THE INTERACTION OF CUSTOMARY LAW, TRADITIONAL RELIGIONS AND STATUTES

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A PAPER FOR THE CONFERENCE ON LAW AND RELIGION IN AFRICA - COMPARATIVE PRACTICES, EXPERIENCES AND PROSPECTS.

This discourse is confined to the Republic of Sierra Leone in its broad perspective being the locality of which the writer has vast knowledge. It is conceded that customary law practices are basically the same with variation in line with various communities. The various aspects of customary law will be discussed alongside provisions of the constitution of Sierra Leone 1991. Also various actions by the state through legislation affecting the state of customary law and the future prospects for customary law and religion.

CUSTOMARY LAW

The generally accepted definition of customary law is that it is law established by practices of persons in a community over a period of time and became generally accepted and adopted as the norm. IIt is when accepted as the norm that it becomes law and everyone in that community expected to go by it. It does not need to be passed by any group of persons meeting to discuss it. This is why the basic principles of customary law date back to time immemorial.

Some old hands like J. S. Fenton who served as a commissioner in Sierra Leone in the 1940s regarded customary law as the wise way of dealing with a situation which the old people had as against new laws which were being tested. That view, I consider to be in line with the largely general one.

It is in many respects elastic and growing but has the tendency of being swallowed up as the community changes. An example is seen in the impact of Islamic law on Customary law. Because of the similarity of many aspects of Customary law with Islamic law, e.g. in marriage and succession they tend to be favoured by people tending to lean towards the latter law instead of the former.

It must be stated that the majority of the population, about 75% are persons naturally governed by customary law. However, with the rapid advancement of education and Western influence, at least 50% of that number do not feel bound by customary law but have more regard for legislative laws instead. This matter will be discussed later in this paper.

Customary Law governs a wide range of activities in our society. It has always been the law of the land until a small area was sold out by Chief Naimbana and King Tom to the European traders who turned it over to the British Government for the resettlement of

freed slaves in about 1860. The Sierra Leone Company which was carrying on trade activities was instrumental in this.

The indigenes knew no other law until about 1880 when the British Government, because of the activities of free booters who plundered the country and disrupted trading activities, had to bring in new legislation. This was the start of government intervention with laws different from customary laws with which the indigenes were well acquainted. However, the colonial government was clever enough not to eradicate customary laws as it would have met with hostility. In fact, it was seen in the reception to a new law requiring payment of tax by every house. They were not used to this and raised the question first in the minds of the Chiefs if the native laws were to be replaced by the British laws, for the people who were illiterate they considered whether the taxes meant their houses now belonged to the government who was asking them to pay for staying in them. It led to what came to be known as the "hut tax war" spear headed by a Chief called Bai Bureh.

The ground was then paved for a system whereby new laws were gradually introduced alongside customary laws. First, was an intrusion into laws relating to crimes by removing from the Chiefs the death penalty and punishment for very serious crimes. These have become very topical these days with a great attention being

given to upholding human rights the world over, and linked to religious teachings.

Customary Law in respect of land has been different from the general law and seems to remain so today. Land in the areas occupied by the indigenes has largely been communal or family owned. This continues till date in the provinces of the country.

However, in the Western Area, which comprises principally land ceded to the British government, it is different. It was either given to the early freed slaves individually by a grant, or by the British government to individuals. It has led to a dual system of tenure of land in the country. This is another matter which brings into question parts of the constitution.

Because land in the provinces belong to various communities or families, the custom still continues that persons not from the provinces cannot acquire freehold of land. Thus a person from the Western Area is deprived from acquiring a freehold in the provinces while it is not the same for those in the provinces who want to acquire land in the Western Area. Here again parts of the constitution of 1991 have to be visited.

RELIGION AND CUSTOMARY LAW –

The religion favoured by customary law has always been what are referred to as traditional religions. They have been in the communities from time immemorial. The people knew of no other religion but theirs before the advent of a new method of worship by the British traders.

Customary Law recognises and support traditional religion. This varied and still varies from place to place but principally have the same notion, as in Christianity there are various groups but have the same principle.

