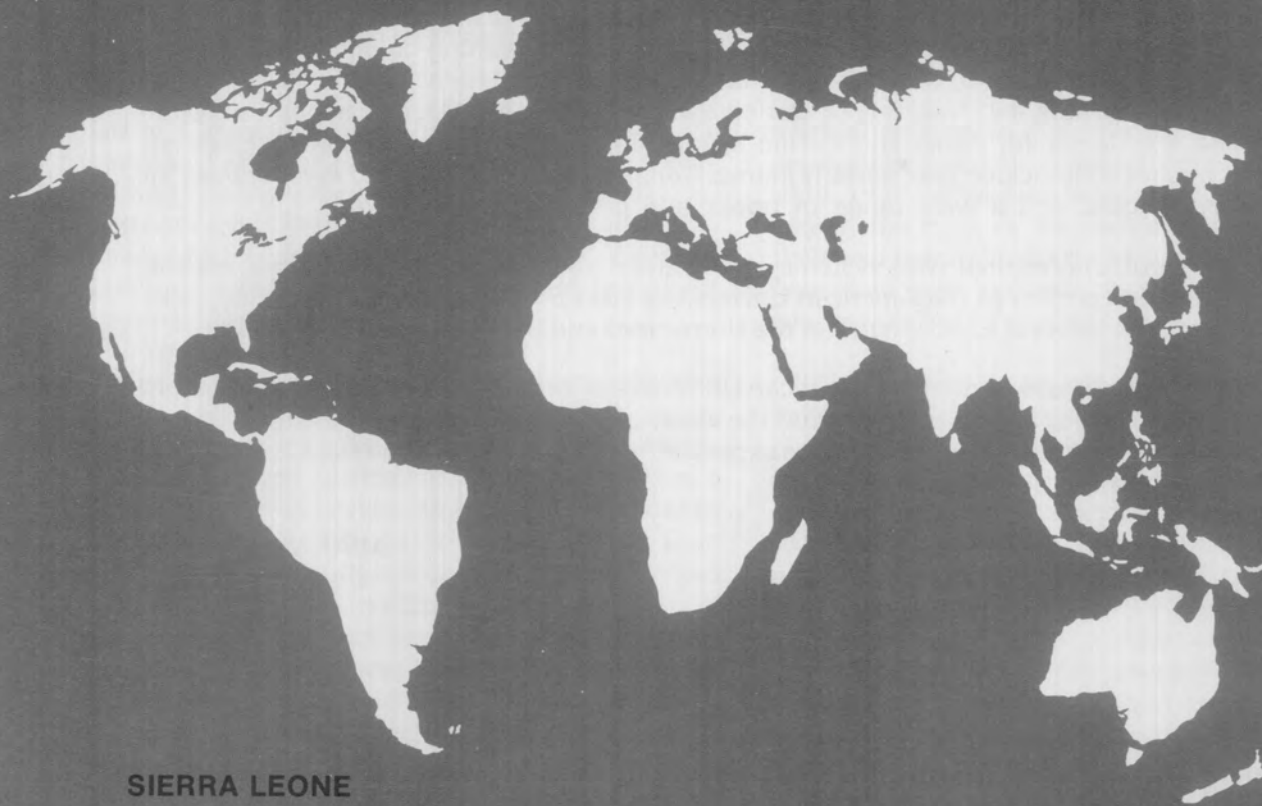




“Native” and “Non-Native” in Sierra Leone Law

by Barbara Harrell-Bond



SIERRA LEONE

The plurality of foreign and indigenous legal systems, in part a legacy of the colonial period, is increasingly disadvantageous to the “Native” population. Stress is especially evident in the areas of family law and of inheritance.

[BHB-1-'77]

Fieldstaff Reports

American
Universities
Field Staff

The American Universities Field Staff

P.O. Box 150, Hanover, NH 03755

THIS FIELDSTAFF REPORT is one of a continuing series on international affairs and major global issues of our time. Fieldstaff Reports have for twenty-five years reached a group of readers—both academic and non-academic—who find them a useful source of firsthand observation of political, economic, and social trends in foreign countries. Reports in the series are prepared by writers who are full-time Associates of the American Universities Field Staff and occasionally by persons on leave from the organizations and universities that are the Field Staff's sponsors.

