamarck does not provide any concrete data by which he reached his conclusion and my feeling is that this is again a reflection of the tendency to abstract from levels and models of living, attitudes and institutions of the developed countries and applying them to the "underdeveloped" countries without careful consideration.[32]

Not only does the evidence as shown by the case of the Japanese industrial corporation, which, with its emphasis on the "cooperative" rather than the "competitive" factor is very similar to the African extended family system, seems to point to the contrary[33] but moreover the self-centred strategy which Kamarck espouses is inimical to development.[34] In addition, where one can neither trust a stranger or an acquaintance as a business associate, or persuade him to lend money, then the extended family may be a necessary source of capital and a necessary bond between business associates. Its abolition would not modernize the society; in the circumstances it would merely paralyze large scale relationships.[35]

But despite all of the above, the misconceptions about the nature and role of the extended family have led many African countries to pass laws to break the institution and to create a nuclear family structure and the basic thrust, as can be seen from the Ivory Coast,[36] has been the creation of the institution of monogamy and the abolishing of the institution of brideprice—which is an institution for the perpetuation of the structure. A lot of things have to be known before such drastic actions may justifiably be taken, for it would be very simplistic to assume that a particular set of provisions imported from a European country which itself is economically highly developed will automatically stimulate or facilitate economic development in the African country.[37]

3. CRITIQUE OF POLITICAL REASONS

a. *Political Unity*

The crucial elements of political development can be succinctly presented in terms of four sets of categories which recur continuously: rationalization, national integration, democratization, and participation.[38]

National integration and democratization, e.g. by alleviating the status of women, have been the realms where law has been constantly used in Africa. Most African leaders desire to increase their political capacities and have thus placed the goals of unification and modernization high on the list of political priorities and to the extent that politico-legal pluralism hinders their realization,

political leaders will endeavour to reduce the pluralism to legal uniformity.[39] This general attitude towards uniformity was expressed by the Kenya commission on marriage and divorce when it said, "whilst our Constitution permits differentiation in treatment of sections of the community in regard to legislation dealing with marriage, divorce and other matters of personal law, that is not to say that such radical distinctions as exist at the present time in Kenya are desirable if we are to integrate the various communities in the interest of building one nation."[40]

There are two main reasons which explain this ardent belief on the part of many African countries. The first one seems to lie in the confusion between national unity - which means a single culture, language, history, and political unity, which is the shared committment to a set of rules and procedures through which binding final decisions in the political realm are resolved.[41] Uniform laws can symbolically represent national unity but more than this symbolism is needed to achieve political unity.

The second reason for the belief is a result of historical western reaction to the non-western world. "The demand for extra-territorial rights in such countries as China, Japan and the Ottoman Turkey reflected the belief that the critical difference between the modern state and the traditional systems was the existence of a universal legal system."[42]

A universal legal system will certainly have to have the attribute of uniformity, and even though as Dr. T.O. Elias points out, "There are surprising similarities at least in important essentials in bodies of African customary law as divergent as those of the Yorubas, the Bantus, the Sudanese, the Ashantie and the Congolese,"[43] one can hardly claim that customary law is uniform.[44]

It is true that due to the nature of plural societies the role of law in theory will generally be greater in these societies than in societies with a greater degree of cultural homogeneity and consensus as regards fundamental ideas. For in culturally homogeneous societies, the state, that is the central political institution, is like law, a derivative, expressive and secondary structure, while in the plural societies the state pre-exists society and provides the legal framework for the new society.[45] But in reality, as the case studies from Ethiopia and Tanzania — two nations that emphasize politico-legal development as the road that leads to nationhood—reveal, the impact of uniform laws in the process of nation-building has, if at all, been very negligible.

As regards the Ethiopian project, D. Sperry said, "generalizing from my research in Ghimbi, I believe that the Ethiopian experience has not yet demonstrated that a unified system of law can unqualifiedly contribute to national unification.[46] As a matter of fact, the same author proceeds to say that "the centripetal forces of unity, forged from an increasing capacity for political development, and the centrifugal forces of disunity, forged from public dis-

content over a host of economic, political, social and administrative factors, are in a state of precarious balance.[47]

Similarly, in connection with the Tanzanian project S.Castelnuovo said, "It would seem that the anticipated contribution to the reinforcement of national unity, which it was assumed, would occur as a byproduct of the codification process itself, was not borne out."[48]

The impact of uniform personal laws is even weaker since "cultural diversity in family institutions may have little relevance for the political structure or it may have political significance under certain social conditions and not others.[49] On the contrary, standardization of an area of law, which by no means is peripheral to the people, may help to intensify local identification—the problem which they are designed to solve.

b. *Democratization*

The second major reason in this area that is prompting the new governments of Africa to take a bolder stand on reform is the democratization of their societies by alleviating the status of women.