Among the Temnes in the Northern Province, there is the Poro which has spread to other parts arising principally from migration and intermarriages, among the Mendes there is the wonde, the Konos have the sande and generally for women the bondo. All these have their forms of worship of a deity with various types of sacrifice, and serve their purpose which has always helped establish customary law and obedience to it.

For the men, initiation into the Poro or Wonde society determines manhood, and helps preparation to take up responsibility in the society, and enter into marriage. It establishes that the man can take care of a family. The same goes for the women in the Bondo society as well as the Sande.

Customary law continues to preserve these traditional religions and this has been supported by provisions in the constitution furthering human rights. However, certain traditional religious practices have come under questioning principally when they relate to women as the criticism of female genital mutilation. Again these have raised the question of violation of the constitution.

The worship shrines usually referred to as “the bush” e.g. Poro bush, are preserved from desecration by customary law which stipulates punishment for sacrilege by doing acts which may tend to defile the bush or expose its secrets. An act of sacrilege may even be founded in having carnal knowledge of a woman in mourning.

Another important aspect of customary law relates to marriage. Since customary law is unwritten there is nowhere to find the laws governing marriage. It does have its own procedure just as the other forms of marriage. The other forms of marriage are governed by statute which are chapters 95, 96 and 97 of the Laws of Sierra Leone 1960, as amended over the years.

Marriages, by customary law though polygamous, as under Islamic law, has a number of similarities with the other forms of marriage. One such similarity is the degrees of consanguinity. A violation of this is referred to as “Simongama” a serious crime against native

law. It may take various forms, but in the principal cases it is when a man has intercourse with any of the following.

i. His mother or grandmother
ii. His daughter/granddaughter
iii. His sister whether uterine or consanguine
iv. His aunt, grand aunt, whether sister germaine to any of his
v. Parent or his grandparents.

vi. The wife/widow of his natural uncle.
vii. His cousin, whether no matter how many times removed.
viii. His niece or great niece.
ix. His wife's sister during the life time of the wife.
x. The descendant of his wife's brother while the wife is living.

As stated earlier, there may be slight variations as, under Kono customary law,simongama is not considered if a man has an affair with the sister, of the same blood, of a wife who is alive.

Customary law marriage, generally, is a matter for families and not just the couples alone. In short, it is a marriage between families, the woman's parents or guardians must consent and since they belong to families they consult the principal members.
This is a very important feature of customary law marriage as the families and communities would not recognise couples who have not consulted families and also go through the procedure.

It has its own procedure as in the case of the other forms of marriage. It has to be in two stages-- the betrothal stage and the marriage. At the betrothal stage which may be without the consent of the bride, but with modern developments consent is not largely obtained. Presents are given to the wife's family in the presence of witnesses and the dowry is agreed upon. She is then marked and the husband contributes largely to her welfare. She remains with the family until marriage. If the proposal is broken, the wife's family then pay back or return all what was given but if the man calls it off, he loses everything. This betrothal stage is what is referred to as "giving of Kola" The marriage takes place at a later date.

I have explained this part extensively because of certain legislation which have recently been passed running contrary to this procedure under customary law and may tend to have an impact on the traditional religion.

Strangely, under customary law the practice of slavery continued, in a different way from the established or known form, until it was finally abolished on 1st January 1928. The situation was such that the consequences of it remained and they still remain today.

a. If a free man lived with his own slave she was considered a free woman and married, the children were in his custody.
b. Where a free man lived with the slave of another, he could redeem her and she would be regarded as married and any child would be in his custody.

c. In any other case the children of a slave woman were considered slaves and the property of her master.

In (a) & (b) If there is a desertion by the woman she invariably claims there was no marriage as no money was paid.

However, whatever money was paid to the master redeemed her. That would put it in the category of a customary marriage entitling the man to a claim. The importance of this presently is that some off springs of such relationship have been in a chieftaincy contest and objections have been taken that such descendants are not entitled to the throne. Quite a number of persons have been denied the right to contest for the position of a paramount chief because their line of descent is from a slave mother. That, I submit, is most unfair and against justice, and an aspect of customary law which should be looked into and some drastic steps taken. I submit that once the foregoing steps had been taken the offsprings are entitled to the throne as children of wives married customarily. It is their belief that the God does not consent to the candidate.