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The American Universities Field Staff, Inc., founded in 1951 as a nonprofit organization of American educational institutions, engages in various international activities both at home and in foreign areas. These activities have a wide range and include writing on social and political change in the modern world, the making of documentary films (*Faces of Change*), and the organizing of seminars and teaching of students at the Center for Mediterranean Studies in Rome and the Center for Asian and Pacific Studies in Singapore. In addition to Fieldstaff Reports, publications include the quarterly journal *Common Ground*, *Fieldstaff Perspectives* for secondary schools, and a wide range of books and collected essays.

Fieldstaff Reports concerned with systems of education and their relations to values are the product of a joint project of the American Universities Field Staff and Brown University, with support from the National Endowment for the Humanities and the Rockefeller Foundation.

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Executive Director

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“NATIVE” AND “NON-NATIVE” IN SIERRA LEONE LAW

by **Barbara Harrell-Bond**

November 1977

One of the most profound challenges facing post-colonial African countries is that of enacting a body of culturally sensitive law. While there are many factors which have impeded progress toward legal reform since independence, probably the most serious stem from the effects of the restructuring of economic and status relations which developed and became entrenched during the period of colonial rule. The plurality of legal systems, in part a legacy of colonialism, has in some cases provided a legal foundation for these status differences. Thus comprehensive reform could well erode the privileges of certain groups within a society. Leaving aside the complicated problem of the application of Islamic law in a West African setting, and examining just one aspect of the imposition of a foreign legal system in Sierra Leone—the persistence of a legal distinction between “Native” and “Non-native”—exposes a range of problems that are intensifying as urbanization proceeds and educational and economic opportunities expand.

The Native/Non-native distinction is a reflection of the colonial legal and administrative system which originated early in the nineteenth century. The Sierra Leone Settlement, founded in 1787 as a refuge for freed slaves and their descendants, became a Colony of the British Crown in 1808. Over the years, many thousands of nonindigenous Africans were settled in villages on the peninsula of Sierra Leone. These Settlers had the status of British Subjects; English law was the basis for the administration of the Colony; and the Settlers were expected to conform to the pattern of social organization which the law reflected.

Land for the settlement had been purchased from local African rulers, and at the founding of the Colony there were a substantial number of indigenous Africans residing there. Because of migration and trading activities their numbers increased throughout the nineteenth and twentieth centuries.

By the turn of the century more than half the population of the Colony was from the hinterland. These Africans were referred to by both the British and the Settlers as “Aborigines,” but around 1890 the nomenclature changed. The Settlers became known as “Sierra Leoneans” and the indigenous population were called “Natives.” The Aborigines Branch of the Colonial Secretariat in Sierra Leone was renamed The Native Affairs Department in 1891.

By 1860 the city of Freetown had already contained distinct ethnic communities, each with its own administrative structure. Although the first attempt to incorporate them into the official colonial administration was in 1890, legislation regulating the ethnic communities was not enacted until 1905.¹ This legislation recognized, to some extent, the right of the communities to maintain their own cultural patterns and customary legal systems, and gave authority to their selected leaders, who were called “Tribal Rulers.”

“Non-native” by this time had become virtually a cultural category. “Non-natives” could no longer claim to be “pure” descendants of Settlers because from the earliest years of the Colony there had been considerable intermarriage between Settlers and the indigenous population. Conversion to Christianity and the attainment of English-based education were also mechanisms by which indigenous individuals “passed” into the Settler or Non-native community. The 1905 legislation acknowledged this cultural dimension by providing a legal instrument which enabled an individual to change his identity from Native to Non-native:

4. Any member of any tribe, over which a Tribal Ruler has been recognised under this Ordinance, who desires to cease to live or not to live under the system of tribal administration recognised by this Ordinance, shall apply to the Police Magistrate for an order of

exemption. At the hearing of such application the Police Magistrate shall hear any evidence advanced by the applicant or by the Tribal Ruler with respect to the application. If the applicant proves to the satisfaction of the Police Magistrate -