It is said that, "Under customary law women are in perpetual minority. Prior to marriage they are under the control of the male head of their family, during marriage under the control of the husband, when the marriage terminates by death or divorce, they are either forced into levirate marriage or revert to the control of their own family. They may be forced to enter into marriage sometimes at a very young age. And of course polygamy is widespread, which may further aggravate the disadvantaged status of the wife."[50] However, although marriage at young age (forced marriage), levirate marriage and polygamy are considered to be problems, as the experience of Moslem societies show, it was the Islamic law of divorce and not polygamy which was the major cause of suffering of women[51] and we shall thus focus our attention on this factor.

There are two conflicting views about divorce under customary marriage; one which holds that "customary marriage is usually capable of being dissolved without the limitations imposed by a rigid set of grounds for divorce and views it as a relationship that is neither enduring nor endearing.[52]

The other view, on the other hand, states that, "under ancient customary law marriage was almost always indissoluble, as it was looked upon as a permanent social and spiritual bond between man and wife on the one hand and their respective families on the other. It was for this reason that a woman who lost her husband by death stayed as a member of her husband's household and might choose, or be chosen by, an eligible member of it.[53]

This latter view seems to be the one supported by empirical research. As Cotran states "certainly my own detailed researches into the marriage laws of

several tribes in East Africa have revealed that, far from being an easy matter, divorce was traditionally either unknown althogether or only resorted to in very exceptional circumstances, e.g. where there are no children of the union. ... The suggestion therefore that customary marriage can be dissolved at the will of the husband could scarcely be further from the truth."[54]

The relative stability of the African family pattern even within the polygamous structure bears this point very well.[55]

The misconception about African divorce seems to lie on the fact that its procedures are different from those of the western world. As a noted authority put it, "there are, however, two factors which certainly distinguish divorces in customary law and the English or European law. The first is the provision in customary law for conciliatory machinery and arbitration and the fact that if this fails the marriage can be dissolved by interfamily arrangement without judicial pronouncement. The second is the fact that in most customary laws, although there must be grounds for divorce, the grounds are not as rigid and clear cut as those recognized in English law.[56] Not only have there been misconceptions as regards the nature of African divorce in particular and African marriage[57] in general, but the degradation of the status of women in traditional African societies has been greatly exaggerated. As Paulme said, "In fact research into actual practices may indicate that the position of the woman in the traditional African society is not so disadvantageous as it is generally believed.[58]

Lloyd goes even further and states that, "the traditional rights of Yoruba women -- to enter into contracts, (easy divorce), for instance -- exceed those granted in most western societies until very recently."[59]

If the position of women is not as disadvantaged as has often been stated, one wonders as to why it is stated as one of the major reasons for reform of the marriage and divorce laws. One theory, which appears to be sound, is that the whole concern with the emancipation of women is simply a concern to find a means to undermine the prevailing patterns of the traditional chiefs by the new elites.[60]

4. CRITIQUE OF LEGAL REASONS

The legal justifications given to support the movement towards uniform laws are varied and wide-ranging and we have extracted those that are basic: symbolism, conflict of laws, certainty and traditional judicial process. We shall deal with each separately.

a. *Symbolism*

In the last section we saw how the fervent movement towards uniform laws in Africa was politically motivated. But in addition to any political value of uniformity the new nations of Africa look upon unity (uniformity) and

rationality, as Rene David looked upon them, as valuable not for political reasons, but as ends in themselves.

As Rene David said in connection with the codification in Ethiopia, "the decision to codify was based on the idea inheld in Ethiopia that codification in itself was progress, a desirable and even a necessary thing for the country."[61] This notion which I shall refer to as "symbolism" is shared by many governments and even though it is not clearly formulated, if it was made explicit it would consist of the following proposition: "the more a legal system is uniform, orderly and systematic, the more highly developed it is."[62]

This theory implies that one can identify higher and lower stages in the growth of law, and second that one can see in these stages a natural sequence or order".[63] Evolutionary theoreticians such as Sir Henry Maine and Max Weber share this fundamental belief of natural sequence but differ as regards the criteria to be used.