To ensure that there was no discontent among those governed by customary law, the colonial government did not abolish the chief's courts which they met. Instead, these were transformed into Native Authority courts and cleverly removed the paramount chiefs as chairmen to avoid misuse of their powers. Later, they became local courts by The Local Courts Act, Act No 20 of 1963, followed by the Rules in 1964.

Though these courts have always had jurisdiction over customary law matters exclusively, they also exercise it in respect of petty crimes of theft to save the time of the magistrate's court.

Such courts are however under supervision by the magistrate of the District who sits as chairman, with two assessors constituting the District Appeals Court, to which appeals from the local courts go.

Thereafter, it may go to the Local Appeals Division of the High Court, thence to the Court of Appeal and finally to the Supreme Court. The danger is that after the High Court, a matter may begin to lose the trend of customary law. There is solace in the provisions of Section 76 of the Courts Act 1965 as amended and Section 120 of the Constitution of 1991.

Both the Courts Act of 1965, as amended, and the Constitution of 1991 make reference to equity, good conscience, and natural justice. This has greatly watered down the harshness of customary law as seen in the case of Shaheen Vs Duralia [1920 – 36]
ALR (SL) 3 in which at that early time the High Court held that for a customary law to be binding on a stranger who knew nothing of it would be repugnant to natural justice, equity, and good conscience.

In the area of succession under customary law, there has been a steady movement away from practices which are unfair and unjust. Under the customary law of the various tribes, a widow was not entitled to the estate of her deceased husband unless she declares to be for a brother or a member of the family, in which case she can enjoy the estate through him.

Before state action in 2007, which will be referred to later, there were decisions at local court level denouncing the law as unfair. This was stated by late Paramount Chief M. K. Jigba III in the matter of The estate of Albert Lansana in the Tikonko Chiefdom, and followed in Re Yagbaje in another Chiefdom.

Generally, such has been the state of Customary Law in Sierra Leone. Its position has to be viewed alongside provisions of the Constitution of 1991.

THE CONSTITUTION

Before the constitution of 1991 (hereinafter termed "the constitution") the position of Customary Law was not different. It was fully recognized and provided for by various constitutions since 1961. However, with advancement of the need for the protection of Human Rights, Section 27 of Chapter III of the constitution calls to question some aspects of Customary Law.

The constitution is the lifeblood of a state and its provisions sacred, it would nullify any act/law which runs counter to any of them. While the local courts are concerned with preserving respect and authority for customary law, they are subject to the constitution.

The Constitution, in Chapter XII at Section 170, provides that the Laws of Sierra Leone shall comprise among others “The Common Law”. It goes on in Section 170 (2) to state:

“The Common Law” of Sierra Leone shall comprise the rules of law generally known as the Common Law, the rules of law generally known as the doctrines of equity, and the rules of Customary Law including those determined by the superior court of judicature”

It goes on in Section 170 (3) to state that: “for the purposes of this section the expression “Customary Law” means the rules of law which by custom are applicable to particular communities in Sierra Leone.

By these provisions, every form of customary law in any community in Sierra Leone is proper under the Constitution. In consequence, all practices would be proper and within the ambit of the law, well protected by the constitution.

However, the same constitution tends to nullify certain customary law practices when not seen to be in conformity with provisions under Chapter III, Recognising and Protecting fundamental Human Rights and freedom of the individual.

Section 27 (1) declares invalid any law which makes provisions which are discriminatory by itself or in its effect.

Discriminatory is, in Section 27 (3), explained to mean different treatment to different people attributable to their race, tribe, sex, place of-origin, political opinion, colour etc. The customary law denying the right to own freehold of land in some parts of the country by persons who come from outside the provincial areas is discriminatory, yet section 170 approves it as part of the laws of the country but it is a denial of human right which must be safe guarded. The constitution is supreme, therefore a customary law which abrogates it in anyway will be void.