(a) That he possesses property which is kept in accordance with the regulations of the Health Authority and the Corporation, with respect to Sanitation, and in accordance with any Building Regulation prescribed by Ordinance, or made by the Corporation under any Ordinance now or hereafter in force, and

(b) That he makes reasonable contribution toward some system of Education, or

(c) That there are any reasons which, in the opinion of the magistrate, made it desirable that the applicant should not be affected by the tribal system of Administration aforesaid

the Magistrate shall make an order of exemption in favour of the applicant, and thereafter the applicant shall not be bound by any regulations as aforesaid (Sec. 4, No. 19 of 1905).

In 1932, however, legislation was enacted which completely revised the Tribal Administration system² omitting this provision:

4. Every member of a tribe resident or temporarily staying in Freetown shall be subject to the recognised Tribal Headman of his tribe:

Provided that nothing in this section contained shall affect the rights acquired by any member of a tribe before the commencement of this Ordinance (sec. 4, No. 48 of 1932).

From the legal point of view, therefore, the great majority of Natives remained within the tribal administration system. The government was concerned about controlling migration into the Colony, and it also recognized the inability of

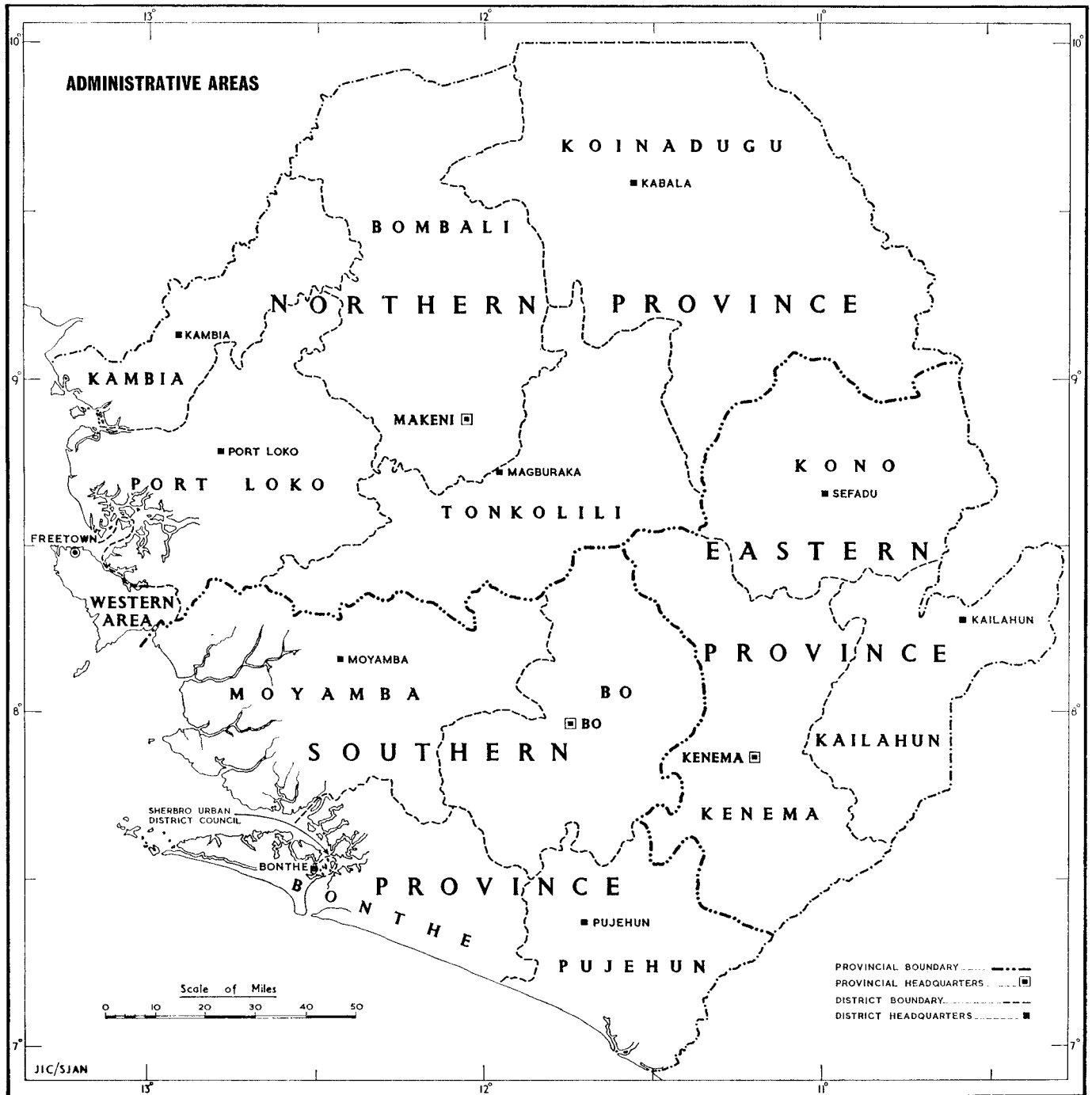
English-based law to deal with the kinds of disputes and other legal problems which arose within the ethnic communities.