Sir Henry Maine bases this natural sequence on the "movement from status to construct."[64] Max Weber on the other hand attributed this evolution to rationality. To Max Weber modern law is both formal and rational, that is, it takes into account only unambiguous general characteristics of the facts of the case and it is explicity based on general principles."[65]

Since under customary law most of a person's rights and obligations depend on his family status, the implication of Sir Henry Maine's theory is that African customary law is underdeveloped. Similarly, even though Weber does not boldly state that the rational is superior to the irrational (primitive customary) or that the irrational is a lower form of justice, as the irrational cannot be reduced to general principles there is room for a strong inference that the irrational is less suitable to the needs of the modern world.[66]

The view that customary law is underdeveloped is reinforced by legal scholars who describe or purport to describe the "modern" or developed legal system. Professor Galanter, for example, among the eleven traits which he lists as being characteristics of the modern legal system, includes uniformity. He states that "modern legal norms are uniform and unvarying in their application, the incidence of these rules is territorial rather than "personal", that is they are applicable to members of all religions, tribes, classes, castes and localities."[67]

These notions seem to add more fuel to the desire of many African nations "to create an illusion of progress and of doing something,"[68] and to propel them into launching massive codification projects.

b. *Conflict of Laws*

The second legal reason for the unification of law arises from the "particularistic" nature of customary law. As Sedler puts it, "if the pluralistic legal

system is to be retained, problems in the internal conflict of laws will be frequent, that is, what customary law is to be applied to those involving persons suspect to different systems of customary law which at present is intensified by increasing migration and contact between members of different tribal groups?[69] Similarly, Allot considers "choice of law" problems as the strongest argument in favour of unification.[70]

True, there are many potential situations which could well give rise to internal conflicts. Conflicts can arise between territorial law and customary law, between customary law and Islamic law and so on.[71] However, despite all these potential areas of conflict most African countries do not have a serious problem caused by multiplicity of laws. Twinning, for example, remarked, "I was surprised when I came to East Africa to find local advocates and judges denying that conflicts of law presented many practical difficulties. In fact so unimportant do they consider the matter that the Kenya Council of Legal Education has refused to prescribe conflicts as even an optional subject in the Local Advocates Examination."[72] Twinning proceeds to point out that the attitude was justified as shown by the few cases which were treated as raising conflict problems.[73] This view as regards the insignificance of conflict problems in East Africa seems to be also true for Nigeria. As Smith stated, "My own experience with the customary courts of Northern Nigeria in the period 1963-65 suggests that, with regard to choice of law problems, the medium is the message. In the mixed courts (which heard disputes between litigants of different tribes) one would have expected "rules of law" to have been clearly articulated. ... But not only did one not find choice of law rules for resolving such conflicts, one seldom encountered a situation where rule was pitted against rule."[74]

Some reasons have been forwarded to explain this rather paradoxical situation. Twinning states, "I find it difficult to get a satisfactory explanation as to why these problems do not thrust themselves more obviously on the courts. I should surmise that partial answer is as follows: If an African and a non-African are disputing over e.g. a contract or tortious matter, the dispute cannot go before the local courts, unless the non-African consents to jurisdiction, which is rare. In the non-African court territorial law applies unless both parties are Africans. This cuts out a lot of potential conflicts and problems as far as the non-African courts are concerned. The general practice of the local courts seems to be to apply the lex fori, willy nilly, the lex fori often being better characterized as the lex judicius -- the law the judge is familiar with.[75] Smith, on the other hand, submits that "the operation and conflict of law rules is only made possible by a mode of procedure in which pleading has become a technical and refined art,[76] and since this is not present in the customary courts the problem does not arise.

