

HUMAN RIGHTS PROMOTION IN POST CONFLICT SIERRA LEONE: COMING TO GRIPS WITH PLURALITY IN CUSTOMARY JUSTICE¹

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Customary Justice in the Current Development Paradigm

Justice sector aid in sub-Saharan Africa has increased significantly during the last decade.² The main factors accounting for this are the democratization process that followed the end of the Cold War and the prevalence of violent conflicts in the region (Piron 2005: 1). At the same time, the current development paradigm is characterized by a focus on poverty reduction, where poverty is not just a matter of material deprivation, but also entails powerlessness, vulnerability, lawlessness and fear of crime (Narayan 2000). As a result, 'access to justice for the poor' features high on justice sector aid agendas as a key strategy to fight poverty

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² From an estimated USD 17.7 million in 1994 to USD 110 million in 2002 (Piron 2005: 1)

(World Bank Justice for the Poor Programme n.d.; Wojkowska 2006, for the UNDP Oslo Governance Centre; DFID 2004). Under this paradigm, development actors increasingly start to show interest in traditional or customary justice since the latter is in general more accessible to poor people in many regions of the developing world (Piron 2006: 291; Golub 2003: 1).³ This is particularly the case in Sub Saharan Africa, where customary justice accounts for about 80% of dispute resolution (World Bank Justice for the Poor Programme n.d.; Wojkowska 2006; DFID 2004; OECD-DAC 2007: 11; German Federal Ministry for Economic Cooperation and Development 2002; SIDA 2002; Penal Reform International 2000). However, development actors remain cautious about engaging with traditional justice. In the first place, there is a lack of consensus and knowledge on how to intervene. Moreover, there is the difficulty of reproducing strategies that are based on specific local circumstances. But probably the main challenge is that traditional justice is often at odds with rule of law principles and human rights standards (Perlin and Baird 2008).

In post conflict countries this dilemma is all the more visible.⁴ On the one hand, international actors are pressed to support the development of a legitimate justice system for reasons of peace and security (Santerholm 2006: 1) and the imperative to prevent a repetition of abuses committed during the war (United Nations Secretary General 2004). On the other hand, the formal justice system may have collapsed during wartime, so that it is not possible to rely on it, at least not in the short and medium term (Baker and Scheye 2007: 507-511; Widner 2001: 70). According to Samuels, it takes about twenty years to recreate a criminal justice system after serious armed conflict (Samuels 2006: 18). In view of this, many development actors have resorted to traditional justice as a means to fill the gap in

³ The term ‘traditional or customary justice’ is used here without distinction between the two in order to contrast them with interventions in the justice sector that address ‘western-like’ justice frameworks. We do not thereby imply a sharp divide between tradition and modernity, nor an evolutionary view of justice. On the contrary, the material presented in this paper underscores the dynamic character of justice frameworks and their porosity (Santos 2002: 437), semi-autonomous nature (Moore 1973: 719-746), and the transnational processes that contribute to shape them (Merry 2006).

⁴ By post conflict we refer to societies emerging from interstate, intrastate (with or without foreign involvement) and non state armed conflicts: Department Of Peace And Conflict Research Uppsala University n.d.

access to justice, while promoting reforms in it so that it complies with international human rights.

In this paper, I explore the scope, reach and limits of such interventions. Based on a case study on Sierra Leone, I analyse different strategies for addressing the tension between traditional justice and human rights. After presenting an overview of key contextual features, I move towards a discussion of the main initiatives that are carried out at national and local level, where I examine the kinds of interventions that are carried out, their objectives and beneficiaries. Finally, I consider these findings in the light of insights developed by socio-legal studies on legal pluralism and human rights in cross-cultural perspective, where I argue that particular attention should be paid to plurality in customary justice.

This analysis is based on qualitative field research carried out during April 2009 in the capital city, Freetown, and upcountry in Makeni and Bo towns, as well as in Moyamba district. A total of 58 semi-structured interviews were conducted with a wide spectrum of actors, including international financial institutions, UN bodies, bilateral donors and aid agencies, and international NGOs, as well as national actors and stakeholders, such as ministries, local NGOs, civil society organizations, traditional authorities, local court functionaries and local consultants and academics. In addition, grey literature, such as program descriptions, annual reports and strategy papers were gathered, analysed and discussed with these actors. The findings emerging from this exercise were further interpreted in the light of a desk review of qualitative and quantitative studies on Sierra Leone's legal landscape, as well as ethnographic and historical material.

Justice Sector Interventions in Sierra Leone: Key Contextual Features

Sierra Leone experienced a brutal civil war from 1991 to 2002. During this conflict about seventy five thousand people died, and over one million were displaced, and the worst human rights abuses were committed. Cultural heritage was destroyed and the country's economy and infrastructure were devastated. The Truth and Reconciliation Commission identified failure of leadership, endemic greed, corruption, nepotism and the subversion of traditional systems by colonial power and post independence governments as root causes of the conflict (Truth and Reconciliation Commission, Sierra Leone 2004). While aid in the immediate aftermath of the war focused on peace keeping and peace building, current interventions start to shift progressively towards long term sustainable

development and addressing the causes of the war. This includes improved access to justice and the promotion of human rights (Government of Sierra Leone 2004: 6, 2005, 2007).

However, many features of Sierra Leone's legal and political landscape present challenges to the attainment of these goals. Next to the difficulties presented by the legacy of the conflict, there is a reality of multi-layered legal pluralism, where an official dual system of common law and customary law operates next to a whole range of other informal justice instances and actors. In addition, the promotion of human rights takes place in a context where certain aspects of the social organization, such as traditional justice in its various forms, are often at odds with several human rights standards. Before going into a discussion of how legal development interventions address this tension in Sierra Leone, in the next lines, I sketch the backdrop against which these initiatives take place.

