Will a New Constitution Resurrect Constitutionalism in Sierra Leone?

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1.1 The 1991 Constitution on the verge of repeal

Sierra Leone's extant constitution was adopted in 1991 in the twilight of the cold war.[1] During the time of its formulation, this was undoubtedly a constitution that was light years ahead of the African constitutional era. At a time when military takeovers were common especially in West Africa, this constitution enshrined democracy and justice as the foundational principles of the Republic of Sierra Leone.[2] In addition to providing for three separate branches of government, multiparty democracy and periodic elections, the 1991 constitution also guarantees and entrenches fundamental human rights and freedoms of individuals regardless of their 'race, tribe, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest'.[3] Some of these rights comprise the right to life and liberty, security of person, freedom of movement, freedom of expression, conscience and assembly, protection from deprivation of property.

The constitution also provides for non-justiciable socio-economic rights under the rubric "fundamental principles of state policy ". Although most civil and political rights are guaranteed, their enjoyment is, however, limited by claw-back clauses in the said constitution. For instance, while freedom of expression is guaranteed in the said constitution (section 25), its enjoyment is subject to such interests as public safety, public morality, public health, and in the protection of the rights and reputations of others, limitations which import a restrictivist approach to constitutional interpretation. In addition to limited rights, section 27(4)(d) of the constitution (the infamous constitutional provision in relation to women's rights) further permits discriminatory laws which most often apply to women. Section 27(4) (d) states that the non-discrimination clause in section 15 does not apply to any law regarding adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law. Women in Sierra Leone face myriad forms of discrimination in customary laws (which are recognised sources of law in Sierra Leone) relating to marriage, property distribution upon death of spouse or divorce, adoption etc. and those customary law provisions subsist because of

[1] Act No. 6 of 1991 http://www.sierra-leone.org/Laws/constitution1991.pdf (accessed 8 December 2015)
[2] Section 5 (1) of the 1991 Constitution: The Republic of Sierra Leone shall be a State based on the principles of Freedom, Democracy and Justice.
[3] Section 15 of the 1991 Constitution.

section 27(4)(d). It is indeed unconscionable, both from a municipal law perspective and the international law perspective, for such discriminatory laws to be accorded normative primacy over the supreme law of the land especially when contemporary international conventions and treaties have rendered them nugatory.

Soon after the adoption of the 1991 constitution, the state of Sierra Leone became embroiled in a civil war that lasted over a decade and became notorious for egregious and unprecedented violations of human rights. The Truth and Reconciliation Commission, one of the twin mechanisms of transitional justice adopted by Sierra Leone at the end of the civil conflict, summarized its conclusion on the causes of the civil conflict in forthright terms as follows:

> "While there were many factors, both internal and external, that explain the cause of the civil war, the Commission came to the conclusion that it was years of bad governance, endemic corruption and the denial of basic human rights that created the deplorable conditions that made conflict inevitable. Successive regimes became increasingly impervious to the wishes and needs of the majority. Instead of implementing positive and progressive policies, each regime perpetuated the ills and self-serving machinations left behind by its predecessor. By the start of the conflict, the nation had been stripped of its dignity. Institutional collapse reduced the vast majority of people into a state of deprivation. Government accountability was non-existent. Political expression and dissent had been crushed. Democracy and the rule of law were dead. By 1991, Sierra Leone was a deeply divided society and full of the potential for violence. It required only the slightest spark for this violence to be ignited."[4]

It may be recalled that the said conflict resulted in the suspension of the 1991 constitution from 1992 until 1996 for the duration of the military rule. In 1996 following the country's return to civilian rule through multiparty elections, the 1991 constitution was restored and has been in existence since then. There is consensus both in governmental and lay circles that the current constitution has been overtaken by global constitutional growth and democratic advancement. Following this apparent need to review and formulate a new constitution, a Constitutional Review Committee (CRC) has been set up and charged with the following mandate to review the 1991 Constitution of Sierra Leone using the Constitutional Review Commission Report submitted to Government in January 2008 as a working document.[5]

[4] http://www.sierra-leone.org/Other-Conflict/TRCVolume1.pdf page 10 (accessed 8th December 2015)
[5] http://www.constitutionalreview.gov.sl/site/AboutCRC/Mandate.aspx (accessed 8 December 2015)

1.2 The doctrines of constitutionalism and rule of Law

In order to appreciate the meaning, nature and scope of constitutionalism as a core element of democratic governance, it is necessary to define the term 'constitution'. According to Black's Law Dictionary,[6] a constitution is:

> "The organic and fundamental law of a nation or State, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government and regulating, distributing and limiting the functions of its different departments, prescribing the extent and manner of the exercise of sovereign powers; A charter of government deriving its whole authority from the governed. The written instrument agreed upon by the people of Union (e.g. US Constitution) or of a particular State, as the absolute rule of action and decision for all departments… and officers of the government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or ordinance of such department or officer is null and void."