Most of the Native population in the Colony were prevented from assimilating to the Non-native culture because the educational facilities were inadequate to meet the needs of the growing urban population. Moreover, the educational system required parents to pay school fees which the poorer Native families were unable to afford. Because the illiterate migrant population was relegated to unskilled and poorly paid employment, they were also unable to acquire the economic position which would have allowed them to emulate or affect the "style of life" of the elite. Despite these obstacles, some Natives did succeed in obtaining the education and wealth necessary to compete within the Non-native system, but the Non-natives continued to be dominant in governmental, educational, and professional employment. This situation has only recently begun to change.

The legal categories "Native" and "Non-native" have been retained even under successive African administrations since independence in 1961.³ In general, retention of the distinction puts Natives at a legal disadvantage, particularly if they reside in the Western Area (see map). There has never been provision for the administration of customary law there, although the great majority of the residents continue to adhere to traditional cultural patterns. The Native population does not, for the most part, trust the English-type courts which administer statutory law to deal fairly with their cases. As a result, a large number of unofficial, customary courts have developed.⁴

The greatest disadvantages suffered by Natives are in the area of family law. During the nineteenth century there was no provision for Natives to marry according to statutory law and the colonial government resisted any suggestion that marriage by "native law and custom" be recognized. Pressure from missionaries resulted in the extension of the Christian Marriage Act to allow Natives to marry under its provisions, as the hallmark of conversion was the acceptance of monogamous marriage, but special restrictions were placed upon them.⁵ While the debate concerning whether a marriage by customary law should be an impediment to a marriage under the Christian Marriage Act was inconclusive,

The Sierra Leone Colony was formed in 1808 from lands purchased in 1787 for the Province of Freedom, a philanthropic venture, and acquired over the next two decades by the Sierra Leone Company, which aimed to replace the slave trade with "honest industry." The Colony occupied an area defined by today's Western Area. The remaining territory came under colonial-type administration only after the British declared a Protectorate over the hinterland in 1896.



Source: J.I. Clarke, *Sierra Leone in Maps*, University of London Press, London, 1966, p. 29.

it was decided *not* to recognize marriages by native law and custom.⁶ Nothing should be done, the legislation's authors agreed, "... to give the Natives ground for thinking that their marriage and the white man's marriage are on a par."⁷

There was a further reason for not recognizing customary marriages, and this was to protect the interests of the Non-natives. The same government document pointed out that many Non-natives "... would be placed in a very awkward position if the practice of having a Xtian [sic] wife in Freetown and native wives in the Protectorate were made a penal offence."