Multi-layered Legal Pluralism

Sierra Leone has a dual legal system, where two types of official law operate concurrently. On the one hand there is general law, which is often called 'the formal system', including the Constitution, laws made by Parliament and common law. On the other hand there is an institutionalized customary law system, often called 'semi-formal', which is recognized by the Constitution, 1991, section 170, as part of common law and which is defined as "the rules of law which by custom are applicable to particular communities in Sierra Leone". This duality stems from colonial times, when the territory of modern Freetown and the Western peninsula became a British Crown Colony in 1808 and was governed by English law. In 1896, a Protectorate was further established to govern the provincial areas by indirect rule (Alie 1990: 112-164). Under this system, the British colonial administration ruled over rural Sierra Leone by co-opting and subordinating traditional authorities to their power, while at the same time enhancing these authorities' power over their populations (Maru 2006; Alie 1990). In this way, chiefdoms were created as administrative units, paramount chiefs were designated as their rulers and the Native Courts Act was passed, by which chiefs got authority to adjudicate customary law in their chiefdoms (Maru 2005: 18,19; Alie 1990: 134-135, 152-153). After independence in 1961, the Local Courts Act, 1963, was passed, by which native courts were replaced by local courts and the power of chiefs to administer justice was passed to local court chairmen. In this way, a recognized version of customary law has continued to be part of the formal legal

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system of Sierra Leone to date, albeit with the many changes introduced during colonial and post colonial administrations. (For discussion of the changes brought about in customary law by colonial rule see: Kent 2007; Manning 2008a: footnote 27; Archibald and Richards 2002: 343.)

The formal legal system comprises the supreme court, the appeals courts, the high courts and the magistrate courts.⁵ These courts have jurisdiction to adjudicate serious crimes, civil claims in Freetown and some civil claims throughout the provinces.⁶ However, different studies on the legal systems in Sierra Leone point to the fact that the formal system is not the dominant mode of dispute resolution for the great majority of Sierra Leoneans (Manning 2008a; Dale 2007, 2008; Baker 2005; Alterman et al. 2002). One of the reasons for this is the inaccessibility of these courts in terms of distance, costs, including direct costs for filing a case, eventual fines, time and transportation (Dale 2007: 1-2). Formal courts are scarce in general, with little to no presence in the provinces as most of the few existing ones are concentrated in the capital. (Maru 2006). Moreover, there exist a number of social and cultural barriers, such as language, formality, lack of information and lack of trust (Dale 2007: 1-2).

About 85% of Sierra Leoneans fall under the jurisdiction of customary law (Dale 2007: 1). 'Local courts' are formally and legally empowered to hear and determine cases involving customary law issues in the provinces.⁷ They are presided over by a chairman, who is assisted by a vice-chairman and a panel of elders, by a clerk and a bailiff, who carry out administrative duties, and by a customary law

⁵ Magistrate courts are courts of first instance for civil disputes below Le 250,000 (about USD 68) or criminal offences where the punishment is a prison sentence of less than three years, or up to seven years if the accused consents. A magistrate court can also be constituted by two Justices of the Peace. High Courts have original jurisdiction for cases exceeding that.

⁶ Sierra Leone is divided into three provincial areas: Southern province, Eastern province and Northern Province and the Western Area, which comprises Freetown, the capital. Each province is divided into districts (12 in total), which are further divided into Chiefdoms (149 in total) and these are divided into sections. Magistrate courts can be found in the provinces up to the district level.

⁷ According to the senior customary law officer of Sierra Leone, there are 300 local courts spread evenly in the country at chiefdom level, except for the Western Area. Personal interview, Bo, 14/04/09

enforcement agency, the chiefdom police. The latter's main responsibilities are conducting arrests, seizing property in default of obedience and imprisonment (Kane et al. 2005: 9). Local courts have jurisdiction within their chiefdom over all civil cases governed by customary law and all civil cases governed by general law where the claim does not exceed 250,000 Leones. This limit does not apply to disputes over land situated in the provinces ownership, use and grants of which are governed by customary law and for which therefore the court of first instance is the local court.⁸ Regarding criminal matters, local courts can hear and determine cases where the sentence does not exceed six months or the fine does not exceed 50,000 Leones, though in practice these limits are not always respected (Kent 2007: 523).⁹ Further, no legal representation is allowed at these courts, according to the Local Courts Act, 1963.

According to a recent survey on local courts, gender disparity is a salient feature of these forums, which is manifested in respect of both the membership and the users of courts (Koroma 2007: 5, 6, 26). 94% percent of the members of the surveyed local courts were male (Koroma 2007: 16) and the majority of the parties to the cases heard by them were also male (Koroma 2007: 21). Next, this study found that the kind of cases most frequently handled by these courts are debt claims (25.3%), breach of chiefdom by-laws (14.49%) and woman palaver (13.04%).¹⁰ Other cases included dishonesty, use of abusive language, marrying daughter without consent of father, failure to pay local tax, and damage to plants and crops by cattle (Koroma 2007: 5, 19). The law applied for these cases is unwritten and varies from community to community. Outcomes depend on the case, ranging from retributive to restorative measures (Koroma 2007: 6, 22, 24).

This customary system is linked to the formal one by means of an appeal procedure that places the former below the hierarchy of the latter. In theory, a

⁸ E-mail communication with Monfred Sessay, senior customary law officer of Sierra Leone, 21/10/10.

⁹ Criminal cases, such as murder or armed robbery, are mainly reported to the Sierra Leone police: personal interviews, April 2009. See also Archibald and Richards 2002: 343.

¹⁰ 'Woman Palaver' refers to allegations of sexual relations between a man and the wife of another community member.