In Kelsenian terminology a constitution is the *grundnorm* of any nation or state. It is the basic law of a country from which all other laws, actions and policies of government derive their right of existence and legitimacy. It embodies the values and aspirations of a people, how much powers their leaders are assigned, and the scope and extent of their fundamental rights and duties as citizens. Since a constitution cannot provide for all matters *in extenso*, it permits the promulgation of other laws or the adoption of policies to cater for all matters in a given society. Therefore, all laws, policies, directives, orders and acts of a government and other entities or individuals must conform to the provisions or the general spirit and intendment of an existing constitution. Accordingly, the constitution is the supreme law of a nation and any law which is repugnant to it is *ultra vires.*

Citing Professor de Smith, Justice Bankole Thompson, one of Sierra Leone's eminent jurists, provides a functional definition of the key elements of constitutionalism in this summary in his book "The Constitutional History and Law of Sierra Leone (1961-1995)"[7]:

> The key elements, then, of constitutional government are: (1) the accountability of the government to an entity other than itself, (2) the existence of an electoral system whereby representative legislatures are freely elected on the principle of one man, one vote, (3) the existence of political parties that are free to organize and campaign prior to elections, (4) the actual holding of elections and the formation of a government by

[6] 6th edition, p. 311.

[7] Bankole Thompson, The Constitutional History And Law of Sierra Leone (1961-1995) Rowman and Littlefield Group 1997, formerly University Press of America pages 237-238

the winning political party, (5) the possibility of the formation of an alternative government by a political party or political parties not in government, (6) the existence of effective legal guarantees of basic civil liberties, (7) the existence of an independent judiciary and (8) the rule of law.

Conceptually, the rule of law and constitutionalism are kindred notions. They are both predicated upon the norm that governmental powers and functions are to be exercised in accordance with the provisions set out in the constitution as the supreme law. To this effect is Justice Thompson's observation (supra)[8] that 'under a constitutional government, the ideal of the rule of law implies the guarantee that all persons are equal before the law, the assurance that justice will be accorded to everyone and that officials of the state are precluded from using their authority to interfere with or stifle the processes of law and the administration of justice'.

It is significant to note that other Commonwealth jurists have articulated the notion of the rule of law in similar terms. Justice Oputa (then Justice of the Supreme Court) in the Nigerian case of The Military Governor Of Lagos State & Ors. V. Chief Emeka Odumegwu Ojukwu & Anor (1986) LPELR-SC.241/1985)[9] opined as follows :

> 'The rule of law presupposes that the state is subject to the law, that the judiciary is a necessary agency of the rule of law, that the Government should respect the right of individual citizens under the rule of law and that to the judiciary, is assigned both by the rule of law and by our constitution the determination of all actions and proceedings relating to matters in disputes between persons, Governments or authority'.

In another Nigerian case, Miscellaneous Offences Tribunal v. Okorafor (2001) LPELR-SC.31/1997[10] Justice Ejiwunmi (then Justice of the Supreme Court) explained the notion of the rule of law in these terms :

> 'Nigerian constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to law. It means also that government should be conducted within the framework of recognized rules and principles which restrict discretionary powers'.

1.3 Constitutionalism and the rule of law in Sierra Leone from 1991 to 2015

Constitutionalism under the 1991 constitution was restored after 1995 with the

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[8] Same as above 243

[9] http://www.lawpavilionpersonal.com/lawreportsummary.jsp?suite=olabisi@9thfloor&pk=SC.241/1985&apk=611 (accessed on 10 December 2015)

[10] http://www.lawpavilionpersonal.com/lawreportsummary.jsp?suite=olabisi@9thfloor&pk=SC.31/1997&apk=9184 (accessed on 10 December 2015)

return to civilian rule in 1996 through the conduct of presidential and parliamentary elections. However few months later in 1997, the elected civilian government was overthrown in a military coup d'état that resulted in the second suspension of the said constitution until mid-1999. To better evaluate constitutionalism and governance under the 1991 constitution since 2000 to the present time, regard must be had to the effectiveness of key institutions within the country. Constitutionalism and the rule of law are measured by the strengths and weaknesses of institutions of governance.