Although customary union had been given implicit recognition in the provinces—still excluding the Western Area—through provision for marriage registration,⁸ it was only in 1965 that recognition of customary marriage appeared in the statutes. The Christian Marriage (Amendment) (No. 2) Act, 1965, made a prior customary union an impediment to a statutory marriage under its provisions. The Civil Marriage Act was also amended in 1965 to allow, for the first time, Natives to marry under its provisions although, again, special conditions were included which applied only to them. The reformed Civil Marriage Act did not, however, make a previous marriage by customary law an impediment to a statutory marriage. Moreover, the definition of bigamy has not been reformed and this section states that "For the purpose of this section a marriage made in accordance with native law and custom shall not be deemed to be a marriage."⁹ The result of these conflicts in the laws is that customary marriages have virtually no legal standing under statutory law. In 1975 provision for the registration of customary marriage was extended to the Western Area for the first time in the history of Sierra Leone.¹⁰ One of the principal disadvantages for Natives married under customary law is that the English-type courts can provide no statutory protection for a married woman or her children who are deserted by the husband and father.¹¹

Another disadvantage for a Native married according to customary law arises under the Criminal Procedure Act (No. 32 of 1965). A person who is party to a marriage which has been contracted as the voluntary union for life of one man and one woman to the exclusion of all others may not be compelled to give evidence for the defense or

prosecution when a spouse has been charged with an offense. Thus Natives who are married according to customary law, marriages which are potentially polygamous, may be compelled to give evidence when a spouse is charged with an offense.¹²

The laws governing inheritance have similar potential for placing the Native population at a disadvantage. Even the Administration of Estates (Amendment) Act 1975 (No. 16 of 1975), perpetuates the categorization of the population of Sierra Leone into "Native" and "Non-native." Subsection 3 of Section 1 of the amendment reads:

(3) Where the District Officer, or the Paramount Chief of the Chiefdom concerned or Tribal Headman certifies that there are no known persons entitled under customary law to the balance of the estate and there appears to be any person or persons who were dependent on the deceased or who would have been entitled had the deceased been a Non-native, the Minister may direct the Administrator and Registrar-General to pay the balance of the estate to such person or persons in such proportions as he may think equitable.

In brief, the inheritance rules for Non-natives in Sierra Leone follow English law for which the official date of reception was January 1, 1880 (Joko Smart 1970). The estates of Natives are governed by customary law, the rules of which have never been recorded. When a Native dies intestate the Administrator and Registrar-General are instructed by law to ascertain the customary law and the names of persons entitled to the balance of the estate. This information is to be elicited from "... the District officer of the area, or the Paramount Chief of the Chiefdom concerned, or the Tribal Headman of the tribe to which the deceased belonged...." (Subsection 2, Sec. 1, No. 16 of 1975).

In contrast to other West African countries, marriage under the Sierra Leone statutes does not alter the personal law of individuals with regard to inheritance. An individual's personal law is determined by his ethnic identity at birth and not by his place of birth or domicile. A Native domiciled in the Western Area is subject to customary law and a Non-native living in the provinces is subject to statutory inheritance law. Yet the definition of Non-native remains ambiguous. Assumption of the

identity of a Non-native appears to be associated with long residence and property interests in the Western Area, some consanguineous or affinal tie with a Westernized elite family, affiliation with Christianity, Western education, and the practice of monogamous, statutory marriage. Thus the application of the terms "Native" and "Non-native" in determining personal law is considerably more arbitrary in practice than was intended by the legislation.

The personal law of Non-natives is statutory, English-based law, and the rules, as has been noted, follow the English pattern. The personal law of Natives is the customary law of their tribe, and, although this law has never been recorded, in principle the property of the deceased is devolved to the head of the family. The wife and dependents of the deceased become the dependents of the head of the family. Inheritance problems are particularly acute in cases where the deceased has been a party to a marriage between a Native and a Non-native. When a Native marries a Non-native under statutory law, upon his death the Native's estate must devolve according to customary law, which means that responsibility for the wife and children is passed on to some male member of the husband's family who serves as the head of the family. The wife may not inherit money or property from her husband. If customary law were to be strictly applied, the husband's relatives would not be obliged to recognize the statutory marriage of their son and could thus avoid the responsibility for maintenance.