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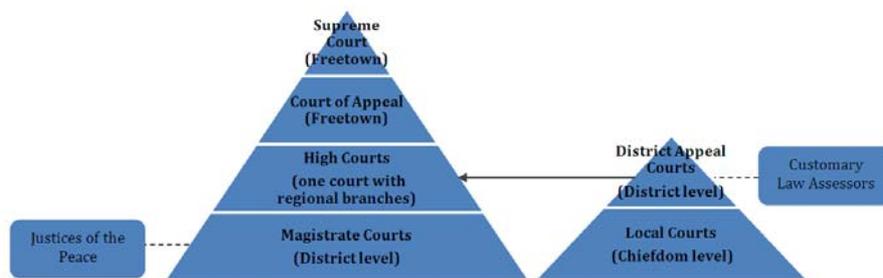
party dissatisfied with the decision of a local court can appeal to the district appeal court, which consists of a district magistrate sitting with two assessors who are experts in customary law. Appeals from this court lie to the local appeals division of the high court, which is constituted by a high court judge sitting with two assessors. Appeals from decisions of the high court lie to the court of appeal and finally to the supreme court. In practice though, the appeals procedure is rarely used.¹¹ In addition, the law provides for regional customary law officers, who are appointed by the Ministry of Justice and whose functions are to advise on matters related to customary law and revise local courts' decisions. However, there are only three officers for the whole country.¹²

According to studies on the perception of the law in Sierra Leone, these forums seem to be the most accepted and best understood formalized system in the provinces, but they operate as a last resort once other informal mechanisms have been tried (Manning 2008a: 3; Alterman et al. 2002; Koroma 2007: 23). Amongst the main problems associated with these forums we find lack of supervision and judicial independence, with chiefs often interfering in rulings and local courts overstepping their mandate, for example by imposing abusive fines (Manning 2008a: 5). Further, the accessibility of the system both in terms of distance and costs is also problematic, though to a lesser extent than in the case of formal courts. Finally, we find the unpredictability of outcomes due to abuses in the application of unwritten rules (Alterman et al. 2000: 17) and a lack of training in case management skills, as well as a gender bias (Koroma 2007).

The following graphic illustrates the relationship between this official customary system and the formal one:

¹¹ Personal Interviews, April 2009; See also Manning 2008a: 5

¹² Interview with the senior customary law officer of Sierra Leone, Bo, 14/04/09.



Next to this dual system, there operate a range of informal traditional justice instances and authorities, such as paramount chiefs', section chiefs' and village chiefs' courts, religious leaders, professional circle leaders, gender and youth leaders, village elders and family heads, secret societies, and sorcerers (Sawyer 2008; Manning 2008a; Manning et al. 2006; Baker 2005; Kane et al. 2005; Alterman et al. 2002; Archibald and Richards 2002). The instance where conflicts are first reported depends on the type of conflict and the community (Foster et al. 2008: 34), but according to various studies, most Sierra Leoneans prefer to solve conflicts at the community or at the closest related unit since it is considered a failure to bring a case to a court (Manning et al. 2006: 13).

Chiefs are present in each human settlement in Sierra Leone and they are legally empowered to mediate or arbitrate but not to adjudicate, though in practice they often do (Manning 2008a: 6, Manning et al. 2006: 13). They play an important role in solving disputes and providing more affordable and speedy solutions to conflicts (Sawyer 2008), but their popularity varies from chiefdom to chiefdom (Manning et al. 2006). For many, this means of dispute resolution is perceived as an initial formal forum, in contrast to the actual legal mandate of chiefs. Cases are not often referred to nor appealed from chiefs' courts due to their authority and power, but when this happens, cases are likely to be taken up in the hierarchy of chiefs, i.e. from a section chief's court to a paramount chief's court (Fortes et al. 2007: 35). In addition they apply traditional community rules, called by-laws. Religious leaders also play a role in mediation, as do women, youth and professional circle leaders regarding intra-group disputes (Alterman et al. 2002: 30, 31; Manning 2008a: 7).¹³ Also paralegals and peace monitors are often

¹³ According to the 2004 National Census, 77% of Sierra Leoneans are Muslim,

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approached for advice and mediation, where modern and traditional laws and views of justice are combined in the treatment of cases with high rates of satisfaction (Sawyer 2008; Maru 2006: 427, 476; Baker 2005: 381).

Sorcerers and supernatural forces are part of the informal legal landscape too (Manning 2008a; Sawyer 2008; Alie 2008; Fanthorpe 2007; Kane et al. 2005; Alterman et al. 2002). Belief in the supernatural seems to be quite strong in some communities, and infractions of certain rules are feared to bring illness and misfortune, not only to the person in question but also to the community (Alie 2008: 136). Diviners are often relied upon for the identification of culprits or for planting curses (Sawyer 2008; Kane et al. 2005: 15; Alterman et al. 2002: 33). In addition, certain matters are handled by sodality groups, called secret societies (Fanthorpe 2007: 4; Kane et al. 2005: 15; Alterman et al. 2002: 31, 32). These are single sex communities the purpose of which is to regulate sexual identity and social conduct, while canalizing and controlling powers of the spirit world (Fanthorpe 2007: ii, 1). They prepare men and women for adult life by means of initiation ceremonies, forming solidarity networks amongst age groups who are initiated in the same event (Fanthorpe 2007: ii, 1).¹⁴ Their activities include meetings that are open only to society members and where decisions are taken affecting many aspects of open communal life. For example, in most communities leaders must hold a certain rank in the hierarchy within the secret society in order to be legitimately entitled to become chiefs (Alterman et al. 2002: 32). Secret societies have their own laws, procedures and penalties and they try breaches of obligations of membership, imposing fines and punishments (Archibald and Richards 2002: 344). These institutions are deeply rooted in Sierra Leonean culture (Archibald and Richards 2002: 344), though according to some reports their importance is in decline in some communities (Manning 2008a: 7). However, because of their very nature, their actual role and functioning in terms of justice administration remains difficult for outsiders to assess.

Consequently, traditional or customary justice in Sierra Leone cannot be identified with a single institution or actor, but is embodied by a range of instances, actors

21% are Christian and 2% follow no religion, but the majority combine these religions with traditional beliefs (Manning 2008a: footnote 43).

¹⁴ In rural Sierra Leone, initiation is a requisite for full integration of the individual as a community member. In the case of women, this includes circumcision (Fanthorpe 2007).

and practices with varying degrees of state recognition and local legitimacy. In other words, we find a combination of ‘state law pluralism’, arising from the recognition and incorporation of parts of customary law into the state legal system, and ‘deep legal pluralism’, in which state law coexists with informal customary law (Woodman 1996: 157, 158).