In the light of this, it is a surprise that steps have not been seriously taken to nullify such customary law. It may be conceded that there have been discussions on a possible review of the land tenure system but it has stalled for many years and the issue continues to be a focal point of such discussions.

The operation of such customary law in respect of ownership of land, has, in effect, fueled animosity between those governed by customary law and those not so governed. The reason being that those governed by customary law from the provinces can, with ease, legally acquire a freehold in the Western Area. However, there is no reciprocity between them and those in the Western Area who are not governed by customary law.

The constitution, however gives support to other areas of customary law as in the case of marriage, divorce, succession. The only factor that may override customary law in these matters is equity as provided in the Constitution itself and again seen in Section 74 of the Courts Act of 1965.

In considering the constitution and its relationship with customary law, it is observed that there is freedom to follow whatever religious faith individuals want. Hence those religious beliefs founded in customary law are fully recognized and have all rights as the main stream religious orders.

The Local Courts which have exclusive jurisdiction to adjudicate on matters of customary law are however not part of the judicial system. They are therefore entirely under the control of the Local Government Offices. This, in my view, is to ensure that there is no interference of statute or common law with them.

Nevertheless, the very fact that the decisions of these courts may find their way progressively to the Supreme Court create the possibility of some customary law being nullified at some stage

What I consider should have been done is to create a local courts system with its own highest appellate body, with similar powers as the Supreme Court. This, it is observed, is the case in some other countries. It does not seem just that the Courts concerned with the

Common Law and Statute Law are clothed with jurisdiction over Customary Law matters by way of Appeal.

Perhaps, such provision is made so as provide checks and balances on the application of Customary Law by the local courts. That leans towards a tendency to either eradicate the application of Customary Law or dilute it. The reason being that the interpretation given by those appellate courts to any aspect of Customary Law will obviously be guided by the general law, and, of course, equity.

It is interesting to observe that while Section 27 (1) prohibits any law that is discriminatory by itself or in its effect, subsection 4 envisages situations when it will not apply. Perhaps it will be better understood if the entire subsection is stated. Section 27(4) states that subsection (1) shall not apply to any law so far as that law makes provision-

(a) for the appropriation of revenues or other funds of Sierra Leone or for the imposition of taxation (including the levying of fees for the grant of licences); or

(b) with respect to persons who are not citizens of Sierra Leone; or

(c) with respect to persons who acquire citizenship of Sierra Leone by registration or by naturalization, or by resolution of parliament; or

(d) with respect to adoption, marriage, divorce, burial, devolution of property or death or other interests of personal law; or

(e) for the application in the case of members of a particular race or tribe or customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or

(f) for authorizing the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period of public emergency; or

There is thus a conflict here in that the same constitution which purports to uphold freedom, justice and human rights promotes an unjust customary law. The argument may be put forward that the constitution should not conflict with customary law. However, the grundnorm of any society must be its constitution and all laws must be in conformity with it.

If I may go further, Section 76 (1) of the Courts Act provides that nothing in the Act shall deprive any court when determining matters arising in the provinces in its civil jurisdiction, of the right to enforce the observance of or shall deprive any person of the benefit of, any customary law existing in the provinces and not repugnant to natural justice, equity and good conscience. It may be said that the courts, by this action, have freedom of discretion. This Act was prior to the constitution in 1991 which would override such provisions. This is a burning issue and references have been made to other countries which have, by their constitution, avoided such conflicts with customary law.

STATE ACTION AFFECTING RELIGION

As a British Colony the State developed a bias towards Christianity, but focused more on the Church of England. It was for this reason that the Cathedral of the Anglican Church in Sierra Leone became the state church. The state was biased in favour of the Anglican Church but that is because of historical ties.It still continues today.