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

When a Non-native man married to a Native woman dies intestate, under statutory law the wife

will receive that proportion of his estate to which widows are entitled. If the Native wife has property and dies intestate before her husband, her estate should be administered under customary law. Again according to a strict interpretation of customary law, the marriage would not be recognized if the wife's family had not received the traditional marriage payments from the husband or his family.

Generally, however, a customary law is *not* strictly followed and a variety of compromises are worked out in practice. In one case, for example, a Native man was married under statutory law to a Non-native woman and also had other Native wives whom he had married under customary law. His property was located in the Provinces and he had money in a bank account. The Administrator-General decided to treat the Non-native wife as the "principal" wife—despite the fact that under customary law in Sierra Leone there is no such concept—thus giving her the largest share of the estate. He concluded that the money in the bank account was under the jurisdiction of statutory law and so assigned this portion of the man's estate to the Non-native wife. The rest of the estate devolved according to customary rules. There was, however, no legal basis for such a division of the property, as all the property of a Native should be devolved according to customary law.¹³

None of these cases has yet been contested in court, although the possibility of a successful contest is evident. Marriages between Natives and Non-natives are increasingly common and it is predictable that the problems of inheritance will increase. Moreover, the Native who has married according to statutory law and who wishes his wife and children to inherit his estate, avoiding its distribution to his patrilineage, may insure their protection only by making a will. Despite its reformist intent, moreover, the most recent legislation—amendment no. 16 of 1975—which included Tribal Headmen among those responsible for determining the rightful heirs of a Native who dies intestate, does nothing to relieve the contradictions in the legal system which were introduced by the British in the nineteenth century.



NOTES

The general legal and historical background for this Report is presented in detail in the following books and articles:

Harrell-Bond, B.E., *Modern Marriage in Sierra Leone: A Study of the Profession Group*, The Hague, 1975.

_____, Howard, A., and Skinner, D.E. *Community Leadership and the Transformation of Freetown (1801-1976)* The Hague, 1977.

Joko Smart, H.M., "Sierra Leone," in *Allott's Judicial and Legal Systems in Africa*, ed. A. Allott, London, 1970.

* * * * *

1. Tribal Administration (Freetown) No. 19 of 1905.
2. Tribal Administration (Colony) No. 48 of 1932.
3. The Interpretation Act, 1971 (No. 8 of 1971).

4. For a discussion of the customary courts and their evolution, see Harrell-Bond, Howard, and Skinner, *Community Leadership and the Transformation of Freetown (1801-1976)*, The Hague, 1977, Chapter 7.

5. Cap. 95, Sec. 3.

6. Cap 95, Sec. 17.

7. CO 267/472/1904, Despatch No. 157.

8. Harrell-Bond 1975: 92-3.

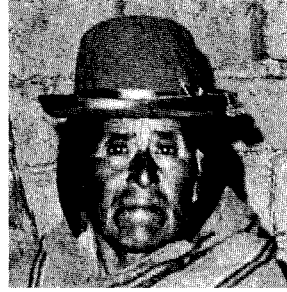
9. The Civil Marriage Amendment No. 2 Act, 1965, Cap. 95, Sec. 16.

10. The Tribal Administration Western Area (Amendment) (No. 2) Act, 1975.

11. The Woman's Maintenance Act, Cap. 10.

12. Criminal Procedure Act (No. 32 of 1965) Sec. 86 and 87).

13. Cap. 45, Sec. 43.



FACES OF CHANGE

The American Universities Field Staff announces the release of a series of 27 documentary films entitled **FACES OF CHANGE**. The films focus on people under a variety of ecological conditions and on their aspirations and beliefs. The roles of women, education, social and economic systems, and the effects of modernization on values are themes explored in each of five rural settings—Bolivian highlands, northern Kenya, northern Afghanistan, Taiwan, and the Soko Islands off the China Coast.

In the Field Staff's multidisciplinary effort to analyze whole societies, the medium of film has proved a superb ally. The production of a film series that touches on the universals of the human condition reflects the organization's long-time preoccupation with social comparison. Working in tandem, using neither scripts nor professional actors, social scientists and film-makers have sought to capture a sense of truth that would not only lead to an understanding of unfamiliar cultures, but also cause Western audiences to ask questions about their own society. At a prerelease screening the films were described as "a rare combination of scholarship and art."