While the relationship between different forms of governance at local level has been addressed by several authors (Manning 2008a; Richards 2008; Thomson 2007; Jackson 2006; Fanthorpe 2005), the ways in which all these layers of justice relate, influence, contest and constitute each other, is a domain that needs further exploration. According to Sawyer,

... the formal and informal spheres are for the most part separate, though there is occasional interpenetration and overlap, and plaintiffs can and sometimes do pursue claims in different spheres simultaneously (Sawyer 2008: 393).

In addition, according to the findings of the World Bank’s programme Justice for the Poor (J4P) in Sierra Leone, it is not always the choice of the persons directly involved in a conflict whether to take it to higher levels for resolution. It is often the family elders or the village headmen who decide on the necessity to bring a case to a section or a paramount chief.¹⁵ Finally, certain forms of interaction are overt and official, whereas others are rather unofficial or concealed. A case in point is the appointment procedure of local court chairmen, which falls under the responsibility of the Ministry of Local Government, on the recommendation of the paramount chief of the region. On the one hand, this practice has been criticized since it undermines the independence of local court chairmen with regard to chiefs, who would often interfere with verdicts and even request cases to be transferred to their own informal courts (Daramy 2008).¹⁶ On the other hand,

¹⁵ Interview with J4P Sierra Leone, Freetown, 09/04/09. The World Bank Programme ‘Justice for the Poor’ in Sierra Leone conducts qualitative and quantitative research on how justice and governance function at community level with the purpose of informing operations.

¹⁶ Note the link with what Shaw refers to as ‘Temne constructions of power and agency’, whereby power and control of a situation are linked to the capacity to act upon it by indirect or hidden means and the capacity to act through others by subsuming their agency (Shaw 2002: 96).

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though no official training or qualification is required to hold the position of local court chairman, it is known that these persons are often required to be senior secret society members, which, since this is not public information, necessitates the involvement of the chiefs. (Personal interviews, Sierra Leone, April 2009; Kane et al. 2005: 15. For further discussion of the ‘unspoken’ political role of civil societies see Fanthorpe 2007). Further exploring these issues would provide us with a richer understanding of how legal pluralism actually operates and what possibilities and challenges it poses for the promotion of human rights.

The Legacy of the Conflict

With the end of the civil war, new opportunities opened for reviewing the organization of justice in Sierra Leone. In part, these result from the fact that the weaknesses found in the administration of justice after the conflict were not only associated with the legacy of the war itself, but went back to pre-war times (Thompson 2002: 5). During the conflict, the judiciary was severely affected at all levels (Keen 2003: 74). State institutions, including magistrate courts, were systematically targeted, bringing the activities of formal courts in the provinces to almost a complete halt (Thompson 2002: 10). In those regions where local courts were not attacked they continued to function but without any government support, the - often arbitrary - fines they imposed being their only source of income (Thompson 2002: 11). The role of chiefs in the administration of justice was also affected during wartime, since they were specifically targeted during the conflict (Archibald and Richards 2002: 344).

However, endemic problems, such as a corrupt administration of justice, the lack of presence of formal courts in the provinces, underinvestment in infrastructure and underfunding of formal and local courts, though aggravated seriously by the war, were not caused by it. On the contrary, the politicization and lack of independence of the judiciary (Thompson 2002) and the manipulation of justice by chiefs in pre-war times, in combination with the poverty and marginalization that affected the youth in particular, have been identified as factors lying at the roots of the conflict (Archibald and Richards 2002: 345). Many chiefs and elders who controlled the rural judicial system used to hand down excessive fines and compelled their subjects to work for them without payment. This generated grievances against them and led several youths to join the rebel movement out of frustration (Fanthorpe 2005: 30, 31), or to settle “old scores for justice gone sour” (Archibald and Richards 2002: 344).

These insights have led scholars to argue that, in order to avoid a repetition of violence, a revision of exclusionary social practices, and especially those found in the justice sector, is needed. Positions vary regarding the means to attain this. On the one hand, we find the view that what is needed is to abolish unsupervised and undocumented judicial practices and to challenge abusive practices by exemplary appeals to higher courts (Richards 2005: 587). On the other hand, we find the position that customary institutions should not be abolished for they remain the closest to the rural populations (Sawyer 2008; Fanthorpe 2005). According to this argument, what is needed is a comprehensive reform in order to increase their downwards accountability and transparency (Fanthorpe 2005: 45). In both scenarios, human rights could offer a powerful framework to contest elite privileges and enhance the inclusion of marginalized groups.

Social Organization, Justice and Human Rights in Sierra Leone

Several aspects of the social organization in Sierra Leone have been identified as marginalizing and unfair. Some scholars refer to this social configuration as a 'lingering gerontocratic tradition' (Manning 2008a), whereas others characterize the context as one ruled by autocrats, where power is concentrated in the hands of 'big men', where violence is part of everyday life and with a failed social infrastructure (Maru 2006: 8, 9). In human rights terms, this comes down to the exclusion of many Sierra Leoneans, and in particular certain categories of persons, such as women, children, 'youth' and 'strangers', from civil and political rights, as well as social and economic rights.¹⁷ In varying degrees, this is reflected at all layers of the administration of justice, so it would be inaccurate to regard this problem as one of customary justice alone.

At the formal level, Sierra Leone is a signatory to the main international and regional human rights conventions. Treaty provisions have to be domesticated into national laws, which according to the Sierra Leone Human Rights Commission, has not been satisfactorily done (Human Rights Commission of Sierra Leone 2007: ix). For example, the National Constitution is contradictory in that some sections

¹⁷ The term 'stranger' refers to a migrant from another region of the country, whereas 'youth' is not necessarily defined by age, but rather socially as a person who is unmarried, landless and without economic and political power (Manning 2008b: 2).