If the conflict of law problem is as insignificant as the above discussion suggests, we find it difficult to make it the "strongest argument for unification."

c. *Lack of Certainty*

Another legal reason that has been submitted is the fact that uncertainty of customary law leads to unnecessary and dilatory litigation and it has been argued that "there is an immediate need for greater certainty to facilitate judicial administration, ease the problem of ascertainment and provide accurate information upon which litigation may be based."[77]

A number of factors have contributed to the problem of uncertainty of customary law. The staffing of the superior courts with expatriate judges with little or no knowledge of customary law was one factor. As Lucian Pye put it, "The fact that bewigged Englishmen could sit enrobed in a tropical climate and with all earnestness and patience seek to explain to natives the essence of their ancestral or tribal rules must have contributed in some degree to the universal reputation that British culture was singularly lacking in a sense of humour."[78]

However, even though it lessens the process, the appointment of African judges does not in every case solve the problem. "The existence of various bodies of customary law, substantially different, or even with only minor variations, made ascertainment of the law difficult, particularly in the absence of authoritative legal treatises and sizeable body of case law. In addition the very nature of customary law, unwritten, flexible and changing in response to new conditions and attitudes, required a continuing ascertainment in some areas of customary law.[79] Finally there was a major difficulty in sifting traditional standards and merely social norms in some areas.[80]

These characteristics were, however, overstated and at the early stages, for purposes of proof, customary law was treated as custom and courts applied the text of antiquity to it. But it soon became evident "that customary law is in very important respects different from English local customs and the test of antiquity for its ascretainment has therefore been abandoned. Nevertheless, examination of the validity of the recorded cases poses some problems that are not amenable to easy reconciliation with the view that customary law is law per se and not just a mere custom. For the courts, in their further attempts to grapple with the problem of ascertainment of customary law, took the view that customary law, if law at all, is foreign law and must be proved as fact.[81]

But as President Kwame Nkrumah said, "No law can be foreign to its own land and country, and African lawyers, particularly in the independent African states, must quickly find a way to reverse this judicial travesty."[82]

We certainly agree that this is a judicial travesty and moreover we are of the opinion that all the above mentioned difficulties with ascertainment and lack of knowledge on the part of expatriate lawyer or judge are weak bases from which to reject the law under which most of the population regulate their marriage, divorce, inheritance and land tenure.[83]

Besides, the difficulties of ascertainment can be corrected without taking such drastic action as unification. A short term answer would be the establishment of a machinery, as was done in Ghana and Nigeria, for the authoritative declaration or modification of customary law,[84] or in the alternative to empower the superior courts to follow the findings of traditional courts as to the existence of customary law.[85]

Possible long term solutions include the recording of customary law[86] or its incorporation into the main body of the law by the process of the taking of judicial notice.[87]

Although not a sufficient reason for the rejection of the various customary laws and the adoption of uniform laws, the unification of laws will definitely help to cut down judicial waste caused by the plurality or customary law. However, it is very dubious whether the adoption of uniform laws, given the present structure of African Societies, will help to stabilize the human relationship which is more fundamental than the question of ascertainment. Apparently, the adoption of uniform laws, at least those based on western legal systems, seem to create more instability by intensifying the uncertainty. As Lucian Pye stated generally "the more the Europeans insisted upon westernized legal system the more uncertainty there was in human relations and the more disputes there were which could not be readily managed."[88]

This has been even more so in the area of marriage and divorce law where the introduction of European substantive and procedural laws, as was done in the case of the Ivory Coast, [89] created more instability in the traditionally stable African family structure[90] by increasing the rate of divorce.

d. *Traditional Judicial Process*

"Generalizing about the traditional judicial process is dangerous, not only because there was variation depending on whether or not a particular society was one with strong central authority or was acephalous (without chiefs), but because the traditional rules of procedure and evidence varied even between similarly organized societies."[92] But features such as informality or reconciliation are not only frequently found but are its remarkable characteristics.

The main reason for the traditional judicial process emphasis on reconciliation is the prevalence of the face-to-face, or what is known as the "multiplex" relationship.[93] The parties are often entwined in several relationships and in order to prevent the breaking of such relationships and thereby prevent extensive damage to the other activities of the disputants and continue the community solidarity and equilibrium, the courts tend to be conciliatory bodies.[94]

Reconciliation, especially in the area of marriage and divorce is essential and the traditional judicial process with its absence of highly technical proce-

dural rules and written pleadings gave the traditional courts a freer hand to probe into the sources of the litigation and gave the parties and witnesses more than a fleeting opportunity to express themselves on the issues".[95] It thus appears that the traditional process by its emphasis on informality and flexibility facilitated rather than hindered this process and ought to have been commended rather than be criticized.