Twenty-five of the films were made over a period of three years under a grant from the National Science Foundation. Produced by Dr. Norman N. Miller, the completed films were made from a total of 85 hours of 16 mm color film footage from the five locations. The National Film School in Beaconsfield, England, provided facilities for editing and finishing the films. "Women in a Changing World" was a co-production with the International Planned Parenthood Federation.

An additional grant from the National Science Foundation has made possible the preparation of printed materials to accompany the films. Based on information gathered by the Field Staff's area representatives, these include basic documentation, interviews, biographies of key persons in the films, charts, tables, and maps. The materials are intended to complement the observational approach used in the filming and help answer questions raised by viewers. Like the films, the printed materials will be available to educational institutions, libraries, and other interested organizations and individuals.

For sales, rentals, and additional information, contact the distributor, Wheelock Educational Resources, P.O. Box 451, Hanover, New Hampshire 03755 (telephone 603/448-3924).

FILM DESCRIPTIONS ON REVERSE



KENYA

KENYA BORAN I and II

A growing town and a new road encroach upon the territory of a once isolated desert people. Two fathers and their sons confront difficulties between old ways and new. The film leads to speculation on the outcome of their choices. (33 min./33 min.)

BORAN HERDSMEN

The Boran of northern Kenya have time-honored solutions for the problems associated with their dependence on cattle for a living. Direct government intervention and the indirect impact of modernization are changing the old patterns. How will the changes be accomplished and what effects will they have? (17 min.)

HARAMBEE ("Pull Together")

Harambee, Kenya's Independence Day slogan, means "pull together." But the ideal of a united Kenya is still a new concept for formerly isolated peoples in the north. Their accommodation to the Harambee's festivities suggests some of the difficulties of changing long-established beliefs. (19 min.)

BORAN WOMEN

The availability of education and other aspects of modernization are changing Boran women's attitudes even while they maintain their traditional and influential roles in a herding culture. (18 min.)

AFGHANISTAN

AFGHAN VILLAGE

A collage of daily life in Aq Kupruk builds from the single voice that calls townspeople to prayer, the brisk exchange of the bazaar, communal labor, and the uninhibited sports and entertainment of rural Afghans. (45 min.)

NAIM AND JABAR

The hopes, fears, and aspirations of adolescence are expressed in the close friendship of two Afghan boys. With intimate understanding, the film-makers and their subjects have produced a film rich in fact and themes of universal concern. (50 min.)

WHEAT CYCLE

The people and their labor are bound to the land in the cycle of activities from the sowing to the harvesting of wheat. Without narration or subtitles, the film conveys a sense of unity between the people and the land. (16 min.)

AFGHAN NOMADS: THE MALDAR

At dawn the caravan descends on Aq Kupruk from the foothills of the Hindu Kush. In their camp and in commerce with the townspeople, the *maldar* reveal the mixture of faith and distrust that have kept nomads and sedentarists separate yet interdependent over the centuries. (21 min.)

AFGHAN WOMEN

The words of the women and the rhythm of their lives in seclusion suggest both satisfying and limiting aspects of the women's role in an Afghan rural community. (17 min.)

CHINA COAST

ISLAND IN THE CHINA SEA

Tai A Chau is home for both farmers and fishermen, who live aboard small junks and use the island as a permanent harbor. The daily routines of Mr. Wong, a fisherman, and Mr. Ng, a farmer, are representative of their respective problems of survival and hopes for the future. (33 min.)

HOY FOK AND THE ISLAND SCHOOL

A fourteen-year-old boy living with his family in a fishing junk near a small island in Hong Kong territory reflects on his visits to an ancient harbor town, on his experience in school, and on his future. (32 min.)

CHINA COAST FISHING

The traditional "floating population" who fishes Chinese coastal waters from family-sized junks based in Hong Kong harbor is in competition with salaried fishermen using motorized boats. The combined effect of education and an increased integration with shore life is putting further strain on old ways. (19 min.)