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grant the protection of the rights of women and discourage discrimination (section 6(2)), whereas other sections allow discrimination under laws of adoption, marriage, divorce, burial, property and aspects of personal law (section 27). In 2007, the Government of Sierra Leone enacted the Gender Acts, i.e. the Domestic Violence Act, the Devolution of Estates Act and the Registration of Customary Marriage Act, as well as the Child Act in order to domesticate the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of the Child. This legislation represents an advance in the protection of women's and children's rights, though certain areas still fall short of international standards, such as the silence regarding the prohibition of female circumcision (Mannah 2007). However, the path that needs to be walked before these laws are effectively enforced, including their dissemination and improved access to justice, is long (Kamara 2008).

In addition discrimination against women in customary law and justice is one of the most problematic human rights issues throughout the whole country (Human Rights Commission of Sierra Leone 2007: 22; United Nations Committee on the Elimination of Discrimination Against Women 2006; Amnesty International 2006). At present traditional justice in its various forms tends to be male-dominated and patriarchal. This is reflected in traditional laws related to land tenure and inheritance, where women are not allowed to own or inherit property, in customary marriages, where women fulfil a subservient role towards their partners and are inherited upon their husband's death, in the husband's right to punish his wife, and in the exclusion of women from participation in many spheres of political life, amongst others. These discriminatory customs result in widespread violations of women's most basic human rights, including lack of access to a fair hearing, unlawful imprisonments and punishments, a lack of respect for their physical integrity, disrespect for their property rights, as in the case of forceable evictions from their homes and land, and high levels of domestic and sexual violence, which represent a significant obstacle to reducing poverty.¹⁸

Children are also subject to discrimination, particularly in the case of the girl child. Clear examples of discriminatory practices are the forced betrothal of girl children and early marriage, which are often related to dowry transactions.

¹⁸ For instance, according to the testimony of a woman from Kenema town, local court officials put her in a box in public all day to humiliate her as a punishment for not signing divorce papers that would deprive her and her children from any maintenance rights (Amnesty International 2006: 5, 6).

Moreover, only local ‘citizens’ have access to local courts, whereas ‘strangers’ can only access a local court through a local citizen protector (Archibald and Richards 2002: 344).¹⁹ Another salient feature of customary law is its oral character, which in many cases has resulted in manipulation, abusive fines and arbitrary trials (Archibald and Richards 2002: 344). Corporal punishment was reported to be in decline, though this is probably only the case at local courts and adjudication by chiefs, whereas it remains unclear if it is also the case within secret societies.²⁰

A recent survey on people’s knowledge, attitudes and perception of human rights in Sierra Leone further confirms the challenge of mainstreaming human rights in this country.²¹ This study found that 40.5% of respondents think their knowledge of human rights is low, compared to the 19.7% who think it is high. In terms of human rights awareness, less than half of the respondents were aware of the Domestic Violence Act, and only 0.7% knew the Devolution of Estates Act. Though respondents supporting gender equality were on the majority side, 81.7% of respondents agreed that women were obliged to have sex with their husbands, even if sick, which reveals the resilient character of patriarchal ideas.

To sum up, the promotion of human rights and access to justice in Sierra Leone takes place in a context characterized by at least the following challenges: a history, and in particular the recent experience of brutal conflict, pointing to the compelling need to reform exclusionary practices and institutions; a legal landscape that combines ‘state law pluralism’ and ‘deep legal pluralism’, where customary justice in its various forms is the most accessible to the majority of the population; and the fact that customary justice is often at odds with several human rights and it is composed by a multiplicity of layers that are not always easy to reach for outsiders.

¹⁹ ‘Local citizens’ are persons from the town, whereas ‘strangers’ are migrants from other regions of the country.

²⁰ Personal Interviews, April 2007. According to some authors, human sacrifices are carried out within the secret societies in order to assuage the spirits (Fanthorpe 2007, citing Bellman 1975).

²¹ See Human Rights Commission of Sierra Leone 2009.

Addressing Human Rights in Sierra Leone's Customary Justice

Against this background, a sort of consensus seems to have arisen amongst national and international development actors active in the justice sector, whereby traditional or customary justice is seen as a key component of what these actors have termed 'primary justice', i.e. justice at the community level.²² As such, traditional justice plays an important role in improving access to justice, especially for the poor. For this purpose, these actors point to the need to reinforce traditional justice by building on its positive features, while modifying or eliminating the negative ones, such as the tension with human rights.²³

In our study of the interventions that have addressed this domain we have identified four main strategies, each dealing with customary justice at a different level: first, the enactment of legislation at the national level regulating problematic aspects of customary law; second, interventions at the level of local courts, such as the restatement of customary law and capacity building, including human rights education for local court personnel; third, sensitization and human rights training for traditional authorities, and fourth, awareness raising activities at the grassroots level in order to promote an understanding of human rights issues and the working of the justice system. In addition, a series of initiatives have been undertaken, whose main objective may not be to address the tension between traditional justice and human rights as such, but which in practice deliver a significant contribution to this end. This is the case of the provision of paralegal services and peace monitoring schemes.

Enacting Legislation to Regulate Customary Law and Justice

At the national level, the enactment of the abovementioned Gender and Child Acts introduced a new frame for the regulation of several aspects of customary law. The Registration of Customary Marriage and Divorce Act provides for the registration of customary marriages and divorces so that marital status can be proved. In addition, it forbids marriage below the age of 18 and it requires the consent of both parties. It also confers on women the right to acquire and dispose of property in their own right, and it abolishes the return of dowry in case of

²² Personal Interviews, April 2009.

²³ Personal interviews, April 2007.

divorce or separation. The Devolution of Estates Act modifies customary law by introducing a principle that both husband and wife have the right to inherit property from each other. In addition, male and female children are given the same inheritance rights. Further, it prohibits involuntary wife inheritance. Finally, the Domestic Violence Act introduces a new offence of domestic violence, which should modify the stance of traditional justice towards condoning certain forms of conduct, such as wife battering. The Child Act refers to the prohibition of forced marriage and dowry transactions and it provides for the right to inherit from parents, whether or not a child was born in wedlock. However, these steps are seriously undermined by the fact that section 27(4)(d) of the Constitution, which takes precedence over these laws, tolerates discrimination with respect to “adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law” (Kamara 2008).