The historical records show that the civil war did not only result in the destruction of the infrastructural and economic organs of Sierra Leone, it also left a legacy of institutional corruption and mismanagement. A study conducted in 2010 reported that:[11]

> 'Almost 10 years after the end of the civil war, Sierra Leone continues to face major challenges of weak governance, widespread poverty and systemic corruption, which undermine sustainable development and long term reconstruction efforts. Corruption continues to permeate almost every sector of Sierra Leone's public life, compromising citizens' access to basic public services and institutions such as health and the police. Corruption in the management of Sierra Leone's abundant natural resources including illegal diamond mining acts as an obstacle to sustainable economic growth'.

In response to the perception of widespread corruption in Sierra Leone, an Anti-Corruption Commission was established in 2000 by an Act of Parliament equipped with prosecutorial powers to stamp out the surging corrupt practices.[12] A recent corruption perception report (released in December 2015) by Transparency International ranks Sierra Leone at 119 out of 175 countries surveyed.[13] The report shows very high perception of corruption within Sierra Leone's parliament, the police force and the judiciary.[14] By any objective reckoning, it appears that the Anti-Corruption Commission has been wholly ineffective especially in regard to institutional corruption with its potential for inhibiting constitutional growth in Sierra Leone. Research studies have shown that the perception of public corruption in Sierra Leone is not merely anecdotal. Discussing the phenomenon of administrative corruption in Sierra Leone during 1968-1992, Kpundeh writes[15]:

> "The pervasive nature of corruption in almost every kind of activity, and the reluctance of the nation's leaders to systematically fight this widespread malaise, allowed questionable practices to continue and eventually became an institutionalized way of life for Sierra Leoneans. Consequently, the culture of corruption enabled the governing class to attain economic

[11] http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-sierra-leone/ (accessed 8 December 2015)
[12] see http://www.anticorruption.gov.sl/ (accessed 8 December 2015)
[13] https://www.transparency.org/cpi2014/results (accessed 8 December 2015)
[14] https://www.transparency.org/gcb2013/country/?country=sierra_leone (accessed on 8 December 2015)
[15] S Kpundeh "Limiting Administrative Corruption in Sierra Leone" in Journal of Modern African Studies 32 (1994:139).

domination, and the whole bureaucratic structure was converted into an instrument of self-endorsement and enrichment by prominent civil servants."

Since the year 2000 up to the present time, there have been numerous instances of the exercise of executive authority in flagrant disregard of the country's constitution in particular, and of the doctrine of constitutionalism, as a core value of democratic governance. Journalists have been incarcerated without cause in violation of press freedom (section 25 of the extant constitution). A former journalist (currently a minister of government) was prosecuted and jailed for a few years at the behest of the former president of Sierra Leone for a publication on the latter's alleged embezzlement of public funds.[16] In 2005, a newspaper editor was beaten to death, allegedly, on the orders of a member of parliament.[17] In 2014, a very popular radio programme titled *monologue* was suspended from broadcasting by the government without any due process.[18] Recently in 2015, parliament summoned some journalists for expressing opinions on issues relating to parliamentary proceedings and/or the exercise or abuse of its constitutional mandate.[19] Also from 2000 to date, executive orders (known in Sierra Leone as 'orders from above') for the arrest and detention of persons without bail have soared.[20] Arbitrary police arrests and detentions, acts of brutality, and bribery have become regular features of policing in Sierra Leone.

Allegations of corruption have been levied against the judiciary as evident from a survey conducted by Transparency International.[21] In addition, it has been strenuously contended that the country's Supreme Court has been manifestly subservient to the other two branches of government in the performance of its responsibility as guardian and interpreter of the Constitution. For example, the Court has been criticized for failing to declare unconstitutional certain provisions of the Public Order Act 1965 which undermine the constitutionally guaranteed freedom of the press.[22] Likewise, in 2002 the Court failed to grant declarations sought by the Sierra Leone Bar Association that the appointment of the Attorney-General and Minister of Justice was subject to parliamentary approval.[23] Recently, in March 2015 the erstwhile Vice-President of Sierra Leone who was sacked by the current President sought redress from the Supreme Court in the form of a declaration that his removal by the President was unconstitutional on the grounds that the President's executive powers do not include the right to