The criticisms made against the traditional judicial process in most instances have been based on overexaggerations of this emphasis on reconciliation and the misunderstanding of its role in the western legal systems. As Van Velsen said, "the majority of writers on this topic would appear to start from the assumption that judgement by agreement and judgment by decrees are mutually exclusive alternatives. And by concentrating on the conciliatory aspects of African courts, they tend to ignore the judge's task of applying laws."[96] On the other hand by creating this artificial dichotomy and by their almost exclusive concentration on the superior courts, ignoring the courts at the bottom of the hierarchy such as the magistrates courts, the small claims courts and so forth[97] the authors intensify the contrasts even more.

To get the proper perspective one should more clearly distinguish between the various stages of the African and any other judicial process. "In both African and European societies pressure tends to be applied to disputants to compromise over their disagreements and not to worsen and disrupt social relationships by going to court."[98]

The fact that a dispute has resulted in a court action is not only an indication that the parties want to fight it out and are therefore less amenable to reconciliation but depending on the hierarchy of the court, i.e. the higher it is the less the judges are likely to be involved in the litigants relationships and therefore the less likely they are to feel the pressure for reconciliation.[99]

In addition one must bear in mind that the aim of litigation may vary from one society to another. For example, the frequency of disputes which is such a striking feature of Tonga society rather than being a sign of social disintegration serves, like ritual and ceremonies elsewhere, to analyze and publicly reassert personal relationship and rights.[100]

Put in its proper perspective, we believe that the African traditional judicial process emphasis on reconciliation is generally beneficial to the whole legal system but even more so in the area under consideration--laws of marriage and divorce.[101]

5. CONCLUSION

In this paper we have attempted, very briefly, to discuss the major reasons for unification and to examine their validity within the limited scope of marriage and divorce laws.

We focused our attention mainly on the issue of the desirability of unification and for this reason our analysis was mostly theoretical. To the objections which we have already raised one may add a rather pervasive pragmatic objection--Africanization. Today when the new elites proclaim the African personality and heritage it would not only be ironic but a great loss to the heritage of African nations to halt the flowering of the cultural diversity with which they are endowed, by standardizing their marriage and divorce laws. But in addition to the theoretical objections that we discussed, proposals for uniformity pose the question of how far it is possible to impose and operate a unified law in societies which are diverse and fragmented. It is generally agreed that the more the law attempts to deal with expressive activities the greater the resistance which it will encounter. Marriage and divorce are a reflection of perhaps some of the most deeply ingrained mores and any directed change in this area is hence bound to create strong resistance. The abortive history of the Ghana Bill clearly demonstrates the difficulties of trying to introduce revolutionary changes in the laws of marriage.

In view of the theoretical objections and the immense problems of implementation we are inclined to suggest that in the area of marriage and divorce rather than uniformity, the achievement of certainty should be sought.

FOOTNOTES

1. Kuper and Smith, *Pluralism in Africa* (1971), p. 21.
2. Kuper, H., "Some Aspects of Urban Plural Societies," In Lystad (ed.), *The African World: A Survey of Social* Research (1965), p. 113.
3. Allot, A., "The Unifications of Laws in Africa," 16 *A.M.S. of Comp. Law* (1968), p.61
4. Ibid., p. 54-55
5. Robert, T. *Judicial Organization and Institutions of Contemporary West Africa*: A Profile (1966), p.1
6. Schiller, A., "Law" in Lysted (ed.), *The African World: A Survey of Social Research* (1965), p. 176. For a new type of pluralism created as a result of the ecclectic approach to codification adopted by some African states and the side by side existence of two European lawscommon and civil law -- e.g. Somali Republic, see Sand, P., "Current Trends in African Legal Geography," 5 *African Law Studies* (1971)
7. Cotran, E., „The place and Future of Customary Law in Africa," *East African Law Today*, p. 72
8. It is worth to note that the commitment to have uniform laws was made back in 1953 when the judicial advisors conference recognized as a general proposition that "in principle any country shall have one body of general law and one judicial system applicable to all persons."
9. Cotran and Rubin, *Readings in African Law* (1970), vol. 1, p. xxii-xxiv.
10. Other terms used include terms such as rationalization, assimilations, merger and suppression, etc. See Cotran and Rubin, cited supra at note 9.
11. Allot, A., "Towards the Unification of Laws in Africa," 14 *Intl. and Comp. L.J.* (1965), p. 366.
12. Cotran and Rubin, cited supra at note 9, p. xxiii.
13. McLain, W., "Recent Changes in African Local Courts and Customary Law," 1 *Howard L.J.* (1964), p. 192.