The Ministry of Social Welfare, Gender and Children’s Affairs (MSWGCA) is the lead agency in the implementation of this legislation through a three year (2009-2011) ‘Strategic Roll Out Plan’, which includes a series of initiatives related to primary justice (MSWGCA n.d.).²⁴ However, the implementation of this plan is seriously undermined by a lack of funding and capacity. The MSWGCA has one of the smallest budgets, with current government priorities lying elsewhere. As a result, by the time of our visit to Sierra Leone, the Ministry had not been able to attract the necessary funding and these activities could not yet be properly undertaken.²⁵

In addition, a ‘Local Courts Bill’ has been in the process of being drafted with the support of the Justice Sector Development Programme (JSDP).²⁶ This law reform aims at depoliticising the local courts and reviewing aspects of their functioning that interfere with the right to a fair trial, such as the appointment of local court

²⁴ This plan was developed with the technical support of the Human Rights Commission for Sierra Leone, the International Rescue Committee, UNIOSIL and Action Aid and with the financial support of UNIFEM and Irish Aid.

²⁵ Interview with an official from the MSWGCA, Freetown, 17/04/09.

²⁶ JSDP is a five year programme (2005-2010) of the Government of Sierra Leone funded by the UK Department for International Development and managed by the British Council (British Council 2004, 2005). The programme is closely linked to the Justice Sector and Reform Strategy and Investment Plan of the Ministry of Justice and the Ministry of Local Governance.

chairmen on the recommendation of chiefs, which is proposed to be transferred to the Chief Justice, on the recommendation of a 'local court service committee'.²⁷

Restatement of Customary Law and Capacity Building at the Semi formal Level

Local courts have been targeted by different initiatives, the 'restatement' of customary law and human rights education being amongst the main ones. Under a pilot project of JSDP in Moyamba district, a 'restatement' of the customary law of the local courts of the 14 chiefdoms of the district has been recently completed. The exercise was carried out by the senior customary law officer of Sierra Leone assisted by local court clerks, who by means of consultation with the communities and traditional authorities arrived at a first written version in English of the customary laws in place. The purpose of this intervention is to register the customary law as it is being used at the level of local courts in order to identify the areas that contravene human rights and modify them. Once this exercise has been completed and the final version approved by the ministry of justice and local traditional authorities, this pilot project would serve as a model to be scaled up to eventually arrive at a national codification.²⁸ Even though codification has been generally rejected by most scholars on the basis that it 'freezes' tradition, in Sierra Leone the dominant view amongst most national and international actors remains that the unwritten character of customary law has led to uncertainty and abuse, which can be remedied by writing it down and making it publicly known.²⁹ In this sense, it is worth to notice that the customary law that is being registered is the one used at the level of the local courts. Considering that customary law varies from community to community, the question remains whether it is feasible to scale up this project to cover the whole country, how ethnic differences will be dealt with, and whether enough funding will be available for it.

In addition, research on the functioning of local courts led JSDP to conclude that

²⁷ Paramount chiefs would continue to form part of these committees, but their influence would be limited by the presence of other members. Interview at Court Monitoring Programme, 07/04/09; Interview at JSDP, 09/04/09.

²⁸ Interview with an official from the JSDP, Freetown, 09/04/09; Interview with Customary Law Officer, Bo, 14/04/09; Interview with an official from the JSDP, Moyamba, 15/04/09.

²⁹ Personal Interviews, April 2009. See also Kane et al. 2005: 24, 25.

there is a need for capacity building, so a training manual is being developed for this purpose, including a module on procedures and jurisdiction of the local courts, a module on human rights, and a module on records management, which will be used to train the local courts' staff. Support to the capacity of local courts extends to infrastructure as well, with the provision of material for record keeping, which would be used in case of appeals. Also the Roll Out Plan of the MSWGCA foresees strengthening local courts by providing them with copies of the Gender Acts together with guidelines, case law from elsewhere and sentencing guidelines (MSWGCA n.d.). Further, the United Nations Integrated Peacebuilding Office in Sierra Leone and UNDP have registered plans to support human rights monitoring and training at local courts in collaboration with the customary law officer.³⁰ However, local court personnel are known to change according to political moves, which undermines the effectiveness of these initiatives.³¹

Sensitising Traditional Authorities

In view of the prominent role traditional authorities play in their chiefdoms and their influence over their communities, development actors cannot afford to ignore them in their programmes.³² Chiefs are present in every community whereas formal and local courts present problems of access and capacity. Therefore, development actors consider their role as mediators at the grassroots as a valuable resource for improving access to justice and avoiding court congestion.³³ However, traditional authorities have been criticised for a lack of transparency and fairness in the administration of justice and they are amongst the groups that contest certain human rights. Consequently, chiefs and traditional authorities are targeted for sensitization about human rights in order to bring about change 'from inside' (Kane et al. 2005: 22). Such is the case of UNICEF's initiative 'Chiefs Champions for Children', which aims at getting traditional chiefs to promote girl

³⁰ Interview with an official from UNIPSII, Freetown, 08/04/09. See also UNDP 2009.

³¹ Personal Interviews, April 2009.

³² Personal Interviews, April 2009.

³³ Interview with an official from the JSDP, Freetown, 09/04/09; Interview with officials from the Ministry of Justice Sierra Leone, Justice Sector Coordination Office, Freetown, 09/04/09.