THE ISLAND FISHPOND

The need for a new freshwater fishpond focuses the island community, representatives of the Hong Kong government, and a single entrepreneur on an effort to increase productivity—and economic well-being—on Tai A Chau. (13 min.)

THREE ISLAND WOMEN

A young, a middle-aged, and an old woman all agree that life on a small Chinese island in Hong Kong waters is better for them than in the past. Participating fully in the island's decision-making and economic life, they also share equally with men the rigors of manual labor. (17 min.)

TAIWAN

PEOPLE ARE MANY, FIELDS ARE FEW

Three farm families, engaged in Taiwan's long summer two-crop rice cycle, compare their lives to those of industrial laborers, expressing both pride and anger concerning present and future conditions of farm life. (32 min.)

THEY CALL HIM AH KUNG

Ah Kung, like most of his schoolmates, will inherit the family farm. Yet he may choose to leave farming, attracted by industry and the urban life style. Ah Kung's personal dilemma symbolizes a national problem affecting Taiwan's ability to continue to feed its population adequately. (24 min.)

WET CULTURE RICE

Taiwan's rice farmers rely less on mechanization than on human labor to produce and harvest two crops during the annual agricultural cycle. Their meticulous cultivation methods achieve the highest average yields per acre in the world. (17 min.)

THE RURAL COOPERATIVE

The Tsao Tung Farmers Association typifies rural cooperatives in Taiwan. It is the center of social, leisure, and economic activities for the 9,600 families who own the cooperative and rely on it for services ranging from irrigation, provision of seeds and fertilizers, farm implements to crop storage and marketing. (15 min.)

A CHINESE FARM WIFE

Mrs. Li, whose husband is a salaried factory worker, is a full participant in farming and community activities in addition to her role in supervising the children's education and managing the household. (17 min.)

WOMEN IN A CHANGING WORLD

In the highlands of Bolivia, the cities and towns of Afghanistan, in northern Kenya, and on the China Coast, women are responding to the psychological and technological impact of modernization. In their own words and actions they speak to issues of universal concern affecting the lives of women everywhere. Traditional women's roles are being challenged by new opportunities created by modern education, family planning, and pressures for economic, social, and political equality. (48 min.)

BOLIVIA

VIRACOCCHA

Mestizos and *campesinos* are linked by an exploitative economic system that heightens their mutual contempt. Market days and fiestas provide opportunities for *mestizos*, alternately benign and abusive, to assert their social dominance over the Aymará and Quechua. (30 min.)

THE CHILDREN KNOW

The deep division in Andean society between *campesinos* and *mestizos*, rural and townspeople, begins at birth, is perpetuated by the schools, and continues through life. Evidence of discrimination's physical effect—the malnourished and diseased children examined by a traveling "doctor"—is not mitigated by the formal Flag Day festivities that bring Indians and *mestizos* together. (33 min.)

POTATO PLANTERS

An Aymará family plants potatoes, prepares and eats a meal, and discusses the religious and astronomical forces that control its destiny. The stark routine of this typical day contrasts with the complexity of their beliefs, bringing us closer to understanding their life and our own. (19 min.)

ANDEAN WOMEN

Aymará women embody a common paradox. The cultural ideal is that women should be subservient to men, and assigned tasks appropriate to their inferior strength and intelligence. In fact, they perform many tasks vital to survival, yet see themselves only as "helpers" in a male-dominated world. (19 min.)

THE SPIRIT POSSESSION OF ALEJANDRO MAMANI

An old Bolivian man nears the end of his life. He has property and status but not contentment. Possessed of evil spirits, he opens his heart to the film-makers to reveal his anguish. His personal anguish brings us close to every man's confrontations with old age and death. (27 min.)

MAGIC AND CATHOLICISM

The people of the Bolivian highlands blend in thought and practice the religion of their ancestors and that of their conquerors. A fatal automobile accident, coincident with the festival of Santiago, provides occasion for unique expressions of both faith and magic in the effort to influence events. (34 min.)