14. The integration of courts, in Ghana and Tanganyika dramatically illustr ates the direction in which policy has been moving in the new states with respect to the administration of justice.

15. Allot, A., "Future of African Law," in Kuper and Kuper (ed.), *African Law and its Adaptations* (1965), p. 224.

16. Schiller, A., "The Changes and Adjustements which should be brought to the present legal systems of Africa to permit them to respond more effectively to the new requirements of the development of the countries," in Andreas Tunc (ed.), *Legal Aspects of Economic Development* (1917), p.197.

17. Friedman, L., "On Legal Development," 24 *Rutgers U.L. Rev.* (1969-70), p. 53.

18. In addition to these major reasons there is one additional reason -- religious. Among the Mulsim countries there is a strong pressure to adopt a law which is clearly Islamic and to reject that part of Western and traditional legal inheritance which contradicts Muslim beliefs and customs. On the other hand, Ethiopia has gone the opposite way. The almost complete suppression, at least in the letter, of Islamic law in the civil code and the compulsory requirement of monogamy represent the assertion of Christian paramountcy. For detailed treatment see: Allot, A. cited supra at note 3.

    Guttman, "The Reception of the Common Law in the Sudan," 6 *Intl. and Comp L. J.* (1957) p. 415.

19. Seidman, R., "Law and Development: A General Model," 6 *Law and Society Review* (1972), p. 314.

20. Sedler, A., "Law Reform in the Emerging Nations of Subsaharan Africa; Social Change and the Development of the Modern Legal System," 13 *St. Louis Un. L.J.* (1968), p. 233.

21. Sperry, D., "Law as a political process in a plural society and problems of personal and community response: A case study of directed politico-legal development among the Galla of Ghimbi District, Wellega Province, Ethiopia," Ph. D. Dissertation, University of Minnesota.

22. Sedler, cited supra at note 20, p. 209.

23. In this connection Dr. T.O. Elias said, "Our concern (for the unification of laws) arises out of the fact practitioners, foreign investors and students of our laws would find it very much easier to cope with a legal system or a series of legal systems that were based on at least fairly uniform principles than for them to have to grapple with competing and often complex jurisdictions within the country." Elias (*ed.*) *Law and Social Ch.ange in Nigeria* (1972).

24. Lloyd, C., *Africa in Social Change* (1972), p. 171

25. Hirschman, A., *The Strategy of Economic Development* (1958) p. 16. The extent to which this individualism can be out-stretched can be inferred from the story of John D. Rockefeller. When he was asked the secret of business success he replied, "Never let your wife know how much money you are making". And as a matter of fact, his wife was still doing her own laundry when he was already a millionaire many times over. See Kamarck, *Economics cf African Development* (1971 ed.), p. 69

26. Hirchman, cited supra at note 25, p. 17.

27. Karmack, *Economics of African Development* (1971 ed.), p. 64.

28. Hagen, E., *The Economics of Development* (1968), p. 225-226

29. Karmack, cited supra at note 27, p.64-65

30. Ibid., p. 64-65

31. Ibid., p. 66.

32. Myrdal, G., "The use of Law in Emerging Society: The Soft state in Underdeveloped countries", 15 *UCLA L. Review* (1968). p. 1119.

33. The loyalty and the lifetime commitment between an individual and his company: the fact that an employee will not move to accept a better job and the company is committed to retaining him until retirement except in instances of the most extreme provocation, and will not lay him off during economic slack causing a downturn in sales, do bear great similarity with the extended family system of Africa.

34. The reasons why the ego-present image of change is inimical to development are several. In the first place, success is conceived not as a result of the systematic application of effort and creative energy, combined perhaps with a little bit of luck, but as due either to sheer luck or to the out witting of others through careful scheming. The immense popularity of lotteries in the Latin American countries and the desperate intensity of the political stru ggle testify to the strength of the belief in, and desire for, change through sheer lack or through scheming respectively.

    These attempts to reach success through various shortcuts abviously diminish the flow of energies into activities that will stimulate economic development. But an exclusively egofocussed conception of progress will act as a drag on economic growth in several ways. Most fundamentally it tends to obstruct a series of progresses that are part of the enterpreneurial function.