[16] https://www.questia.com/magazine/1G1-135611678/sierra-leone-journalists-want-paul-kamara-released (accessed 8 December 2015)
[17] https://cpj.org/killed/2005/harry-yansaneh.php (accessed on 8 December 2015)
[18] http://www.sierraexpressmedia.com/?p=68928 (accessed 8 December 2015)
[19] http://www.sierraleonepress.com/sierra-leonean-parliament-summons-journalists-over-story-africa-review/ (accessed 8 December 2015)
[20] http://www.switsalone.com/21051_no-charge-for-8-in-sierra-leone-held-for-2-months-under-executive-order/ (accessed 8 December 2015)
[21] https://www.transparency.org/gcb2013/country/?country=sierra_leone (accessed on 8 December 2015)
[22] SC1/2008 Sierra Leone Association of Journalists v Attorney General & Others (unreported; judgment delivered by the then Chief Justice U. H. Tejan-Jalloh on 10th November 2009)
[23] SC.2/2002 Sierra Leone Bar Association V Attorney General & Another (Unreported)

remove a sitting Vice-President.[24] The Supreme Court in a unanimous judgment that sparked the ire of constitutional proponents ruled that the Vice-President's expulsion from his political party created a vacancy in the office of Vice-President and the President's exercise of executive powers in the 1991 constitution in appointing some other person to occupy the said office was no infraction of the constitution. Before this judgment was delivered, one of Sierra Leone's finest legal luminaries, Justice Abdulai Conteh (Justice of Appeal of the Court of Appeal of the Commonwealth of The Bahamas; former Chief Justice of the Republic of Belize) had written an open letter to the President stating in the plainest of language that the President's action in removing his vice had/has no validation or sympathy in the current constitution and such act if not revisited would have corrosive effect on the nation's nascent democratic credentials:[25]

> "'Permit me therefore, to say, and please believe me when I say that it pains me to say so, that the removal from office of the Vice President, as stated in the Release from your office, is nothing short of an exercise of power that can find no validation in the text of our national Constitution.
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> ……
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> Please allow me to close by stating that the use of executive power to remove the Vice President from office is irreconcilable with the provisions of the Constitution; and in my humble view, sets to naught the sovereign will of the electorate and people of Sierra Leone so eloquently expressed when in 2007, and again in 2012, you and the Vice President were elected to your respective offices."

1.4 Can a new constitution foster greater constitutionalism in Sierra Leone?

A new constitution, however progressive its provisions may be, does not translate into constitutionalism as a key norm of democracy. By parity of reasoning, democracy and its attendant values cannot simply be achieved through the narrow compass of a constitutional instrument. Notwithstanding this position, the South African and Kenyan experiences are clear examples, so far, of how a new constitution accorded the sacrosanctity of the supreme law, nurtured and sustained by a constant process of compromises and consensus rooted in the spirit of liberty and commitment to the impartial dispensation of justice can aid progress towards national development and prosperity. The post-apartheid constitution of South Africa of 1996[26] is the first to provide for various justiciable socio-economic rights in a constitutional document despite the myriad

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[24] SC4/2015 Alhaji Samuel Sam Sumana V Attorney General & Another (unreported; judgment delivered by the Acting Chief Justice on 9 September 2015) Available on this website http://www.sierra-leone.org/Supreme_Court_090915.pdf (accessed on 10 December 2015)

[25] http://www.thisissierraleone.com/sierra-leone-in-short-your-excellency-neither-you-nor-the-vice-president-can-lawfully-be-removed-from-office-except-as-provided-for-in-sections-50-and-51-of-the-constitution-dr-abdulai-conte/ (accessed 8 December 2015)

[26] http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf (accessed 8 December 2015)

of social and economic problems inherited from the apartheid system of government.

Justice Chaskalson, who later became Chief Justice of South Africa, in the case of Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC)[27] described the 1996 Constitution of South Africa in these terms:

> 'a historic bridge reached between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition human rights , democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of sex, race, belief or class. South Africa has to contend with unequal and insufficient access to housing, food, water, health care and electricity'.

The Kenyan constitution of 2010[28] is another example of a new and impressive constitution with modern and ambitious provisions on fundamental rights, institutional accountability and supremacy of the rule of law inspired by the resolve not to permit a recurrence of the post-election violence in 2007. One commentator[29] remarked that 'the new constitution brings with it significant changes to the political system of governance of Kenya, expands the rights and fundamental freedoms, and introduces a new system of public finance among other changes.'

The Constitutional Review Committee of Sierra Leone which is mandated to put together the draft of a new constitution has already, in addition to feedbacks from nationwide consultations, received hundreds of position papers[30] on the need for the inclusion of wide ranging socio-economic rights, the inclusion of national ethos/values, thirty percent quota for women, extension of presidential tenure, establishment of a separate constitutional court, limitation of executive powers, increase in public accountability/transparency and greater respect for the supremacy of the rule of law, to cite a few. Except for the proposal for the extension of presidential tenure these submissions vividly portray the desire of Sierra Leoneans to be governed by constitution compatible with modern conceptualizations of inclusive governance, fundamental human rights and constitutionalism.