Since the 1970'S there has been a steady march towards liberalism by the state in respect of religion. It has tried to ensure that Christian, and Muslims are treated equally;. In any State/Public function, when prayers are to be offered, they are done both ways. (Christian Prayers and Muslim Prayers). The state has taken steps to ensure that a number of pilgrims are sponsored to the Hajj each year. Because it is a secular state and has since colonial times had a bias towards Christianity, such action would bridge the gap and cement people of all religious following together.

However, the customary religious faiths have not enjoyed such patronage though they are not different from the mainstream ones. The mainstream religions worship a God no matter the name given, it is still one God. The religions based on customary beliefs also worship one God. They are not pagans, the difference, depending on the local custom, it is what is taken to represent God. It may be a tree, a stone, a river etc

In Sierra Leone, there is Poro, Bondo, Wonde, Sokobana, all coming from the same stem. They do not enjoy the same government support as the Orthodox religions. The state recognizes them, they perform their ceremonies and are encouraged to do various acts in public. There is no state action to ensure that they are accorded the same treatment in other respects e.g. no holiday is observed on their special day. One reason for little state action is that most persons linked to traditional religions are also Christians or Muslims and tend to identify themselves more with these. The state does not encourage violation of their sacred bush or shrine as in the case for churches, mosques, temples, of the mainstream religions. There is recognition and respect for religious faiths borne out of customary law.

However, state action has been seen in various legislation in recent times. The first one is The Devolution of Estates Act 2007 which applies to the estate of persons irrespective of religion or ethnic origin and, consequently, has affected estates and succession linked to customary and Muslim law.

Before the Act, under customary law generally, when a man dies the wife is not entitled to his estate. His brother of full age takes the estate and the widow can only have the benefit of it if she remains with the family. She could therefore not administer the estate.

Any surviving spouse can administer the estate of a deceased spouse irrespective of customary or Muslim law. It goes further to provide for the distribution of an intestate estate ensuring fairness to a surviving spouse, the children, the surviving parents and the family. In the case of the family, it does provide for 15% in accordance with customary law or Muslim law. The act thus repealed parts of the Mohamedan Marriage Act which
tend to discriminate among persons.

The statute also provides for an aggrieved dependant who is not satisfied with the provision for him to challenge a will in a testate estate, and the court shall apply the doctrine of Equity to determine if the person is entitled to a better share than that given.This is a great intervention eliminating unfair Customary law and Muslim law provisions in so far as they discriminate among persons.

The more radical intervention by the state on customary law is seen in the Registration of Customary Law Marriage And Divorce Act of 2007. From time immemorial the people who practised customary law were illiterate and had no interest in writing. The idea of registration never arose. This law has deviated from the absence of a registration process to one in which parties to such marriages or divorce are required to register such and obtain a certificate. This, in effect takes it out of customary law and into the realm of statute law, and in line with marriages and divorce under the general law.

However, a more fundamental intrusion is seen in Section 6 of the Act which now provides for couples governed by customary law who are 18 years and living together as husband and wife to be considered as married and can register. This finally makes customary marriage statutory by state action. The families are now left out completely and can be ignored by the parties. This action will definitely disintegrate customary law and have an impact on the indigenous religions.

What is strange is that the act also provides for objection to be taken, after publication of a notice, under the applicable customary law. By its action the state is contributing to the disintegration of customary law in respect of marriage rather than preserve it. Thus ,there is erosion into the traditional religions which know only customary marriage.

A similar intrusion is observed in succession to the estates governed by customary law, by the Devolution of Estates Act, 2007. Persons who follow traditional religions consider certain practices taboo to be performed by women. To them the gods do not allow such and my invite a curse on the family e.g. in some parts a woman cannot be the head for a bush.

The impact of state intervention through legislation will encourage people who practice traditional religions to move more towards civil marriage provided for in Chapter 97 of The Laws of Sierra Leone. They may hold on to the moslem faith which is nearest or be converted to Christianity.The continued existence of traditional Religions is thus seriously threatened.

The Sierra Leone situation has been chosen because with a clear knowledge of it, it can be put beside other experiences. There is a lot more to be done if it is desired to ensure that all the various religious groups thrive together and the various customary law firmly entrenched so as to preserve culture, and the traditional religions.

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