    Hirschman, cited supra at note 25, p. 16.

35. Hagen, cited supra at note 28, p. 26.

36. The Ivory Coast in 1964, comprehensively revised its marriage laws in an atte npt to promote the nuclear family structure in the nation. Included in its legislation was the abolition of polygamy and brideprice. See Salaecise, J., *An Introduction to the Law of French West Africa* (1969)

37. Dunning, H., "Law and Economic Development in Africa: The Law of Eminent Domain," 68 Col. L. Rev. (1968), 1287.

38. Huntington, P., *Political Development and Political Decay* (1967), p. 287.

39. Sperry, cited supra at note 21, p. 20-21. In one case this would have been achieved by adoption of the customary law. In the case of the Somali Republic, the northern and sourthern halves of the country were divided by differences in the general law, yet they were united by a common subjection to the Sharia and to Somali customary law and the indigenous laws would accordingly provide the basis of a national law. See Allot, cited supra at note 11, p. 380.

40 Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce (1968), p. 14-15

41. Twinning, W., *Place of Customary Law in the National Systems of East Africa* (1964), p. 19.

    A similar view was expressed by Castelnuovo when she said, "Some sixty years of colonial rule and seven years of independence have produced a limited import in terms of penetrating these societies with respect to developing kinds of beliefs and views (regarding authority, delegation, representative bodies) which are needed to support this larger political unit".

42. Pye, L., *Aspects of Political Development* (1966), p. 116, In this connection see Morrein, N., *The Ethiopian Empire -- Federation and Laws* (1954) for a discussion of the role of consular courts.

43. Elias, T.O., *The Nature of African Customary Law* (1956), p. 3

44. Similarly Allot, cited supra at note 3, mentions that there were two factors that diminished legal disunity. At the territorial level the variations between different customary laws were not so great in many instances as to cause serious difficulty, as with the dialects of a single language, so sub-species of customary laws tended to merge or agglomerate into larger units under pressure of a common external administration and the weakening away of tribal difference by intertribal contact and mobility.

45. Smith, M.G., "The Sociological Framework of Law,: in Kuper and Kuper (ed.), *African Law and its Adaptations* (1965), p. 26. There are two quite antithetical traditions as regards to the nature of societies characterized by pluralism. According to the first -- conflicting model -- the stability of plural societies is seen as precarious and threatened by sharp cleavages between different plural sections. The second tradition equilibrium model -- offers a conception of the pluralistic society, in which the pluralism of the varied constituent groups and interests is integrated in a balanced adjustement which provides conditions favourable to stable government.

The role of law will to a great extent depend on which of these two views one adopts.