Inherent in every new constitution is a fresh incentive to move beyond the inertia of the existing socio-political milieu into the dynamic landscape of the ambitions and aspirations contained in the new document. Therefore, formulation of a new constitution of Sierra Leone is an expression of an inclination to replace the existing constitution made ineffective and unworkable by flagrant constitutional

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[27] http://www.saflii.org/za/cases/ZACC/1997/17.html (accessed 8 December 2015)
[28] http://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf (accessed 8 December 2015)
[29] http://www.coulsonharney.com/FileBrowser/ArticleDocuments/The%20New%20Constitution%20-%20Overview.pdf (accessed 8 December 2015)
[30] http://www.constitutionalreview.gov.sl/site/AboutCRC/SubCommittees/position_papers.aspx (accessed 8 December 2015)

violations and abuse with the liberalism of a new constitution reflective of popular consensus. However, one cannot ignore the fact that, from the normative perspective the task of making a constitution work requires discriminating judgment on the part of those assigned that responsibility between the necessary and acceptable, on the one hand, and the unnecessary and unacceptable, on the other. Such discriminating judgment presupposes the application of a sound doctrine of constitutional interpretation.

1.4.1 Is the modern judicial approach to constitutional interpretation a stimulant for constitutionalism?

Constitutional interpretation is a difficult, subtle and complex process. It involves adherence to the letter and spirit of its provisions without threatening its efficacy and survival as the fundamental law of the country. Hence, for it to progress and aid in the realization of national goals and objectives consistent with changing legitimate socio-political and economic paradigms and realities, it must evolve pragmatically. Such pragmatic evolution can only be secured by a liberal approach to constitutional interpretation than a literal and textualist approach. Hence, it is hoped that the Sierra Leone judiciary, like other leading Commonwealth judiciaries (notably, India, South Africa, and Nigeria) will adopt the purposive or teleological approach to constitutional interpretation when the new Constitution becomes law.

Fatayi-Williams (former Chief Justice of Nigeria has expressed support for this method of constitutional interpretation. In the case of Senator Abraham Ade Adesanya V. President Of The Federal Republic Of Nigeria & Anor,[31]the learned Chief Justice opined:

> "My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat.* I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends."

Likewise, the Constitutional Court of South Africa and the Supreme Court of India have shown strong preference for this method in their landmark cases. This has earned their judicial tribunals international prominence and high commendation as to the quality of their jurisprudence in the constitutional law domain. The Constitutional Court of South Africa also adopted a liberal approach to the

[31]SC1/81 Available on http://www.lawpavilionpersonal.com/lawreportsummary.jsp?suite=olabisi@9thfloor&pk=SC.1/1981&apk=564 (accessed 8 December 2015)

interpretation of the South African Government's obligations to protect the socio-economic rights of its citizens.[32]

The Supreme Court of India has in many instances adopted a liberal approach to the interpretation of a fundamental right in the Indian constitution.[33] The Nigerian Supreme Court has also underscored the need for a broader interpretation of the provisions of the supreme law in the case of Nafiu Rabiu v. Kano State (1980 811SC 130).[34]

1.5 Conclusion

The promulgation of a new and progressive constitution should serve as a clarion call for the Supreme Court of Sierra Leone to consistently adopt a liberal approach to constitutional interpretation. The interpretative attitude of the Supreme Court to a large extent would determine the vitality of the constitution and set the stage for adherence to its provisions by both the government and the governed. While a new constitution (especially one with progressive human rights and good governance provisions) can amount to a restoration of constitutionalism in the truest normative sense of the concept in Sierra Leone, it cannot singularly guarantee constitutionalism or democratic governance. Compliance with its provisions and limitations by the executive, legislative and judicial branches of government and civil societies will create an atmosphere conducive to its survival. Adherence to and respect for the letter and spirit of the constitution by the government and the governed will also enhance the rule of law. Optimistically, in Sierra Leone, fidelity to a new constitution will serve as a constraint against those negative forces and influences that combined to disrupt the democratic norms and processes culminating in the decade –long civil conflict in the country.

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[32] Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR

[33] A list of landmark cases adjudicated by the supreme court of India is available on http://www1.umn.edu/humanrts/research/india-jurisprudence.html (accessed on 8 December 2015)

[34] At pages 148-149 (judgment delivered by Udo-Udoma, JSC)Also referenced by Fatayi-Williams CJN in the case of Senator Abraham Ade Adesanya V. President Of The Federal Republic Of Nigeria & Anor. (Nigerian Constitutional Law Report Vol 2 1981, page 374)