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child education, and denounce early marriages and female circumcision, amongst other acts.³⁴ The United Nations Population Fund supports the formation of community leaders' networks, with the purpose of reinforcing their capacity to promote human rights.³⁵ Also the MSWGCA Roll Out Plan foresees sensitization activities for chiefs, elders, mammy queens, and youth and religious leaders (MSWGCA n.d.). This aims to gain the support of traditional authorities regarding the Gender laws, while delineating their different roles under the new Acts. In addition, this plan deems the education of 'key influencers', such as traditional authorities, a crucial step due to their role in disseminating these laws, including through 'traditional channels'.³⁶ The Pilot Project of JSDP in Moyamba district has also involved traditional authorities in their 'task force', including a paramount chief who is a member of the human rights committee.³⁷

All these initiatives aim to generate the collaboration of traditional authorities in the promotion of human rights, which would eventually be reflected in the incorporation of human rights ideas in the way they deal with conflict resolution. At the same time, chiefs are sensitized to devolve adjudication to the local courts, which would result in fairer trials.³⁸ This is complemented by informing communities about the official role of the chiefs in the justice sector. For example, JSDP is piloting a community mediation scheme that encourages people to reconcile when they have problems rather than resorting to chiefs' courts for adjudication.

³⁴ Interview with an official from UNICEF local office, Freetown, 08/04/09.

³⁵ Interview with officials from United Nations Population Fund (UNFPA) local office, Freetown, 06/04/09.

³⁶ Though not explicitly mentioned in the Roll Out Plan, this refers to secret society meetings.

³⁷ Interview with Paramount Chief Joseph Ali-Kavura Kongomah II, Fakunya Chiefdom, 15/04/09.

³⁸ All national and international organizations that were interviewed coincided in agreeing that the role of chiefs should be to mediate or arbitrate but not to adjudicate. Personal Interviews, April 2009.

Raising Awareness at the Grassroots

At the demand side of justice, different awareness raising campaigns have been organised aiming to produce a better understanding of the justice sector and an internalization of human rights at the grassroots. The dissemination of the Gender and Child Acts at community level has been envisaged by various organizations, including JSDP, the Lawyers Centre for Legal Assistance (LAWCLA), and the MSWGCA. The latter foresees community meetings and discussions led by ‘key influencers’, such as traditional authorities, whereas LAWCLA has developed user friendlier versions of these laws. Further, JSDP plans to bring the results of the restatement of the customary law back to the communities, where traditional practices found to contravene human rights will be exposed with reference to the new national legislation.

The integration of the new laws into the national and teacher training curriculum has been another way of addressing the issue. UNICEF has supported the incorporation of new curricula at schools, where children learn about their rights and more progressive gender roles.³⁹ In addition, illiterate people are targeted by radio programmes, community drama and story telling, community cinema projections and music. The use of theatre, social drama, storytelling and songs for the promotion of community discussions on traditional values and human rights are popular techniques for opening up discussions on human rights issues since they build on the African oral tradition, which is culturally closer to the communities than formal trainings.⁴⁰ In doing this, some actors have tried to identify local practices and ideas that reinforce those values that can also be found in human rights, so that the concept is not perceived as strange or coming from outside.⁴¹

Finally, paralegals and ‘peace monitors’ also play an important role in raising human rights awareness at the grassroots. These organizations do not address the tension between customary justice and human rights directly, but they provide different services at community level, such as mediation, education, advocacy and free legal services, thereby constituting an alternative to other local channels to

³⁹ Interview with an official from UNICEF local office, Freetown, 08/04/09.

⁴⁰ Interview with an activist from ‘Community Organization for Mobilization and Empowerment’ (COME) Sierra Leone, Bo, 14/04/09. These activities have been financed by JSDP. See also Jalloh and Braima 2008.

⁴¹ Interview with officials from UNFPA local office, Freetown, 06/04/09.

seek justice.⁴² Working with local respected people facilitates the acceptance of these schemes, which, in principle, constitute some form of ‘competition’ with local traditional authorities. This is mitigated by a search for cooperation and mutual involvement. In his study of customary justice and human rights in rural Sierra Leone Kent describes how a positive interaction between paralegals and other customary justice actors can be built, as in cases where they consult with each other on the way to resolve their respective cases (Kent 2007: 525). This in turn enhances the implementation of human rights by means of a process of ‘societal norm internalization’, which takes advantage of the openings provided by the dynamic nature of customary law and the contestation of cultural norms. (Kent 2007). In addition, though some paralegal organizations offer legal representation, they also draw on customary law for the resolution of cases, working as a bridge between the two regimes (Maru 2005: 22).

Another community mediation scheme that has gained popularity is that of ‘peace monitors’, which are respected individuals in their communities, sometimes even the chiefs themselves, who receive training on conflict management techniques and human rights, which is linked to local traditional methods of compromise and conflict settlement. During meetings and dialogues, the peace facilitators, the conflicting parties and community members analyse the causes, consequences and solutions to their problems.⁴³

Finally, it is worth noticing that interventions aimed at improving the quality of justice at the formal level can have an indirect positive impact on human rights in customary forums, either by providing for ‘negotiation resources’ in the interpretation of traditional laws or by providing for competition (Oomen 2006).

Dealing with Plurality in Customary Justice

The above mentioned strategies are in line with one of the main lessons learnt from the well known debate on human rights regarding universality and cultural

⁴² Interview with a member of ‘Timup for Justice’, Freetown 09/04/09, Interview with a member of ‘Timup for Justice’, Bo 14/04/09.

⁴³ Interview with a member of ‘Conciliation Resources’, Freetown, 08/04/09; Interview with members of ‘Conciliation Resources’ Bo, 14/04/09, Interview with members of ‘Peace and Reconciliation Movement’, Bo, 14/04/09.

diversity, namely, that justice systems, and culture in general, are open and dynamic, and that tradition and custom are not static, so that the tension between local perceptions of social order and human rights ideas can be bridged (Cowan et al. 2001). However, when turning to the difficult question of how to achieve this in practice, we find partial answers that can inform interventions. Several scholars draw our attention to the notion of dialogue and struggle around the ‘legitimacy’, both of human rights and of custom. An Na’Im argues that compliance with human rights should stem from their legitimacy in the societies where they are to be applied, which becomes possible through an enhanced interpretation of cultural norms (An Na’Im 1992). For this purpose, a process of ‘internal discourse’ is necessary, where disadvantaged persons can challenge the monopolization and manipulation of the interpretation of cultural norms by powerful individuals, groups and their interests. The exercise of restating the customary law seems to open an opportunity for a more inclusive interpretation of customary rules, provided that there is room to hear all voices and contest interpretations that perpetuate oppressive understandings.