46. Sperry, D., cited supra at note 21, p. 314.
47. Ibid., p. 99
48. Castelnuovo, S., *Legal and Jodicial Integration in Tanzania* (1970) p. 186.
49. Kuper and Smith, cited supra at note 1, p. 15.
50. Sedler, cited supra at note 20, p. 237-38.
51. Anderson, J.N., *Islamic Law in the Modern World* (1959), p. 63.
52. Twinning, cited supra at note 41, p. 19-20.
53. Elias, T.O, *The Nigerian Legal System* (1963), p. 298.
54. Cotran, E., "The Changing Nature of African Marriage," in Anderson (ed.), *Family Law in Asia and Africa* (1968), p. 19-20.
55. Sedler, cited supra at note 20, p. 240.
56. Cotran, E., cited supra at note 54, p. 20.
57. African marriage was described as wife purchase, concubinage or customary union and the very fact that it was a form of marriage was doubted. It is thus not amazing to hear Cotran state, "I make no apology that African marriage has sufficient in common with marriage in other parts of the world (including European to warrant the usage of describ ing it by the same general term marriage".
58. Paulme, D., *Women of Tropical Africa* (1962).
59. Lloyd, C., cited supra at note 24, p. 179.
60. For a discussion of how emancipation has been used to undermine the backbone of a traditional community's political cohesion and hasten the grafting and assimilation of the new Soviet authority -- see Massel, "Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia," 2 *Law and Soc. Rev.* (1967-68).
61. David, R., "A Civil Code for Ethiopia," 37 *Tul. L. Rev.* (1962-63), p. 188.
62. Friedman, cited supra at note 17, p. 53.
63. Ibid., p. 16.
64. Maine, H. Ancient Law (13th ed. 1890), p. 169-70. For criticisms of this view see Elias, *Nature of African Customary Law* (1956), p. 6. p. 282.
65. Weber, M., *On Law in Economy and Society* (Rheinstein, ed., 1954), p. 63-64.
66. Friedman, cited supra at note 17, o. 19-20.
67. Galanter, M., "The Modernization of Law," In Friedman and Macaulary (ed.), *Law and the Behavioral Sciences* (1969) p. 970. The listing has been criticized by several authors. Seidman cited supra at note 19 made a rather succinct criticism when he said, "Had he (Gallanter) found that all of them used a decimal system in numbering statutes, would that that become a characteristic of a "modern" system.
68. Allot, cited supra at note 3, p. 52.
69. Sedler, cited supra at note 20, p. 209.
70. Allot, A., *New Essays in African Law* (1970).
71. Twinning, cited supra at note 41, p. 24.
72. Ibid., p. 74.
73. Ibid., p. 74.
74. Smith, D., "Man and Law in Urban Africa: A Role of Customary Courts in the Urbanization Process", 20 *Am.S. of Comp. Law* (1972), p. 240.
75. Twinning, cited supra at note 41, p. 24-25
76. Smith, cited supra at note 75, p. 238. In "Native Courts of Northern Nigeria: Technique for Institutional Development,: 48 B.U. Law Review (1968) the same author mentions that until 1943 the conflict between the individual's expectation that his personal law would be applied and the native courts inability to apply it was generally avoided because most strangers tended to settle in special quarters of the larger towns.

McLain, cited supra at note 13, p. 220.

Pye, cited supra at note 42, p. 120.

77. McLain cited supra at note 13, p. 212.
78. Pye, cited supra at note 13, p. 120.
79. Mclain cited supra at note 13, p. 212.
80. Elias, T.O., "Law in a Developing Society," in Nigerian *Law Journal* (1970), p. 20.
81. Ibid., p. 20.
82. Mclain, cited at note 13, p. 212.
83. Castelnuovo cited supra at note 48, stated that,, 80½ of the local laws case (in Tanzania) were decided according to customary law".
84. Woodman, R., "Some Realism about Customary Law: The West African Experience," *Wisc. L. Rev.* (1964), p. 128.
85. Daniels, E.W.C., *The Common Law in West Africa* (1964), p. 356.
86. Mclain, cited at note 13, p. 225.
87. Elias, cited supra at note 54, p. 28-29. In this connection see Art 14 (2) of the Evidence Act of Nigeria which provides "A custom may be judicially noticed by the court if it has been acted upon by a court of superior coordinate jurisdiction in the same area to the extent which justified the court asked to apply it in assuming that the person or class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration."
88. Pye, cited supra at note 42, p. 117. This experience seems to be borne out to a certain extent in the case of Ethiopia where the adoption of the civil code designed to end the uncertainty created by customary law appears to have intensified it See David cited supra at note 61, p. 203-204. Shack, W., "Guilt and Innocence: Problem and Method in the Gurage Judicial System," Gluckman (ed.) *Ideas and Procedures in African Law* (1969).
89. Salacuse, J., *The Legal System of French West Africa* (1969), p.
90. Cotran, cited supra at note 54, p. 16.
91. Ibid., p. 20
92. Mclain, cited supra at note 13, p. 196-97.
93. Van Velsen, J., "Procedural Informality, Reconciliation and False Comparisons", Gluckman (ed.) *Ideas and Procedures in African Customary Law* (1969), p. 148-49)
94. Castelnuovo, cited supra at note 13, p. 199.
95. Mclain, cited at note 13, p. 197. In this connection the absence of trained lawyers is a major factor contributing to flexibility of the process. See Gibbs, J., "The Kpelle Moot: A Therapeutic Model for Informal Settlement of Disputes," 33 Africa: *Journal of International African Institute* (1963), p. 5-6
96. Van Velsen, cited supra at note 93, p. 144.
97. Ibid., p. 139.
98. Ibid., p. 146.
99. Ibid., p. 149.
100. Ibid., p. 147
101. It was in realization of the advantages of informality that the participants at the conference "on the future of law in Africa" suggested the maintenance of the traditional courts and process.