It remains to be seen which approach will be followed to address those customary norms that are found to contradict human rights. In this sense, scholars have pointed out that taking seriously the social legitimacy of custom implies that reforms should result from an internal critique and cannot be imposed in a top down fashion (Kane et al. 2005). In addition, Merry argues that ‘localizing’ human rights implies a process of ‘vernacularization’, where on the one hand human rights ideas are translated into frameworks that are relevant to the life situations of grassroots people, and, on the other hand, these ideas are appropriated by these people to the degree that they are useful in the advancement of their interests (Merry 2006: 219). Kent refers to these processes as the ‘societal internalization’ of human rights into areas governed by customary law, so that the latter evolves in line with these international standards (Kent 2007: 511). The recourse to community insiders and local agents of change as allies in the implementation of human rights could facilitate such processes of vernacularization, but at the same time this requires some degree of monitoring so that the emancipatory dimension of human rights standards is not ‘neutralized’ by interpretations that reproduce a status quo, or is even lost in the translation.

In this sense, the feature of ‘plurality’ in customary justice is key to an understanding, for it ranges from more or less formalized customary laws, as applied at the level of local courts, to arbitration by chiefs and mediation by elders, family heads and respected persons. As the evidence from Sierra Leone

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shows, the great majority of 'social order' issues are negotiated rather than taken to court and sorted out according to pre-established rules. This reality compels us to think of customary justice and legal pluralism in a pluralistic way, where the focus not only goes to the diversity of courts and norms and how human rights can be implemented at that level, but to a deeper diversity that operates at the level of how societies imagine justice, or in the words of Geertz, other 'legal sensibilities' (Geertz 1983: 175). In Sierra Leone this is exemplified by those dispute fora that are more inclined to apply norms and rules explicitly, such as the local courts, as opposed to those that resort to negotiation and consensus building, such as family heads and local leaders. Therefore, a more explicit understanding is needed of how the different 'layers' of customary justice, their particular 'logics' and ways of operating present different challenges and opportunities to the implementation of human rights.

In turn, this brings us to a focus on justice from the perspective of 'process' (Moore 1978) and how the different 'layers' of justice interact with each other. In this sense, we realize that the interplay between interventions at national, semi-formal, informal and grassroots levels is crucial. In the present case study, we find that the different layers of traditional justice are differently targeted and affected by interventions. Customary justice, as it is found at the level of local courts, is the one that is most explicitly engaged with for the promotion of human rights by means of the restatement of customary laws, the regulation by national legislation, training, and monitoring, whereas 'deeper' informal layers, such as the justice that is applied within secret societies, is hardly ever discussed in the frame of interventions. One wonders whether awareness-raising initiatives and sensitization of chiefs and traditional authorities on human rights issues have an impact on the way justice operates within this realm.

Moreover, a gender perspective is required when engaging with plurality in customary justice. In Sierra Leone, most users of local courts are men. The fact that there exists a gender disparity at this particular layer of customary justice should lead us to a reflection on who is actually benefiting from each intervention. Would a focus on improving local courts guarantee better access for women? Should interventions instead focus on other fora to which women currently have more access? Or both? Resources are limited, so it is necessary to evaluate how the expected outcomes are likely to reach and benefit as many persons as possible, and in particular those that are frequently excluded.

Finally, the other side of the coin in this debate is how much room these

interventions foresee for an inclusive conceptualization of human rights (Brems 2001). On the one hand, this means that human rights' universality does not imply uniformity so they can be differently interpreted depending on the particular context where they operate. On the other hand, it means that the definition of what human rights are, is also dynamic. An Na'im refers to this in terms of a 'cross-cultural dialogue', whereby human rights become legitimate through the contribution of different cultural traditions (An Na'im 1992). It exceeds the scope of the present case study to perform an analysis of what an inclusive understanding of human rights would look like in the light of the different Sierra Leonean traditions, but this is certainly an issue that deserves consideration.

Conclusions

Engagement with customary justice in the frame of post-conflict justice sector aid is often guided by the aim to improve access to justice. At the same time, this entails undertaking initiatives that bring customary justice into line with human rights. The findings in the present case study suggest that policy makers and practitioners designing interventions in this domain should take account of two different but related issues. On the one hand, it is necessary to recognize that a binary approach, i.e. 'the formal' vs 'the customary', does not take account of the reality on the ground, which is characterized by a much greater plurality. The colonial experience of many sub-Saharan African countries resulted in a multiplicity of 'layers' of customary justice. However, most interventions addressing customary justice deal with the 'most visible' actors, i.e. local courts and chiefs, whereas other actors that fulfil a key role in maintaining local order, such as religious and group leaders, elders, family heads, secret society authorities and sorcerers, are at best indirectly targeted by awareness-raising activities that are directed to the community in general and which address general issues.

On the other hand, we find the need to engage with different 'logics' or ways of understanding justice. Most interventions aim at getting customary *rules* in line with human rights. However, it is mainly local courts, and to some extent the chiefs, that are inclined to apply a priori defined rules in the resolution of conflicts. Elders, family heads and group leaders, are more inclined to solve conflicts by means of mediation and consensus building, whereas secret society heads and sorcerers operate according to 'logics' that are hardly ever considered in relation to human rights. A cross-cultural approach that considers the particular challenges and opportunities that these different 'logics' represent to the

implementation of human rights needs to be the point of departure. Moreover, all these layers of justice interact in ways that need to be included in the analyses. Therefore, it is paramount to deal with plurality in customary justice in an explicit way, so that strategies for action do not remain 'at the tip of the iceberg'.

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